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## COURT OF APPEAL (UK) — CRIMINAL DIVISION

**R v WALKINGTON**

Geoffrey Lane LJ, Swanwick and Wien JJ

**20 February 1979 — [1979] 2 All ER 716; [1979] 1 WLR 1169; 68 Cr App R 427; (pet. dis.) [1979] WLR 1179G**

**CRIMINAL LAW – BURGLARY – ACCUSED ENTERED DEPARTMENT STORE SHORTLY BEFORE CLOSING TIME AND WENT INTO THE COUNTER AREA WHICH WAS RESERVED FOR STAFF AND OPENED THE TILL – AS THE TILL WAS EMPTY HE SLAMMED IT SHUT – ACCUSED WAS INTERCEPTED BY POLICE IN THE STORE AND LATER CHARGED WITH BURGLARY – WHETHER ACCUSED ENTERED PART OF A BUILDING AS A TRESPASSER – ENTERING WITH INTENT TO STEAL – ACCUSED CLAIMED THAT HIS INTENTION TO STEAL WAS CONDITIONAL DEPENDING ON WHETHER HE FOUND SOMETHING WORTH STEALING – ACCUSED FOUND GUILTY – WHETHER COUNTER AREA WAS PART OF A BUILDING – WHETHER ACCUSED HAD AN INTENTION TO STEAL: THEFT ACT 1966 (UK) S9(1)(a).**

Shortly before closing time in a department store, when the sales assistants were engaged in cashing up their tills, the store detective and two of his colleagues noticed the accused in the ground floor department. He appeared to them to be interested primarily in the activity at the tills. He went up to a department on the first floor where there was a till in one of the corners of a rectangle made up of a moveable three-sided counter (the counter area). The drawer of the till was partially open and the accused went into the counter area which was reserved for the store staff and opened the drawer further. It was empty so he slammed it shut. As he was leaving he was detained for questioning by the police. He was subsequently arrested and charged with burglary contrary to s9(1)(a) of the *Theft Act* 1966, in that he entered as a trespasser part of a building with intent to steal therein. At his trial he claimed that he had gone up on to the first floor to look at some dresses, that he had not realised that he was not allowed to enter the counter area and that it was only after he had done so that he decided to open the drawer to see whether there was something inside worthwhile stealing. He submitted that in the circumstances there had been no trespass and that the case should be withdrawn from the jury. The judge refused and directed them that they had to decide (1) Whether the counter area was a prohibited area, (2) whether the accused realised when he entered that area that it was a prohibited area and (3) if they decided against the accused on (1) and (2), whether at the time he entered the counter area he intended to steal. The accused was convicted. He appealed, contending that the counter area could not constitute part of a building for the purposes of s9(1)(a) and so he could not have trespassed by entering the area, and further, that, in any event, he did not have the necessary *mens rea* for the purposes of theft because his intention to steal was conditional, depending on whether he found something worth stealing. Upon appeal—

**HELD: Appeal dismissed.**

**1. It was a matter for the jury to decide whether the area physically marked out by the counter amounted to part of a building from which the general public were excluded and there was ample evidence on which they could conclude that the store's management had impliedly prohibited customers entering the counter area and that the accused knew of the prohibition.**

**2. When a person entered part of a building as a trespasser intending at the time of entry to steal anything in that part of the building it was immaterial whether there was in fact anything in that part of the building worth stealing. He had an intent to steal which was sufficient to found a conviction for burglary contrary to s9(1)(a) of the 1968 Act. On the evidence the accused undoubtedly intended to steal the contents of the till (ie cash) at the time when he entered the counter area and it would have been unrealistic for the judge to have directed the jury to ask themselves what sort of intention he had.**

Excerpts from the judgment are as follows:

Page 720: "First of all, as far as the store was concerned was this area prohibited, was it off limits? Secondly, if so, did the defendant realise when he crossed that limit that it was off limits? Thirdly, at the time when he crossed the limit, the first two questions having been decided against the defendant, did he have an intent to steal?"

Page 721: "Here there is a physical demarcation, and if one turns to the same publication at the passage where Professor Griew (in the *Theft Act* 1968 and 1978) is dealing with the situation which exists here, we find

'A licence to enter a building may extend to part only. If so, the licensee will trespass if he enters some other part not within the scope of the licence. To do so with intent to commit in that other part one of the specified offences, or to do so and then to commit or attempt to commit one of those offences therein, will be burglary.'

That seems to us precisely to fit the circumstances of the present case and really deals the death blow to this part of counsel's submission.

If support is required, it is to be found in Professor JC Smith's book *The Law of Theft* where he says:

A customer in a shop who goes behind the counter and takes money from the till during a short absence of the shopkeeper would be guilty of burglary even though he entered the shop with the shopkeeper's permission. The permission did not extend to his going behind the counter.

One really gets two extremes as it seems to us. First of all you have the part of the building which is shut off by a door so far as the general public is concerned with a notice saying "Staff only" or "No admittance to customers". At the other end of the scale you have, for example, a single table in the middle of the store, which it would be difficult for any jury to find properly was a part of the building into which the licensor prohibited customers from moving. The present case, it seems to us, was that there was a physical partition."

age 722: The second ground of appeal is set out as follows:

2. The evidence also suggested that the defendant intended stealing anything of value which he might find in the counter area. In the event, he found nothing and left. As the law presently stands, the defendant's intention to steal was conditional, and a conditional intention falls below the required *mens rea* for the purposes of theft.

3. Similarly, it cannot be said that where the defendant has it in mind to steal only if what he finds is worth stealing he has a present intention to steal.

The Court points out: "These submissions are based on the decision of this court in *R v Husseyn* (1977) 67 Cr App R 131 n.)" After citing the following passage from *R v Husseyn*, viz:

'The learned judge said that the jury could infer that what the young men were about was to look into the holdall and, if its contents were valuable, to steal it. In the view of this court that was a misdirection. What has to be established is an intention to steal at the time when the step is taken which constitutes, or which is alleged to constitute, the attempt. Edmund Davies LJ put the point in *Easom* in a passage which begins: "In every case of theft the appropriation must be accompanied by the intention of permanently depriving the owner of his property. What may be loosely described as a conditional appropriation will not do. If the appropriator has it in mind merely to deprive the owner of such of his property as, on examination, proves worth taking and then, finding that the booty is valueless to the appropriator, leaves it ready to hand to be repossessed by the owner, the appropriator has not stolen". The direction of the learned judge in this case is exactly to the contrary. It must be wrong, for it cannot be said that one who has it in mind to steal only if what he finds is worth stealing has a present intention to steal.'

The judgment in this case reads as follows:-

So, whilst acknowledging that these recent decisions do provide difficulties which have been pointed out to us clearly by counsel for the appellant, it seems to us in the end that one must have regard to the wording of the Act. If that is done, the meaning, in our view, is clear."

[Ed Footnote by JE Wallace SM: "The court refused leave to appeal to the House of Lords but certified that the following point of law of general public importance was involved in the decision: If a defendant enters a building or part of a building as a trespasser intending at the time of entry to steal money from a till, when in fact unknown to him there is nothing in the till at the time, does he have an intent to steal sufficient to found a conviction for burglary contrary to s9(1)(a) of the *Theft Act* 1968?]