



Neutral Citation Number: [2021] EWCA Crim 597

Case No: 201904259 B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT INNER LONDON
HHJ DONNE QC
T20190056

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/04/2021

Before:

LADY JUSTICE THIRLWALL
MR JUSTICE KERR
and
MR JUSTICE FREEDMAN

Between:

Bruce Chipunza
- and -
Regina

Applicant/Appellant
Respondent

Audrey Cherryl Mogan (instructed by Laurence & Co Solicitors) for the **Applicant/Appellant**
Paul Casey (instructed by the Crown Prosecution Service) for the **Respondent**

Hearing dates: 02.02.2021

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 12:30pm on 23 April 2021.

Lady Justice Thirlwall:

1. This is a renewed application for permission to appeal against conviction. We give leave. We are grateful to Mr Casey for the respondent and Ms Mogan for the appellant for their submissions on the appeal.
2. The issue for the jury in this case was whether the burglary of a hotel room was a burglary of a dwelling.
3. On the morning of 12 June 2018, the appellant entered a hotel room in Canary Wharf, London. The hotel guest had checked in the evening before and had gone to work. The housekeeping staff were cleaning her room. The appellant walked in unchallenged. He remained there for a while and rang reception to ask to extend the booking. He was told that the booking was already for three nights. He said he was ringing on behalf of his boss. Shortly afterward he rang and asked for someone to come up and open the safe. The manager went upstairs into the room and opened the safe. There was nothing in it. As the manager left the room, he noticed women's clothing. He went downstairs and checked the CCTV. He realised that the appellant was an intruder. He went back upstairs and confronted him. The appellant left the hotel and was arrested at a later date. He was interviewed in December 2018 and made no comment. He was charged with burglary.
4. The case was sent by the Magistrates to the Crown Court at Inner London. At the Plea and Trial Preparation Hearing on 15th April 2019 the appellant pleaded guilty to count 2 on a two-count indictment, burglary contrary to section 9(1)(a) of the Theft Act 1968. Count 2 was an alternative to Count 1 which was also burglary contrary to section 9(1)(a) of the Theft Act. The facts in support of the two counts were identical. In count 1 the appellant was said to have entered a dwelling, namely Room 2515 in the hotel. In count 2 he was said to have entered part of a building, namely Room 2515 in the hotel. Nothing was stolen.
5. The appellant's plea of guilty with admission of all the facts was not acceptable to the Crown and the case was adjourned for trial. This took place over 2 days at Inner London Crown Court in October 2019. The appellant was convicted by a majority of 11 to 1. He was sentenced on a third day, 11th October 2019. He had a long history of dishonesty, including for offences of burglary. The trial judge sentenced him to a total of 3 years and 2 months' imprisonment made up of 30 months' imprisonment for the burglary on count 1 with a sentence of 8 months' imprisonment to run consecutively in respect of a separate count of burglary (of the office area of a different hotel) to which he had pleaded guilty.
6. Before the trial, the judge asked the prosecution why it was necessary to proceed with the trial, given the admissions. He was told that it would make a difference to sentence because if convicted of burglary of a dwelling the appellant was liable to a minimum custodial sentence of three years because the conviction would be a third qualifying "domestic" burglary where all three offences were committed after 30 November 1999 (Powers of Criminal Courts (Sentencing) Act 2000, s.111) – unless such a sentence would be unjust. It was the prosecutor's view that it was in the public interest to have a trial on this issue. The judge told the jury after the verdict "the defendant is actually not going to get any sort of different sentence from the one

he would have got as a result of his plea of guilty in any event.”

7. Before the jury heard any evidence the judge drew to the attention of counsel the case of **R v Addai Kwame [2018]** EWCA Crim 2922 in which a hotel building contractor had used a master key to enter a number of hotel bedrooms and steal items, including a diamond ring. He was charged and convicted of non-dwelling burglary. On the appeal against sentence this court described the offences as similar to dwelling house burglaries. There was no suggestion that the charges were incorrect.
8. The judge pointed out that the Home Office recorded hotel room burglaries as commercial burglaries. He was concerned that the bringing of this case reflected a difference of approach between different CPS areas. During the hearing of the appeal, we asked how many burglaries of hotel rooms had been charged as burglaries of dwellings in the last two years. Despite Mr Casey’s efforts after the hearing, the CPS was unable to provide that information because of the way offences are recorded. We think it likely that there have been very few such charges.
9. The parties referred the judge to the decision of this court in **R v Flack [2013] 2 Cr App R (S) 56 CA**. The appellant had pleaded guilty to burglary of a dwelling. Nonetheless it was his case that the building he had burgled was not a dwelling, but a building site. The building was a house. From the outside it looked like a dwelling. There were net curtains up in the window. There was a skip outside the house full of builder’s rubbish. No one appeared to be living in the house and the only person present at the time of the burglary was a builder who was laying the floor. The appellant stole his phone from the porch and ran away. The builder chased him and caught him. He was arrested and charged with burglary of a dwelling to which he pleaded guilty on the basis that the house was not a dwelling but a building site. When the case came to the Crown Court for sentence, the judge held a Newton hearing and found that the house was a dwelling and sentenced the appellant accordingly.
10. On the appeal against sentence the court found that the approach taken was incorrect. If there was an issue about whether the house was a dwelling the appellant should not have pleaded guilty to burglary of a dwelling. There should have been two counts on the indictment and a trial could have taken place in which the issue of whether the house was in fact a dwelling would have been decided by the jury.
11. The court in **Flack** was invited to give guidance as to “how the issue of whether a property is a dwelling-house should be approached, when and where and if it is in dispute.” The court declined to do so on the basis that **Flack** was not a suitable case. “In an appropriate case it would be a matter for a jury to determine and the directions given by the judge could, if appropriate, be considered by this court. It is however largely a question of fact in each individual case which the jury would have to decide.” The appellant in **Flack** was subject to the minimum term provisions but in the event the court reduced his sentence, finding it would be unjust to impose a term of three years in that case.
12. The same question came before the Divisional Court in slightly different circumstances in **R v Crown Prosecution Service ex parte Hudson [2017] 2 Cr App R 21 (269)**. In that case the appellant had accepted that he had burgled a house but had pleaded not guilty to burglary of a dwelling because at the time of the burglary it

was unoccupied: the tenants had moved out and the next tenants had not been identified. The Deputy District Judge (Magistrates' Courts) (DDJ (MC)) found that the house was a dwelling and convicted the appellant of burglary of a dwelling. The appellant appealed to the Divisional Court by way of case stated. His appeal was dismissed. The court found that current use as such was not necessary for a building to be a dwelling. It was a matter of fact and degree. The DDJ(MC) was entitled to come to the conclusion that the building was a dwelling. There is a reference in the judgment, obiter, to the fact that a hotel room had been found to be a dwelling in the case of **R v Massey [2001] EWCA Crim 531**. This is a misreading of that decision. **R v Massey** was an appeal against sentence where the appellant had pleaded to the burglary of two hotel rooms. He had not pleaded guilty to burglary of a dwelling. He was sentenced to 5 years' imprisonment which this court reduced to 4 years' imprisonment. The appellant had argued that the burglaries were of relatively small commercial premises and should attract a lower sentence. This court considered that on the facts they were "more akin to" domestic burglaries which aggravated the sentence, but not to the extent the judge had determined. The court did not suggest that these were burglaries of a dwelling. The same approach was taken in **Addai Kwame**.

Dwellings

13. The only issue at trial was whether the hotel room was a dwelling at the time of the burglary. The word dwelling is an ordinary word, albeit somewhat old fashioned in 2021. It was not very much in use 20 years ago. In **Uratemp Ventures Limited v. Collins (Ap) [2001] UKHL 43 (11th October, 2001)** Lord Millett explained its meaning thus, at paragraph 30:

"The words "dwell" and "dwelling" are not terms of art with a specialised legal meaning. They are ordinary English words, even if they are perhaps no longer in common use. They mean the same as "inhabit" and "habitation" or more precisely "abide" and "abode", and *refer to the place where one lives and makes one's home*. They suggest a greater degree of settled occupation than "reside" and "residence", connoting the place where the occupier habitually sleeps and usually eats, but the idea that he must also cook his meals there is found only in the law reports. It finds no support in English literature."

14. In most cases, it is obvious whether or not a building is a dwelling. Houses and flats are generally built to be lived in, to be used as dwellings. The fact that no one is living in it at the time of a burglary does not necessarily render a building other than a dwelling (see **ex parte Hudson** above). We can envisage a situation where, for example, a newly built house may not yet be a dwelling. It may well be possible for a building built and previously used as a dwelling to become derelict, or to become a building site. Whether the newly built house has become a dwelling, or the latter remains a dwelling would be a question of fact for a jury if it were felt necessary to litigate the issue. It is not apparent that there has been any concern about the adequacy of sentencing powers in this regard. The maximum sentence for burglary of a dwelling is 14 years' imprisonment. For a non-dwelling, it is 10 years' imprisonment (see Section 9(3) Theft Act). In the definitive guideline, Burglary Offences, for domestic burglary (i.e. burglary of a dwelling the sentence range is a community order to six years' custody. For non-domestic burglary, the range is a fine to five years' custody.

15. Hotels are not generally built to be used as dwellings. Their commercial function is to provide a temporary place to stay: generally private rooms and bathrooms with access to communal parts and ancillary services in exchange for a nightly payment. We are confident that where no one has checked into it, a standard hotel room cannot be said to be a dwelling. Where someone lives in a hotel long term and uses it as their home, the hotel or a part of it may be a dwelling. Some rooms may be provided within a hotel for staff to live in. Such rooms could be dwellings. Much would depend on the configuration of the rooms and the particular arrangements in each case.

The Trial

16. The trial proceeded on the basis that the question of whether the hotel room was a dwelling was a matter of fact for the jury. There were some agreed facts about the hotel. It was a large chain business hotel in Canary Wharf which provided all the usual hotel services in addition to bedrooms with bathrooms. Room 2515 was a standard hotel room.
17. The evidence relied on in support of the prosecution case that this was a dwelling was contained in two statements from the hotel guest which were read to the jury.
18. In her first statement dated 17th December 2018, six months after the offence, the hotel guest said that on 14 June 2018 she was staying as a guest in the hotel in room 2515 on the 25th floor. She had left the premises at 8am and was contacted at 11.30am and asked to return to the hotel. She returned and was told about the burglary. She was moved at her request to a different room.
19. The next statement is dated June 2019, a year after the burglary and after the PTPH at which the question of whether the hotel room was a dwelling had been raised. She provided further details about her stay. She had arrived at about 7pm on the Monday, the day before the burglary. She could not remember the room number. She would usually stay three nights and spend the rest of the week at her home address in Birmingham. She said “my job is currently based in London in Canary Wharf and has been since November 2017. Consequently, I usually travel from my address in the Birmingham area to Canary Wharf on a Monday morning, and stay at a hotel in the Canary Wharf area until the following Thursday morning, for three (3) nights, before returning to my address in the Birmingham area.”
20. She was asked to describe what she generally did in the room. She said that if she was not out socialising after work with colleagues, she relaxed and slept there, occasionally working there or reading. She ate in the hotel bar area and sometimes worked there too. She used the hotel gym on occasion. She said “I treat my room in the hotel, just like I would any normal room in my house. I use it for relaxing and for my private time”. She had with her just sufficient clothing and other belongings required for a three-night stay.
21. The statements of the hotel manager were also read. The defendant did not give evidence.

The Appeal

22. There are two grounds of appeal:-
Ground 1: The judge misdirected the jury in providing a definition of “dwelling”.
Alternatively, the definition placed undue emphasis on the concept of habitation.
Ground 2: The learned judge’s comments on the evidence in the summing up were unfair.
23. As envisaged in **Flack** it falls to us to review the judge’s directions. The summing up was short, and we take the directions in turn.
24. The judge told the jury “There is no definition of “dwelling” in the Theft Act. It is an ordinary English word and whether a building or part of a building is a dwelling is a question of fact and degree to be determined by you, the jury.” This was correct.
25. The judge sought to give assistance to the jury about what constitutes a dwelling. In our view, assistance was essential. He told the jury, “Section 9(4) of the Act does extend the definition of a “building which is a dwelling” to an inhabited vehicle or vessel. Now, a vehicle, truck, car, train, I suppose, for that matter, or a vessel, a boat or a ship, would not necessarily be thought of as a building, but where it is inhabited, it becomes a building for the purposes of the Theft Act, so you have that extension and that applies to any vehicle or vessel at times when the person having a habitation in it is not there as well as at time when she or he is.”
26. Given that the hotel room was a part of a building it was unhelpful to distract the jury with an inexact summary of a subsection of the Theft Act, the purpose of which was to deem a building a vehicle or vessel. The introduction of the concept of habitation might have been useful, but left unanchored to the facts of the case it was not.
27. The judge went on to say that the jury might think “It also follows that it is primarily the use to which the space is put by the occupier that determined whether it is a dwelling.”
28. It was the Crown’s case (as the judge reminded the jury) that every hotel room in which the witness stayed was a home from home (and so, we infer, a dwelling). It seems to have been overlooked that the witness did not use that phrase herself and it is not easy to see that it was apt. The use to which the room was put was sleeping and relaxing, occasionally working and storing belongings needed for a three-night stay.
29. The judge added “Now the reason a distinction is made between dwellings and other premises is that a dwelling is a space and I use space as a neutral expression, I am sure you understand it is amongst other things considered to be private and secure and an unauthorised intrusion into such a space by someone intent on stealing is likely to lead to greater feelings of distress, violation and possibly endangerment than would be the case for an occupant of other premises, an office, for example”. This direction was agreed with counsel. It is not easy to see how it was helpful or why it was necessary here. Having given the direction the judge did not remind the jury of two matters which supported the defendant’s case that the room was not a dwelling: first, that in this case there was no evidence of any distress, violation or endangerment. At its highest the witness put it, “I no longer felt comfortable staying in that room.” Second, the witness insisted on an immediate change of room, an option which is not generally available after the burglary of a dwelling.

30. The judge singled out for mention a number of arguments made by defence counsel during her speech. The first was the contention that the room could not be a home from home, as the prosecution asserted, because the guest could not remember the number of the room. The judge said “Does that make a difference as to whether it is actually a dwelling or not”. He went on “You might, many years ago, have lived at an address in a particular road. You can remember living there. You might have grown up there. Can you remember the precise number of the address? Maybe not. Does that mean it is not a dwelling? That is a matter for you, but that is an argument that is advanced”. The judge’s view was clear: if a building is a dwelling, a failure to remember its number is irrelevant, but that was not the issue. The relatively small point being made was whether a failure to remember the number of a hotel room occupied for one night might be an indicator that the room was not a dwelling.
31. Counsel for the appellant also relied on the fact that many people had access to the hotel room, unlike a home (cleaning teams, housekeeper, supervisor, managers, security etc). The judge likened this to having a cleaner in one’s home. This was inapposite. A hotel guest does not choose which staff come into their room. That is a matter for the hotel. A householder generally decides who to allow into their home.
32. The judge turned to the fact that Ms Mogan had said that the hotel provided all the furniture, fixtures and fittings in the room and that there was a hotel policy of no smoking with which hotel guests had to comply, unlike a person at home. The judge said “various items, permanent items in the room do not belong to [the hotel guest] but what about university halls of residence, for example, where a student probably spends at least half the year if not a little bit more. Does that mean their room is not a dwelling because the bed and the fittings and the fixtures are provided by the university management?”
33. He then referred to bedsits in multi occupancy with a landlord. “Does it mean it is not a dwelling because the landlord is using the building for commercial purposes and has provided these fixtures and fittings. Does that make it not a dwelling”?
34. A room in a university hall of residence in which a student lives for about half a year is a very different proposition from a hotel room which has been occupied for a single night and in which the same guest is to stay for another two nights before returning to their home. A bedsit or a house in shared occupation where a number of people live all the time are self-evidently dwellings, as is the childhood home referred to earlier. The judge started from the premise that if a place is a dwelling then the fact that the furniture etc was provided by the landlord does not stop it being a dwelling, all of which was undoubtedly correct, but the question for the jury was – was room 2515 a dwelling? It was upon that question that the jury required assistance.
35. The jury would have been helped by a comparison between the childhood home or a home occupied for many years and the hotel room in this case. It would have assisted had the judge identified the features which may make rooms in a hall of residence or a house in shared occupation a dwelling, but he did not do so. He confined his assistance to the direction to which we referred earlier that it was principally the use to which the “space” is put by the occupier that determined whether it is a dwelling. It is unfortunate that nowhere in the summing up did the judge direct the jury about the absence of features that usually characterise a dwelling or the presence of features which pointed away from it being a dwelling.

36. The most striking feature which pointed away from the hotel room being a dwelling was the transient nature of the hotel guest's occupation of it. She had arrived the previous evening, intending to stay for three nights. In our judgment the judge was bound to invite the jury to consider whether such occupation was consistent with the room being a dwelling rather than simply a place to stay when working away from home.
37. Other factors which pointed away from the hotel room being a dwelling were these:
The guest's home address was in Birmingham.
She referred to "staying" in hotels, rather than living there.
She stayed in different rooms in different hotels every week.
She had no control over which room she had or even which hotel she stayed in. This was all determined by the hotels.
Check in and check out times were determined by the hotel 2pm and 12 pm respectively.
She had no control over who went into the room when she was not there. Hotel employees had a master key.
She was bound by the rules of the hotel as to smoking, fire drills and so on.
She had no choice over the décor or furniture in the hotel room.
38. Some of those points would be less important in a case where a person is living in a hotel, using it as their home, receiving mail there. They are nonetheless relevant factors here in determining whether, in the absence of any settled occupation, the hotel room was a dwelling. The points Ms Mogan sought to make to that effect were effectively dismissed by the judge.
39. The omissions in the summing up are surprising given what the judge said to counsel before the evidence was read and what he said to the jury after they had convicted when he told them that he had been looking at the way the government records statistics in respect of criminal offences. He referred particularly to the Home Office statistics in respect of burglaries "If a hotel room is used as it were a permanent residence, a long-term hotel residence, you remember Fawlty Towers, I think the Major used to live there...well that is recorded by the Home Office as a dwelling burglary. But if it is just somebody staying in a hotel for one or two nights it is not, it is recorded as a commercial burglary." He then referred to this court's decision in **Addai Kwame** and commented that the court did not demur from the prosecution's decision not to prosecute the defendant for burglary of a dwelling. The points he made about the features of the Major's occupation of the hotel would have been helpful to the jury during the summing up.
40. The judge opined that there should be a protocol to assist consistency, perhaps by reference to the Home Office approach "If, for example, it is the burglary of – I use the halls of residence example earlier on but long-term hostel type accommodation or hotel accommodation then that should be charged as a dwelling. If it is just somebody staying in a hotel for one or two nights then that should not be charged as a dwelling, but the Judge can take into account the fact that it was an occupied room, and I think that will lead to much greater consistency." Those considerations would have assisted the jury too. Whilst the Home Office Classification Rules and Guidance do not determine the matter since they refer to the rules for counting recorded crime, there are features included which would have assisted the jury in their task in this case. The guidance reads as follows:

“A burglary in a ‘long-stay hotel’ whose rooms are let out on a permanent basis (**i.e. so that the hotel is the resident’s permanent postal address**) should be recorded as a burglary (or aggravated burglary) – residential.

A burglary in a hotel whose rooms are let out to guests on a ‘short-stay’ basis (i.e. so that the hotel is not the guest’s permanent address) should be recorded as a burglary (or aggravated burglary) – business and community.

A combination of the above two types should be classified according to the victim or victims. In general, burglary of common areas in hotels should be classified as burglary – business and community; and burglary of living quarters inhabited by the proprietor, manager or employees (**so that the hotel is their permanent postal address**) should be recorded as burglary residential.”

41. We consider it unlikely that there will be many instances where facts such as those in this case will be considered by a jury. For that reason, our observations on the factors which may have assisted the jury should be confined to the facts of this case.
42. We are satisfied that, contrary to the defence submission, the judge could and should have explained to the jury what a dwelling is. It would have been sufficient to say a dwelling is a building or part of a building in which a person is living and makes his/her/their home. The most usual examples of dwellings are houses and flats in which people live and make their homes. Other buildings or parts of buildings may be dwellings. This should have been followed by a list of the features to which we have referred which the jury may have considered pointed towards or away from the room being a dwelling.

The judge told the jury on a number of occasions that the decision about whether the room was a dwelling was a matter for them, but the failure to put before them a balanced account of the features which pointed away from the hotel room being a dwelling while focussing entirely (and not just principally) on what the guest generally did when she was in a hotel room rendered the summing up unfair. It follows that we are satisfied that the conviction is unsafe.

Conclusion

43. Accordingly, we allow the appeal and quash the conviction on Count 1 of the indictment. Mr Casey does not seek a retrial on the grounds that it is not in the interests of justice. We agree. The original plea of guilty to count 2 was vacated and the count was ordered to lie on the file not to be proceeded with without leave of the court. We give leave to proceed on count 2 and direct that the case be returned to Inner London Crown Court for further listing.