Criminal Law – Burglary – Dwelling – Hotel Room

R v Chipunza (Bruce) [2021] EWCA Crim 597

Court of Appeal (Criminal Division)

Facts

The appellant entered a hotel room in Canary Wharf, London. The hotel guest, who had checked in that room the evening before, had gone to work for the day and housekeeping staff were cleaning her room. The appellant walked into the room unchallenged. He telephoned the hotel reception and asked someone to come up and open the safe. The hotel manager went upstairs into the room and opened the safe but found it to be empty. The manager subsequently checked the hotel CCTV footage and realised that the appellant was an intruder. The manager challenged the appellant, who then left the hotel. Nothing was stolen. The appellant was later arrested.

The appellant was charged with two alternative counts of burglary contrary to s.9(1)(a) of the Theft Act 1968. On count 1, the appellant was said to have entered a dwelling, namely the hotel room, as a trespasser with the intention of committing theft. On the alternative count 2, the appellant was said to have entered part of a building as a trespasser with the intention of committing theft. The facts to support the two counts were identical. The only issue was whether or not the hotel room constituted a 'dwelling' for the purposes of s.9(3), which creates separate offences of burglary of a dwelling (domestic burglary) and burglary of a non-dwelling (non-domestic burglary).

Following trial, the appellant was convicted of burglary of a dwelling under count 1. He appealed against conviction on two grounds. First, that the judge misdirected the jury in providing a definition of 'dwelling', which placed undue emphasis on the concept of habitation, and second that the judge's comments in summing up to the jury were unfair.

Decision

The appeal was allowed. The term 'dwelling' is an ordinary English word, and it was settled law that whether a building constituted a dwelling is a matter of fact for the jury (for example, *R v Flack* [2013] EWCA Crim 115). Nevertheless, the judge should have guided the jury as to what a dwelling was. It would have been sufficient to say that a dwelling was a building or part of a building in which a person was 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, but other buildings or part of buildings may also be dwellings. The judge had misdirected the jury as to the meaning of a dwelling and had failed to provide a balanced account of the features that may have been taken into consideration as pointing towards or away from the hotel room being a dwelling.

In summing up to the jury, the judge erred by failing to provide a balanced view, directing the jury toward the reasons why the hotel room might constitute a dwelling, but failed to remind the jury of matters which supported the appellant's case that the room was not a dwelling. The most striking feature that pointed away from the room being a dwelling was

the transient nature of the hotel guest's occupation. She had arrived at the hotel the previous evening and intended to stay for three nights. She had bought only the belongings that were necessary for the duration of her stay. The judge ought to have invited the jury to consider whether such an occupation was consistent with the room being a dwelling. The imbalance in the guidance provided to the jury rendered the summing up unfair. It followed that the conviction was unsafe and that the conviction must be quashed. The prosecution did not seek a retrial on the ground that it was not in the interests of justice to do so.

Commentary

The law distinguishes between burglary of a dwelling and of a non-dwelling to give due consideration to the differences in types and levels of harm experienced by the victim. A 'dwelling' includes a home and as such is considered to be a private and secure space into which unauthorised intrusion is likely to lead to greater feelings of distress, violation and possibly endangerment than would be the case in non-dwelling premises, such as an office, factory or warehouse. The Theft Act 1968 sets two different maximum penalties for burglary, depending on whether the offence takes place in a dwelling or not. For burglary of a dwelling, the maximum sentence is 14 years' imprisonment (s.9(3)(a) Theft Act 1968), and for other types of burglary, the maximum is set at 10 years' imprisonment (s.9(3)(b)).

The Theft Act does not define a dwelling other than by providing that inhabited vehicles and vessels can constitute a dwelling for the purposes of s.9(3)(a), irrespective of whether or not the vehicle or vessel is in fact inhabited at the time of the offence (s.9(4)). In most burglary cases, it will be obvious whether or not the building in question is a dwelling. There are, however, situations where the nature of the property as a dwelling will be less obvious, and the Court of Appeal has had to consider the meaning of 'dwelling' on a number of occasions. Where there is any uncertainty as to the nature of the building, *R v Flack* [2013] EWCA Crim 115 provides that two alternative counts should be entered on the indictment: one for domestic burglary and another for non-domestic burglary, and that the matter should be left to the jury to decide.

The Court has faced the question of the proprietary nature of a hotel room on a few occasions recently, and these have given rise to potential confusion. In *R v Addai Kwame* [2018] EWCA Crim 2922, a hotel building contractor used a master key to enter a number of hotel bedrooms and stole items from within. He was convicted of non-domestic burglary. On appeal against sentence, the Court of Appeal described the offences as *similar to* domestic burglaries, but there was no suggestion that the appellant should have been convicted of domestic burglary. In *Hudson v Crown Prosecution Service* [2017] EWHC 841 (Admin), reference was made to the fact that a hotel room had been found to be a dwelling in *R v Massey* [2001] EWCA Crim 531, but this is a misreading of that decision. *Massey* was an appeal against sentence where the appellant had pleaded guilty to the burglary of two hotel rooms and was sentenced to five years' imprisonment. The Court of Appeal considered that, on the facts of the case, the offences were *akin to* domestic burglaries that aggravated the seriousness of the offence. The Court did not suggest that these were burglaries of a dwelling.

There may, however, be times when a hotel room is properly regarded as a dwelling, such as where the occupant lives in the hotel long term and uses it as their home. Some hotel rooms may be provided for staff to live in, and those rooms could be deemed to be dwellings. While the question of whether or not a building constitutes a dwelling remains a matter for the jury, it is most likely correct that, ordinarily, a hotel room should not constitute a

dwelling. Hotels are not generally built to be used as dwellings. Their function is commercial in nature, and they provide a temporary place to stay. While hotels invariably include private rooms, the hotel guest does not have adequate control over that space to exclude others from entering the room, or to furnish or decorate the space. A hotel stay is transient in nature and lacks any sense of permanence or continuity that might otherwise signal that the space is a dwelling. By providing a definition of 'dwelling' as 'a building or part of a building in which a person is living and makes his/her/their home' (at para [42]), the Court of Appeal has at least provided some welcome guidance to juries in the future.

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