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[1972] 2 All ER 1105

R v Collins

CRIMINAL; Criminal Law

COURT OF APPEAL, CRIMINAL DIVISION
EDMUND DAVIES, STEPHENSON LJ AND BOREHAM J
5 MAY 1972

Criminal law – Burglary – Entering a building as a trespasser – Entering with intent to commit specified offence – Mens rea – Trespass – Knowledge that entry a trespass – Necessity of proving that at moment of entry accused knew he was a trespasser or reckless whether or not he had owner’s consent to enter – Theft Act 1968, s 9(1).

Criminal law – Burglary – Entering a building as a trespasser – Common law doctrine of trespass ab initio inapplicable – Theft Act 1968, s 9(1).

The appellant was a young man of 19 and the complainant a girl of 18. One evening the appellant had had a good deal to drink and was desirous of having sexual intercourse. Passing the complainant’s house he saw a light on in an upstairs room which he knew was the complainant’s bedroom. He fetched a ladder, put it up against the window and climbed up. He saw the complainant lying on her bed, which was just under the window, naked and asleep. He descended the ladder, stripped off his clothes, climbed back up and pulled himself on to the window sill. As he did so the complainant awoke and saw a naked male form outlined against the window. She jumped to the conclusion that it was her boyfriend, with whom she was on terms of regular and frequent sexual intimacy. Assuming that he had come to pay her an ardent nocturnal visit she beckoned him in. In response the appellant descended from the sill and joined her in bed where they had full sexual intercourse. After the lapse of some time the complainant became aware of features of her companion which roused her suspicions. Switching on the bed-side light she discovered that he was not her boyfriend but the appellant. She thereupon slapped him and went into the bathroom. The appellant promptly vanished. He was subsequently charged **£ 1105** with burglary with intent to commit rape contrary to s 9(1)(a)^a of the Theft Act 1968. The complainant stated that she would not have agreed to intercourse if she had known that the intruder was not her boyfriend. In the course of his testimony the appellant stated that he would not have entered the room if the complainant had not beckoned him in. There was no clear evidence whether, when the complainant beckoned him, he was still outside the window or had entered the room and was kneeling on the inner sill. The judge directed the

jury that they had to be satisfied that the appellant had entered the room as a trespasser with intent to commit rape and that the issue of entry as a trespasser depended on the question: was the entry intentional or reckless? The appellant was convicted and appealed.

^a Section 9, so far as material, provides:

‘(1) A person is guilty of burglary if—(a) he enters any building or part of a building as a trespasser and with intent to commit any such offence as is mentioned in subsection (2) below

‘(2) The offences referred to in subsection (1)(a) above are offences of stealing anything in the building or part of a building in question ... or raping any woman therein ...’

Held—(1) There could not be a conviction for entering premises ‘as a trespasser’ within s 9 of the 1968 Act unless the person entering did so knowing that he was a trespasser and nevertheless deliberately entered or was reckless whether or not he was entering the premises of another without the other party’s consent (see p 1110 *c*, post).

(2) The crucial question for the jury, therefore, was whether the Crown had established that, at the moment that he entered the bedroom, the appellant knew that he was not welcome there or, being reckless whether or not he was welcome, was nevertheless determined to enter. That in turn involved consideration whether he was inside or outside the window at the moment when the complainant beckoned him in (see p 1110 *d*, post).

(3) It followed that the appeal would be allowed since the jury had not been invited to consider the vital question whether the appellant had entered the premises as a trespasser (see p 1111 *h*, post).

Per Curiam. The common law doctrine of trespass ab initio has no application to burglary under the Theft Act 1968 (see p 1111 *f*, post).

Notes

For burglary, see Supplement to 10 *Halsbury’s Laws* (3rd Edn) para 1550A.

For the Theft Act 1968, s 9, see 8 *Halsbury’s Statutes* (3rd Edn) 788.



Authorities also cited

Salmond on Torts (15th Edn, 1969), ch 3, p 62.

Smith and Hogan’s Criminal Law (2nd Edn, 1969), p 410.

Appeal

On 29 October 1971 at Essex Assizes before Willis J and a jury the appellant, Stephen William George Collins, was convicted of burglary with intent to rape contrary to s 9(1)(a) of the Theft Act 1968, and was sentenced to 21 months’ imprisonment. He appealed against conviction pursuant to a certificate of the trial judge, under s 1(2) of the Criminal Appeal Act 1968, in the following terms:

‘Whether in the circumstances of the case, i.e. Burglary with intent to commit rape in which the Jury by their verdict found that an intent to commit rape existed in the mind of the [appellant] at the moment of his entry into a bedroom but nevertheless the evidence was capable of the interpretation that almost contemporaneously with the act of trespass a licence to enter the room was given by the occupier, albeit under a mistake of fact as to the identity of the [appellant] and/or was acted on by the [appellant] under a mistake of fact I should have directed the jury as a matter of law and/or matters for them to consider that those mistakes or either of them negated and/or were capable  **1106**  of negating the element of entry as a trespasser which was an essential ingredient of the offence and further whether the common law doctrine of “trespass ab initio” applies to Burglary under the Theft Act 1968.’

The appellant also applied for leave to appeal against sentence. The facts are set out in the judgment of the court.



P Perrins for the appellant.
F Irwin for the Crown.

5 May 1972. The following judgment was delivered.

EDMUND DAVIES LJ delivered the judgment of the court. This is about as extraordinary a case as my brethren and I have ever heard either on the Bench or while at the Bar. Stephen William George Collins was convicted on 29 October 1971 at Essex Assizes of burglary with intent to commit rape and he was sentenced to 21 months' imprisonment. He is a 19 year old youth, and he appeals against that conviction by the certificate of the trial judge. The terms in which that certificate is expressed reveals that the judge was clearly troubled about the case and the conviction.

Let me relate the facts. Were they put into a novel or portrayed on the stage, they would be regarded as being so improbable as to be unworthy of serious consideration and as verging at times on farce. At about two o'clock in the early morning of Saturday, 24 July 1971, a young lady of 18 went to bed at her mother's home in Colchester. She had spent the evening with her boyfriend. She had taken a certain amount of drink, and it may be that this fact affords some explanation of her inability to answer satisfactorily certain crucial questions put to her. She has the habit of sleeping without wearing night apparel in a bed which is very near the lattice-type window of her room. At one stage on her evidence she seemed to be saying that the bed was close up against the window which, in accordance with her practice, was wide open. In the photographs which we have before us, however, there appears to be a gap of some sort between the two, but the bed was clearly quite near the window. At about 3.30 or 4.00 am she awoke and she then saw in the moonlight a vague form crouched in the open window. She was unable to remember, and this is important, whether the form was on the outside of the window sill or on that part of the sill which was inside the room, and for reasons which will later become clear, that seemingly narrow point is of crucial importance. The young lady then realised several things: first of all that the form in the window was that of a male; secondly that he was a naked male; and thirdly that he was a naked male with an erect penis. She also saw in the moonlight that his hair was blond. She thereupon leapt to the conclusion that her boyfriend, with whom for some time she had been on terms of regular and frequent sexual intimacy, was paying her an ardent nocturnal visit. She promptly sat up in bed, and the man descended from the sill and joined her in bed and they had full sexual intercourse. But there was something about him which made her think that things were not as they usually were between her and her boyfriend. The length of his hair, his voice as they had exchanged what was described as 'love talk', and other features led her to the conclusion that somehow there was something different. So she turned on the bed-side light, saw that her companion was not her boyfriend and slapped the face of the intruder, who was none other than the appellant. He said to her, 'Give me a good time tonight', and got hold of her arm, but she bit him and told him to go. She then went into the bathroom and he promptly vanished.

The complainant said that she would not have agreed to intercourse if she had known that the person entering her room was not her boyfriend. But there was no suggestion of any force having been used on her, and the intercourse which took place was undoubtedly effected with no resistance on her part.

The appellant was seen by the police at about 10.30 am later that same morning. According to the police, the conversation which took place then elicited these points: He was very lustful the previous night. He had taken a lot of drink, and we may  **1107**  here note that drink (which to him is a very real problem) had brought this young man into trouble several times before, but never for an offence of this kind. He went on to say that he knew the complainant because he had worked around her house. On this occasion, desiring sexual intercourse—and according to the police evidence he had added that he was determined to have a girl, by force if necessary, although that part of the police evidence he challenged—he went on to say that he walked around the house, saw a light in an upstairs bedroom, and he knew that this was the girl's bedroom. He found a step ladder, leaned it against the wall and climbed up and looked into the bedroom. What he could see inside through the wide open window was a girl who was naked and asleep. So he descended the ladder and stripped off all his clothes, with the exception of his socks, because apparently he took the view that if the girl's mother entered the bedroom it would be easier to effect a rapid escape if he had his socks on than if he was in his bare feet. That is a matter about which we are not called on to express any view, and would in any event find ourselves unable to express

one. Having undressed, he then climbed the ladder and pulled himself up on to the window sill. His version of the matter is that he was pulling himself in when she awoke. She then got up and knelt on the bed, she put her arms around his neck and body, and she seemed to pull him into the bed. He went on:

‘... I was rather dazed, because I didn’t think she would want to know me. We kissed and cuddled for about ten or fifteen minutes and then I had it away with her but found it hard because I had had so much to drink.’

The police officer said to the appellant:

‘It appears that it was your intention to have intercourse with this girl by force if necessary and it was only pure coincidence that this girl was under the impression that you were her boyfriend and apparently that is why she consented to allowing you to have sexual intercourse with her.’

It was alleged that he then said:

‘Yes, I feel awful about this. It is the worst day of my life, but I know it could have been worse.’

Thereupon the officer said to him—and the appellant challenges this—‘What do you mean, you know it could have been worse?’ to which he is alleged to have replied:


‘Well, my trouble is drink and I got very frustrated. As I’ve told you I only wanted to have it away with a girl and I’m only glad I haven’t really hurt her.’

Then he made a statement under caution, in the course of which he said:

‘When I stripped off and got up the ladder I made my mind up that I was going to try and have it away with this girl. I feel terrible about this now, but I had too much to drink. I am sorry for what I have done.’

In the course of his testimony, the appellant said that he would not have gone into the room if the girl had not knelt on the bed and beckoned him into the room. He said that if she had objected immediately to his being there or to his having intercourse he would not have persisted. While he was keen on having sexual intercourse that night, it was only if he could find someone who was willing. He strongly denied having told the police that he would, if necessary, have pushed over some girl for the purpose of having intercourse.

There was a submission of no case to answer on the ground that the evidence did not support the charge, particularly that ingredient of it which had reference to entry into the house ‘as a trespasser’. But the submission was overruled, and, as we have already related, he gave evidence.

Now, one feature of the case which remained at the conclusion of the evidence in **1108**  great obscurity is where exactly the appellant was at the moment when, according to him, the girl manifested that she was welcoming him. Was he kneeling on the sill outside the window or was he already inside the room, having climbed through the window frame, and kneeling on the inner sill? It was a crucial matter, for there were certainly three ingredients that it was incumbent on the Crown to establish. Under s 9 of the Theft Act 1968, which renders a person guilty of burglary if he enters any building or part of a building as a trespasser and with the intention of committing rape, the entry of the appellant into the building must first be proved. Well, there is no doubt about that, for it is common ground that he did enter this girl’s bedroom. Secondly, it must be proved that he entered as a trespasser. We will develop that point a little later. Thirdly it must be proved that he entered as a trespasser with intent at the time of entry to commit rape therein.

The second ingredient of the offence—the entry must be as a trespasser—is one which has not, to the best of our knowledge, been previously canvassed in the courts. Views as to its ambit have naturally been canvassed by the textbook writers, and it is perhaps not wholly irrelevant to recall that those who were advising the Home Secretary before the Theft Bill was presented to Parliament had it in mind to get rid of some of the frequently absurd technical rules which had been built up in relation to the old requirement in burglary of a ‘breaking and entering’. The cases are legion as to what this did or did not amount to, and happily it is not now necessary for us to consider them. But it was in order to get rid of those technical rules that a new test was introduced, namely that the entry must be ‘as a trespasser’.

What does that involve? According to the learned editors of Archbold (Criminal Pleading, Evidence

and Practice (37th Edn 1969), p 572, para 1505):



‘Any intentional, reckless or negligent entry into a building will, it would appear, constitute a trespass if the building is in the possession of another person who does not consent to the entry. Nor will it make any difference that the entry was the result of a reasonable mistake on the part of the defendant, so far as trespass is concerned.’

If that be right, then it would be no defence for this man to say (and even were he believed in saying), ‘Well, I honestly thought that this girl was welcoming me into the room and I therefore entered, fully believing that I had her consent to go in’. If Archbold is right, he would nevertheless be a trespasser, since the apparent consent of the girl was unreal, she being mistaken as to who was at her window. We disagree. We hold that, for the purposes of s 9 of the Theft Act 1968, a person entering a building is not guilty of trespass if he enters without knowledge that he is trespassing or at least without acting recklessly as to whether or not he is unlawfully entering.

A view contrary to that of the learned editors of Archbold was expressed in Professor J C Smith’s book on The Law of Theft ((1968), pp 123, 124, para 462), where, having given an illustration of an entry into premises, the learned author comments:

‘It is submitted that ... D should be acquitted on the ground of lack of *mens rea*. Though, under the civil law, he entered as a trespasser, it is submitted that he cannot be convicted of the criminal offence unless he knew of the facts which caused him to be a trespasser or, at least, was reckless.’

The matter has also been dealt with by Professor Griew (The Theft Act 1968, pp 52, 53, para 4–05) who in his work on the Theft Act 1968 has this passage:

‘What if D wrongly believes that he is not trespassing? His belief may rest on facts which, if true, would mean that he was not trespassing: for instance, he may enter a building by mistake, thinking that it is the one he has been invited to enter. Or his belief may be based on a false view of the legal effect of the known facts: for instance, he may misunderstand the effect of a contract  1109  granting him a right of passage through a building. Neither kind of mistake will protect him from tort liability for trespass. In either case, then, D satisfies the literal terms of section 9(1): he “enters ... as a trespasser.” But for the purposes of criminal liability a man should be judged on the basis of the facts as he believed them to be, and this should include making allowances for a mistake as to right under the civil law. This is another way of saying that a serious offence like burglary should be held to require *mens rea* in the fullest sense of the phrase: D should be liable for burglary only if he knowingly trespasses or is reckless as to whether he trespasses or not. Unhappily it is common for Parliament to omit to make clear whether *mens rea* is intended to be an element in a statutory offence. It is also, though not equally, common for the courts to supply the mental element by construction of the statute.’

We prefer the view expressed by Professor Smith and Professor Griew to that of the learned editors of Archbold. In the judgment of this court, there cannot be a conviction for entering premises ‘as a trespasser’ within the meaning of s 9 of the Theft Act 1968 unless the person entering does so knowing that he is a trespasser and nevertheless deliberately enters, or, at the very least, is reckless whether or not he is entering the premises of another without the other party’s consent.

Having so held, the pivotal point of this appeal is whether the Crown established that the appellant at the moment that he entered the bedroom knew perfectly well that he was not welcome there or, being reckless whether he was welcome or not, was nevertheless determined to enter. That in turn involves consideration as to where he was at the time that the complainant indicated that she was welcoming him into her bedroom. If, to take an example that was put in the course of argument, her bed had not been near the window but was on the other side of the bedroom, and he (being determined to have her sexually even against her will) climbed through the window and crossed the bedroom to reach her bed, then the offence charged would have been established. But in this case, as we have related, the layout of the room was different, and it became a point of nicety which had to be conclusively established by the Crown as to where he was when the girl made welcoming signs, as she unquestionably at some stage did.

How did the learned judge deal with this matter? We have to say regretfully that there was a flaw in his treatment of it. Referring to s 9, he said:

‘... there are three ingredients. First is the question of entry. Did he enter in to that house? Did he enter as a trespasser? That is to say, did he—was the entry, if you are satisfied there was an entry, intentional or reckless? And, finally, and you may think this is the crux of the case as opened to you by [counsel for the Crown], if you are satisfied that he entered as a trespasser, did he have the intention to rape this girl?’

The judge then went on to deal in turn with each of these three ingredients. He first explained what was involved in ‘entry’ into a building. He then dealt with the second ingredient. But he here unfortunately repeated his earlier observation that the question of entry as a trespasser depended on ‘was the entry intentional or reckless?’ We have to say that this was putting the matter inaccurately. This mistake may have been derived from a passage in the speech of counsel for the Crown when replying to the submission of ‘No case’. Counsel for the Crown at one stage said:

‘Therefore, the first thing that the Crown have got to prove, my Lord, is that there has been a trespass which may be an intentional trespass, or it may be a reckless trespass.’

Unfortunately the trial judge regarded the matter as though the second ingredient in the burglary was whether there had been an intentional or reckless entry, and when he came to develop this topic in his summing-up that error was unfortunately perpetuated. The trial judge told the jury:

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‘He had no right to be in that house, as you know, certainly from the point of view of [the girls’ mother], but if you are satisfied about entry, did he enter intentionally or recklessly? What the Prosecution say about that is, you do not really have to consider recklessness because when you consider his own evidence he intended to enter that house, and if you accept the evidence I have just pointed out to you, he, in fact, did so. So, at least, you may think, it was intentional. At the least, you may think it was reckless because as he told you he did not know whether the girl would accept him.’

We are compelled to say that we do not think the trial judge by these observations made it sufficiently clear to the jury the nature of the second test about which they had to be satisfied before the appellant could be convicted of the offence charged. There was no doubt that his entry into the bedroom was ‘intentional’. But what the appellant had said was, ‘She knelt on the bed, she put her arms around me and then I went in’. If the jury thought he might be truthful in that assertion, they would need to consider whether or not, although entirely surprised by such a reception being accorded to him, this young man might not have been entitled reasonably to regard her action as amounting to an invitation to him to enter. If she in fact appeared to be welcoming him, the Crown do not suggest that he should have realised or even suspected that she was so behaving because, despite the moonlight, she thought he was someone else. Unless the jury were entirely satisfied that the appellant made an effective and substantial entry into the bedroom without the complainant doing or saying anything to cause him to believe that she was consenting to his entering it, he ought not to be convicted of the offence charged. The point is a narrow one, as narrow maybe as the window sill which is crucial to this case. But this is a criminal charge of gravity and, even though one may suspect that his *intention* was to commit the offence charged, unless the facts show with clarity that he in fact committed it he ought not to remain convicted.

Some question arose whether or not the appellant can be regarded as a trespasser *ab initio*. But we are entirely in agreement with the view expressed in Archbold (Criminal Pleading, Evidence and Practice (37th Edn, 1969), p 572, para 1505) that the common law doctrine of trespass *ab initio* has no application to burglary under the Theft Act 1968. One further matter that was canvassed ought perhaps to be mentioned. The point was raised that, the complainant not being the tenant or occupier of the dwelling-house and her mother being apparently in occupation, this girl herself could not in any event have extended an effective invitation to enter, so that even if she had expressly and with full knowledge of all material facts invited the appellant in, he would nevertheless be a trespasser. Whatever be the position in the law of tort, to regard such a proposition as acceptable in the criminal law would be unthinkable.

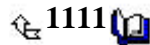
We have to say that this appeal must be allowed on the basis that the jury were never invited to consider the vital question whether this young man did enter the premises as a trespasser, that is to say knowing perfectly well that he had no invitation to enter or reckless of whether or not his entry was with

permission. The certificate of the trial judge, as we have already said, demonstrated that he felt there were points involved calling for further consideration. That consideration we have given to the best of our ability. For the reasons we have stated, the outcome of the appeal is that this young man must be acquitted of the charge preferred against him. The appeal is accordingly allowed and his conviction quashed.

Appeal allowed. Conviction quashed.

Solicitors: *Registrar of Criminal Appeals* (for the appellant); *T Hambrey Jones*, Chelmsford (for the Crown).

N P Metcalfe Esq Barrister.



end of selection
