Chipunza and Regina [2021] EWCA Crim 597 (43 paragraphs)

I think I was more interested in reading this decision than most. The reason for this is that I well remember discussing the case of **Hudson** with a large group of lawyers back in 2017 – the case of **R v Crown Prosecution Service ex parte Hudson [2017] 2 Cr App R 21 (269)** gets a mention in the **Chipunza** case at paragraph 12.

I shall review the facts of **Hudson** shortly – I just want to say that I had posed the question of whether or not anyone would consider that a burglary of my room at the Premier Inn (in which I was staying at the time) would be in the nature of a burglary of a dwelling or a burglary of a non-dwelling?

Some of the lawyers in the room were of the view that it would be more in the nature of a commercial burglary rather than a burglary of a dwelling.

Some of the lawyers in the room were of the view that it would most certainly be a burglary of a dwelling.

Some of the lawyers in the room said that there was case-law on it and that it was settled law that a burglary of a hotel room was to be classified as a burglary of a dwelling.

I was intrigued by this comment from some of the lawyers and did a little research on the case-law and came to the conclusion that it was nowhere near as clear-cut as some of those lawyers in the room had been making out.

Hudson v Crown Prosecution Service [2017] EW HC 841 (Admin)

This was an interesting case as to whether or not the 'building' in question was a 'dwelling' for the purposes of **Section 9 (3) (a) of the Theft Act 1968.**

It was an appeal by way of Case Stated to the High Court from the decision of a Deputy District Judge sitting in Birmingham to hold that, on the facts before her, the building was indeed a 'dwelling'.

The appellant and a co-accused were charged with burglary contrary to **Section 9 (1) (a).** Both of them had pleaded guilty to 'non-domestic' burglary but that plea was not acceptable to the Crown.

The facts:

1 – The property in question was rented out to tenants – the last tenant having left the property some 2 days before the burglary occurred

2 – It was not disputed that the appellant and the co-accused were responsible for the burglary

3 – The property was fully furnished in all rooms and equipped to be habitable. The utilities – gas, electricity and water were connected and the house was ready for new tenants to move in albeit at this stage new tenants had not been identified

The Deputy District Judge held that she did not consider this to be a commercial burglary

Sections 9 (3) and 9 (4) of the Act provide as follows:

'(3) A person guilty of burglary shall on conviction on indictment be liable to imprisonment for a term not exceeding –

(a) Where the offence was committed in respect of a building or part of a building which is a dwelling, 14 years;

(b) In any other case, 10 years

(4)..... the reference in Subsection (3) above to a building which is a dwelling, shall also apply to an inhabited vehicle or vessel, and shall apply to any such vehicle or vessel at times when the person having habitation in it is not there as well as times when he is'

You can immediately see the problem – the statutory definition of a building which is a 'dwelling' makes no mention of the fact of whether or not it continues to be a 'dwelling' even if unoccupied – that clarification point is only mentioned in relation to vehicles or vessels

Counsel for the appellant argued that the Judge had answered in a manner unsustainable in law. Alternatively, this Court should give guidance as to the law. On the facts in this case, the building was not the home of anyone at the time. To be a 'dwelling' it had to be someone's home at the time. Whether premises were properly to be regarded as a 'dwelling' was a question of fact.

Counsel for the Crown submitted that 'dwelling' was an ordinary English word; its meaning was a question of fact for the Court – not one of law for the Court. A question of law would only arise for this Court if no tribunal of fact acquainted with the ordinary use of language could reasonably have concluded on the facts of the case that the property in question constituted a 'dwelling'. **The Oxford English dictionary definition of 'dwelling' was a house or other place of residence'.** This was in contrast to buildings which were not places of residence, such as commercial properties. As a matter of ordinary language, the word 'dwelling' was capable of including not only a building dwelt in but also a building constructed or designed for dwelling in.

The distinction is an important one for 2 main reasons:

Burglary of a dwelling carries 14 years on indictment whereas burglary of a non-dwelling carries a maximum of 10 years on indictment

Section 111 of the Powers of Criminal Courts (Sentencing) Act 2000, contains the 'three strikes' provision requiring a (presumptive) minimum custodial sentence of 3 years where an offender aged 18 or over is convicted of a third 'domestic burglary' in the circumstances there set out. In turn, 'domestic burglary' is defined by **Section 111 (5) of the 2000 Act** as '.... a burglary committed in respect of a building, or part of a building, which is a dwelling'.

The Court said two things of real importance that assist:

Firstly, '....'dwelling is an ordinary English word; its meaning is a question of fact for the jury, Magistrates' or a District Judge.....' (Paragraph 19)

Secondly, 'The paradigm case of a 'dwelling' is one which is occupied by an owner or tenant. It is thus someone's home. It is that feature which attracts the particular gravity of a dwelling house burglary: it is an offence against the person as well as an offence against property, undermining a sense of security, violating privacy and causing disturbance and distress as well as economic loss.....' (Paragraph 20)

'It does not, however, follow that the policy or logic of dealing severely with burglary of a 'dwelling' means that a building, otherwise obviously a 'dwelling', ceases to be one for the purposes of **Section 9 (3) of the Act,** the moment the 'dwelling' becomes unoccupied. As it seems to me, where a 'dwelling' has become unoccupied, it is a question of fact and degree – not law – as to whether it is no longer a 'dwelling' within **Section 9 (3).** There is a spectrum of factual possibilities' (Paragraph 21)

The burglar takes the risk of the Court finding, on the facts, that that which was burgled was indeed a dwelling!

Please always bear in mind that these cases will be very facts-specific. This was an important point made by the Court of Appeal.

The matter arrived in the Court of Appeal by way of a renewed application for permission to appeal against conviction. The Court of Appeal gave leave.

The facts were relatively straightforward – the hotel guest had checked in the evening before and had gone off to work in the morning. 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 3 nights. 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. The manager noticed women's clothing and went downstairs and checked the CCTV. He then 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 and went 'no comment'. He was charged with burglary contrary to **Section 9(1) (a) of the Theft Act 1968.**

At the Crown Court it was a 2-count indictment. The facts in support of the 2 counts were identical. In 1 the appellant was said to have entered a dwelling, namely room 2515 in the hotel. In 2 he was said to have entered part of the building, namely room 2515 in a hotel. Nothing was stolen. The counts were in the alternative.

The appellant's plea of guilty with an admission of all the facts was not acceptable to the Crown and the case was adjourned for trial.

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 3 years because the conviction would be a third qualifying domestic burglary

within the meaning of what was then **Section 111 of the Powers of Criminal Courts (Sentencing) Act 2000 unless such a sentence would be unjust – [see now the Section replicated in the same terms in the Sentencing Act 2020 – appropriate where the conviction is on or after the 1st December 2020]**

There was consideration of previous authorities in this area – they don't really assist as they turned upon their own facts save that we get the general principle that in an appropriate case it would be a matter for a jury to determine whether that which was burgled was a dwelling or a non-dwelling and that any directions given by the Judge could, if appropriate, be considered by the Court of Appeal.

The trial therefore proceeded on the basis that the question of whether the hotel room was a dwelling was a matter of fact for the jury.

Some guidance from the Court of Appeal is to be found at paragraph 15 of the judgement which reads as follows:

'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 – (paragraph 15)

'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'– (paragraph 35)

'The most striking feature which pointed away from the hotel 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 judgement 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'– (paragraph 36)

In the event, the Court of Appeal allowed the appeal and quashed the conviction on count 1 of the indictment

They made this decision because they were of the view that 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 the 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 focusing entirely (and not just principally) on what the guest generally did when she was in a hotel room rendered the summing up unfair. The Court came to the conclusion that they were satisfied that the conviction was therefore unsafe.

What would you say? – dwelling or non-dwelling after having considered these factors in the instant case:

1 – The guest's home address was in Birmingham

2 – She referred to staying in a hotel rather than living there

3 – She stayed in different rooms in different hotels each week

4 – She had no control over which room she had or even which hotel she stayed in. This was all determined by the hotels.

5 – Check-in and check-out times were determined by the hotel 2pm and 12pm respectively

6 – She had no control over who went into the room when she was not there. Hotel employees had a master key.

7 – She was bound by the rules of the hotel as to smoking, fire drills and so on.

8 – She had no choice over the decor or furniture in the hotel room.

[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].

9 – After having heard about the burglary she requested that she be moved to a different room

10 – She had arrived at about 7pm on the Monday, the day before the burglary

11 – She could not remember the room number

12 – She would usually stay 3 nights and spend the rest of the week at her home address in Birmingham

13 – She relaxed and slept in the room – occasionally working there or reading

14 – She put in her statement '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'.

15 – She had with her just sufficient clothing and other belongings required for a 3-night stay