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IN THE HIGH COURT OF NEW ZEALAND M NO 517/83

WELLINGTON REGISTRY

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BETWEEN K , WELLINGTON

Appellant

AND POLICE, WELLINGTON

Respondent

Hearing: 8 February 1984

Counsel: W M Johnson for Appellant
JHC Larsen for Respondent

Judgment: 23 February 1984

JUDGMENT OF JEFFRIES J

Appellant in the District Court at Wellington before a judge alone faced a charge of breaking and entering a dwelling house at Milne Terrace, Wellington, in the early hours of 15 January 1983 being an offence contrary to s 241(a) of the Crimes Act 1961. At the conclusion of the defended hearing at which appellant gave evidence he was convicted by the judge who conducted the trial. He now appeals against that conviction.

There was some dispute about facts in the lower court and in this court on appeal, but in the final analysis the decision does not turn on those disputes. I now relate the facts basically as found by the trial judge. Appellant is a young Polish immigrant who came to New Zealand in 1981. On the date of the incident he had been in New Zealand about 15 months and was aged 20 years. On the night before the entry to the dwelling house appellant had been to a Polish social occasion with another young friend who shared accommodation situated near the dwelling house. Alcoholic

liquor had been consumed. The complainant lived at Milne Terrace with another female. They too had been out late (separately it seems) and on arrival home together they hung washing on their clothesline at about 2 a.m. They re-entered and complainant in evidence said she observed her companion lock and bolt the back door. The windows were locked with the exception of a fanlight window into another bedroom. Complainant retired to bed and before sleep thought she heard a noise outside and went to her companion's bedroom and spoke with her but they did nothing. She returned to her bed and went to sleep. She was awakened some time later to hear footsteps walking across her bedroom floor and then the sound was like someone crawling across the floor. A hand was placed on the bed itself and she turned the light on to reveal appellant on the floor. She said they were both surprised. Appellant stood up, profusely apologised, said he must have come to the wrong house, innocently kissed her hand twice and obeyed complainant's order to leave. He left through the back door which was already open. The fanlight was flapping. She did not consider him to be intoxicated. She gave evidence of general fear and apprehension but not of sexual assault on herself, or of any other action by him pointing to any other offence. She was able to describe his clothing. After he left she communicated with the police and reported the incident.

Evidence was given by Constable Renouf that in the early hours of 15 January he apprehended appellant in a street near the dwelling house. He said he was carrying a bottle of alcoholic liquor but did not think he was intoxicated. It was agreed by counsel the judge, in stating that the constable thought appellant very intoxicated, made an error for that clearly was not his evidence. The constable

questioned appellant about the incident which he denied. He was taken to the police station where he repeated his denial in a written statement. The clothes worn by appellant when apprehended were not as described by complainant.

The factual situation may now be disposed with. At the trial appellant made no attempt to dispute complainant's evidence that he was the person in her bedroom at about 3 a.m. and who had had the exchange with her. It follows he had to admit he had lied to the constable both orally and in writing. He gave as a reason fear of police and that seemed to be accepted by the judge allowing lies as evidence to be put aside. Appellant in his evidence maintained he was very intoxicated and this was responsible for him being unable to recall how he had effected entry to the dwelling house. In court he gave an explanation why he had changed his clothing after leaving complainant's dwelling. Appellant's counsel in argument on appeal attempted to challenge the judge's finding he had entered through the fanlight and cautiously opened the back door to facilitate escape. If he had negotiated entry through a fanlight rather than passing through an open back door that not only establishes the breaking in element of the crime but necessarily leans against a state of gross intoxication in turn affecting intent and the acceptability of the evidence given by appellant. I think there was sufficient evidence to support the judge's finding on this point. However in this court's view of the law that still does not dispose of the appeal.

Burglary is a crime which requires the prosecution to prove three separate ingredients, namely a breaking and entry, into a building, with intent to commit a crime therein. The crime charged is a serious crime which requires proof of specific intent before the accused can be convicted.

The prosecution satisfactorily established the first two ingredients of the crime but it is the third which is now in question. It is established by The King v O'Meara [1943] NZLR 328 that it is immaterial what crime was committed, or intended. The necessary intention must be proved to have been formed at the time of breaking and entering. As juries are frequently told intent ordinarily may not be proved directly because there is no way of fathoming or scrutinising the operations of the human mind but the accused's intent may be inferred from the surrounding circumstances. That entails a consideration of any statements made by accused and all other facts and circumstances in evidence which indicate his state of mind.

I return now to the trial. When questioned by this court Mr Larsen (who did not prosecute in the lower court) had to concede that at no point does the record disclose the prosecution actually nominated a specific crime intended to be committed. It seems this ingredient was not adverted to by either prosecution or defence, but it is for the former to prove it as an element of the crime charged. The failure of the issue to emerge in the course of the trial is reflected in the oral judgment of the judge in that it is not there mentioned as an ingredient to be proved but seemingly left in the realms of some unspecified criminal intent. Needless to say the reasons for conviction do not say what crime it was that fulfilled the statutory element. Mr Larsen argued that all that was necessary was for the prosecution to establish a felonious intent and the circumstances satisfied that. He said it was not necessary for the prosecution unless ordered to nominate the precise crime. That if the prosecution had been so ordered in this case it was open to nominate theft,

or crime of a sexual nature. The nearest the judge got to the issue was to remark in the judgment "... the mere fact that the defendant was apprehended before he committed any direct crime in my judgment provides him with no defence." It is difficult to fathom what the learned judge meant by this statement as it was the complainant who dealt with him in the house and it could only make sense if it excludes her as a possible object of crime, namely a sexual attack. The judge sentenced appellant immediately and said "... it hadn't been proved that you had any ulterior motive toward the girl concerned." That really leaves theft but there was no evidence at all to support that intent.

This court has reached the conclusion there is no alternative but to quash the conviction. The failure by the presiding judge to advert to this essential ingredient of the offence simply reflects the evidence that none existed to satisfy it. That appellant intended to commit theft, or a crime of a sexual nature, is speculative. Mr Larsen conceded the hand kissing was devoid of any sexual overtone and by word or act there was no other evidence. The judge himself really excluded any intent to commit a sexual crime. There was no evidence to support an intent to commit the crime of theft. There was no evidence anything had been stolen, or that appellant had taken possession of anything. His behaviour when asked to go was in his favour. It would also appear he had opportunity to steal and get away. See Pearson (1910) 4 Cr. App. R. 40 where accused was found in a girl's bedroom in the dark sitting in an armchair. He claimed to be resting. There was evidence that he had forced entry but the conviction was quashed because there was no evidence he had any felonious intentions.

In O'Meara (supra) the jury was satisfied that the accused had broken into a dwelling. Money had been stolen but the jury was not satisfied the accused was responsible for the theft. On appeal the court held that apart from the disappearance of some money there was no evidence to suggest that the accused intended to commit a crime of theft and that there was nothing in the evidence upon which a jury could reasonably find that there was an intent to commit any other crime.

The appeal is allowed and the conviction quashed.

Solicitors for Appellant: Johnson & Miliszewski

Solicitors for Respondent: Crown Solicitor, Wellington