NZLR

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

AP No. 283/97

BETWEEN H of 5 Parkland Mews, 326 The Terrace, Wellington

Appellant

A N D POLICE of Wellington

Respondent

Hearing: 5 November 1997

Counsel: B A Buckett for Appellant
M J Bodie for Respondent

Judgment: 12th November 1997

JUDGMENT OF GREIG J

Solicitors:
Crown Solicitor, WELLINGTON, for Crown

After a defended hearing the appellant was found guilty on a charge of burglary that on 13 August 1996 he did break and enter a building, a dwelling situated at Flat 3, 326 The Terrace, with intent to commit a crime therein (s 241). He appeals that conviction.

There were three grounds to the appeal. The first was that on the evidence there was no breaking and entering within s 240 of the Crimes Act. That point was conceded by the Crown. The second ground was that there was insufficient evidence for a finding that there was an intent to commit a crime. The third ground was that the finding of identification of the appellant was in error, being either contrary to the evidence before the Court or not being available on that evidence beyond reasonable doubt.

The premises which were entered were described as Flat 3. The appellant lives in Flat 5 of the complex. The eyewitness lived in Flat 6. The flat in question was shared by three young women who worked during the day. One of them, as appears to have been her custom, left her bedroom window partly open. Her bedroom was on an upper floor, the window was an aluminium or metal-framed window hinged at the top on both sides. On the afternoon on the day in question the eyewitness who was in her kitchen saw a man climbing out of that bedroom window. Her evidence was that she had watched as he climbed out and down a drainpipe. She identified him as the appellant, as the neighbour who lived next door to her. She said that she had been a neighbour for just over three months and had spoken to him previously. She described him as wearing a blue jersey, dark trousers and on both of his hands white gloves that were turned back so that you could see a green trim round the wrist area. In cross-examination she said that the time that she had watched this person was about 20 seconds. Gloves that could have been similar to those seen by the eyewitness were found in the appellant's kitchen. They were a common type of household glove. They were examined by a forensic scientist at the ESR and compared with print lifts taken from about the window of the complainant's flat. The pattern of the lifts and on the gloves were the same. The unchallenged evidence was that, in the bedroom from which the person was seen to leave and in other bedrooms in the house, articles had been moved, drawers opened, but nothing was taken. It

seems to have been accepted and it was a finding of the judge that the appellant's appearance was that he had a rather unusual hairstyle which appeared in the photograph taken on the day in question by the police.

On the question of identification the judge began his judgment by recording that there was no real dispute that somebody had entered the premises and that the neighbour had seen a man climbing out of the window and down the drainpipe. The question was whether it was the appellant. Although the judge did not refer to *Turnbull's* case (*R v Turnbull* [1976] 3 All ER 549) expressly he recited at some length and in some detail the dangers and the caution with which evidence of identification has to be viewed and weighed. In the course of that he referred to what he expressed to be a conflict in that witness' evidence with the description and information that she had given to the policeman in that she, as he put it, "... apparently accepts that she acknowledged to another resident in this block of flats that she may not have been able to identify the man she had seen, or did not recognise the man she had seen."

Then the judge deals with his view as to the credibility of the appellant who gave evidence in the trial. He came to the view that the appellant had been untruthful on two particular aspects, one of which was evidence given by one of the complainants that on the day before she had seen the appellant peering into a room in the flat on the ground floor. His conclusion on this question of identity is expressed in these words on p 4:

> " The single issue then is whether or not I should act upon the evidence of Ms Davis who identifies the defendant as the burglar. I am satisfied that the circumstances were such, the knowledge of the defendant was such, her knowledge of the defendant was such, coupled with his unusual hair style and appearance, that I should accept and rely upon her identification as being accurate, notwithstanding that it was a short identification. It was of someone she knew. Thus I am satisfied that he was the man seen climbing out of the window. "

Miss Buckett, on behalf of the appellant, submitted with vigour and in detail a number of points arising out of the evidence and in particular the evidence of the eyewitness neighbour to show, she said, that matters of doubt raised serious issues as to the identity and did not satisfy and ought not to have satisfied the judge on the appropriate standard of proof. One has to say, of course, that the judge had the advantage of seeing and hearing the witnesses. A transcript, even a verbatim transcript, cannot give the flavour of the evidence or the demeanour of the witness. From time to time the spoken word, when translated to the written page, does not accurately or precisely reflect the meaning that was spoken or was heard.

In the course of her cross-examination of the eyewitness the eyewitness fixed the time at about 20 seconds although she did use the term "glimpse" to a question which led on the use of that word. It is clear, on a reading of the transcript however, that she remained adamant that she had recognised the appellant and continued to do so.

On the question about what she had said to the neighbour, this matter, in its relevant terms, was recorded in this way. The eyewitness had accepted that she had spoken to the neighbour after she had first spoken to the police and before the return later in the evening. Questions and answers are recorded as follows:

> " Q. And you remember saying to him that you didn't - you couldn't identify who it was at that stage. You had an idea but you couldn't confirm who that might have been that you saw coming out of that window?
> A. I recognised him as being my neighbour from number 5, and I thought his name was Nigel.
>
> Q. But you recall talking to Mr Stoppart in the interim and telling Mr Stoppart in that conversation that you didn't know who you'd seen at that stage? You are on oath Ms Davis, I wonder if you could just answer the question?
> A. Can you repeat the question please?
>
> THE COURT

Q. The question simply is, did you tell Mr Stoppart you couldn't recognise the burglar?
A. I might have said that. "

There were other statements made or answers given by the eyewitness which indicated that she had been unsure of the name of her neighbour, that is to say his first name, Nigel. It was also said in submissions to me that his jersey was green, although the eyewitness had said it was blue.

I have given this matter careful consideration but I remain unpersuaded that any of the matters raised, singly or together, reach the position where it can be said that the judge must have erred and ought to have been left with reasonable doubt in his conclusion as to identification. Although finders of fact must exercise caution where evidence of identification depends on eyewitnesses, that evidence can be accepted. It is right that the evidence should be scrutinised and carefully weighed but the rules and the law does not mean that such evidence is inherently doubtful or is of lesser value than any other evidence given in the matter. Clearly, on the evidence before him, the judge was entitled to accept the evidence of the eyewitness. He has clearly dealt with it with care and with caution and has come to his conclusion. His conclusion must stand.

I turn then to the question of issue as to intent. It is an essential element to be proved by the prosecution that the person entered with intent to commit a crime. That is a matter to be inferred from the circumstances of the case. It is not necessary to show that a crime has been committed, merely that there was an intent to commit a crime at the point that entry was made. It was the judge's inference that there was an intention to steal something although nothing was in fact taken. He accepted that the most frequent reason for people breaking and entering was with a desire to steal something. He accepted that sometimes nothing is stolen. A jewellery box had been disturbed, a top drawer with underwear had been disturbed, and other movements of articles in the house indicated to the judge that a search had taken place. He said that a search was a clear indication of an intention to steal.

When somebody uninvited has entered a house, it seems through a window on an upper floor, and then spends some time going through some drawers and a jewellery box and other articles, the common-sense answer is that that conduct indicates some sinister or improper intention. It is what thieves do. It is unlikely that anyone with an innocent purpose, if one can imagine an innocent purpose for such conduct, would enter a building, a residence, through an upper storey in the circumstances and situation of the appellant. I think the inevitable inference is that the entry was made for the purpose and with the intention of stealing something but, for whatever reason, nothing was stolen.

Because the window through which the entry was assumed and the departure was made was open there was no breaking as required by the law: see *R v Parry* [1957] NZLR 846 (CA) and *R v Toth* (1987) 2 CRNZ 377 (CA). It was conceded that in those circumstances the appellant could not be convicted of the charge which was laid against him. I was invited by the Crown, however, to substitute the offence under s 242 of unlawfully entering with intent. That was the course adopted in *Toth*.

Miss Buckett opposed that course. She said that it had aspects of unfairness. The case had been presented throughout on the basis of breaking and entering although it must be said that the defence was a denial of entry at all. The issue of breaking and entering or breaking was a collateral matter, not a matter that was an issue on the evidence. It was her case that the appellant had been charged with an alternative charge under s 21A of the Summary Offences Act 1981 that he was found without reasonable excuse in a building. As recorded at the end of the judge's decision to convict that charge was withdrawn. That would be the normal situation in a case where alternative charges have been laid and conviction is obtained on the more serious charge. It is pointed out that in any event a withdrawal by leave does not prevent any further charges being laid.

The conclusion of this matter is that the appellant did enter the building, the premises, and the inevitable inference that he intended to commit the crime of theft. To escape that conviction by a technicality about the state of the

window and his entry seems to me to be unjust. I think that this is an appropriate case for substituting a conviction under the lesser charge under s 242 and I do so.

Having done that it is necessary to consider whether any variation should be made in the sentence that was imposed. The appellant was sentenced to 12 months' supervision on particular conditions. That was after a probation officer's report and a number of other reports which were furnished to the judge relating to the particular circumstances and mental condition of the appellant. The maximum penalty under s 241 is 10 years' imprisonment. The maximum penalty under s 242 is 5 years' imprisonment. I do not think that any variation in the sentence is required.

The appeal against conviction is allowed. The conviction is quashed and a conviction for entering with intent is substituted and the sentence imposed confirmed.