JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 42 of 1972

BEFORE: The Hon. Mr. Justice Luckhoo, J.A.(Presiding).
The Hon. Mr. Justice Fox, J.A.
The Hon. Mr. Justice Edun, J.A.

REGINA v. HUGH REID

Enoch Blake for the appellant.

P.T. Harrison for the Crown.

16th January, 16th February, 1973

LUCKHOO, J.A.:

On January 16, 1973, we dismissed this appeal and promised to give our reasons therefor in writing. This we now do.

The appellant was convicted on March 3, 1972, in the Home Circuit Court, Kingston, before Parnell, J. and a jury on the first two counts of an indictment charging him with (i) burglary, contrary to s.36 of the Larceny Law, Cap. 212; (ii) shooting with intent to murder, contrary to s.12 of the Offences Against the Person Law, Cap. 268; (iii) shooting with intent to do grievous bodily harm, contrary to s.16 of the Offences Against the Person Law, Cap. 268, the second and third counts being charged in the alternative. He was sentenced to 8 years imprisonment on each count in respect of which he was convicted, the sentences to run concurrently. He was also ordered to receive 7 lashes in respect of his conviction for burglary.

A substantial question was raised by this appeal and it is this. Is the offence of burglary committed when a person in the night discharges a loaded firearm into a dwelling house of another with intent to commit a felony therein, the firearm being discharged from without that house? The other grounds of appeal argued we found to be without merit.

It is unnecessary to relate in any detail the evidence adduced at the trial. Suffice it to say that there was ample evidence, which the jury by its verdict obviously accepted, to the effect that the appellant in the night of August 10, 1972 while standing outside the door of a dwelling house occupied by the complainant, one Lewis Reid, discharged a loaded firearm

at the complainant who, standing within the house, was in the act of shutting the door against the appellant and others after it had been broken open by them. The bullet discharged from the firearm pierced the wooden fabric of the door and travelled across one of two rooms in the house striking the wall at the far end and rebounding therefrom onto a bed standing near to that wall. It is evident that the jury also came to the conclusion that the appellant shot at the complainant with intent to murder him and this conclusion is amply supported by the evidence. The defence was an alibi.

There seems to be no reported case on the substantial question raised by this appeal. There are, however, the opinions of writers which offer some guide in the determination of the question. These opinions are in point for the offence of burglary enacted by s.36(1) of the Larceny Law, Cap. 212 is in terms identical with burglary at common law - breaking and entering the dwelling house of another in the night with intent to commit some felony therein, while entering by day or night in a dwelling house with intent to commit felony or being in such house and committing a felony and thereafter breaking out in the night declared burglary by Stat.12 Ann. C.7, is also burglary under s.36(2) of the Larceny Law, Cap. 212. At 2 East Pleas of the Crown p.340 there appears the following passage dealing with the ingredient of entry in proof of the offence of burglary -

> "But if a man shoot without the window, and the bullet come in; this seems, says Lord Hale, to be no entry to make burglary; though he subjoins a quare. And Hawkins expressly considers the discharge of a loaded gun into a house as an entry. And indeed it seems difficult to make a distinction between this kind of implied entry, and that by means of an instrument introduced within the window or threshold for the purpose of committing a felony; unless it be, that the one instrument by which the entry is effected is holden in the hand, and the other is discharged from it. No such distinction is however anywhere laid down in terms: nothing further appearing than that the entry must be for the purpose of committing a felony."

At 1 Hawkins Pleas of the Crown p.132 in reference to what entry is sufficient in proof of the common law offence of burglary there appear the following passages -

> "Section 11. It seems agreed, that any the least entry, either with the whole or with but part of the body, or with any instrument, or weapon, will satisfy the word "intravit" in an

> indictment of burglary; as if one do put his foot over the threshold, or his hand, or a hook or pistol within a window, or turn the key of a door which is locked on the inside, or discharge a loaded gun into a house, etc."
>
> "Sect. 12. But it seems, that the instrument must be introduced for the purpose of committing the felony ..."

Mr. Enoch Blake for the appellant contended that having regard to the examples given (at section 11) before the words "or discharge a loaded gun into a house" those latter words should be read as meaning a discharge of the gun with at least part of the gun within a window or over the threshold of a dwelling house. We see no warrant for reading this example in the way suggested by Mr. Blake and indeed none of the writers in the works we have been able to consult construe this example in the way suggested by Mr. Blake.

Of the works mentioned so far East and Hawkins take the view that the discharge of a loaded gun from without a dwelling house into the house with the intent to commit a felony constitutes a sufficient entry on an indictment for burglary whereas Hale says that it seems to be no entry but questions the correctness of such a conclusion. Reference was made at the hearing of this appeal to a passage appearing in Smith & Hogan's Criminal Law (2nd Edition) at pp. 409, 410 where the learned authors discuss the question of what is an entry sufficient for the purposes of burglary as constituted by s.9 of the English Theft Act, 1968:

> "The common law rule is that the insertion of any part of the body, however small, is a sufficient entry. So where D pushed in a window pane and the forepart of his finger was observed to be inside the building, that was enough. But the common law goes farther than that. If an instrument is inserted into the building for the purpose of committing the ulterior offence, there is an entry even though no part of the body is introduced into the building. So it is enough that hooks are inserted into the premises to drag out the carpets or that the muzzle of a gun is introduced with a view to shooting someone inside. It would amount to an entry if the holes were bored in the side of a granary so that wheat would run out and be stolen by D, provided that the boring implement emerged on the inside. On the other hand, the insertion of an instrument for the purpose of gaining entry and not for the purpose of committing the ulterior offence, is not an entry if no part of the body enters. If D bores a hole in a door with a centre bit for the purpose of gaining entry,

the emergence of the point of the bit on the inside of the door is not an entry.

Even if the courts are willing to follow the common law in holding that the intrusion of any part of the body is an entry, they may be reluctant to preserve these technical rules regarding instruments, for they seem to lead to outlandish results. Thus it seems to follow from the common law rules that there may be an entry if a stick of dynamite is thrown into the building or if a bullet is fired from outside the building into it. What then if a time bomb is sent by parcel post? Has D "entered", even though he is not on the scene at all? - perhaps even abroad and outside the jurisdiction? Whether D enters or not can hardly depend on how far away he is and the case seems indistinguishable from the others put.

There is, however, a cogent argument in favour of the common law rules which may be put as follows. If D sends a child, under the age of ten, into the building to steal, this is obviously an entry by D, through an "innocent agent", under ordinary principles. Suppose that, instead of a child, D sends in a monkey. It is hard to see that this should not equally be an entry by D. But if that point be conceded, it is admitted that the insertion of an animate instrument is an entry; and are we to distinguish between animate and inanimate instruments? Unless we are, the insertion of the hooks, etc., must also be an entry."

There can be no doubt that the insertion of any part of the body e.g. a finger, for the purpose of committing a felony e.g. stealing is a sufficient entry. R. v. Davis (1823) R. & R. 499. Nor can there be any doubt that the insertion of an instrument into the house for the purpose of committing a felony is a sufficient entry e.g. inserting hooks into the building to drag out carpets, (1583) 1 Anderson 114 or a firearm put in for the purpose of killing some person in the house. See R. v. O'Brien (1850) 4 Cox C.C. 398 where Patteson, J. said (pp. 398-399) -

"Where an instrument is used, the law appears to be different; there the instrument must be within the premises, not only for the purpose of making the entry, but also for the purpose of effecting the contemplated felony, as where a hole is introduced for the purpose of taking away goods, or a pistol put in for the purpose of killing the inmates of the house, there the entry is sufficient; but if the instrument is merely used for the purpose of making an entry, then the proof of entry fails."

The position in relation to the insertion of instruments is a logical conclusion from that as to entry of a part of the body in that the instrument inserted

with the felonious intent is held in the hand and forms as it were an extension of the hand, though the insertion of the instrument must be with intent to commit a felony. We think that it is likewise a logical conclusion to hold it a sufficient entry where for the purpose of committing a felony in a dwelling house, the hand causes a projectile (one instrument or part of an instrument) to leave a gun (another instrument or another part of an instrument) and enter that building.

For these reasons we answered the question raised by this appeal in the affirmative and dismissed the appeal, affirming the convictions and sentences.