JEFFREY BAIN AUSTIN .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1968

*May 2
June 26

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Criminal law—Entering dwelling house with intent to commit indictable offence—Elements of offence—Proof of intent—Criminal Code, 1953-54 (Can.), c. 51, s. 293.

The appellant was convicted by a magistrate upon a charge of unlawfully entering a dwelling house with intent to commit an indictable offence therein, contrary to s. 293 of the *Criminal Code*. The magistrate found that the accused had entered unlawfully and without lawful excuse and had not given an explanation of his presence, that is, a reasonable or logical explanation. His conviction was affirmed by the Court of Appeal. He was granted leave to appeal to this Court on the question of law as to whether the magistrate had erred in failing to determine whether the intent to commit an indictable offence had been proved beyond a reasonable doubt.

Held (Judson and Pigeon JJ. dissenting): The appeal should be allowed and the conviction quashed.

Per Martland J.: The offence defined in s. 293 of the Code contains two elements: an entry without lawful excuse and an accompanying intent, which must exist at the time of entry, to commit an indictable offence in the dwelling house. Under subs. (2) of s. 293, the Crown could establish a case against the accused upon proof of entry without lawful excuse and in the absence of other evidence. Where, however, other evidence is given relating to the circumstances the Court must be satisfied, upon the whole of the evidence, beyond a reasonable doubt, that the entry was made accompanied by the requisite intent. The trial judge appears to have overlooked that the explanation given by the accused, while not establishing a lawful excuse for his presence in the premises, might well have created a reasonable doubt as to his intent to commit an indictable offence therein.

Per Hall and Spence JJ.: Proof of the intent to commit an indictable offence, which intent must exist at the time of entry, is a necessary ingredient for a conviction and all that subs. (2) does is to provide *prima facie* evidence, not disturbing the principle of law that on the whole evidence the Crown must prove each essential element including, in this charge, the intent beyond reasonable doubt. There was no evidence upon which the magistrate could find beyond a reasonable doubt that the accused had entered the premises with intent to commit an indictable offence.

Per Judson and Pigeon JJ., *dissenting:* When the magistrate stated that the appellant had not given the Court an explanation for his presence, that is, a reasonable or logical explanation, he was stating his

*PRESENT: Martland, Judson, Hall, Spence and Pigeon JJ.

1968

AUSTIN v. THE QUEEN

conclusion that in his opinion the accused's explanation was no explanation at all. The magistrate's mode of expression meant that he rejected the explanation as one that might reasonably be true and convicted on the operation of s. 293(2). He was not required to find that the Crown had to prove beyond a reasonable doubt entry with intent to commit an indictable offence quite apart from the operation of the presumption. He correctly applied the presumption. On the facts of this case, the appellant's entry was without lawful excuse.

Droit criminel—Entrée dans une maison d'habitation avec l'intention d'y commettre un acte criminel—Éléments de l'infraction—Preuve de l'intention—Code criminel, 1953-54 (Can.), c. 51, art. 293.

L'appelant a été déclaré coupable par un magistrat de s'être introduit illégalement dans une maison d'habitation avec l'intention d'y commettre un acte criminel, contrairement à l'art. 293 du *Code criminel*. Le magistrat a statué que l'accusé s'était introduit illégalement, sans excuse légitime, et n'avait pas donné d'explication de sa présence, c'est-à-dire, une explication raisonnable ou logique. La déclaration de culpabilité a été confirmée par la Cour d'appel. L'appelant a obtenu la permission d'en appeler à cette Cour sur la question de droit, à savoir si le magistrat avait erré en omettant de décider si l'intention de commettre un acte criminel avait été prouvée hors d'un doute raisonnable.

Arrêt: L'appel doit être accueilli et la déclaration de culpabilité annulée, les Juges Judson et Pigeon étant dissidents.

Le Juge Martland: L'infraction dont on donne une définition à l'art. 293 du Code contient deux éléments: l'entrée sans excuse légitime et une intention l'accompagnant, devant exister au moment de l'entrée, de commettre un acte criminel dans la maison d'habitation. En vertu de l'alinéa (2) de l'art. 293, la Couronne peut prouver l'accusation sur preuve d'une entrée sans excuse légitime et en l'absence de toute autre preuve. Cependant, lorsqu'une autre preuve relativement aux circonstances est présentée, la Cour doit être satisfaite hors d'un doute raisonnable, en se basant sur la preuve entière, que l'entrée était accompagnée de l'intention requise. Il semble que le juge au procès n'a pas tenu compte que l'explication donnée par l'accusé, quoique n'établissant pas une excuse légitime de sa présence sur les lieux, pouvait très bien avoir créé un doute raisonnable quant à son intention d'y commettre un acte criminel.

Les Juges Hall et Spence: La preuve de l'intention de commettre un acte criminel, laquelle intention doit exister au moment de l'entrée, est un élément nécessaire pour obtenir une déclaration de culpabilité et tout ce que l'alinéa (2) fait est de fournir une preuve *prima facie*, sans mettre de côté le principe de droit que la Couronne, en se basant sur toute la preuve, doit établir chaque élément essentiel y compris, dans le cas présent, l'intention hors d'un doute raisonnable. Il n'y avait aucune preuve sur laquelle le magistrat pouvait statuer hors d'un doute raisonnable que l'accusé s'était introduit dans les lieux avec l'intention de commettre un acte criminel.

Les Juges Judson et Pigeon, *dissidents*: Lorsque le magistrat a déclaré que l'appelant n'avait pas donné à la Cour une explication de sa

présence, c'est-à-dire une explication raisonnable ou logique, il énonçait ses conclusions à l'effet que dans son opinion l'explication donnée par l'accusé n'était pas une explication. L'expression employée par le magistrat signifie qu'il a rejeté l'explication comme pouvant être raisonnablement véridique et a appliqué l'art. 293(2) pour le déclarer coupable. Il n'était pas obligé d'en venir à la conclusion que la Couronne devait prouver hors d'un doute raisonnable une entrée avec l'intention de commettre un acte criminel indépendamment du jeu de la présomption. Il a correctement appliqué la présomption. Sur les faits de la cause, l'entrée de l'appelant était sans excuse légitime.

APPEL d'un jugement de la Cour suprême de l'Alberta, confirmant une déclaration de culpabilité. Appel accueilli, les Juges Judson et Pigeon étant dissidents.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division, affirming the appellant's conviction. Appeal allowed, Judson and Pigeon JJ. dissenting.

J. Harper Prowse, for the appellant.

Brian A. Crane, for the respondent.

MARTLAND J.:—I am in agreement with my brother Spence and merely wish to add the following comments:

The charge against the appellant was that he did unlawfully enter a dwelling house with intent to commit an indictable offence therein, contrary to s. 293 of the *Criminal Code.*

Section 293 provides as follows:

293. (1) Every one who without lawful excuse, the proof of which lies upon him, enters or is in a dwelling house with intent to commit an indictable offense therein is guilty of an indictable offence and is liable to imprisonment for ten years.

(2) For the purposes of proceedings under this section, evidence that an accused, without lawful excuse, entered or was in a dwelling house is prima facie evidence that he entered or was in the dwelling house with intent to commit an indictable offence therein.

There are two elements in the offence charged as defined in s. 293(1):

1. Entry without lawful excuse.
2. An accompanying intent to commit an indictable offence therein.

1968

AUSTIN v. THE QUEEN

Martland J.

Under subs. (2) it is provided that entry without lawful excuse is *prima facie* evidence of entry with intent to commit an indictable offence therein. In other words, in the absence of other evidence the Crown can establish a case against the accused upon that evidence.

Where, however, other evidence is given relating to the circumstances the Court must be satisfied, upon the whole of the evidence, beyond a reasonable doubt, that the entry was made accompanied by the requisite intent.

In finding the appellant guilty, the Court said this:

> I find as a fact that the accused entered the premises of 505 Kennedy Towers unlawfully and without lawful excuse and he has not given this Courtroom an explanation for his presence, that is, a reasonable nor a logical explanation.
>
> Jeffrey Bain Austin I find you guilty of being in these premises contrary to Section 293 of the Criminal Code.

(The underlining is mine.)

The Court appears to have been of the view that if a prima facie case, under subs. (2), was made, thereafter the onus was on the appellant which had to be met by providing a reasonable and logical explanation for his presence in the premises. This overlooks the fact that the evidence, while not establishing a lawful excuse for the presence of the accused in the premises, might well create a reasonable doubt as to his intent to commit an indictable offence therein. This is a vital element in the commission of this offence, and it appears to have been overlooked in this case.

For this reason I think this appeal should be allowed and the conviction quashed.

The judgment of Judson and Pigeon JJ. was delivered by

JUDSON J. (*dissenting*):—The Appellate Division of the Supreme Court of Alberta, in affirming this conviction by the magistrate, delivered the following unanimous reasons:

> Assuming that rule in the Ungaro case is applicable, it is clear that the learned Magistrate considered whether the explanation of the Appellant's presence in the apartment was one which might reasonably be true. He found that under all the circumstances disclosed the explanation was not one which might reasonably be true. We have examined those circumstances and we agree with his conclusion. Accordingly the appeal is dismissed.

To me it is clear that the magistrate disbelieved the appellant and, in particular, held that his evidence was untruthful when he stated that Mrs. Hickling had intended him to look in and keep an eye on the children. Although the appellant stated that he knew the girl and that she was in the apartment baby-sitting and that his only purpose was to "See if she was O.K.", the girl's evidence, which was accepted by the Magistrate, was that the appellant opened the door, said "Hi" to her and went directly into the boy's room and that she was too frightened to ask him to leave.

The following are the reasons in full of the magistrate:

> Firstly, with respect to the evidence of the adults, Mr. and Mrs. Hunt, I find that their evidence is very clear. As a matter of fact, I marvel at the restraint exercised by Mr. Hunt in the manner in which he gave his testimony. The testimony of both Mr. and Mrs. Hunt and of the Constable, Constable Benson, make it quite clear that the accused was adamant at the time that Mrs. Hickling had asked him to look in upon her children while she was absent from the city. I accept the denial of Mrs. Hickling that she made such a request or that such a request would be even thought necessary because she had left her children in charge of a capable sitter. The evidence of the young girl Margaret or Peggy, as she was probably called, Hickling, who was babysitting the young Hunt boy at the time on this occasion, was quite clear after she got over her first fright at being in this Courtroom. The evidence of that young lady and the evidence of Mr. and Mrs. Hunt clearly indicate also at the time the Hunts returned that Austin, the accused, was sitting on the bed and not at the doorway as he himself said in his own testimony. In other words, on both of those occasions I find that his evidence is untruthful and I accept the evidence to the contrary by the other persons.
>
> I find as a fact that the accused entered the premises of 505 Kennedy Towers unlawfully and without lawful excuse and he has not given this Courtroom an explanation for his presence, that is, a reasonable nor a logical explanation.

In my opinion, when the magistrate stated that the appellant had not given the court an explanation for his presence, that is, a reasonable or logical explanation, he was stating his conclusion that in his opinion the accused's explanation was no explanation at all. When an explanation is tendered as one that might reasonably be true, it cannot be mere fancy but must have relation to the evidence. The magistrate's mode of expression does not mean that he failed properly to apply s. 293(2) of the *Criminal Code*. It means that he rejected the explanation as one that might reasonably be true and convicted on the operation of s. 293(2). He was not required to find that the

1968
AUSTIN
v.
THE QUEEN
Judson J.

Crown had to prove beyond a reasonable doubt entry with intent to commit an indictable offence quite apart from the operation of the presumption. He correctly applied the presumption and in so doing his judgment was affirmed by the Appellate Division.

Section 293 reads:

> 293. (1) Every one who without lawful excuse, the proof of which lies upon him, enters or is in a dwelling house with intent to commit an indictable offense therein is guilty of an indictable offense and is liable to imprisonment for ten years.
>
> (2) For the purposes of proceedings under this section, evidence that an accused, without lawful excuse, entered or was in a dwelling house is *prima facie* evidence that he entered or was in the dwelling house with intent to commit an indictable offence therein.

The appellant's entry into the apartment was without lawful excuse. He went directly to the boy's room where he sat on the bed and on at least one occasion, laid his hands on the boy. When the boy pulled away from the appellant and tried to get out of bed, the appellant still stayed with him.

The magistrate properly convicted the appellant of an offence against s. 231(1) of the *Criminal Code* on the same evidence.

I would dismiss the appeal.

The judgment of Hall and Spence JJ. was delivered by

SPENCE J.:—This is an appeal from the judgment of the Appellate Division of the Supreme Court of Alberta pronounced on November 8, 1967, whereby that Court dismissed an appeal from the conviction by the magistrate made on May 1, 1967, of the accused upon the charge that he did:

> on or about the 3rd day of April, A.D. 1967 at the City of Edmonton, in the Province of Alberta, did without lawful excuse enter a dwelling house situated at Suite # 505, Kennedy Towers, with intent to commit an indictable offence therein, contrary to Section 293 of the *Criminal Code*.

This Court granted leave to appeal upon the following question of law:

> Did the learned Magistrate err in failing to determine whether the intent to commit an indictable offence, which is an essential element in the offence defined by section 293(1) of the *Criminal Code*, had been proved beyond a reasonable doubt?

A rather detailed statement of the relevant facts is necessary. The appellant was living separated from his wife and family in Apartment 1104 in the Kennedy Towers Apartment House in the City of Edmonton. A Mrs. Lucy Hickling with her son David and her daughter Peggy, twelve years of age, lived in Suite # 708 in the same apartment house. A Mr. and Mrs. James Hunt and their son David, seven years of age, lived in Suite 505 again in the same apartment house.

The appellant knew Mrs. Hickling and her children and had spent part of the evening prior to April 3, 1967, in the company of Mrs. Hickling. He also knew that Mrs. Hickling was leaving for Calgary to spend the weekend. On April 3, 1967, about 5:00 p.m., when the appellant returned from his work, he met in the elevator of the apartment house Peggy Hickling. The appellant left his brief case in his own apartment and then went to the Hickling apartment, picked up Peggy Hickling there, and another young boy from another apartment, and took the two children with him when he went shopping. He returned a very short time later and left the children at their respective apartments. He then returned to his own apartment, and to use his own words, "I had something to eat. I had nothing to do so I decided to go down and see how David and Peggy Lou were making out". The appellant arrived at the Hickling apartment, # 708, to find that David was there alone. He spent a short time with David and then learning that Peggy Hickling was in apartment 505, the Hunt apartment, he went to that apartment, knocked on the door, and went in. Peggy Hickling had been engaged by Mrs. Hunt to act as a baby sitter for her young child David. She had gone to the apartment after she and the appellant had parted a little earlier in the evening and her brother David Hickling had later attended that apartment to give her a sandwich. It would appear that when he left the apartment, David Hickling had not pressed the lock on the door so that when the appellant knocked on the door and opened it it was unlocked permitting his easy entry. The hour was about 9:30 in the evening; David Hunt had retired to his bed but was not asleep. The door to David Hunt's room was almost opposite the entrance door to the

1968
AUSTIN
v.
THE QUEEN
Spence J.

apartment and it stood open. The appellant walked into David Hunt's bedroom and sat down on the edge of the bed.

The appellant, in his evidence, gave as his reason for entering the boy David Hunt's bedroom that he was not asleep and that the appellant throught he might be able to get the boy to sleep. The appellant swore that in an attempt to persuade the boy to sleep he promised him a ride in his, the appelant's motor boat, if the boy would sleep. David Hunt, who gave unsworn evidence, corroborated this statement adding, "I said we could buy our own boat". Although David Hunt said that the appellant laid against him and his feet were then partially on the floor, Peggy Hickling who had stood in the doorway of the room and observed all that occurred, testified that when the boy David Hunt attempted to roll off the bed the appellant merely put his hand on the boy to hold him in the bed and that at that time the appellant was sitting on the edge of the bed with his feet on the floor. At this juncture, Mr. and Mrs. Hunt returned. What could only be described as a fracas occurred, the police were called and the appellant was taken into custody. Constable Benson of the Edmonton Police Force, who had attended at the apartment upon being summoned, gave evidence that he questioned the appellant as to the reason he had been in the apartment and that the appellant told him that he, the appellant, had been asked by Mrs. Hickling to look in on her children while she was away in Calgary. The constable testified that because of that answer they had not held the appellant in custody that night, but after a further investigation they did place the appellant under arrest and proceeded with the charge. It would appear that that subsequent investigation included questioning Mrs. Hickling, Peggy Hickling's mother, as she gave evidence at the trial that she had not requested the appellant to look after her daughter since she had already arranged for a responsible person as baby sitter for her children.

In his evidence, the appellant testified that his purpose in going down to the Hickling apartment was that he knew Mrs. Hickling was out of town and he thought that she might appreciate him "looking in on the kids to see how they were doing and to be sure they were o.k.". He acknowledged that he did not recall Mrs. Hickling asking

him directly to do so but said that they had had considerable conversation and "I think I may have mentioned that I would check on the kids when she was out of town".

It should be added that both the appellant and James Hunt admitted that they had drunk what they both described as a rather small quantity of alcohol during the course of the evening. Upon all that evidence, the magistrate convicted the accused of a breach of s. 293 of the *Criminal Code*. That section provides:

> 293. (1) Every one who without lawful excuse, the proof of which lies upon him, enters or is in a dwelling house with intent to commit an indictable offence therein is guilty of an indictable offence and is liable to imprisonment for ten years.
>
> (2) For the purposes of proceedings under this section, evidence that an accused, without lawful excuse, entered or was in a dwelling house is prima facie evidence that he entered or was in the dwelling house with intent to commit an indictable offence therein.

In view of the wording of the question of law propounded by this Court in its order granting leave to appeal, the appellant chose to argue that even upon the basis that the accused had not proved the lawful excuse, the burden of proof which lies upon him under the provisions of s. 293 (1), the Crown had failed to prove that there was any intent to commit an indictable offence. By subs. (2) of s. 293, evidence that the accused without lawful excuse entered the dwelling house is *prima facie* evidence that he intended to commit an indictable offence therein. Proof of the intent, of course, is a necessary ingredient for a conviction and all that subs. (2) does is to provide *prima facie* evidence not disturbing the principle of law that on the whole evidence the Crown must prove each essential element including, in this charge, the intent beyond reasonable doubt: *Regina v. Wendel*[1]. It was also pointed out in the judgment of Tysoe J.A. in that case that the intent must exist at the time of the entry. Tremeear, in the 6th edition, at p. 476, however, in the notes to the section, expresses the view that so long as the intent and the being in the premises are in concurrence then a conviction may be adjudged. The learned author of Tremeear bases his opinion on *The King v. Higgins*[2], a decision of the

[1] (1966), 57 W.W.R. 684, 50 C.R. 37, [1967] 2 C.C.C. 23.
[2] (1905), 10 C.C.C. 456.

1968
AUSTIN
v.
THE QUEEN
Spence J.

Supreme Court of Nova Scotia. In *The King v. Higgins*, the charge was "for being unlawfully in a dwelling house by night with intent to assault", while in the *Wendel* case and the present case the charge is "entering a dwelling house with intent". I am, therefore, of the opinion that here the judgment in the *Wendel* case outlines the applicable law and in order to support a conviction it must be found that the accused had entered the apartment with intent to commit an indictable offence.

When one turns to consider whether there was any evidence upon which the magistrate could find beyond reasonable doubt that the accused had entered the apartment with intent to commit an indictable offence, one asks oneself what indictable offence is it alleged the accused intended to commit. The form of charge, unlike those used on the great majority of occasions, does not specify the intended indictable offence and merely describes it in the words of the section as "an indictable offence". I have read the complete evidence at trial, and such references to argument as are contained in the appeal case and I have read the respondent's factum, and I do not find therein any clear statement of the offence which it was alleged the accused intended to commit. It is true that the accused was charged at the same time with common assault upon David Hunt and, pleading not guilty thereto, by consent the evidence adduced in reference to the charge presently under appeal was applied to the assault charge. The accused was convicted and was fined $100. Counsel for the Crown in his argument before us would seem to rely upon that conviction as showing the indictable offence which it was alleged the accused intended to commit when he entered the apartment.

It is significant that the conviction for assault was one for common assault. The learned magistrate said in discussion with counsel for the accused:

> In this particular case, I find that the intent on his own evidence was to pull him back into bed, that was sufficient attempt to create an assault here by touching that boy.
>
> *Counsel for the accused*: With no hostile intent.
>
> *The learned magistrate*: The attempt was to restrain him, which is sufficient. I don't accept your argument that it has to be hostile in the sense that you are suggesting not with the new Criminal Code as we have it as of 1955.

I cannot understand how upon the whole record there can be any evidence that when the accused entered the apartment he had any intent to commit an assault on the boy, David Hunt. There is no evidence that he knew the age of the boy or even that he had known the boy at all. There is no evidence that he knew the boy would be in bed or would be up and around. There is a perfectly reasonable explanation given by the accused, and in no way contradicted, that his whole intent, which was first arrived at after he entered the apartment, was to persuade the boy to go to sleep, as a boy of that age should have been asleep at that hour. The grasping of the boy by the arm or his shoulder to prevent the boy from leaving his bed was only part of the carrying out of the purpose, not any evidence of an intent to commit an indictable offence.

The learned magistrate was much concerned with what he termed "nasty, sexual overtones" but such concern which moved him to request a pre-sentence report and which he even mentioned in his report to the Appellate Division has no support whatsoever from the evidence. I have no hesitation in saying there was no evidence of intent to commit an indictable offence against the boy David Hunt at any time let alone at the time the accused entered the apartment.

Was there any evidence of intent to commit an indictable offence as to the girl Peggy Hickling? The accused had the girl in his car earlier and had shown no such intent on that occasion. The accused was a good friend of the girl's mother. When the accused entered the apartment, on his explanation to merely check on the girl's welfare, he merely greeted her and she greeted him as he walked past her into the boy's room. The accused never moved near her or touched her. She made no protest at his entry. Although in examination in chief the girl testified in reply to clearly leading questions by the Crown that she was frightened to ask the accused to leave, on cross-examination, she agreed that such fear was really at the possible displeasure of the Hunts should they return, as they did, and discover the accused in the apartment. Again, on all of the evidence, there is simply no evidence of intent to commit any indictable offence against the girl Peggy Hickling either at the time of the accused entering into the apartment or thereafter.

1968

AUSTIN
v.
THE QUEEN

Spence J.

For these reasons, I would allow the appeal and quash the conviction.

Appeal allowed and conviction quashed, JUDSON *and* PIGEON JJ. *dissenting.*

Solicitors for the appellant: Prowse, Dzenick, Grossman & Mousseau, Edmonton.

Solicitor for the respondent: The Attorney General for Alberta.