Aggravated burglary: exactly what does it entail?

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Abstract

This article examines the many instances of failed prosecutions and incorrect decisions made in the lower courts on the issues concerning aggravated burglary in Caselaw on Theft Act 1968 and concurs with the higher court decision in *R v Shola Eletu and Jerome Marlow White* [2018] and the observance of Rule 25.14(4) of the Criminal Procedure Rules.

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Legislation

Criminal Justice Act 1991, s 26; Firearms Act 1968 s57; Larceny Act 1916; Police and Criminal Evidence Act s 94; Prevention of Crime Act 1953; Criminal Procedure Rules, Rule 25.14(4); Theft Act1968, s9 (1) (a); s9 (1) (b); s 9(2); s 10.

Caselaw

Ohison v Hylton [1975] 1 WLR 724; *P v DPP* [2013] 1 WLR 2337; *R v Atta-Dankwa* [2018] EWCA Crim 320; *R v Collins* [1973] 3 WLR 243; *R v Downer* [2009] EWCA 1361; *R v S. Eletu and J.M.White* [2018] EWCA Crim 599; *R v Gorry and Coulson* [2018] EWCA Crim 599.; *R v Jogee* [2016] 2 WLR 681; *R v Jones and Smith* [1976]1 WLR 672; *R v Kelly* [1993] 97 Ct App R 245; *R v Kelt* [1977] 65 Cr App R 7; *R v Klass* [1998]1 Cr App R 453; *R v O'Leary* [1986] Crim App Rev 341; *R v Pawlicki* [1992] 1 W.L.R 827; *R v Reid* [2011] EWCA Crim 2571; *R v Stones* [1989] W.L.R. 156; *R v Vinell* [2011] EWCA Crim 2652; and *R v Wiggins* [2012] EWCA Crim 885.

Why are burglars difficult to apprehend and to successfully prosecute?

According to the Office for National Statistics, recorded burglary based on figures up to March 2018 increased by 6% to just fewer than 438,000 offences, whilst the success rate decreased across the police service. Based on arrest figures released by the Home Office, the police nationally on average arrested only 14 offenders for every 100 burglaries. Undoubtedly, with high value items often on display, and a preparedness to use violence, in order to gain entry and seize them (see *R v Gorry & Coulson*[2]) the importance of establishing a case of aggravated burglary is therefore critical to ensuring the offenders culpability is properly reflected and dealt with, if the consequences in the troublesome case of *R v Shola Eletu and Jerome Marlow*

White [3]are to be avoided. This appeal was allowed and a retrial ordered.[4]

[2] [2018] EWCA Crim 1867
[3] [2018] EWCA Crim 599.

Burglary *Simpliciter*

The offence of burglary is contained in s.9 of the Theft Act 1968, and replaced the old larceny offence of 'breaking and entering'.[5] There are two distinct ways in which to commit burglary, each defined in its own subsection and often referred to as either a s 9(1) (a) or alternatively s 9(1) (b) type burglary. However, it is the contradistinctions that exist between the two types of burglary that can easily be misapplied.

Distinguishing Theft Act 1968, s 9(1) (a) from s 9 (1) (b) *burglary* offences

Under s 9(1) (a), a person commits this form of burglary if it is proven that he/she *entered* a building or part of a building *as a trespasser* with an *intent* to commit one or more of several offences, namely steal anything, or inflict GBH on any person, or unlawful damage.

The critical aspect is whether there is sufficient evidence to draw the necessary inference of intent at the point of effective entry for s9 (1)(a), if not, then s9 (1)(b) is the better charge based on post entry intent to steal. Equally, the ambit

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[4] These 'two appellants were convicted of aggravated burglary on 9 February 2017 at Inner London Crown Court. They were sentenced to 11 years' imprisonment (Sentencing Guidelines maximum range).The charge on the indictment alleged that they, together with others, on 2 September 2016, having entered a building as trespassers, attempted to steal therein cash and cigarettes and at the time of committing that burglary had with them weapons of offence, namely knives and a crowbar' (Para 1). See also Para 35. Lord Justice Tracey said:
'*The appeal is allowed in each case. The convictions in each case are quashed. We order a retrial to take place on the count of aggravated burglary. The indictment probably should also contain, should it not, the alternative of burglary? Pleas were tendered but not accepted by the Crown. So we will say there will be a retrial on both the aggravated burglary with the indictment to contain the alternative offence of burglary. We direct that a fresh indictment be served and that there be re-arraignment on that fresh indictment within two months. We direct that the case be tried on the South-eastern circuit at a venue to be determined by a presiding judge of that circuit. It will in the circumstances be desirable that the case is tried by a different judge from the judge who conducted the original trial...*'

[5] The old offence of 'breaking and entering' of the 1916 Larceny Act, has been repealed by the s9 Theft Act 1968 offence of burglary committed, night or day, whether by 'breaking' in or other means. By s26 of the Criminal Justice Act 1991 new subsections (2) and (4) were added to s9 of the Theft Act 1968 and by these two subsections (2) and (4), a two-division system was created, causing higher penalties to apply if the building burgled is a 'dwelling' which is subject to a maximum penalty of 14 years imprisonment, whereas for any other building it is limited to ten years imprisonment.

of two offences differ, with an intention to commit criminal damage forming part of s9 (1)(a), but not under s9(1)(b) and would therefore have to be charged separately. (See *R v Collins* [6&7] and also *R v Jones and Smith,* [8&9] both cases dwelling on the excess of *permission to enter* [10]).

Theft Act 1968, section 10: Aggravated Burglary

Section 10 provides that a person who commits the primary offence contained in s9 and in the course of committing that offence '*has with him*' one or more specified items, namely,

(i) *'any firearm'* (including air gun/air pistol) or imitation firearm (see s 57 of the Firearms Act 1968), or

(ii) *'weapon of offence'* (this adopts similar language as to the meaning of an offensive weapon in the Prevention of Crime Act 1953, but is wider in that not only does it mean any article specifically designed to cause injury, it also includes incapacitation, or equally, if not, then it was intended by the person having it to do so), or

(iii) *'Explosive'* (This only relates to any article designed to a 'practical effect by explosion', or intended to create such an effect).

–will be guilty of aggravated burglary.

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[6] [1973] 3 WLR 243.

[7] Defendant in *Collins* [1973] was charged with burglary. He had climbed a ladder to an open window where a young woman was sleeping naked in her bed. The woman thought it was her boyfriend and so she invited him in. They proceeded to have sexual intercourse and she then realised it was not her boyfriend and screamed for him to get off. He ran off. The following day he was questioned by the police and charged with burglary under s 9(1) (a) as he had entered as a trespasser with the intent to commit rape. The jury convicted. The defendant appealed on the grounds of misdirection of the jury. The trial judge did not ask the jury to consider if the Defendant had entered as a trespasser. On appeal, the conviction was quashed. There must be an effective and substantial entry with knowledge of being a trespasser. The girl had invited him in.

[8] [1976]1 WLR 672.

[9] In this appeal, the two Appellants, Jones and Smith went to the home of one of their parents and stole two television sets. The father gave evidence stating that his son had permission to be in his house. Therefore he was not a trespasser but both Appellants had exceeded their permission by stealing and were thus trespassers.

[10] The points that prosecution must prove are that the defendant (i) entered a building or part of a building; (ii) as a trespasser, (iii) with intent, (iv) to steal property in that building and inflicts grievous bodily harm on the person or persons in that building, and committed unlawful damage to the building or anything inside that building. S9(1) (a) can also be proved if (a) a person, having entered a building or part of a building, (b) as a trespasser, (c) did steal or attempted to steal anything therein and inflicted or attempted to inflict grievous bodily harm on any person therein.

Meaning of 'has with him' and Joint Enterprise Liability

For the aggravated element to arise, it must be proved that the Defendant 'has with him' the specified item. Although the provision does not expressly use the word 'possession' this is critical to proving this element and therefore the defendant must be at least be shown to have had actual knowledge of the weapon or article or to have been aware of its existence. (See *R v Kelt*.[11] In this appeal Lord Scarman said that the Appellant Kelt was arrested at his home where police found a sawn–off shot gun which Kelt told them that he was keeping for a friend. It was held that the mere fact of possession was not enough. It had to be shown that there was a close physical link with the accused or that he had immediate control over it; it was not necessary to show he was *carrying* it (applied in *R v Pawlicki*[12]).

In *R v Stones*[13] the appellant was caught with a kitchen knife within the vicinity of a house burglary. When questioned, he claimed it was intended for self–defence, not to assist in a burglary. Dismissing his appeal that there was an adverse ruling of the Trial Judge, the Court of Appeal held that in order to commit the s10 offence, it must be shown that the defendant *knew* he was carrying a knife at the relevant time of the s9 offence and that his general *intention* was a preparedness to use it should the need arise.

In *R v Klass*[14] the Court of Appeal quashed the Appellant's conviction for aggravated burglary and substituted one of s9 burglary, when the Appellant and Another used a piece of pole to break into a caravan. [15] At the time of doing this, the occupier came out of the caravan and the Appellants had demanded money, but he did not have any. They hit him with the pole and repeatedly hit him as he ran away. The Appellant then returned to steal from the caravan.

[11] [1977] 65 Cr App R 7.
[12] [1992] 1 W.L.R 827.
[13] [1989] W.L.R. 156.
[14] [1998]1 Cr App R 453.
[15] Theft Act 1968, s 9(1) (a) and s 9(2) refer to the word 'building' and this applies to an inhabited vehicle or vessel at the times when a person having a habitation in it is not there as well as at times when he is.

The Court of Appeal observed that the s10 offence can be committed in a joint enterprise by a co–accused who does not have the weapon or indeed use it during the course of committing the

s9 burglary or by a person who aids and abets the offence. The court stated:

> *'The fact that a getaway driver has a weapon with him in the car would not, in our judgment, be sufficient to turn an offence of burglary into one of aggravated burglary since the gravamen of this offence is entry into the building with a weapon. The purpose of the section is to deter people from taking weapons into buildings whilst committing burglary.'*

Given that the appellant had not entered the caravan with the pole, his conviction for s10 Theft Act 1968 could not be sustained and had to be quashed with the Court substituting the s 9(1) (b) burglary offence instead. Notwithstanding these clear observations, the same legal misunderstanding was made in *R v Wiggins*[16] in which the Appellant was apprehended in a Cemetery near the place where, at a recent burglary, a Taser gun and perfume were taken from the burgled premises. The Defendant Wiggins had claimed he innocently found these items whilst looking for his uncle's grave. Fingerprints of someone other than the appellant's were found at the point of entry of the burgled premises. However, the Trial Judge had failed to direct the jury to consider the possibility that the appellant may have acted as a lookout and had not therefore entered the building with the firearm; neither was their sufficient evidence to show that an unknown co–accused had done so. Accordingly, the Court of Appeal had no option but to quash his conviction for aggravated burglary and substitute this for a basic s 9(1(b) offence, given the jury must have been sure that he at least had committed burglary.

If the prosecution chooses to base its case on a joint enterprise aggravated burglary, then careful consideration needs to be given to the active participation of each co–accused and whether to rely either on a joint principal enterprise, all forming part of a common purpose to commit not just a

[16] [2012] EWCA Crim 885.

burglary, but intent to do so with the use of weapons, or as a joint secondary party based on an intent to encourage the others to enter with a weapon of offence based on the *mens rea* charge made in *R v Jogee*[17] which case reached the UK Supreme Court.

The first paragraph of this UK Supreme Court decision states:

> *'In the language of the criminal law a person who assists or encourages another to commit a crime is known as an accessory or secondary party. The actual perpetrator is known as a principal, even if his role may be subordinate to that of others. It is a fundamental principle of the criminal law that the accessory is guilty of the same offence as the principal.'*

The UK Supreme Court went on to consider at length many English joint enterprise cases and after 119 paragraphs, stated its decision which reversed previous case law precedent on joint enterprise.

However, in *R v Reid*[18], this potential difficulty was overlooked in respect of the Appellant who had acted as a getaway driver outside the premises and had denied knowing that one of the other four co–accused would pick up a dumbbell and threaten the occupants with an intention to steal from them.

Pair of chrome dumbbells

The Trial Judge had directed the jury on the basis that all five participants where acting as principals to each other. However, this failed to properly reflect the position of the Appellant as a secondary party and therefore the Trial Judge had failed to direct the jury on the sufficiency of his intention to encourage the

[17] [2016] 2 WLR 681.
[18] [2017] EWCA Crim 2571.

others to commit aggravated burglary, knowing they either had possession of weapons or would arm themselves intending to cause injury, rather than simply attack them.

A failure therefore to guide the jury 'on the fundamental issue of the Appellant's *mens rea'* is a material omission and had undermined the safety of his conviction.

Nevertheless, Hallett LJ who gave the leading judgment observed that this difficulty could have been avoided by indicting them with robbery, which unlike aggravated burglary, only requires proof of the use of a sufficient degree of force or puts or seeks to put another in fear of force, in order to steal, as confirmed in *R v Vinell* [19]and in *P v DPP*[20]. Similar factors will also need to be observed if considering an offence of conspiracy to commit aggravated burglary as part of a shared common purpose–see *R v Shilliam*[21] and *R v Austin*[22].

Meaning of 'weapon of offence' and s10 'intent'

Picture of a Zombie knife

Possession of items that have the potential to cause injury but are not prescribed in law as a 'weapon of offence' (such as a 'zombie knife') will only constitute such a weapon of offence if 'injurious intent' can be proved. However, the necessary intent must coincide with the relevant *actus reus* of basic burglary, dependant on which particular s 9 offence the prosecution

[19] [2011] EWCA Crim 2652.
[20] [2013] 1 WLR 2337.
[21] [2013] EWCA Crim 160.
[22] [2015] EWCA Crim 349.

decides to charge. If contrary to s 9(1) (a) then the necessary 'intent' must be established at the point of effective entry (as confirmed in *O'Leary*[23], *and Klass*[24]) whereas if under s 9(1)(b), then such coincidence can only arise when the offender, having entered a building, decides to steal or attempts to steal, and not before.

In *R v Kelly*[25] the Court of Appeal rejected a defence contention that the decision in *Ohison v Hylton*[26] equally applied to s10, namely, that unless it could be proved that the defendant had armed himself beforehand, intending to cause injury, the s10 conviction cannot be sustained. To rule otherwise would defeat the very object of s10 which is to stop those who take possession of a weapon of offence which is ready for use if the need arose during the course of a burglary.

The Appeal Court, following the decision in *O'Leary*[27]ruled that under s 9(1) (b), once possession is established, then provided this coincided with an intent to cause injury as opposed to merely frighten (only if a live issue on the facts (see para 32 in *R v Eletu & White*[28]) *at the time of stealing*, the aggravated element is made out.) The appellant who had used a screwdriver to gain access to a dwelling house and, confronted by the occupants as he was stealing a video recorder, had pushed the screw driver into the side of one of the occupants before fleeing the scene, was righty convicted of s10.

Regrettably, in *R v Eletu & White* the trial Judge had not only materially misdirected the jury, but had also overcomplicated the legal ingredients necessary for aggravated burglary. The appellants had been part of a gang, which had targeted a convenience store by entering through the roof, and demanded money from staff inside, whilst in possession of knives, a crowbar and hacksaw. The appellants had accepted being part of a simple burglary, but denied being aware of any weapons.

[23] [1986] 82 Cr App R 341.
[24] [1998] 1 Cr App R 453).
[25] [1993] 97 Ct App R 245.
[26] [1975] 1 WLR 724.
[27] [1986] 82 Cr App R 341.
[28] [2018] EWCA Crim 599.

Given the type of the weapons involved, what should have been an issue of *intention,* the Trial Judge had wrongly invited the jury to consider whether these were made or adapted specifically to cause injury, nor did the directions focus on required coincidence of *mens rea* vital to a conviction under s 9(1) (b). Equally, a lack of clarity as to importance in distinguishing on the one hand a primary offender who enters, or having entered a building, in possession of a weapon of offence, intending to use it to cause injury, whilst on the other, a secondary party who encourages it, having knowledge of the weapon, had further compounded the inadequacies of the directions of the Trial Judge.

Providing the jury with a *written route to verdict*

Quashing the appellant's s10 conviction, the Court of Appeal noted that it was 'unfortunate' that the jury had not been provided with a *written route to verdict*. Had this occurred, then such errors and unnecessary confusion could have been avoided. This clearly endorses the observations of Holroyde LJ in *R v Atta-Dankwa,*[29] that whilst some cases are routinely straightforward and obviously do not necessitate any written assistance, these 'are in the minority'. Since even a straightforward case can become problematic and that 'quite apart from the assistance which the end product will provide to the jury, the mental discipline of drafting a route to verdict in itself assists the court to identify the essential ingredients of the offences charged and the issues on which the jury must focus'.

Framing the Indictment

Unless and only if the offender has the requisite intent to cause injury at the point of effective entry and a sufficient inference can be drawn to this effect, should the indictment be framed on the bases of the s 9(1) (a) type. Otherwise, the better course is to use s 9(1)(b), in circumstances where the defendant has a weapon of offence, either before entering the building with only an intent to

[29] [2018] EWCA Crim 320.

use it to gain entry, or as in *O'Leary,* later picks up a knife from the kitchen. The prosecution have only to prove, that the defendant had the weapon of offence at the time at which they embark on the stealing, with an intention to use it to cause an injury as opposed to simply frighten, even if does not materialise. This gives a wider evidential range to establish, not only the intention to steal, but also the intention to cause injury, whilst being in possession of the offending weapon.

However, the dangers of not taking a cautious approach to correctly drafting the *indictment* and ensuring the *statement and particulars of offence* are legally accurate can be seen in *R v Downer*[30]. Here, the Court of Appeal quashed the appellant's conviction for s 9(1) (a) aggravated burglary on the basis that the guilty pleas of his two co–accused for s 9(1)(b) aggravated burglary adduced under s 74 of PACE 1984, were highly prejudicial to the appellant's case and had no probative value to the essential issue the jury had to try, namely whether the appellant entered the premises with the alleged weapons (a machete and a knife) whereas the two co–accused had only admitted to being guilty of a s 9(1) (b) type offence (namely that they took possession of the weapons when in the premises and not before).

This unfortunate mistake arose due to the prosecution amending the indictment to present its case against the appellant on the bases of s 9(1) (a) type burglary instead of the originally indicted s 9(1) (b). This error was further confounded with the Trial Judge wrongly directing the jury that the two co–accused had pleaded guilty to the same offence charged against the appellant.

The Court of Appeal rejected the contention of the prosecution that s10 on its wording amounts to one substantive offence, which can be committed in several ways. To rule otherwise, would ignore the contradistinctions that are present in the two separate offences contained in s 9(1) for the sole purpose of s10. Section 10 clearly states that 'if he commits any burglary'. Accordingly, s10 creates two separate distinct aggravated forms of the s 9(1) offences. If the

[30] [2009] EWCA Crim 1361; [2009] WLR (D) 233.

consequences in *Downer* are to be avoided then, this legal distinction must adequately be reflected in the wording of the indictment, and must properly state on what factual/legal bases the s10 offence is being brought.

Conclusion

Aggravated burglary is clearly a serious indictable offence but without careful scrutiny as to what is being alleged and how this falls within s10 and its sub–categories, risks undermining the statutory purpose of the offence. *It is clear from the above authorities that for the purposes of aggravated burglary, the prosecution must be able to prove that the offender not only took possession of a weapon of offence in the course of committing burglary, but also intended to use this to cause injury at the time of intending to steal. Critical to this, is to ensure that the requisite intention coincides with the corresponding actus reus specified in either s 9(1)(a), or s 9(1)(b) and whether the offender is a primary or secondary party.*

Equally, if the consequences that arose in *R v Eletu & White* are not to be repeated, then consideration ought to be given to the drafting of a *written route to verdict* document, in line with Rule 25.14(4) of the Criminal Procedure Rules.[31] These can then be tailored specifically towards the factual context of the particular case, whilst at the same ensuring the jury is provided with a simple set of questions that sufficiently transpose the definitional components of the offence.

ENDS+

[31] The Criminal Procedure Rules, as amended in October 2018 include rule 25.14 on 'Directions to the jury and taking the verdict' and subsection (4) states: '*The court may give the jury directions, questions or other assistance in writing'.* See https://www.justice.gov.uk/courts/procedure-rules/criminal/docs/criminal-procedure-amendment-rules-2018-guide.pdf/