A

EMORI FOTU

v.

REGINAM

B

[SUPREME COURT, 1977 (Mishra, J.) 23rd June.]

Appellate Jurisdiction

Criminal Law—evidence and proof—breaking with intent a commit a felony—must be clear evidence of the intent to commit a specific felony—whether necessary to specify felony in charge—Penal Code (Cap. 11) s.335(2)—Criminal Procedure Code (Cap. 14) ss.120, 290(1), 323. C

The appellant was charged with breaking into a school with intent to commit a felony therein. No felony was specified.

On appeal the appellant who was unrepresented said that he had merely gone into the school to sleep. D

Held: 1. It was advisable, although not absolutely necessary to specify in the charge the details of the felony; there must be, however, some clear evidence of the intent to commit a specific crime.

2. Although the appellant had pleaded guilty, the outline of the facts before the court did not disclose any intention on the part of the appellant to commit any felony within the school, and in such circumstances the court was acting improperly in recording a conviction. E

Cases referred to:

The State v. O'Brien [1974] Crim. Law Jo. 159.
The King v. O'Meira [1943] N.Z.L.R. 328.
R. v. Pearson (1910) 74 J.P. 451; 4 Cr. App. R. 40. F
R. v. Blandford J.J.s. ex parte G (an infant) [1966] 2 W.L.R. 1232; [1966] 1 All E.R. 1021.

Appeal against sentence imposed in the Magistrate's Court for breaking with intent.

MISHRA J.:[23rd June 1977]— G

Appellant was charged before the Magistrate's Court, Suva, with School—House Breaking with Intent to commit a Felony contrary to section 335(2) of the Penal Code. The particulars of offence alleged that "Emori Fotu alias Emori Votu, on the 10th day of April 1977 at Nasinu Suva, in the Central Division broke into Kamthorn Primary School-house with intent to commit felony therein". No felony H was specified.

Appellant pleaded guilty and was sentenced to 12 months' imprisonment.

He appeals only against sentence on the ground that it is too severe. If the conviction was correctly recorded the sentence, in my view, is not excessive at all and the appeal must fail. He has, however, put forward two grounds which, while they have no bearing on the sentence, allege absence of an element necessary to support a conviction under section 335(2) of the Penal Code.

These grounds are:

"3. I broke into that place to sleep off my drinks. I had no place to sleep.

5. I did not steal anything."

Appellant was not represented either at the trial or before this Court. At the hearing of the appeal he said:

> "I was drunk *when I committed this offence* (emphasis mine). I did not intend to commit any offence when I went into the school house..... I wanted a place to sleep. I had nowhere to sleep."

According to the facts outlined by the prosecution at the trial a member of the school committee and another person in broad daylight had "found accused trying to open the door of school office after having removed the louvres. He was questioned and he replied he was a member of the settlement and I am simply looking around."

Mr Raza for the Crown conceded that from these facts it was not at all clear what felony, if any, the appellant could be taken to have intended to commit. It was, however, open to the learned trial magistrate to say that he was satisfied from the facts that the appellant broke into the school-house with the intent of committing larceny or rape or arson or some other specific offences. There is nothing on the record from which this could be gathered.

All that we have is the appellant's own plea of guilty to the particulars contained in the charge itself. These do not mention the intent to commit any specific offence. What the appellant said before this Court shows that he thought that what he had already done i.e. the removal of louvres, constituted a complete offence under the section.

The question is: How should an appellate court view a conviction based on such a plea where the particulars of offence do not specify any felony? The relevant authorities do not seem to be entirely clear.

In case of burglary where, as in this case, intent is an essential ingredient of the offence the following appears in *Archbold* (36th Edn. para. 1819):

> "The intent laid in the indictment must be to commit some felony in the dwelling house such as larceny, murder, rape etc. and the intent must be proved as laid. Where the intent is at all doubtful it may be laid in different ways in different counts."

This would appear to support the view that a specific felony ought to be mentioned in the particulars. This was also the majority view in the case of *The State (M) v. O'Brien,* an Irish case, reported in the *Journal of Criminal Law* (No. 150 April/June at p. 159). O'Daly C. J. there said,

"But what offence? With intent to commit what felony? If the intent is to commit some felony..... the charge is defective. The intent must be to commit a specific felony." A

The minority view, however, did not consider a failure to specify the felony to be fatal to the charge.

In an earlier case, the New Zealand Court of Appeal considered this issue and also came to the view that it was not essential to specify the crime in the particulars *(The King v. O'Meira,* 1943 N.Z.L.R. 328). They, however, considered it B necessary that the Court should have before it evidence from which clear inference may be drawn as to the specific crime which the accused intended to commit. The accused, in that case, was acquitted. In reaching its conclusion about the particulars of the charge the Court of Appeal appears to have been, to some extent, influenced by the provisions of section 329 of their Crimes Act which enables a crime to be stated in the words of the enactment creating it and which, while requiring C reasonable information concerning the offence to be contained in the particulars, states that "the absence of insufficiency of such details shall not vitiate the count."

Section 120 of the Fiji Criminal Procedure Code requires the charge to contain a statement of offence "together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged". Form 9 of the Second Schedule to the Code which is required to be followed "as nearly as may D be" mentions a specific offence in the particulars.

Section 323 of the Code does not permit objections to a charge to be raised for the first time on appeal except in cases where the appellant was unrepresented at the trial. In the present case the appellant was unrepresented.

From the authorities referred to above there would appear to be two views on E the subject. The Stricter one would prefer to treat the charge itself as being defective unless the particulars of the charge specify the felony the commission of which the accused is alleged to have intended. The other view would not consider it essential for the particulars themselves to mention any specific felony but it would regard a conviction bad unless there was clear evidence before the Court from which it could decide which specific felony the accused had in mind at the relevant time. F

On either of the two views it would be unsafe, in my view, to allow the conviction in the present case to stand.

In a case of burglary, or house-breaking with intent, where a specific felony is in fact committed, that is, of course, the best proof of the intent. Where, however, no felony is committed at all, the accused's own admission, or some other evidence of G the intent to commit a specific felony becomes essential. If the particulars themselves clearly specify a felony, a plea of guilty to the charge puts the matter beyond doubt. Where, however, the particulars only mention "a felony" then (assuming that the charge itself is not defective) there must be something in the outline of facts to show what particular felonious intent the accused had. If he then agrees with the facts outlined, the conviction may, according to the second view H referred to above, be allowed to stand. Here, there was no admission of any felonious intent by the appellant either to the two villagers who found him at the school, or to the police when they interviewed him. It is as likely as not that when

he pleaded guilty he was merely admitting that he had removed the louvres from the window in order to open the door. That in itself will not amount to an offence under the section, the gist of the offence being the intent to commit a felony inside the school house *Pearson* 4 Cr. App. R. 40). What felony in this case? What would a person like the appellant know about felonies? Might he not think the removal of louvres itself to be a felony for the purposes of this offence? If, for instance, he had been told that his intent was to steal, he might have denied it in which case a plea of not guilty would have had to be entered. A plea of guilty under such circumstances cannot be treated an unequivocal for the purposes of section 290(1) of the Criminal Procedure Code which prevents the quashing of a conviction in the case of a plea of guilty.

In *R. v. Blandford Justices, Ex parte G.* (An infant) [[1966] 2 W.L.R. 1232] a girl of 15 pleaded guilty to a charge of larceny. She had made a statement to the police in which she had admitted taking the jewellery in question from her employer but had said that she had intended to keep it only for a short while after which she was going to return it. This statement was read out after the plea of guilty had been recorded. The justices convicted her on her plea of guilty. She was unrepresented.

On appeal it was held that:

> **"....., where a defendant was unrepresented or was of tender age or for any other reason there was doubt as to his ability fully to decide whether or not to plead "Guilty", the justices should accept a plea of "Guilty" provisionally and defer final acceptance until they had had an opportunity of seeing whether there was any undisclosed factor which might render the plea misleading; that once it became apparent from the applicant's statement that she had intended to return the jewellery, the justices were not in possession of an unequivocal plea of "Guilty" but one which, properly understood, was "Not Guilty"; and that therefore their decision to convict was a nullity."**

In the present case the outline of facts before the Court did not disclose any intention on the part of appellant to commit any felony inside the school-house. On those facts the learned magistrate ought to have made further enquiries of the accused or of the prosecution to satisfy himself of the unequivocality of the plea of guilty before entering a conviction.

I have, therefore, reluctantly come to the conclusion that the conviction in this case ought not to stand. It is quashed and the sentence set aside.

Appeal against conviction allowed.