IN THE SUPREME COURT)
OF THE TERRITORY OF)
PAPUA AND NEW GUINEA)

CORAM: MANN, C.J. Tufi, 18/6/1960.

BETWEEN:

REG.

v.

V. KINGSTON-KAPOLI

JUDGMENT

The Accused was charged under Section 421 (1) of the Criminal Code with Breaking and Entering a Shop and Committing a Crime therein. The crime alleged consisted of stealing one plate. At the end of the Crown Case, Counsel for the Defence, contended that there was no case to answer on the ground that the evidence showed that the building had been empty for about twelve months and had been disused during that period and therefore could not in law constitute a shop within the meaning of Sec. 421 at the time of the alleged offence. He also contended that there was no evidence that the plate allegedly stolen was the property of the witness Cridland, who was proprietor of the building, but in the course of argument it appeared that on this point there was some evidence which might support an inference as to ownership.

ARGUMENT:-

O'REGAN: The Crown has not produced evidence that the accused broke and entered a shop within the meaning of Sec. 421 (1). "Shop" ordinarily means a place where retail business is actually carried on.

QUINLIVAN: The building was used as a store where Mr. Cridland supervised the business, the nature of it was not discontinued and it had no other nature. It retains it's previous character. As to what lapse of time might affect the position, it was regarded as Cridland's store by the natives. Interruptions to actual use, e.g. when painting the premises or during holidays, do not affect it and the building remains a shop.

RULING:

The question raises the meaning of the word "shop" in section 421 (1). The facts are not in dispute on this point. There is no definition for "shop" in the Code, although there is one for the expression "dwelling house" as used in Sec. 419. (see Sec.1). The essentials of this definition are:-

a) That it is a building which is for the time being kept by the owner,

b) It is kept for the purpose of residence,

c) The residence contemplated is that of himself, his family or servants,

d) It is immaterial that the building is from time to time uninhabited.

The definition shows that so far as a dwelling house is concerned, there is no need to establish that the building is in fact used or is adapted for use for the particular purpose, or that it is at any particular time in actual occupation for that purpose. It is enough if it is at the time in question being kept for the purpose of residence.

The building in question in the present case, was in fact used as a shop for a substantial period of time. The owner went away for about ten months, on a holiday, with the intention to return and resume operations in the building. It was in fact empty for over twelve months. During the absence of the owner he kept it locked to protect it for further use as a shop. The stocks were removed and the employees were not on the premises during this period.

The ordinary meaning of the word "shop", is "a building which is in fact used as a shop" and the particular mode of use may determine whether a temporary absence or cessation of business amounts to a cessation of the character of a shop. However these are considerations of fact. In the absence of any special definition in the Code, or any guidance on the subject, I think that I should apply a definition based on an analogy to the definition of a dwelling house and take it that if a building is kept for the time being for use as a shop, a temporary non-user of the building for that purpose is immaterial.

In the definition of a dwelling house, the expression "residence" is used. Is it limited to present residence or might it include future residence? This definition admits the intention of the owner as to the purpose if a building is in fact being kept for that purpose and therefore a present keeping for future residence satisfies the definition.

I think what I should hold by analogy that the present keeping of the building in question in this case for a future contemplated resumption of trade after the holidays, is sufficient to constitute the building a shop for the purposes of Section 421. I think therefore that as the evidence stands, there is sufficient to support a finding that the building is a shop.

The Defence called no evidence and desired to make no statement.

ADDRESSES.

QUINLIVAN:- Breaking and Entering of the building are clear. As to the commission of a crime for the purposes of Sec. 421, it is sufficient if Mr. Cridland has a special property in the goods stolen. Under Sec. 391 he would acquire a special property in his plate by virtue of the fact that is was in his possession. His right to possession would continue until some superior right arose.

O'REGAN:- The Defence does not contest the breaking and entering, or the ownership of the building. Apart from the contest as to the premeses being a shop, the Defence contends that the Crown has not proved beyond reasonable doubt that the old plate was the property of Cridland. He admitted that it could belong to Eustace (an employee) or some past customer might have thrown it away or left it behind. He referred to Bridges v. Hawksworth (1851) Jurist Rep. 1079, Hanna v. Peel (1945) K.B. 509.

There are no alternative verdicts open. The accused cannot be convicted of an offence under Sec. 422 as an alternative verdict - R. v. Corby (1945) St. R. Qld. 186. He referred to Sections 581, 583 and 584.

REASONS.

MANN, C.J.:-

The first two elements of the offence are adequately proved and not denied. The property alleged to have been stolen must have been practically valueless and either discarded as rubbish or left behind because the owner was unknown. None of the four members of the accused's party deemed it of any value. Mr. Cridland does not know whether it was ever his or not. It was probably not a stock item but may have been used as a container. He had not lost any title he may have had to it but in the absence of any real claim to ownership, I cannot say it was stolen. It may have been discarded by the true owner as rubbish. Mr. Cridland's possession of the premises without knowledge of the existence of the plate in himself or his servants would confer no special property on him.

I find the stealing not proved but am satisfied on the facts of the intention of the accused when he broke and entered, to steal anything of value he might find. Therefore Accused should be found Not Guilty of the offence under Sec. 422 if that is open as an alternative verdict.

Chapter LXI does not give any specific authority to reach an alternative verdict. Stealing is not a circumstance and is therefore not within Sec. 575, Secs. 580 and 581 are not applicable. Sec. 584

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presupposes power to reach an alternative verdict and allows a minor charge to be established by evidence which would support a major charge to which the minor charge is an alternative. The only provision which may lead from 421 to 422 as an alternative is 583.

It seems to me that the accused has committed an attempt to commit the offence defined by Sec.421. This is not attempted breaking, attempted entering, or attempted stealing. It is attempting to commit the crime of breaking entering and stealing, for which there is no convenient short title. The intent to commit each element of the offence under 421 is established and on the evidence accused has taken the first two steps in putting his whole intention into execution, but has desisted - evidently because he found nothing suitable to steal (beyond the old plate - which is not established as stolen). These facts satisfy Sec.4 - including the last two paragraphs (cf. the common law case of a pickpocket who finds the pocket empty R. v. Collins 168 E.R. 1477, R. v. Ring 66 L.T. 390, 8 T.L.R. 326.)

Sec. 583 does not refer in terms to Sec. 422 and the question arises whether the accused should be found guilty of an offence under Sec. 422 or of attempting to commit the offence defined in Sec. 421.

The effect of Sec. 422 is to specify as a crime and not as a mere attempt, a course of conduct which is in fact one of several possible instances of an attempt to commit a crime under Sec.421. Does this operate to exclude the operation of Sec.583 in all other cases of attempts to commit such a crime, or what is the effect of expressly making the kind of attempt specified in Sec. 422 an independent crime?

The penalty under Sec. 421 is fourteen years. Under 583 the penalty for an attempt would be reduced to seven years by virtue of Sec. 526, and the offence is a misdemeanour by virtue of Sec. 535.

Under Sec.422 the same offence becomes a crime but is subject to the same punishment.

The sole apparent effect of Sec. 422 is therefore to convert what would be a misdemeanour into a crime.

It is not necessary for me to decide now, whether by implication Sec. 422 abrogates the application of Sec. 583 to other possible kinds of attempts to commit an offence under Sec. 421, since the present attempt also falls within the definition in Sec. 422. I think that in the present case the intention of the Criminal Code is that the kind of attempt proved should be regarded by virtue of Sec. 422 as a crime and should therefore be dealt with under Sec. 422.

This offence becomes an available alternative to Sec. 421, because of the provisions of Sec. 583, and Sec. 422 is resorted to, not to authorize the imposition of an alternative verdict, but to give an authorised alternative a new classification.

VERDICT: Guilty of offence under Sec. 422.

COMMONWEALTH CROWN SOLICITOR.
TOWNSVILLE

17th November, 1958.

Dear Alan,

I came across an interesting article in the Criminal Law Review of October 1958 entitled "The Outlook for a Devil in the Colonies" by Justin Lewis. The author expresses quite a few of the views which I heard you express and I think you will find it of some interest. Doubtless you will have read it, but just in case you miss it, I thought that you ought to make a particular point of reading it.

I have also had sent to me a recent decision of Martin Kriewaldt's, in which he discusses some of the provisions of the Fugitive Offenders Act and considers a number of the reported cases. I do not know whether you receive judgments such as this, but as it is likely to be of limited interest to me and possible future interest to you, I am sending it on with the compliments of the Commonwealth.

I hope you will let me know if there are any further expenses arising out of our Rabaul stay.

Kindest regards to your wife,

Sincerely yours,

Kerr Adamus

Mr. Justice A. H. Mann M.B.E.
Supreme Court,
PORT MORESBY.