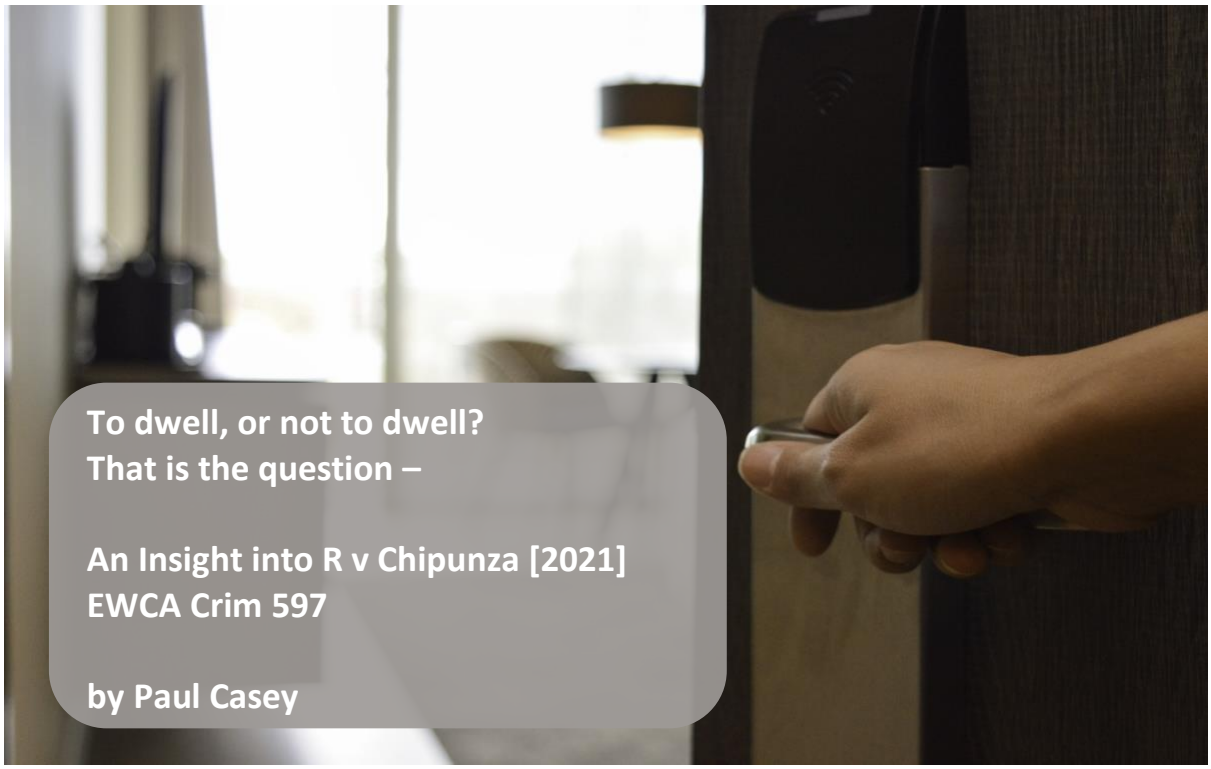
TWO HARCOURT BUILDINGS



To dwell, or not to dwell? That is the question –

An Insight into R v Chipunza [2021] EWCA Crim 597

by Paul Casey

When Bruce Chipunza appeared before a jury at the Crown Court at Inner London in September 2019 he had accumulated 23 convictions for 44 offences during a 15-year criminal career. Over 30 of these were for a variety of frauds, walk-in thefts and burglaries, including five of people's homes. The jury were told nothing of his history, however, and heard nothing from him. Indeed during a course of a trial lasting a short afternoon they heard no live or disputed evidence at all. The sole matter for them to consider was the question of whether the burglary which had given rise to conviction number 24 involved a dwelling for the purposes of section 9 (1) (a) of the Theft Act 1968.

On the morning of the 12th of June 2018 he had walked in to a hotel room in Canary Wharf whilst the housekeeping staff were cleaning. The female occupier had checked in the previous evening for three nights. She was not a tourist but worked in London for a number of days every week and would regularly stay at the hotel for stretches of three or four nights at a time for those purposes. She was completely unknown to Mr Chipunza.

He was not challenged by the staff and rang reception to ask for someone to come up and open the room's safe. Somewhat embarrassingly the manager went upstairs and did so, but as he was leaving he noticed some of the true (female) occupier's clothing. Belatedly sensing the wool being pulled over his eyes he checked the CCTV and realised that the supposed guest was in fact an intruder.

Mr Chipunza was arrested and pleaded guilty to count 2 on the indictment, alleging a non-dwelling burglary. The sole issue at his trial was whether in fact the hotel room constituted a dwelling - count 1.

He did not answer questions in interview or give evidence, so it will never be known whether his decision to specifically target a hotel room was spontaneous or prompted by his own intricate knowledge of section 9 of the Theft Act and the associated minimum sentencing provisions. His experience in the field would undoubtedly rival many a member of the junior criminal bar.

At common law and under the Larceny Acts only a dwelling could be burgled, but sections 9(3)(a) and (b) of the Theft Act 1968 created a unified burglary offence that applied both to dwellings and buildings which are not dwellings. The maximum sentence is different (14 years in the case of burglary of a dwelling, ten years in any other case) and section 111 of the Powers of Criminal Courts (Sentencing) Act 2000 (now section 314 of the Sentencing Act 2020) contains provisions requiring a presumptive minimum custodial period of three years where an offender aged 18 or over is convicted of a third domestic burglary. Domestic burglary is defined by section 111(5) of the 2000 Act (now section 314(5) of the Sentencing Act 2020) as *"a burglary committed in respect of a building, or part of a building, which is a dwelling"*.

There is little in the way of statutory assistance as to what may constitute a dwelling, and the authorities suggest it is a question solely of fact and degree rather than one of law. In *R v Flack* [2013] 2 Cr App R (S) 56 the Court of Appeal held that the question should be determined by way of alternative counts on the indictment, with the matter left to the jury to decide.

So can a hotel room constitute a dwelling for these purposes? On the facts of this case the jury had said yes, by a majority of 11 to 1. The prosecution had invited them to conclude that the room was effectively the occupant's home-from-home, albeit temporarily, with clothing and other personal belongings being kept there. The deliberate targeting of the safe demonstrated that Mr Chipunza intended to steal personal belongings of potential value. The prosecution case was that the gravamen of this offence was akin to the burglary of someone's home.

Mr Chipunza's appeal against conviction was heard by the full court in January (*R v Chipunza* [2021] EWCA Crim 597). I appeared for the respondent. Were the jury correct in concluding that a hotel room can constitute a dwelling? In quashing his conviction the Court of Appeal resisted the temptation to offer a definitive answer, or to set down any guidance. They instead concluded that the trial Judge's summing-up ought to have offered more assistance to the jury, principally by way of examples of where and why hotel rooms may occasionally *not* be properly described as dwellings. At paragraph 15:

Hotels are not generally built to be used as dwellings. Their commercial function is to provide a temporary place to stay: generally private rooms and bathrooms with access to communal parts and ancillary services in exchange for a nightly payment. We are confident that where no one has checked into it, a standard hotel room cannot be said to be a dwelling. Where someone lives in a hotel long term and uses it as their home, the hotel or a part of it may be a dwelling. Some rooms may be provided within a hotel for staff to live in. Such rooms could be dwellings. Much would depend on the configuration of the rooms and the particular arrangements in each case.

One can readily imagine examples where an extended residency in a hotel room or suite *could* indisputably constitute a person's dwelling. Those with long memories of the watering holes around the Aldwych may recall the spectral figure of the late Richard Harris living out the final years of his life as a semi-permanent occupant at the Savoy Hotel (legend has it that whilst being carried out on a stretcher shortly before he died he was keen to warn arriving guests that *"it was the food"*), whilst more recently Manchester United fans will unhappily recall Jose Mourinho's two-year Alan Partridge-esque residency at the Lowry Hotel in Salford.

In discussions with counsel the trial judge chose the example of Major Gowen in Fawlty Towers, and that character's deserved place in legal history is now secured at paragraph 39 of the Court of Appeal's judgment:

The omissions in the summing up are surprising given what the judge said to counsel before the evidence was read and what he said to the jury after they had convicted when he told them that he had been looking at the way the government records statistics in respect of criminal offences. He referred particularly to the Home Office statistics in respect of burglaries "If a hotel room is used as it were a permanent residence, a long-term hotel residence, you remember Fawlty Towers, I think the Major used to live there…well that is recorded by the Home Office as a dwelling burglary. But if it is just somebody staying in a hotel for one or two nights it is not, it is recorded as a commercial burglary." He then referred to this court's decision in Addai Kwame and commented that the court did not demur from the prosecution's decision not to prosecute the defendant for burglary of a dwelling. The points he made about the features of the Major's occupation of the hotel would have been helpful to the jury during the summing up.

The Court of Appeal explicitly confined their observations to the facts of this case, considering it unlikely that there would be many instances where similar situations would be considered by a jury – ***"In most cases, it is obvious whether or not a building is a dwelling"*** (paragraph 14). The question will remain a question of fact for a jury ***"when it is felt necessary to litigate the issue"***, the court noting at paragraph 14 that ***"It is not apparent that there has been any concern about the adequacy of sentencing powers in this regard"*** and citing both the maximum sentences and the upper end of the sentencing guideline brackets for both dwelling and non-dwelling burglaries.

The small category of cases falling on the cusp may continue to present challenges for those tasked with advising upon or making charging decisions, perhaps particularly when dealing with experienced offenders targeting belongings of potentially high sentimental or personal value. Ultimately the nature of the items stolen, or intended to be stolen, cannot be the determinative factor when considering whether the place they were stolen from is a dwelling. Those factors will however continue to have an effect on sentence imposed.

The trial judge imposed a sentence of 30 months (the statutory minimum adjusted to allow for some credit for the fact that the defendant had entered a guilty plea to count 2) but after the verdict had told the jury that his sentence would have been the same regardless of their decision. It may be that in future cases such as this will continue to be charged as non-dwelling burglaries but will be sentenced more severely. This is clearly foreshadowed in the draft revised guidelines for burglary offences, which follow an evaluation of the existing definitive guidelines that came in to force in 2012 and are open for consultation until the 1st of September 2021. The draft guidelines introduce new middle categories for both culpability and harm to allow greater flexibility to sentencers. The draft for non-dwelling burglaries includes a new list of potentially aggravating factors including the level of planning involved and the emotional impact and loss to the victim (economic, commercial or personal).

Mr Chipunza could therefore have expected a sentence in similar terms to the statutory minimum when his case was remitted to the Crown Court for him to be re-sentenced in May of this year. In the event he received what at first sight might seem a lenient 14 weeks, but it turned out that the biggest mitigating factor in his favour was the principle of totality aligned to his own prolific offending. In between his trial and triumph in the Court of Appeal he had clocked up conviction number 25 for which he received a sentence of 8 years in November 2020, so his ultimate victory in this case may have been a little bittersweet.