

# HIGH COURT OF AUSTRALIA

KIEFEL CJ,  
GAGELER, GORDON, EDELMAN, STEWARD, GLEESON AND JAGOT JJ

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BA

APPELLANT

AND

THE KING

RESPONDENT

*BA v The King*  
[2023] HCA 14  
*Date of Hearing: 7 February 2023*  
*Date of Judgment: 10 May 2023*  
S101/2022

## ORDER

- 1. Appeal allowed.*
- 2. Set aside the orders of the Court of Criminal Appeal of the Supreme Court of New South Wales made on 20 August 2021 and, in their place, order that the appeal pursuant to s 107 of the Crimes (Appeal and Review) Act 2001 (NSW) be dismissed.*

On appeal from the Supreme Court of New South Wales

### Representation

S J Odgers SC with K J Edwards and E S Jones for the appellant (instructed by Legal Aid NSW)

T A Game SC with L A Coleman and M L Millward for the respondent (instructed by Solicitor for Public Prosecutions (NSW))

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## CATCHWORDS

### BA v The King

Criminal Law – Appeal – Break and enter and commit serious indictable offence – Where appellant and complainant co-tenants of apartment under *Residential Tenancies Act 2010* (NSW) ("RT Act") – Where appellant had moved out and ceased paying rent – Where appellant, while still a co-tenant, entered apartment by breaking down locked door and assaulted complainant – Where appellant pleaded not guilty to "breaks and enters any dwelling-house ... and commits any serious indictable offence therein" in circumstances of aggravation under *Crimes Act 1900* (NSW), s 112(2) – Where trial judge directed verdict of not guilty under s 112(2) because appellant had right to enter apartment under residential tenancy agreement – Whether person who "breaks and enters any dwelling-house" under s 112 must be trespasser without lawful authority to enter – Whether appellant had lawful authority to enter premises.

Landlord and Tenant – Whether right of occupation granted under residential tenancy agreement conditional upon tenant's purpose of entry being use of premises as residence – Whether no lawful authority to enter premises where entry made without consent of occupant – Whether right of exclusive possession under lease lost when co-tenant vacates premises but remains a lessee – Whether provisions of RT Act condition tenant's lawful authority to enter premises.

Words and phrases – "break and enter", "breaks", "burglary", "co-tenants", "consent", "damage to premises", "dwelling-house", "entry", "exclusive possession", "habitation", "lawful authority", "liberty to enter", "occupation", "purpose of entry", "residential tenancy agreement", "right of entry", "right of possession", "trespass", "trespasser".

*Crimes Act 1900* (NSW), ss 4, 105A, 112, Pt 4 Div 4.

*Residential Tenancies Act 2010* (NSW), ss 13(1), 51(1)(d), 79.



1 KIEFEL CJ, GAGELER AND JAGOT JJ. This appeal should be dismissed. The Court of Criminal Appeal of the Supreme Court of New South Wales did not err in allowing the Crown's appeal against the appellant's acquittal<sup>1</sup>, on the charge of break and enter and commit serious indictable offence (intimidation) in circumstances of aggravation (use of corporal violence) contrary to s 112(2) of the *Crimes Act 1900* (NSW), which was ordered by direction of the District Court of New South Wales.

2 Section 112(2) of the *Crimes Act* must be understood in the context of s 112(1). That section is relevantly in these terms:

**"112 Breaking etc into any house etc and committing serious indictable offence**

(1) A person who:

- (a) breaks and enters any dwelling-house or other building and commits any serious indictable offence therein, or
- (b) being in any dwelling-house or other building commits any serious indictable offence therein and breaks out of the dwelling-house or other building,

is guilty of an offence and liable to imprisonment for 14 years.

(2) **Aggravated offence** A person is guilty of an offence under this subsection if the person commits an offence under subsection (1) in circumstances of aggravation. A person convicted of an offence under this subsection is liable to imprisonment for 20 years."

3 The Court of Criminal Appeal was correct to conclude that, on the facts of this case, the appellant's status as a co-tenant under a residential tenancy agreement did not give him a right to kick down the door, enter the dwelling-house, and assault his former partner who resided in the dwelling-house and who had refused him entry.

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1 *R v BA* (2021) 105 NSWLR 307.

## Background

4        There is no dispute about the facts. From about September 2018, the appellant and his partner resided together in an apartment. They occupied the apartment as co-tenants under a residential tenancy agreement dated 29 August 2018 under the *Residential Tenancies Act 2010* (NSW). The appellant ceased to pay rent from about April 2019. The appellant and his partner separated in about May 2019. The appellant moved out of the apartment, taking most of his possessions with him. On 5 July 2019, with the help of her mother, the appellant's by then former partner packed up the appellant's remaining possessions in the apartment for him to collect, by arrangement with her, on 6 July 2019 when she would be absent from the apartment. Contrary to the arrangement, the appellant attended the apartment four times on 5 July 2019. The first time, his former partner let him into the apartment. The other three times, the former partner's mother denied the appellant entry. On 6 July 2019, in accordance with the arrangement, the appellant visited the apartment to collect whichever of his belongings he wished to keep. On leaving the apartment, he left his security token for the garage and his key for the deadlock on the front door to the apartment on a bench in the apartment. He retained one key to the apartment but both keys were required to unlock the front door. As the appellant put it, "it was not disputed that the appellant was not residing at the apartment ... at the time of the alleged offence. It was also not disputed that, on 8 July 2019, the front door to the apartment was locked".

5        On 8 July 2019, at about 6.00 am, the appellant arrived at the apartment. He screamed at his former partner demanding to be let in. His former partner did not let him in. He then kicked open the door, which was secured by three locks, including the deadlock, and forced the door inwards causing the deadlock to shatter the wooden doorframe. He entered the apartment and grabbed his former partner by the shoulders, shook her, yelled at her, seized her mobile phone when she tried to make a call on it, and threw the phone to the floor.

6        The appellant was charged with the offence of break and enter and commit serious indictable offence (intimidation) in circumstances of aggravation (use of corporal violence) contrary to s 112(2) of the *Crimes Act*. He pleaded not guilty.

7        The District Court of New South Wales directed that a verdict of not guilty be entered, and the appellant was acquitted. The Crown appealed on a question of law which asked if the District Court erred in deciding that, as a pre-condition to an offence under s 112(2) of the *Crimes Act*, "the prosecution was required to establish that an accused person did not have a pre-existing right to enter the subject dwelling house, notwithstanding that entry was effected by an actual breaking involving force".

3.

8 The Court of Criminal Appeal allowed the Crown's appeal<sup>2</sup>. Brereton JA and Fullerton J concluded that the determinative issue was the consent or permission, or lack of consent or permission, of the occupant to the entry<sup>3</sup>. Adamson J concluded that the appellant's right to possession of the apartment under the residential tenancy agreement did not authorise him to enter by the use of force<sup>4</sup>.

9 As will be explained, the reasoning of Brereton JA and Fullerton J is correct.

### Statutory provisions: *Crimes Act*

10 Division 4 of Pt 4 of the *Crimes Act*, in which s 112 is located, identifies seven principal offences concerning the intention to commit or the commission of a serious indictable offence in, relevantly, a dwelling-house<sup>5</sup>. The statutory provisions cover four possible circumstances of a physical relationship between an accused and, relevantly, a dwelling-house: (a) breaking and entering; (b) entering and breaking out of; (c) entering; and (d) being in and breaking out of.

11 Relevantly, the first limb of s 109(1) involves *entering* a dwelling-house of another with intent to commit a serious indictable offence therein and *breaking out* of that dwelling-house. The second limb of s 109(1) involves *being in* a dwelling-house of another and committing any serious indictable offence therein and *breaking out* of that dwelling-house. Section 111(1) mirrors the first limb of s 109(1) except that the relevant dwelling-house need not be "of another" and there is no requirement to break out of that dwelling-house. Section 111(1) requires only that a person *enters* any dwelling-house with intent to commit a serious indictable offence therein. Section 112(1)(a) requires the person to *break and enter* any dwelling-house or other building and to commit any serious indictable offence therein. Section 112(1)(b) requires a person, *being in* any dwelling-house or other building, to commit any serious indictable offence therein and to *break out* of the dwelling-house or other building.

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2 *R v BA* (2021) 105 NSWLR 307.

3 *R v BA* (2021) 105 NSWLR 307 at 309-311 [5]-[10], 315-316 [21]-[28] per Brereton JA; 318-319 [40] per Fullerton J.

4 *R v BA* (2021) 105 NSWLR 307 at 323 [64].

5 Namely, the first and second limbs of s 109(1), s 110, s 111(1), s 112(1)(a), s 112(1)(b) and s 113. For the evolution of these provisions, see *Ghamrawi v The Queen* (2017) 95 NSWLR 405 at 417-420 [66]-[78].

4.

- 12 Under s 4(1) of the *Crimes Act*, a "[d]welling-house" includes:
- "(a) any building or other structure intended for occupation as a dwelling and capable of being so occupied, although it has never been so occupied,
  - (b) a boat or vehicle in or on which any person resides, and
  - (c) any building or other structure within the same curtilage as a dwelling-house, and occupied therewith or whose use is ancillary to the occupation of the dwelling-house".
- 13 It will be apparent that the provisions of Div 4 of Pt 4 distinguish between offences involving the dwelling-house of another and offences involving any dwelling-house. If effect is not given to this distinction, insofar as dwelling-houses are concerned, s 112(1)(b) would add nothing to the second limb of s 109(1). Even if the historical position was that, at common law, a person could not break and enter their own dwelling-house (which, as will be explained, it was not), the scheme of Div 4 of Pt 4 ensures that this is no longer the case in New South Wales<sup>6</sup>.
- 14 It will also be apparent that the offences created by Div 4 of Pt 4 do not depend on the commission of the common law tort of trespass or any form of proprietary wrong. For example, it is not a trespass merely to enter or to be in a dwelling-house. Yet merely entering any dwelling-house, with intent to commit a serious indictable offence therein, is an offence under s 111(1). And merely being in a dwelling-house of another, committing a serious indictable offence therein and breaking out of the dwelling-house is an offence under the second limb of s 109(1). This indicates that the elements of criminal liability for one or more of the offences under Div 4 of Pt 4 are not coterminous with proprietary rights. Given the descent of the provisions of Div 4 of Pt 4 from the common law of burglary, discussed below, it is apparent that the core provisions, concerning dwelling-houses, extend beyond proprietary rights to protect the peaceful habitation of occupants from intrusions by non-occupants.
- 15 Equally importantly, Div 4 of Pt 4 of the *Crimes Act* creates no offence of merely breaking into, entering, or being in a dwelling-house. It is the intention to commit, or the commission of, a serious indictable offence in the dwelling-house (or other building, where so specified) that engages the seven principal offences in Div 4 of Pt 4 of the *Crimes Act* identified above. Merely breaking into a dwelling-house may be a civil wrong, such as the tort of trespass, but Div 4 of Pt 4 of the *Crimes Act* may apply to conduct which does not involve the commission

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6 See, to the same effect, *Ghamrawi v The Queen* (2017) 95 NSWLR 405 at 421 [88].



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of the tort of trespass. The fundamental rationale of the provisions, insofar as dwelling-houses are concerned, is to protect peaceful occupation, which is done by, relevantly, criminalising unauthorised entry by force or some kind of fraud into a dwelling-house, combined with the intention to commit or the commission of a serious indictable offence therein. It is the latter intent or conduct which converts what may be lawful conduct (such as entry or even, in certain circumstances, breaking and entry) or a mere civil wrong (such as the tort of trespass) into a crime.

16       Section 13(1) of the *Residential Tenancies Act*, which provides that a residential tenancy agreement is an agreement under which a person (the tenant) is granted a "right of occupation of residential premises for the purpose of use as a residence", cannot justify or excuse an offence against s 112(2) of the *Crimes Act*. Nor, if the facts remained the same but the appellant and his former partner were co-owners of the apartment, would the appellant's co-ownership of the apartment provide justification or excuse.

17       The concepts of "breaks", "enters" and "dwelling-house" derived from the common law crime of burglary. We turn now to that common law crime as part of the context of Div 4 of Pt 4 of the *Crimes Act*.

## **Burglary**

18       Burglary involved "breaking into a dwelling-house – or church – by night with intent to commit any felony"<sup>7</sup>. Professor Baker has said "[t]he law had always given special protection to dwelling-houses, and protection was especially needed at night when the inhabitants were off their guard; for 'the law would that every man's house against malefactors should be a safehold and defence for him'"<sup>8</sup>. Professor Baker records that as early as 1519 it had been held that "it was possible to commit burglary in one's own house, if part of it was in separate possession, as

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7     Baker, *The Oxford History of the Laws of England* (2003), vol 6, ch 31 at 573 (footnote omitted).

8     Baker, *The Oxford History of the Laws of England* (2003), vol 6, ch 31 at 573. See *Ghamrawi v The Queen* (2017) 95 NSWLR 405 at 414-415 [53].

where an innkeeper broke into his guest's locked room intending to commit a felony"<sup>9</sup>. Spelman put it this way<sup>10</sup>:

"[I]f an innkeeper hands his guest the key to his room, and during the night the innkeeper comes and breaks into his room in order to kill and rob him, but does nothing when he gets there, this is burglary in the innkeeper, notwithstanding that it is his own house; for when he hands him the key it is a lease of the room, and the innkeeper has no more to do with it for the time being than a stranger, and so, etc."

19 In other words, the room had become the dwelling-house, albeit temporary, of the guest because it was the place the guest inhabited and the title and rights of the innkeeper to enter the room did not exclude the criminal law if the innkeeper entered with felonious intent.

20 Blackstone explained that burglary was no more and no less than nocturnal housebreaking<sup>11</sup>. He explained that burglary<sup>12</sup>:

"has always been looked upon as a very heinous offence: not only because of the abundant terror that it naturally carries with it, but also as it is a forcible invasion and disturbance of that right of habitation, which every individual might acquire even in a state of nature".

21 The focus of burglary was actual occupation of a dwelling-house, not a mere right to possession. It followed, Blackstone said, that breaking open a house where no-one resided was not burglary but breaking open a house left empty by the person residing there, if they intended to return to reside in the house, was burglary<sup>13</sup>.

22 According to Blackstone, burglary was only committed if there was both a breaking and an entry with the requisite felonious intent. The breaking had to be

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9 Baker, *The Oxford History of the Laws of England* (2003), vol 6, ch 31 at 572, citing *John Spelman's Reading on Quo Warranto delivered in Gray's Inn (Lent 1519)*, Selden Society, vol 113 (1997) at 161, case 21.

10 *John Spelman's Reading on Quo Warranto delivered in Gray's Inn (Lent 1519)*, Selden Society, vol 113 (1997) at 161, case 21.

11 Blackstone, *Commentaries on the Laws of England* (1769), bk 4, ch 16 at 223.

12 Blackstone, *Commentaries on the Laws of England* (1769), bk 4, ch 16 at 223.

13 Blackstone, *Commentaries on the Laws of England* (1769), bk 4, ch 16 at 224-225.

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an actual breaking involving "a substantial and forcible irruption" and not a mere legal breaking which may involve no more than a civil wrong such as a trespass<sup>14</sup>. The requirement for an actual breaking, however, included obtaining entry by fraud, deception, or trickery because, as Blackstone put it, "the law will not suffer itself to be trifled with by such evasions"<sup>15</sup>.

23 The special status of a dwelling-house as deserving of the law's utmost protection is clear in other authorities. For example, Hale's *The History of the Pleas of the Crown* described burglary as a crime concerning "the habitation of a man", because "every man by the law hath a special protection in reference to his house and dwelling"<sup>16</sup>. The law protected a dwelling-house from both a breaking by actual force upon the house and a breaking involving entry "into another's house against his will"<sup>17</sup>. In this latter regard, in law, permission to enter property obtained by threat, fraud, trickery, or artifice was no permission at all<sup>18</sup>.

24 To the same effect, Archbold said that, for burglary, "[o]ccupation rather than legal ownership must be proved"<sup>19</sup>. East described occupation as the key to making a mansion house subject to this "high protection of the law"<sup>20</sup>. East also explained that burglary did not depend on either ownership or possession, but occupation by inhabitation<sup>21</sup>. An 1840 report of Her Majesty's Commissioners on criminal law recorded that burglary "is the invasion by force or fraud of a man's habitation by night" accompanied by felonious intent or commission of a felony<sup>22</sup>.

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14 Blackstone, *Commentaries on the Laws of England* (1769), bk 4, ch 16 at 226-227.

15 Blackstone, *Commentaries on the Laws of England* (1769), bk 4, ch 16 at 226.

16 Hale, *The History of the Pleas of the Crown* (1778), vol 1, ch 48 at 547.

17 Hale, *The History of the Pleas of the Crown* (1778), vol 1, ch 48 at 551.

18 See, eg, Archbold: *Pleading, Evidence & Practice in Criminal Cases*, 35th ed (1962), ch 11 at 715 §1803; East, *A Treatise of the Pleas of the Crown* (1803), vol 2, ch 15 at 485.

19 Archbold: *Pleading, Evidence & Practice in Criminal Cases*, 35th ed (1962), ch 11 at 719 §1811.

20 East, *A Treatise of the Pleas of the Crown* (1803), vol 2, ch 15 at 496.

21 East, *A Treatise of the Pleas of the Crown* (1803), vol 2, ch 15 at 500.

22 Great Britain, *Fifth Report of Her Majesty's Commissioners on Criminal Law* (1840) [242] at 4.

They said that the crime was distinct from a "bare but aggravated trespass"<sup>23</sup>. They observed that the "fundamental principle of the law is, the protection of the dwelling-house"<sup>24</sup>.

25        *Howard's Criminal Law* described burglary as a specific offence of attempt, the "compelling rationale [for which] is protection of occupants of dwellings against the fear or risk of physical injury likely to arise from encounters with intruders"<sup>25</sup>. This is not the same rationale that informs the common law tort of trespass. The different rationales explain why the commission of an offence against s 112(1)(a) and (2) of the *Crimes Act* must be determined by reference to the language used in that provision, the focus of which, in terms of conduct, is "breaks and enters". The entry may but need not be "as a trespasser"<sup>26</sup>, but to break and enter there must be the use of force or some kind of fraud and unlawful or unauthorised entry. The requirement of lack of authorisation may be satisfied, as in this case, if the entry is by force (or some kind of fraud) by a person not in occupation of a dwelling-house against the will of the person in occupation of the dwelling-house.

26        The same understanding has prevailed in the United States where it has been explained that the "predominant factor underlying common law burglary was the desire to protect the security of the home, and the person within his home. Burglary was not an offense against property, real or personal, but an offense against the habitation, for it could only be committed against the dwelling of another."<sup>27</sup> The United States case law is also replete with examples of proprietary rights, such as being a co-tenant under a lease, not preventing conviction for burglary where the

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23    Great Britain, *Fifth Report of Her Majesty's Commissioners on Criminal Law* (1840) [242] at 4.

24    Great Britain, *Fifth Report of Her Majesty's Commissioners on Criminal Law* (1840) [242] at 5.

25    *Howard's Criminal Law*, 5th ed (1990) at 272.

26    *Barker v The Queen* (1983) 153 CLR 338 at 355.

27    Wright, "Statutory Burglary – The Magic of Four Walls and a Roof" (1951) 100(3) *University of Pennsylvania Law Review* 411 at 427 (footnotes omitted).

objective facts demonstrate that the person with the proprietary right no longer inhabits the dwelling-house<sup>28</sup>.

27 When the provisions of Div 4 of Pt 4 of the *Crimes Act* are considered against this background, and in their full statutory context, the proposition that the appellant did not break and enter the dwelling-house merely by reason of the fact that he continued to be a co-tenant under the residential tenancy agreement is exposed as untenable. No provision of the *Residential Tenancies Act* can be understood as rendering lawful a person's forcible (or fraudulent or deceptive) entry into a dwelling-house occupied by another person against the will of that other person if the person either intends to commit a serious indictable offence therein or in fact commits a serious indictable offence therein.

### **The present case**

28 The appellant was not entering the apartment to exercise any right under the *Residential Tenancies Act*. He broke a door down so he could enter, and then assaulted his former partner in her home.

29 The objective evidence puts the outcome beyond question. By 8 July 2019 the appellant was out of occupation and his former partner was in sole occupation. She continued to occupy and possess the apartment as her residence after the appellant moved out in May 2019. Her sole occupation was overt both in fact and in intention. She permitted the appellant to enter on 5 July 2019. In so doing, she manifested that the permission was hers alone to give. It must also be inferred that she authorised her mother to deny the appellant entry on 5 July 2019, which her mother did three times. She permitted the appellant to enter again in her absence on 6 July 2019 to collect his remaining possessions. Again, in so doing, she manifested that the permission was hers alone to give. She denied the appellant entry on 8 July 2019. The appellant then broke the door down and entered the apartment despite her denial of permission. He broke, entered, and then assaulted her.

30 This conduct falls squarely within s 112(1) and (2) of the *Crimes Act*. In the statutory context of Div 4 of Pt 4, the "break" contemplated by s 112(1) of the *Crimes Act* is nothing more than an act of force or of fraud, trickery or deception by a person who is not in occupation of a dwelling-house to obtain entry to the

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28 Anderson, "From the Thief in the Night to the Guest Who Stayed Too Long: The Evolution of Burglary in the Shadow of the Common Law" (2012) 45(3) *Indiana Law Review* 629 at 650, citing Suk, "Criminal Law Comes Home" (2006) 116(1) *Yale Law Journal* 2 at 28.

dwelling-house against the will of any person who is in occupation of the dwelling-house.

31 No doubt there may be some borderline cases in which real questions might arise as to the fact of an accused not being in occupation. The examples given by Fullerton J in the Court of Criminal Appeal<sup>29</sup> expose the importance of the objective facts of being in and out of occupation. If one co-tenant or co-owner physically ejects the other and the ejected co-tenant or co-owner returns and re-enters a few hours later, it could not be said that the ejected co-tenant or co-owner was out of occupation and the other co-tenant or co-owner in sole occupation. Further, if there are multiple co-tenants or co-owners, each co-tenant or co-owner in actual occupation has authority to give permission to any person, including a co-tenant or co-owner out of occupation, to enter.

32 But this was not a borderline case. This was a forcible entry into what was, by 8 July 2019, someone else's home against the sole occupant's express wish that the appellant not enter, and for no reason connected with the vindication of any right of residential occupation. It involved a break and entry.

33 This is a result which reflects the values of a contemporary civilised society. Nothing seems more apt to risk serious disturbances of social peace and good order and to engender potential violence against people in their own homes than concluding that, in kicking the door down to enter, and then assaulting his former partner (and if he intended to do so, whether or not he in fact assaulted her, as he did in this case), the appellant committed no crime.

34 It is not to the point that the appellant might not have committed a common law trespass. His proprietary and contractual rights under the *Residential Tenancies Act*, and any associated common law rights, are no defence to or excuse for his forcible entry into the apartment which his former partner occupied, and which he did not, against the will of his former partner.

35 For these reasons, the appeal should be dismissed.

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29 *R v BA* (2021) 105 NSWLR 307 at 319 [46]. Compare examples from United States cases given by Suk, "Criminal Law Comes Home" (2006) 116(1) *Yale Law Journal* 2 at 32-33 fn 111.

36 GORDON, EDELMAN, STEWARD AND GLEESON JJ. This difficult case illustrates the complexities of the concept of "break and entry", the meaning of which was established in historical circumstances quite different from contemporary society, including when domestic and family violence was generally not treated as criminal. In other jurisdictions, "breaking and entering" as an element of housebreaking and burglary offences has been replaced with trespass<sup>30</sup> or unlawful or unauthorised entry<sup>31</sup> in response to these complexities<sup>32</sup>, while avoiding the extension of those offences to lawful entries<sup>33</sup>.

37 No such amendment or replacement of the older concepts has been undertaken by the New South Wales Parliament in respect of s 112 of the *Crimes Act 1900* (NSW). That section, which, as will be explained below, instantiates the long common law and statutory history of "breaking and entering", relevantly provides:

"(1) A person who:

(a) breaks and enters any dwelling-house or other building and commits any serious indictable offence therein ...

is guilty of an offence and liable to imprisonment for 14 years.

(2) **Aggravated offence** A person is guilty of an offence under this subsection if the person commits an offence under subsection (1) in circumstances of aggravation. A person convicted of an offence under this subsection is liable to imprisonment for 20 years."

38 The appellant and the complainant, his former partner, were co-tenants of an apartment in Queanbeyan subject to a residential tenancy agreement under the *Residential Tenancies Act 2010* (NSW) ("the RT Act"). They separated and the

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30 See *Criminal Code* (ACT), s 311(1); *Criminal Code* (Cth), s 132.4(1)(a); *Criminal Code* (Tas), s 244; *Crimes Act 1958* (Vic), s 76(1). Compare *Criminal Law Consolidation Act 1935* (SA), s 168(1). See also *Penal Code 1871* (Sing), ss 441-442; *Theft Act 1968* (UK), s 9(1)(a); *Theft Ordinance* (HK) cap 210, s 11(1)(a).

31 *Criminal Code* (NT), s 213; *Criminal Code* (WA), s 401(1). See also *Crimes Act 1961* (NZ), s 231(1)(a) and LaFave, *Criminal Law*, 4th ed (2003) at 1019-1020.

32 Griew, *The Theft Act 1968 and 1978*, 3rd ed (1978) at 61; Weinberg and Williams, *The Australian Law of Theft* (1977) at 66; *R v Collins* [1973] QB 100 at 104.

33 Smith, *The Law of Theft*, 2nd ed (1972) at 133-136.

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Steward J  
Gleeson J

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appellant moved out. While still a co-tenant at law, the appellant attended the apartment and demanded to be let in. The complainant refused him access. The appellant kicked in the door, damaging the doorframe, and intimidated and assaulted the complainant. Having been acquitted of the offence under s 112(2), the appellant eventually pleaded guilty to common assault, intimidation and destruction of property.

39 The question raised by this appeal is: for the purposes of s 112 of the *Crimes Act*, did the appellant commit a "break[]" and enter[]"? The answer is "no", and the appeal should be allowed.

40 The case is to be decided by an analysis of the common law and legislative history, and their interactions with long-standing concepts in property law and the relevant residential tenancy law. The appeal presents four interrelated issues. The first and central issue is whether, for the purposes of s 112 of the *Crimes Act*, a person "who breaks and enters any dwelling-house" must be a trespasser, that is, whether the offence may only be committed by a person who enters a premises without lawful authority<sup>34</sup>. The second, third and fourth issues are all, in effect, alternative contentions focused upon rights conferred and obligations imposed on a tenant under the RT Act.

41 The second issue, related to the first, is whether such lawful authority to enter a premises is removed where the entry is made without the consent of the present occupant. The third and fourth issues concern whether certain provisions of the RT Act somehow condition a tenant's lawful authority to enter a premises. The third issue, raised by the Crown in oral argument, is whether entry into a residential premises under a "right of occupation" granted under a residential tenancy agreement is conditional upon the tenant's purpose being to use the premises as a residence. That issue was framed as whether, where a tenant's purpose of entry is other than to use the premises as a residence – such as a purpose of assaulting an occupant inside the premises – the tenant no longer has any legal entitlement to be on those premises. The fourth issue, raised by the Crown's notice of contention, is whether a tenant's right to enter a premises is qualified by the operation of s 51(1)(d) of the RT Act, which prohibits a tenant from "intentionally or negligently caus[ing] or permit[ting] any damage to the residential premises".

42 For the reasons given below, the composite elements of "breaks and enters" in s 112(1)(a) require a trespass, that is, entry to premises of another without lawful authority. The appellant's "right of occupation", granted under his residential tenancy agreement, was not in the nature of a mere permission to occupy that might

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34 *Barker v The Queen* (1983) 153 CLR 338 at 341-342.



be qualified in the ways contended for by the Crown. The appellant had a right of exclusive possession which would not have been lost even if it had been found that he ceased to occupy the premises prior to the expiry or termination of the residential tenancy agreement. Consistent with that right, the appellant had lawful authority for entry into the Queanbeyan apartment, including by force of the kind that would constitute a "break" in the absence of such authority, so that his forcible entry was no trespass. Having that authority, the appellant did not require the complainant's consent to enter the residential premises. The appellant's liberty to enter the premises was also not conditional upon his having a purpose to use the premises as a residence, nor was it removed when he entered the apartment by force, in contravention of s 51(1)(d) of the RT Act. Accordingly, the appeal should be allowed.

### **The alleged offence and the evidence**

43 The appellant pleaded not guilty to one count on an indictment alleging that:

"on the 8th day of July 2019, at Queanbeyan in the State of New South Wales, [the appellant] did break and enter the dwelling house of [the complainant at the relevant address] and did commit a serious indictable offence therein, namely, intimidation, in circumstances of aggravation, namely, at the time of the offence [the appellant] used corporal violence on [the complainant]."

44 The appellant and the complainant were in a relationship for some time and had lived together in the Queanbeyan apartment, which was a "dwelling-house" within the meaning of s 112(1)(a)<sup>35</sup>. As at 8 July 2019, the appellant and the complainant were co-tenants of the apartment under a residential tenancy agreement regulated by the RT Act. The agreement commenced on 12 September 2018 for a period of 12 months. Ultimately, the residential tenancy agreement was terminated on 23 July 2019.

45 By about May 2019, the relationship between the appellant and the complainant had broken down and the appellant had ceased to live at the apartment, although the complainant continued to live there. The appellant had also relinquished at least one of the two keys that were required to unlock the front door and the security token for the garage. The appellant ceased to pay rent after

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35 Defined in s 4 of the *Crimes Act* as, relevantly, "any building or other structure intended for occupation as a dwelling and capable of being so occupied, although it has never been so occupied".

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about April 2019 and, by 8 July 2019, he had removed the great bulk of his possessions from the apartment.

46 On the morning of 8 July 2019, the front door of the apartment was locked. The appellant arrived at the front door at about 6 am, where he screamed at the complainant and demanded to be allowed in. When not permitted access, the appellant kicked open the door, which was secured by three locks, including a deadlock, and forced it inwards, causing the deadlock to shatter the wooden doorframe. Once inside the apartment, the appellant grabbed the complainant by her shoulders, shook her and yelled at her, seized her mobile phone when she endeavoured to make a call and threw the phone to the floor. The force used by the appellant in breaking down the door also amounted to "intentionally ... caus[ing] ... damage to the residential premises" contrary to s 51(1)(d) of the RT Act.

47 The trial was conducted in the District Court of New South Wales by Williams SC DCJ without a jury. Williams SC DCJ found that the Crown had not established an essential precondition to liability for the offence under s 112 and directed a verdict of not guilty. Williams SC DCJ made no finding (as his Honour was not required to do so) as to the appellant's intent or purpose at the time of entry into the apartment. His Honour accepted the appellant's argument that, because he was a tenant of the apartment at the time of the alleged offence, he had a right to enter and could not be guilty of breaking into his own premises. His Honour found that there was "no doubt that the tenancy agreement granted to the complainant and the accused a right of occupation at the relevant time". As appears below, the Crown sought to contest the scope of the appellant's right of occupation for the first time at the hearing of the appeal to this Court.

48 The Crown's case was neutral as to whether or not, as a matter of fact, the appellant could be said to have been in occupation of the apartment on 8 July 2019. The appellant's application for a verdict by direction was made on the basis that the Crown had failed to prove the absence of a right to enter the Queanbeyan apartment as an essential precondition of the offence. The Crown opposed the application upon the basis that it was irrelevant to the offence whether the appellant had permission to enter the apartment. The Crown never alleged that the appellant, as a matter of fact, was not in occupation of the apartment. That allegation, even if raised in this Court (which it properly was not), could not be entertained for the first time on a final appeal in a criminal case.

### **Reasons of the Court of Criminal Appeal and the appeal to this Court**

49 The Crown appealed to the Court of Criminal Appeal of the Supreme Court of New South Wales pursuant to s 107 of the *Crimes (Appeal and Review) Act 2001* (NSW), which permitted an appeal against the appellant's acquittal by the

trial judge on any ground that involved a question of law alone. The relevant question of law was:

"Whether his Honour erred in determining that, as a pre-condition of the element of 'breaking' in an offence pursuant to s 112(2) *Crimes Act 1900*, the prosecution was required to establish that an accused person did not have a pre-existing right to enter the subject dwelling house, notwithstanding that entry was effected by an actual breaking involving force."

50 The Crown did not contest the trial judge's finding that the complainant and the appellant had a right of occupation of the Queanbeyan apartment at the time of the alleged offence. The appeal proceeded upon the basis that the appellant had a right of occupation or a right of possession of the Queanbeyan apartment at the time of the alleged offence<sup>36</sup>, although the Crown argued that the relevant right was qualified by s 51(1)(d) of the RT Act<sup>37</sup>.

51 Brereton JA concluded that an entry into a dwelling-house effected pursuant to a contractual right (such as a right of occupation granted by a residential tenancy agreement) will nonetheless involve a "break" if made without the consent of the "actual occupant"<sup>38</sup>. Fullerton J held that such an entry involves a "break" if made without the permission of "those either in occupation of the premises or those entitled to occupy those premises"<sup>39</sup>. Adamson J found that the entry was in breach of s 51(1)(d) of the RT Act and involved a "break"<sup>40</sup>.

52 Brereton JA and Adamson J expressed concern that the lesser offences to which the appellant entered pleas of guilty did not represent the total criminality of the alleged offending<sup>41</sup>. Brereton JA observed that those offences did not take into account that the appellant's conduct took place in the complainant's home, "in

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36 *R v BA* (2021) 105 NSWLR 307 at 312 [13] per Brereton JA; 320 [50], 323 [64] per Adamson J.

37 *R v BA* (2021) 105 NSWLR 307 at 311 [11].

38 *R v BA* (2021) 105 NSWLR 307 at 315 [20]-[21], 316 [28(3)].

39 *R v BA* (2021) 105 NSWLR 307 at 319 [41].

40 *R v BA* (2021) 105 NSWLR 307 at 322-323 [63]-[64].

41 *R v BA* (2021) 105 NSWLR 307 at 318 [34] per Brereton JA, 324 [70] per Adamson J.

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which she was entitled to feel secure, the assurance of that sense of security being the very rationale of the offence in s 112"<sup>42</sup>. His Honour cited<sup>43</sup> Leeming JA's statement in *Ghamrawi v The Queen* that the principle underlying the offences in Div 4 of Pt 4 of the *Crimes Act*, including s 112, "is that criminality is more serious if it takes place in a victim's home into which the offender has broken without permission"<sup>44</sup>.

53 On the appeal to this Court, the appellant's case was that in the absence of any trespass by him the Crown could not prove the element of "breaks" for the purpose of the s 112 offence. The appellant argued that irrespective of the consent of his co-tenant, of any purpose he had in seeking to enter the premises, and of any force used by him, he was not capable of committing a trespass because he had a liberty to enter the Queanbeyan apartment associated with his right of exclusive possession arising from the residential tenancy agreement which granted a "right of occupation"<sup>45</sup>.

54 The Crown ultimately did not seek to defend the totality of the reasons of any of the judges of the Court of Criminal Appeal. As explained below, the Crown was correct not to attempt that task. Instead, the Crown put different arguments but ones which must also fail.

**First issue: "breaking and entering" in s 112 of the Crimes Act requires trespass**

55 Section 112 is one of seven offences contained in Div 4 of Pt 4 of the *Crimes Act*, entitled "Sacrilege and housebreaking". The offence in s 112(2) has three elements, requiring a person: to "break[] and enter[] any dwelling-house or other building"; to commit a "serious indictable offence therein"; and in circumstances of aggravation. "Dwelling-house" is defined to include any building or other structure "intended for occupation as a dwelling and capable of being so occupied, although it has never been so occupied"<sup>46</sup> and is also further defined such

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42 *R v BA* (2021) 105 NSWLR 307 at 318 [34].

43 *R v BA* (2021) 105 NSWLR 307 at 314 [16].

44 (2017) 95 NSWLR 405 at 422 [92].

45 RT Act, s 13(1).

46 *Crimes Act*, s 4(1) (definition of "Dwelling-house").

that it does "not cease to be a dwelling-house by reason only of being temporarily unoccupied"<sup>47</sup>.

56 There was no dispute that the apartment was a "dwelling-house". There was also no dispute that the appellant committed a "serious indictable offence therein" in circumstances of aggravation. The focus of this appeal was upon the word "break". That word is not defined in the *Crimes Act*, but it was, properly, common ground on this appeal that the provisions of Div 4 of Pt 4 of the *Crimes Act*, including the word "break", were to be interpreted in light of their lengthy legislative histories and judicial interpretation of the predecessor provisions<sup>48</sup>.

*The meaning of "breaks and enters" in s 112*

57 Section 112 has a long legislative history, recorded by Leeming JA in *Ghamrawi*<sup>49</sup>, and commencing in New South Wales with the incorporation into New South Wales law by the *Imperial Criminal Acts Adoption Act 1828* (NSW) (9 Geo 4 No 1) of the *Larceny (England) Act 1827* (7 & 8 Geo 4 c 29) ("the 1827 UK Act"). In England, the precursor statutory "breaking and entering" offences go back at least as far as 1547<sup>50</sup>.

58 The original offences, which were the precursors to the seven offences contained in Div 4 of Pt 4 of the *Crimes Act*, were described by Coke as requiring a break and entry, with the intention to commit a felony, into "a mansion house of

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47 *Crimes Act*, s 4(2). Section 112 also refers to breaking and entering any "other building", where "building" for the purposes of that provision is defined to include any place of Divine worship: *Crimes Act*, s 105A(1) (definition of "building").

48 *Aubrey v The Queen* (2017) 260 CLR 305 at 323 [34], citing *R v Slator* (1881) 8 QBD 267 at 271-272, *Webb v McCracken* (1906) 3 CLR 1018 at 1027, *Attorney-General for NSW v Brewery Employees Union of NSW* (1908) 6 CLR 469 at 531-532, and *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566 at 585-586 [44]-[45].

49 (2017) 95 NSWLR 405 at 414 [50]-[51], 417-419 [66]-[73].

50 1 Edw 6 c 12 which was an "Act for the Repeal of certain Statutes concerning Treasons and Felonies": Baker, *The Oxford History of the Laws of England* (2003), vol 6, ch 31 at 573.

another"<sup>51</sup>. The cases consistently recognised some complexity around the outer limits of the concept of a "break". The "break" (*fregit*) needed to be a break "in law" as well as a break "in fact". For centuries, it was established that breaking and entering required both of these elements of law and fact<sup>52</sup>.

59 A break "in law" was "every entry into the house by a trespasser", although it included an act done *in fraudem legis*<sup>53</sup> ("in fraud of law"). This requirement underscored that there must, of course, be an "entry" in addition to a break to constitute the crime of burglary (*fregit et intravit*)<sup>54</sup>. The requirement of entry was satisfied upon "any part of the body be[ing] within the house"<sup>55</sup>. For example, a single finger being placed inside a window would constitute entry<sup>56</sup>. The essence of the break "in law" requirement was therefore "unlawful entry on the possession of another", which would support an action in trespass *quare clausum fregit*<sup>57</sup>. The trespass was also the foundation of the need for an indictment to state with accuracy "to whom the mansion belongs"<sup>58</sup>, with ownership of the dwelling-house being "neither referable altogether to the legal title, nor to the possession, but partaking sometimes of one sometimes of the other, as well as of both"<sup>59</sup>.

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51 Coke, *The Third Part of the Institutes of the Laws of England* (1644), ch 14 at 63. See also Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown* (1778), vol 1, ch 48 at 549.

52 Russell, *A Treatise on Crimes & Misdemeanors*, 1st Am ed (1824), vol 2, bk 4, ch 1 at 901.

53 Coke, *The Third Part of the Institutes of the Laws of England* (1644), ch 14 at 64.

54 *R v Hughes* (1785) 1 Leach 406 [168 ER 305]; *Ghamrawi* (2017) 95 NSWLR 405 at 415 [55], quoting Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown* (1800), vol 1, ch 48 at 549 [550].

55 East, *A Treatise of the Pleas of the Crown* (1803), vol 2, ch 15 at 490.

56 *R v Davis* (1823) Russ & Ry 499 [168 ER 917]. See also *In re Gibbons* (1752) Fost 107 [168 ER 53]; *R v Rust* (1828) 1 Mood 183 [168 ER 1234].

57 Hawkins, *A Treatise of the Pleas of the Crown*, 8th ed (1824), vol 1, bk 1, ch 17 at 130.

58 East, *A Treatise of the Pleas of the Crown* (1803), vol 2, ch 15 at 499.

59 East, *A Treatise of the Pleas of the Crown* (1803), vol 2, ch 15 at 500.

60 A break "in fact" required some "substantial and forcible irruption"<sup>60</sup> although opening a lock with a key or "lifting up the latch of a door or unloosing any other fastening which the owner has provided" was sufficient<sup>61</sup>. Although the element of a break "in fact" could involve a minimal physical action, that physical action with felonious intent was still necessary, "otherwise it is only a trespass"<sup>62</sup>. In other words, a trespassory entry by an open door or window was not sufficient without more for the requirements of breaking and entering<sup>63</sup>.

61 The effect of the trespass requirement of a break "in law" was that it was well established that a person with a right of immediate possession of a premises could not commit burglary by entering the premises. In that sense it was said that "it cannot be burglary [for a person] to break open [their] own house"<sup>64</sup>. An owner residing in the same house would not commit burglary by breaking the chamber of an inmate having the same outer door<sup>65</sup>, and nor could a person by breaking into any part of a dwelling-house which they occupy with another<sup>66</sup>. Further, a landlord would not commit burglary by stealing from the room of a travelling guest because the landlord "might go into the room when he pleased, and would be no trespasser to the guest"<sup>67</sup>. And the same was true of any contractual right to entry or occupation that did not amount to a right of exclusive possession. For example, if

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60 *The Oxford English Dictionary*, 2nd ed (1989), vol 8 at 104: "**1637**: R Humphrey tr *St Ambrose* Pref, The Goths ... making irruptions into Gaule. **1707**: *Lond Gaz* No 4375/3 That the whole Body of the Troops ... lie in a readiness to oppose any new Irruption of the Enemy."

61 Blackstone, *Commentaries on the Laws of England* (1769), bk 4, ch 16 at 226; Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown* (1778), vol 1, ch 48 at 551-552.

62 Blackstone, *Commentaries on the Laws of England* (1769), bk 4, ch 16 at 227.

63 Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown* (1778), vol 1, ch 48 at 552; East, *A Treatise of the Pleas of the Crown* (1803), vol 2, ch 15 at 485.

64 East, *A Treatise of the Pleas of the Crown* (1803), vol 2, ch 15 at 506. See also *R v Prosser* (1768) 2 East PC 502.

65 East, *A Treatise of the Pleas of the Crown* (1803), vol 2, ch 15 at 502-503.

66 Eardley-Wilmot, *A Digest of the Law of Burglary* (1851), ch 7 at 105.

67 East, *A Treatise of the Pleas of the Crown* (1803), vol 2, ch 15 at 503.

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a person was a paid lodger at an inn – and therefore had contractual permission to enter and leave the inn – they could not be convicted of burglary if they stole from the inn<sup>68</sup>. The position was different if the owner or landlord had no right of immediate possession, such as where there was said to be a "lease of the room"<sup>69</sup>.

62 This long history of breaking and entering as requiring a trespass by the accused person has been consistently reiterated<sup>70</sup>. As earlier noted, in some jurisdictions, the element of breaking and entering has been simplified in analogous statutory offences by removing the requirement of a break "in fact" and replacing the element with that of trespass or unlawful or unauthorised entry, consistently with the established understanding that trespass is a core element of a break<sup>71</sup>.

63 Against this long history, the Crown identified no authority to suggest a different meaning of the word "breaks" in the compound phrase "breaks and enters" in s 112. Nor is there any reason of principle that it should bear a different meaning. Thus, for example, an owner of a house who breaks a window to gain entry, having lost their keys, does not "break" the premises within the meaning of s 112. Likewise, a tenant who breaks a window in the same circumstances does not "break" the premises within the meaning of s 112 in the absence of some term of the relevant lease or residential tenancy agreement that limits their right or authority to enter the premises in that way.

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68 Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown* (1800), vol 1, ch 48 at 553, quoted in *Ghamrawi* (2017) 95 NSWLR 405 at 420 [80]-[81].

69 *John Spelman's Reading on Quo Warranto delivered in Gray's Inn (Lent 1519)*, Selden Society, vol 113 (1997) at 161, case 21.

70 See, eg, Criminal Law and Penal Methods Reform Committee of South Australia, *Fourth Report: The Substantive Criminal Law* (1977) at 217-218; Gillies, *Criminal Law*, 4th ed (1997) at 502; Anderson, "From the Thief in the Night to the Guest Who Stayed Too Long: The Evolution of Burglary in the Shadow of the Common Law" (2012) 45(3) *Indiana Law Review* 629 at 633, 644-645; Bagaric, *Ross on Crime*, 9th ed (2022) at 244. See also *Barker v The Queen* (1983) 153 CLR 338 at 355, citing "A Rationale of the Law of Burglary" (1951) 51(8) *Columbia Law Review* 1009 at 1020-1021.

71 See "A Rationale of the Law of Burglary" (1951) 51(8) *Columbia Law Review* 1009 at 1020-1021.



"Any dwelling-house"

64 The Crown submitted that the words of s 112(1)(a) of the *Crimes Act* by which a break and entry could be committed in "any dwelling-house" rather than "the dwelling-house of another" had negated any requirement of trespass for the completed offence. The Crown relied upon the constraint in s 109 which relevantly creates an offence if a person "enters the dwelling-house *of another*, with intent to commit a serious indictable offence therein" and "breaks out of the said dwelling-house" (emphasis added). By contrast with s 109, the words "of another" are not present in s 110 (assault with intent to murder or infliction of grievous bodily harm after a person "breaks and enters any dwelling-house") or s 111 (entering "any dwelling-house, with intent to commit a serious indictable offence therein") or s 112(1)(a).

65 It is unnecessary to consider the history or meaning of other provisions of Div 4 of Pt 4 of the *Crimes Act* such as ss 109, 110 and 111 because once "breaks and enters" is read in the manner explained above, it will necessarily confine the scope of "any dwelling-house" that could be broken and entered into by a person to those dwelling-houses in respect of which the person has no right, authority or permission to enter.

66 In any event, while the requirement for a trespass has remained consistent, the history of provisions concerning breaking and entering has oscillated between including or omitting a requirement of a dwelling-house "of another". For instance, Blackstone omitted the words "of another" in his description of the offence of burglary<sup>72</sup> although others continued to describe the offence (and the related offence of "housebreaking") as involving the break and entry into a dwelling-house "of another"<sup>73</sup>. Further, the *Robberies in Houses Act 1712* (12 Ann c 7) referred to

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72 Blackstone, *Commentaries on the Laws of England* (1769), bk 4, ch 16 at 224.

73 East, *A Treatise of the Pleas of the Crown* (1803), vol 2, ch 15 at 481; Eardley-Wilmot, *A Digest of the Law of Burglary* (1851), ch 7 at 102; Russell, *A Treatise on Crimes & Misdemeanors*, 1st Am ed (1824), vol 2, bk 4, ch 1 at 900, ch 3 at 965. Similar statements were repeated in the 1877 English edition of Russell with the same citations to support it: Russell, *A Treatise on Crimes and Misdemeanors*, 5th ed (1877), vol 2, bk 4, ch 1 at 2, ch 3 at 58-59.

an offence of burglary "in any dwelling-house" but it was held that this did not include a felony committed by a person in their own house<sup>74</sup>.

67 Perhaps most significantly, the offences in ss 109 and 112 of the *Crimes Act*, the former of which contains the words "of another" and the latter of which does not, appear to be derived respectively from s 11 and part of s 12 of the 1827 UK Act which, as mentioned above, were incorporated into New South Wales law in 1828. The presence of the words "of another" was never considered to make any difference. The 1856 edition of Archbold's *Pleading and Evidence in Criminal Cases*<sup>75</sup> provided that an indictment under s 12 was required to specify the owner of a dwelling-house for proof of breaking and entering "in the same manner as in burglary"<sup>76</sup>. The same view was taken in relation to provisions that succeeded s 12 of the 1827 UK Act such as s 56 of the *Larceny Act 1861* (24 & 25 Vict c 96)<sup>77</sup> and s 27 of the *Larceny Act 1916* (6 & 7 Geo 5 c 50)<sup>78</sup>.

68 An alternative submission by the Crown was that any element of the common law offence of burglary requiring that the offence take place in the home of another was one that was focused upon occupation as distinct from legal title. That submission would involve a radical change from the history of "breaking and entering", which treated a break "in law" as involving a legal question of trespass rather than a factual examination of occupation. The historical commentaries cited by the Crown in support of that submission establish, consistently with a requirement for trespass, that for an indictment of burglary a person described as the owner must be proved to have some right or title to occupy the premises<sup>79</sup>. In any event, the modern offence of burglary does not rely on actual occupation, given

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74 *R v Gould* (1780) 1 Leach 217 [168 ER 211]; *R v Thompson* (1784) 1 Leach 338 at 339 [168 ER 272 at 272].

75 Jervis, *Archbold's Pleading and Evidence in Criminal Cases*, 13th ed (1856).

76 Jervis, *Archbold's Pleading and Evidence in Criminal Cases*, 13th ed (1856) at 334, 337. See also *R v Gould* (1780) 1 Leach 217 [168 ER 211]; *R v Thompson* (1784) 1 Leach 338 [168 ER 272].

77 See Russell, *A Treatise on Crimes and Misdemeanors*, 5th ed (1877), vol 2, bk 4, ch 3 at 58-59.

78 See Kenny, *Outlines of Criminal Law*, 10th ed (1920), ch 12 at 178.

79 See, eg, Butler and Garsia, *Archbold: Pleading, Evidence & Practice in Criminal Cases*, 35th ed (1962) at 719.

that an offence under s 112 of the *Crimes Act* can be committed in a dwelling-house even though "it has never been ... occupied" as a dwelling<sup>80</sup>.

**Second, third and fourth issues: the appellant's lawful authority to enter premises not affected by lack of consent, purpose of entry or damage to property**

*The appellant's lawful authority to enter the premises*

69 Trespass occurs when a person enters the premises of another without lawful authority<sup>81</sup>, including when a person enters by licence or permission but with a purpose contrary to the exclusive purpose of the licence<sup>82</sup> or in a manner contrary to the terms of the licence<sup>83</sup>. There is a basic divide at common law between a lease and a licence. An essential element of a lease, in contrast with a licence, is that it confers a right against others to exclusive possession of land as distinct from a mere licence or permission to enter land and use it for some stipulated purpose or purposes<sup>84</sup>. A tenant's right of exclusive possession entitles the tenant (or, if held jointly, co-tenants) to bring an action for ejectment or, after entry, for trespass against all others apart from limited exceptions at common law, such as a landlord exercising a limited right of entry for confined purposes<sup>85</sup> or "using only such force as is necessary" to remove a tenant who remains in possession after the expiry of the tenancy<sup>86</sup>. The right of exclusive possession held

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80 *Crimes Act*, s 4 (definition of "Dwelling-house").

81 *Barker v The Queen* (1983) 153 CLR 338 at 341-342.

82 *Barker v The Queen* (1983) 153 CLR 338 at 365; *Roy v O'Neill* (2020) 272 CLR 291 at 320 [73].

83 *Hillen and Pettigrew v ICI (Alkali) Ltd* [1936] AC 65 at 69; *R v Jones* [1976] 1 WLR 672 at 675; [1976] 3 All ER 54 at 58-59; *Roy v O'Neill* (2020) 272 CLR 291 at 321 [76].

84 *Radaich v Smith* (1959) 101 CLR 209 at 216-217, 220, 222; *Lewis v Bell* (1985) 1 NSWLR 731 at 734; *Western Australia v Ward* (2002) 213 CLR 1 at 222 [501]; *Georgeski v Owners Corporation SP49833* (2004) 62 NSWLR 534 at 562 [102], citing Wonnacott, "Flawed judgment" (1999) 9911 *Estates Gazette* 165.

85 *Radaich v Smith* (1959) 101 CLR 209 at 222.

86 Redman, *The Law of Landlord and Tenant*, 6th ed (1912) at 624-625. See also Spencer, *Woodfall's Law of Landlord and Tenant*, 22nd ed (1928) at 924-925.

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by a tenant means, by definition, that others whom the tenant can exclude cannot bring an action for trespass against the tenant. A tenant may be liable to compensate a landlord for damage to premises. But the duty of a tenant to maintain the premises is a separate duty from, and not a condition upon, the tenant's right of exclusive possession<sup>87</sup>.

70 The Crown accepted that the residential tenancy agreement to which the appellant was a party conferred a right of exclusive possession upon the appellant and, accordingly, was a lease under the general law. Subject to the terms of the RT Act, this concession by the Crown necessarily means that the appellant was not a trespasser when he entered the premises. No person had a superior right to immediate possession of the premises. Neither the complainant, as co-tenant<sup>88</sup>, nor the landlord, could exclude the appellant from the premises or bring an action for trespass against the appellant upon his exercising his liberty to enter the premises.

71 There is no doubt that the acts of the appellant, if done by a person who did not have a liberty or authority to enter the Queanbeyan apartment, would have involved conduct amounting to the offence in s 112 of the *Crimes Act*. Another person without liberty to enter the apartment, who engaged in the appellant's acts of breaking the front door and entering the apartment, would be found to be a person "who breaks and enters any dwelling-house". In light of the conclusion that the appellant had a liberty to enter the apartment and was not, therefore, a trespasser, the central question on this appeal is whether that liberty was sufficient to save the appellant from a conviction for that offence.

72 These legal rules concerning trespass have been developed and refined over hundreds of years based upon the concept of possession. Possession is a different legal concept from occupation or habitation.

73 Whether a person does or does not occupy or inhabit premises are not necessarily straightforward questions. "Occupation" is a word with different meanings in different contexts<sup>89</sup>. In ordinary usage, a person would not be described as "occupying" a holiday property that they own but are not inhabiting.

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87 Douglas and McFarlane, "Defining Property Rights", in Penner and Smith (eds), *Philosophical Foundations of Property Law* (2013) 219 at 226-228.

88 *Murray v Hall* (1849) 7 CB 441 [137 ER 175]; *Forgeard v Shanahan* (1994) 35 NSWLR 206 at 221. See also *Jacobs v Seward* (1872) LR 5 HL 464 at 474-475.

89 Compare *Hadley v Taylor* (1865) LR 1 CP 53, *Parker v Leach* (1866) LR 1 PC 312, and, in a statutory context, *Western Australia v Ward* (2002) 213 CLR 1.

A furnished apartment rented to tourists but intermittently empty would not be described as "occupied". But, in law, "occupation" is a term of art used to mean the exercise of "physical control over land"<sup>90</sup>. Even then, the legal relevance of occupation, or "physical possession", has only been as an element which, combined with an intention, can establish a legal right to possession<sup>91</sup>. Hence, as Lord Browne-Wilkinson said in the leading speech in *J A Pye (Oxford) Ltd v Graham*<sup>92</sup>:

"there has always, both in Roman law and in common law, been a requirement to show an intention to possess in addition to objective acts of physical possession ... Suppose a case where A is found to be in occupation of a locked house. He may be there as a squatter, as an overnight trespasser, or as a friend looking after the house of the paper owner during his absence on holiday. The acts done by A in any given period do not tell you whether there is legal possession. If A is there as a squatter he intends to stay as long as he can for his own benefit: his intention is an intention to possess. But if he only intends to trespass for the night or has expressly agreed to look after the house for his friend he does not have possession. It is not the nature of the acts which A does but the intention with which he does them which determines whether or not he is in possession."

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"Habitation" is a word in common English usage without any common law meaning. The references to "habitation" in the law of trespass or the law of burglary were never in the technical sense of a legal element to establish trespass or burglary. A holiday house or a second apartment in which the owner is not in present habitation is capable of being burgled. Conversely, a person in habitation did not always have a right to immediate possession sufficient at common law to support an indictment for burglary<sup>93</sup>, as the mere fact of habitation does not

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90 Jowitt and Walsh, *Jowitt's Dictionary of English Law*, 2nd ed (1977), vol 2 at 1274. See also *Western Australia v Ward* (2002) 213 CLR 1 at 82 [52]; Gray and Gray, *Elements of Land Law*, 5th ed (2009) at 153 [2.1.7].

91 Holmes, *The Common Law* (1881) at 216.

92 [2003] 1 AC 419 at 435-436.

93 As explained by East, a travelling guest occupying a room at an inn had a "special interest in the bed-chamber ... for a particular purpose" of sleeping there that night, but this did not give rise to a "certain and permanent interest in the room itself" given that possession remained with the landlord: East, *A Treatise of the Pleas of the Crown* (1803), vol 2, ch 15 at 503.

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necessarily create a right of exclusive possession<sup>94</sup>. Further, at common law there would not be a burglary if the break and entry was to an inhabited building that was not a dwelling-house, such as a barn or warehouse<sup>95</sup>.

75 The facts of "occupation" or "habitation" may be difficult to determine in the context of domestic or family violence, especially where one spouse or family member leaves or is ejected from or locked out of the family home. That person may be either a perpetrator or a victim of domestic or family violence who may seek to return to the family home in a multiplicity of circumstances. Cases of shared households may raise similar problems about whether or not a member or former member of the household is in occupation or habitation, and who has the right to exclude them. As identified below, s 79 of the RT Act is evidently designed to address such problems by varying the rights of former co-tenants in cases of apprehended domestic violence.

76 It is against this background that the second, third and fourth issues are to be considered.

*Second issue: a tenant's liberty to enter premises is not conditional upon consent*

77 The Crown sought to argue that, in some manner, the appellant's liberty to enter the premises in which he had a right of exclusive possession was affected by the circumstances that: (1) the relationship between the appellant and the complainant had broken down; (2) the appellant was no longer occupying the apartment as a matter of fact; and (3) the complainant no longer consented to the appellant's entry into the apartment. The appellant accepted that these were the circumstances at the time of the alleged offence.

78 The Crown was unable to explain how any of the identified circumstances was capable, without more, of detracting from the appellant's liberty to enter premises in which he had a right of exclusive possession. In particular, as explained above, the complainant had no legal right to exclude the appellant from the premises whether under the residential tenancy agreement or at common law because of the breakdown of their relationship or otherwise. And, as the Crown

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94 *Radaich v Smith* (1959) 101 CLR 209 at 223; *Peakin v Peakin* [1895] 2 IR 359.

95 *R v Davies* (1800) 2 Leach 876 [168 ER 537] and East, *A Treatise of the Pleas of the Crown* (1803), vol 2, ch 15 at 499, cited in Butler and Garsia, *Archbold: Pleading, Evidence & Practice in Criminal Cases*, 35th ed (1962) at 718.

accepted, the appellant's departure from the apartment did not amount to an abandonment of the premises for the purposes of the RT Act.

79 There is no principle of general law that a co-tenant's entry into leased premises is conditional upon the consent of all or any other co-tenants, or all or any other persons in occupation of the leased premises. Accordingly, the circumstances of the appellant's entry (namely that, immediately prior to his entry on the morning of 8 July 2019, the complainant was the sole person in lawful occupation of the Queanbeyan apartment before the appellant's entry and she did not consent to his entry) do not deny the appellant's liberty to enter the premises over which he had a right of exclusive possession.

80 The Crown observed that the complainant was entitled to protect herself from apprehended violence to her person in the security of her own home by refusing to unlock the front door. In a practical sense, this is true. However, the complainant's power to keep the appellant, as a co-tenant, out of the apartment was not unlimited. The source of the appellant's liberty to enter the Queanbeyan apartment was the residential tenancy agreement. It was not the complainant's consent. It was not within the complainant's power unilaterally to alter the appellant's liberty to enter. For example, neither the landlord nor the complainant could lawfully change the locks for the premises to exclude the appellant without the appellant's consent, or without a reasonable excuse<sup>96</sup>.

81 Section 79 of the RT Act provides for the automatic termination of the tenancy of a tenant or co-tenant on the making of a final apprehended violence order that prohibits the tenant or co-tenant from having access to the residential premises. There is no evidence about whether the complainant had sought or obtained an apprehended violence order against the appellant prior to the offending on 8 July 2019. Section 79 is consistent with the continuation of a tenant's rights and obligations under a residential tenancy agreement, including the right of occupation, until the relevant residential tenancy agreement is terminated and, accordingly, inconsistent with any power of a co-tenant to affect those rights and obligations unilaterally.

82 Accordingly, as a matter of law, the appellant did not require the complainant's consent to enter the premises. The premise of Brereton JA's reasons, with which Fullerton J agreed, that any tenant of residential premises requires the consent of each other actual occupant of the premises to enter, is incorrect. To the

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96 RT Act, s 71(1).

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contrary, the complainant was not free to lock the appellant out of the premises after he ceased to be an occupant.

*Third issue: the RT Act does not make a tenant's liberty to enter conditional upon use for the purpose of residence*

83 One of the Crown's alternative arguments was raised for the first time in oral argument in this Court. It contended that at the time the appellant forcibly entered the Queanbeyan apartment, he did not have any legal entitlement to be on that premises because he did not, at that time, intend to occupy the premises for the purpose of using it as a residence, but instead entered the premises for the purpose of assaulting the complainant.

84 The RT Act applies to "residential tenancy agreements" in respect of "residential premises"<sup>97</sup>. "Residential premises" are relevantly any premises used or intended to be used as a residence<sup>98</sup>. "Premises" is defined inclusively<sup>99</sup>, and the Act specifies premises to which the RT Act does not apply<sup>100</sup>. Section 13(1) defines a "residential tenancy agreement" as an agreement under which a person grants to another person for value a "right of occupation" of residential premises for the purpose of use as a residence. Unlike the requirement of exclusive possession, which is necessary for a lease, the right of occupation need not be exclusive<sup>101</sup>. The effect of these provisions is that a residential tenancy agreement spans the divide between leases and licences at common law.

85 While a landlord has limited rights of entry<sup>102</sup>, the RT Act does not specifically confer a liberty of entry into residential premises upon a tenant or co-tenant. However, a tenant with a right to quiet enjoyment of residential premises

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97 RT Act, s 6.

98 RT Act, s 3 (definition of "residential premises").

99 RT Act, s 3 (definition of "premises").

100 RT Act, s 7.

101 RT Act, s 13(3)(a).

102 See RT Act, ss 55, 56, 57, 59, 60.



has a liberty of entry that is necessarily associated with that right and which is necessary for the vindication of that right<sup>103</sup>.

86 The Crown's submission should be rejected.

87 The effect of the Crown's submission would be that, contrary to its concession, the terms of a residential tenancy agreement make it a mere licence, rather than a lease, such that the common law liberty of the appellant to enter the premises is subject to terms in the same way that the terms of a permission constrain a licence<sup>104</sup>, so that if he entered contrary to those terms, he would be a trespasser.

88 Indeed, the terms of the definition of "residential tenancy agreement" in s 13 of the RT Act, upon which the Crown based its submission, do not concern the subjective intentions of a tenant. Subjective intention is irrelevant to the right of occupation granted under a residential tenancy agreement. The "purpose" there referred to is the objective purpose of the residential tenancy agreement at the time the agreement is entered into, not any subjective purpose of a tenant during any specific time of entry. To allow the validity of such agreements to fluctuate with the subjective intentions of the tenant would undermine the certainty of residential tenancy agreements.

89 Further, problems of proof would inevitably arise should such a contention be accepted. As the Crown properly conceded, their argument is "defeat[ed]" if the accused has "mixed purposes" at the time of entering the property. In any event, even in the realm of implied licences – which a residential tenancy agreement is not – a person who enters with one or more purposes will not usually be a trespasser even if they have some other purpose that falls outside the scope of the licence: a person's entry to a premises for an authorised purpose "is not made unlawful because he enters with another and alien purpose in mind"<sup>105</sup>.

90 Finally, a tenant's liberty to enter without any condition limiting entry to the purpose of use as a residence is also implied in three other ways from other provisions of the RT Act.

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103 RT Act, s 50.

104 See cases cited at fn 84 above.

105 *Roy v O'Neill* (2020) 272 CLR 291 at 319 [72], quoting *Barker v The Queen* (1983) 153 CLR 338 at 347.

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91 First, a liberty to enter for purposes other than residence might be necessary for the performance by the tenant of the duties: to keep the premises in a reasonable state of cleanliness<sup>106</sup>; to notify the landlord of any damage to the residential premises as soon as practicable<sup>107</sup>; and to permit a landlord to have access to the residential premises<sup>108</sup>. Entry for the performance of these duties will not necessarily be for the purpose of use of the premises as a residence.

92 Secondly, the provisions of the RT Act prohibiting the use of premises for illegal purposes further demonstrate that the tenant's entry into the premises for purposes other than use as a residence does not affect their right of occupation, although an illegitimate use may lead to a termination of the residential tenancy agreement in accordance with the process set out in the RT Act<sup>109</sup>.

93 Thirdly, s 7(h) of the RT Act provides that the Act does not apply to premises in fact used for residential purposes if the predominant use of the premises is for the "purposes of a trade, profession, business or agriculture". It follows that a residential tenancy agreement may be an agreement under which a person grants to another person for value a right of occupation of residential premises for the purpose of multiple uses including, for example, a profession provided that the non-residential use is not the predominant use. In that event, the tenant will be entitled to occupy (and enter) the premises for a purpose other than its use as a residence, namely, for the purpose of conducting a profession.

*Fourth issue: the RT Act does not make a tenant's liberty to enter conditional upon lack of damage to premises*

94 By its notice of contention, the Crown alleged that by entering the apartment "in the manner that he did", causing damage to the apartment, the appellant's conduct "exceeded the scope of the authority conferred upon him by the landlord and reflected in s 51(1)(d) of the [RT Act]". This was effectively a submission that the RT Act made entry into demised premises by a tenant conditional upon a lack of any damage to the premises by the tenant. If the appellant's entry to the premises was conditional in this way, the breach of that condition would make the appellant a trespasser.

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106 RT Act, s 51(2)(a).

107 RT Act, s 51(2)(b).

108 RT Act, s 58.

109 RT Act, ss 51(1), 91.

95 Section 51 of the RT Act imposes various requirements upon the use of premises by a tenant. Those requirements are a term of the residential tenancy agreement<sup>110</sup>. As already mentioned, one requirement, in s 51(1)(d), is that a tenant must not "intentionally or negligently cause or permit any damage to the residential premises". The RT Act specifies the consequences of a contravention of s 51(1)(d) including: a termination order by the Civil and Administrative Tribunal; an order for compensation; an order that the tenant remedy the breach; and alleviation of the landlord's obligation to repair damage<sup>111</sup>.

96 The Crown did not dispute that the appellant had been granted a right of occupation of the Queanbeyan apartment which, as explained above, was accepted to be a right of exclusive possession amounting to a lease at common law. Ultimately, the Crown also did not dispute that the appellant's right of occupation subsisted as at 8 July 2019. Rather, the Crown's argument was that the right of occupation granted to the appellant under the residential tenancy agreement was restricted to occupation that was consistent with s 51(1)(d). Hence, the appellant was only entitled to occupation that did not involve intentionally or negligently causing damage to the premises.

97 In effect, the Crown sought to treat the RT Act as having made the lessee's common law right of exclusive possession conditional upon a duty not to intentionally or negligently cause damage to the residential premises. Again, the common law liberty of a lessee to enter, occupy or use premises would be made subject to terms in the same way that the terms of a permission constrain a licence so that if the appellant entered contrary to those terms, he would be a trespasser. Whether or not s 51(1)(d), as a term of a different residential tenancy agreement that conferred a licence rather than a lease, might operate as a condition upon entry to residential premises, it did not affect the appellant's liberty to enter the premises associated with his right of exclusive possession.

98 The provisions of the RT Act clearly do not deprive a person with a right of exclusive possession of the liberty to occupy those premises even upon breach of a term such as s 51(1)(d). A termination order, as one of the Tribunal's discretionary powers upon breach of s 51(1)(d)<sup>112</sup>, or the occurrence of one of the circumstances in s 81, is necessary before that breach could result in a tenant's loss of the right of occupation granted under a residential tenancy agreement. Further,

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**110** RT Act, s 51(5).

**111** RT Act, ss 87(4), 187(1)(d), 187(1)(e), 63(3).

**112** RT Act, s 187(1)(i).

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s 49(2) unconditionally requires the landlord to "ensure that the tenant has vacant possession of any part of the residential premises to which the tenant has a right of exclusive possession". And s 50(4) makes the tenant's right to quiet enjoyment a term of every residential tenancy agreement.

99 If a tenant with a right of exclusive possession does not lose a liberty to occupy the premises because of a breach of s 51(1)(d), there is no reason to suppose that the tenant's liberty to enter ceases or is suspended on the occasion of a breach of s 51(1)(d), or that entry is conditional upon compliance with s 51(1)(d).

100 Further, s 51(1)(d) is contravened not only by a tenant who intentionally causes any damage to the residential premises, but also by a tenant who negligently causes or permits any damage to the premises. Section 51 also prohibits other conduct including interference with the reasonable peace, comfort or privacy of any neighbour of the tenant, or permitting a number of persons to reside in the premises that exceeds any number specified in the residential tenancy agreement. These breaches may involve much less serious harm than the appellant's act of intentionally damaging the door of the Queanbeyan apartment. There is no reason to treat intentional damage to residential premises differently from any other breach of s 51 of the RT Act, and there is no reason to suppose that the right of occupation granted under a residential tenancy agreement is conditional upon compliance with s 51 such that it could be removed by much less serious breaches of that provision, in the absence of a term of the agreement having that effect.

101 The notice of contention must be dismissed.

### **Disposition**

102 The appeal must be allowed. The orders of the Court of Criminal Appeal made on 20 August 2021 should be set aside and, in lieu of those orders, it should be ordered that the appeal pursuant to s 107 of the *Crimes (Appeal and Review) Act 2001* (NSW) be dismissed.

