**Houseguests, trespassers and the use of reasonable force in ejectment**

**Day [2015] EWCA Crim 1646, Court of Appeal**

Keywords: Assault occasioning actual bodily harm, common assault, self-defence, ejectment

Edina Day (D) was charged with assaulting Jac Jones (J), occasioning actual bodily harm, contrary to s.47 of the Offences Against the Person Act 1861 (OAPA). She appeared before HH Judge Cottle and a jury at Bristol Crown Court in June 2014 and entered a plea of not guilty.

In November 2013, D was staying overnight at a friend’s student accommodation in Clifton, Bristol. This consisted of a flat comprising three bedrooms, one occupied by D’s friend, Hannah Smeaton (S), one by another female, Shubnah Miah, and one by J. The alleged assault occurred in the early hours of the morning when D pushed J out of S’s bedroom (where D was going to be sleeping). Over the course of the evening, D, J and S had argued about J playing loud music in his room. Subsequently, while D was in S’s bedroom getting ready for bed, J and S were arguing in the living room. D asked J to come into the bedroom to talk, but the discussion became heated and D asked J, who had by his own admission been drinking, to leave S’s room. She warned him that if he did not leave, she would shut the door on him. J told the jury that he presumed that she meant leave the flat, and not just the bedroom. He stood his ground, saying he paid rent. At that point, J told the jury ‘She got up and stood really close to me. She was squaring up to my face. She said ‘‘say it again’’ and with that she pushes me with both hands in the chest, causing me to fall backwards and crack my head on the bathroom door frame.’ An ambulance was called and J was taken to hospital where he was given 10 staples to close up a head gash.

HH Judge Cottle directed the jury on self-defence but refused to allow D to also rely on the common law right of householders to use reasonable force to eject trespassers (‘ejectment’), because D was only S’s guest in the flat. He said, ‘She was there as a guest. So I reject that, and say that she has no defence arising from that.’ The jury acquitted D of the s. 47 OAPA offence (on the basis that J’s injuries were not caused by D’s push), but convicted her of common assault. She appealed to the Court of Appeal contending that the defence of ejectment was available to anyone who was in lawful occupation of property.

**HELD, ALLOWING THE APPEAL,** the judge had been wrong not to allow D to invoke the ejectment defence. That defence was ‘not only available to the owner or resident of the place in question, but generally if the relevant person is in lawful occupation. Such a person is entitled to use reasonable force to evict an unwanted trespasser’ (at [6]). According to Laws LJ, giving the judgment of the court:

‘The jury might well have concluded that this young woman, partly clad at night-time, did no more than seek to eject a drunk from her room. If the judge had directed the jury that [D] was in all the circumstances entitled to use reasonable force to get [J] out of her bedroom, it is clearly possible that they might have accepted that that was all she did and acquitted her’ (at [9]).

**Commentary**

***Causation in s. 47 OAPA Cases***

It appears that the jury acquitted D of the offence charged on the basis that J’s injuries were self-inflicted after J had ‘theatrically fallen backwards following what had in fact been a gentle push’ (at [3]). The present case therefore illustrates the proposition that the ‘daft’ or ‘unexpected’ response of the victim of an assault or battery may be sufficient to break the causal chain in a s. 47 case. As Stephenson LJ explained in *R v Roberts* (1972) 56 Cr App R 95, in which V jumped from a moving car and sustained injury amounting to actual bodily harm after the driver, D, attempted to remove her coat:

‘The test is: Was [actual bodily harm] the natural result of what [D] said and did, in the sense that it was something that could reasonably have been foreseen as the consequence of what he was saying or doing? [If] of course [V] does something so ‘daft’ . . . or so unexpected [such] that no reasonable man could be expected to foresee it, then it is only in a very remote and unreal sense a consequence of his assault, it is really occasioned by a voluntary act on the part of [V] which could not reasonably be foreseen and which breaks the chain of causation between the assault and the harm or injury.’ (at 102).

***Ejectment***

The common law defence of ejectment is not one that is frequently invoked but, when it is, the present case confirms that there is no rule of law restricting it to the owner of, or resident in, the property. One of the best-known examples is *R v Scarlett* [1994] 98 Cr App R 290, in which the accused’s manslaughter conviction was quashed on the basis of the trial judge’s misdirection to the jury about ejectment. The accused was a landlord in Halifax who had forcibly ejected ‘a large, heavily-built man’ who was ‘the worse for drink’ from his pub. This unfortunately culminated in the man’s death after he fell down

the steps leading up to the front door of the pub and struck his head on the pavement. Beldam LJ, giving the judgment of the Court of Appeal, said:

‘We are of the opinion that the directions to the jury in the circumstances of this case were inadequate to support a verdict of guilty of manslaughter. The appellant had given clear evidence that he only intended to use sufficient force to remove the deceased from the bar, an act he was lawfully entitled to do.’ (at 296)

More recently, in *Semple v DPP* [2009] EWHC 3241, which also involved the ejection of a drunken man from a pub, this time in Luton, Hickinbottom J referred to the ‘right of a licence holder to eject a customer whom he does not wish to remain on the premises’ (at [11]). He then added that ‘[At] common law an occupier of premises—*whether licensed or not*—has the right to ask a person to leave and the right to eject him using reasonable force if he refuses’ (at [11]; emphasis added).

The Crown in the present case relied on the case of *R v Burns* [2010] EWCA Crim 1023, [2010] 1 WLR 2694, in support of the proposition that D could not claim the defence of ejectment. In *Burns*, the accused had been convicted of assault occasioning actual bodily harm after forcibly removing a prostitute from his car as a result of which she suffered scratches and grazes to her legs. He had picked her up in the red light area of Huddersfield, negotiated and paid a fee of £50 for oral sex, and then driven to a more ‘secluded’ area when he switched on his car’s interior lights and realised that she was somewhat less attractive than she had appeared whilst on the street. He had asked her to get out but, after she had refused, he had (he claimed) used no more than reasonable force to eject her from his car. However, his defence of ejectment (described by Lord Judge CJ as ‘self-help’) had been rejected by the jury and his conviction was upheld by the Court of Appeal. Laws LJ in the present case pointed out that the defence in *Burns* had failed because it had not been necessary for the accused to use force at all (instead of dragging the woman out, he could have regained possession of the vehicle by driving her back to the place where he had picked her up), as opposed to the defence not being available to the owner of a vehicle. Laws LJ said that *Burns* ‘does not begin to contradict the proposition that in circumstances such as those in this appeal the lawful occupier of the space in question is entitled to use reasonable force to remove an unwanted trespasser’ (at [9]).

***Householder Cases under the Criminal Justice and Immigration Act 2008***

D’s application for leave to appeal was heard in the Court of Appeal in February 2015. In granting leave, Hallett LJ referred to the ejectment defence as the ‘householder defence’ (*R v Day* [2015] EWCA Crim 253 at [5]). That invites confusion with s. 76(5A) of the Criminal Justice and Immigration Act 2008 (the 2008 Act). That provision was inserted into the 2008 Act by s. 43 of the Crime and Courts Act 2013 (the 2013 Act). Section 76(5A) of the 2008 Act (as amended) provides:

In a householder case, the degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was grossly disproportionate in those circumstances.

In the present case, Laws LJ said that ‘the expression ‘‘householder defence’’ appears in section 76 of the [2008 Act]. That of course has no bearing in the present case’ (at [4]). However, Laws LJ does not explain why the ‘householder defence’ would be inapplicable. It is not a question of timing; s. 76(5A) became effective several months before the incident in the present case. The likely explanation is that s.76(5A) had ‘no bearing’ because D was not acting in self-defence. Given the jury’s verdict (not guilty under s. 47 OAPA but guilty of common assault), they must have accepted that, whilst D pushed J out of S’s room, she did not do so with sufficient force to cause his injuries. Hence, there was no suggestion that she used disproportionate force; rather, her plea of self-defence was rejected because she was not acting in order to defend herself (but was acting in order to eject a drunken man from her friend’s bedroom).

However, had D been acting in self-defence, and had there been a dispute as to the amount of force used, then it appears that s. 76(5A) of the 2008 Act would have been applicable. Section 76(8A) of the 2008 Act (as amended by the 2013 Act) defines ‘a householder case’:

For the purposes of this section ‘a householder case’ is a case where –

1. the defence concerned is the common law defence of self-defence,
2. the force concerned is force used by D while in or partly in a building, or part of a building, that is a dwelling . . .
3. D is not a trespasser at the time the force is used, and
4. at that time D believed V to be in, or entering, the building or part as a trespasser.

The following points should be noted about the scope of the ‘householder case’.

*Need to be Acting in ‘Self-Defence’.* Section 76(5A) only concerns ‘the common law defence of self-defence’. At first glance, this appears to rule out cases where the accused was acting in defence of others, for example her children. However, this is not the case: s. 76(10) of the 2008 Act states that ‘references to self-defence include acting in defence of another person’. Thus, the accused is entitled to use ‘disproportionate’ force in protecting themselves and/or other people in a ‘dwelling’. However, s. 76(5A) clearly does not apply to the defence of ejectment, hence its unavailability in the present case.

*Need To Be In—or Partly In—a ‘Dwelling’.* The accused must be in, or partly in, a ‘building’ which is also a ‘dwelling’. Clearly, this means that if the accused is in her own home, s. 76(5A) will apply, but it is not a requirement. Hence, if D is staying as a guest with friends or relatives in their home and uses force against a burglar or trespasser, it will still be classed as a ‘householder case’. This aspect of the ‘householder’ defence would have been satisfied in the present case. The concept of being ‘partly in’ a building is undefined in the 2008 Act and may well attract litigation. However, it is clearly designed to deal with cases where the accused uses ‘disproportionate’ force against a burglar (or attempted burglar) whilst stood in the doorway or other entrance of a dwelling—perhaps even whilst leaning out of a window. As long as the accused was at least ‘partly’ in a building, which is also a ‘dwelling’, s. 76(5A) will apply.

*The Accused Must Not Be a ‘Trespasser’.* As far as the accused is concerned, they must not be trespassing. They need not be the owner or resident of the dwelling in question, but they must be there lawfully, for example as a guest. This aspect of the ‘householder’ defence would also have been satisfied in the present case.

*Need to Believe that V was Trespassing.* Although s. 76(5A) is clearly designed to deal with householders who use force against burglars, there is no requirement that V actually was trespassing, or even that V was in the building, at the time. It is sufficient that D believed that V was in, or was entering, the building as a trespasser. Moreover, s. 76(8D) of the 2008 Act (as amended) states that ‘subsections (4) and (5) apply for the purposes of subsection (8A)(d) as they apply for the purposes of subsection (3)’. This means that:

* the accused’s belief may be mistaken, even unreasonably mistaken; provided it is a genuinely held (and sober) belief, she can rely upon it (see s. 76(4) of the 2008 Act)
* the accused cannot rely upon a mistaken belief if that belief was induced by voluntary intoxication (see s. 76(5) of the 2008 Act).

As far as the present case is concerned, it appears that this element would also have been satisfied. According to D, she had asked J to leave S’s bedroom three times but he refused to do so, culminating in her pushing him out of the room. J may therefore have genuinely believed—rightly or wrongly—that D was trespassing by refusing to leave S’s room.

Finally, it is useful to consider how s. 76(5A) might apply to some of the pre-2008 Act cases involving householders and burglars. In *R v Martin* [2001] EWCA Crim 2245, [2003] QB 1, the outcome may have been different. In Martin, D’s plea of self-defence was rejected and he was convicted of murder (and wounding with intent, contrary to s. 18 OAPA) on the basis that he used excessive force in shooting at two burglars in his home, killing one of them and injuring the other. Under s. 76(5A), D may have been acquitted on the basis that the force used was not ‘grossly disproportionate’ according to the facts as he believed them to be. In *R v Hussain & Another* [2010] EWCA Crim 94, however, the outcome would be exactly the same. In that case, the defendants chased a burglar down the street before attacking him with a cricket bat and other weapons, causing serious injury. The defendants were convicted of causing GBH with intent, contrary to s. 18 OAPA, after their self-defence pleas failed. It is clear that s.76(5A) would not alter these verdicts, because it was not a ‘householder case’. At the time of the force being used, the defendants were not ‘in or partly in a building’ (as required by s.76(8A)(b)) and at ‘at the time the force [was] used’, the victim was not ‘in, or entering, the building or part as a trespasser’ (as required by s. 76(8A)(d)).