[COURT OF CRIMINAL APPEAL.]

1942 **Moseley S.P.J., Hearne and de Kretser JJ.**

THE KING *v.* SILVA KAVIRATNE.

*20—M. C. Balapitiya, 42,647.*

*Court of Criminal Appeal—Application for extension of time—New ground of appeal—Not considered by Supreme Court before—Causing grievous hurt whilst housebreaking—Penal Code, s. 445.*

**Application for extension of time within which to appeal may be granted where the ground upon which it was sought to appeal raised a point which does not appear to have been considered by the Supreme Court of Ceylon.**

**Whilst house-trespass, on which the offence of housebreaking is founded, is complete when the act of entry is complete, the commission of the offence continues so long as the house-trespass, which follows the act of entering continues.**

THE accused filed an application for leave to appeal on the facts. At the hearing of the application, Counsel for the accused stated that he could not support the points raised in the application but brought to the notice of the Court an important point of law which had not been raised hitherto in Ceylon. The application was dismissed, but the Court suggested that the accused, if so advised, might make an application for extension of time to appeal on the law. This application was accordingly made and came up for hearing on August 31, 1942. The application was allowed, and the appeal was argued on the same date.

*E. H. T. Gunasekera, C.C.*, appeared as *amicus curiae*.—This is not a murder case, and it is submitted that except on strong grounds this Court will not entertain an application for extension of time for leave to appeal. *Vide*, for example, *R. v. Rigby* [1]. *R. v. Williams* [2] is an instance where extension of time was granted, but in that case the ground of appeal was the discovery of fresh evidence. The point of law sought to be taken in the present case is one which could have been taken at the trial. It cannot be said that want of legal assistance prevented the accused from taking the point earlier. Throughout the preliminary inquiry and the trial the accused was defended by Counsel.

[The objection was overruled, and leave to appeal on the point of law was granted.]

*H. W. Jayewardene*, for the appellant.—The conviction and sentence under section 445 of the Penal Code cannot be justified in law. That section contemplates that the two acts of housebreaking and causing grievous hurt should be contemporaneous in point of time. In the present case, however, the offence of grievous hurt was committed after the act of housbreaking had terminated. The case of *Mirza Said Ahamad v. Emperor* [3] is exactly in point. See also *Queen Empress v. Ismail Khan* [4] and *Enayet Ali v. Emperor* [5].

*E. H. T. Gunasekera, C.C.*, for the Crown, was not called upon.

[1] *(1923) 17 Cr. App. R. 111.*
[2] *(1912) 8 Cr. App. R. 71.*
[3] *28 Cr. L. J. 554.*
[4] *(1886) I. L. R. 8 All. 649.*
[5] *36 Cr. L. J. 698.*

'September 14, 1942. MOSELEY S.P.J.—

This matter comes before us by way of an application for extension of time within which to appeal. Leave was granted inasmuch as the ground upon which it was sought to appeal raised a point which does not yet appear to have been considered by the superior Courts of the Island. and in regard to which the few authorities which we had consulted appeared to support the applicant's contention.

The appellant was charged with—

(1) housebreaking by night;
(2) causing grievous hurt whilst committing housebreaking;
(3) causing grievous hurt.

He was convicted on the first and second counts and sentenced to terms of five and fifteen years' rigorous imprisonment, respectively.

The facts proved against the appellant are shortly as follows: At 1 A.M. on the morning of December 9, 1941, the house of a woman, Jameshamy, was entered in circumstances amounting to housebreaking. The woman identified the intruder as the appellant. He struck her on the head, whereupon she ran to a near-by boutique. The appellant ran after her to the boutique, where he seized her and dragged her back to the front steps of her house, where he struck her on the legs with a club, fracturing certain bones. He then held her by the hair and "flung her inside the house through the doorway".

The point taken on behalf of the appellant is that the evidence does not support the conviction on count (2) of the indictment, inasmuch as the offence of grievous hurt was committed after the offence of housebreaking had terminated. The section of the Penal Code under which count (2) was laid is 445, which is as follows:—

> "Whoever, whilst committing lurking house-trespass or housebreaking, causes grievous hurt to any person or attempts to cause death or grievous hurt to any person, shall be punished with imprisonment of either description for a term which may extend to twenty years, and shall also be liable to fine, or to whipping."

The decision of the point raised hinges upon the interpretation of the word "whilst". Counsel contended that a necessary ingredient of the offence is that it must be committed at or within the period of time occupied by the act of housebreaking, which act, he argued, is complete when an intruder has effected entrance of the house in one of the ways contemplated by section 431 of the Code. He cited the case of *Queen Empress v Ismail Khan and Others*[1], in which it was held that a conviction under this section could not be had unless the offence of lurking house-trespass or housebreaking had been completed, that is to say, the causing of grievous hurt during an abortive attempt to commit housebreaking does not constitute an offence under this section. "In other words", said Straight J., "the causing of the grievous hurt . . . . must be done in the course of the commission of the offence of housebreaking".

[1] *8 All. 649.*

Those words, I would say with respect, correctly state the law but the learned Judge did not, nor was he in that case required to, offer any opinion as to the meaning of the words "in the course of the commission of the offence of housebreaking". A case which is more in point and of more assistance to the appellant is *Mirza Said Ahmad and Another v. Emperior through Ram Karan Singh and Others*[1], in which Ashworth J. held that a housebreaking is complete when the act of entering the house is complete, and that any grievous hurt subsequently caused by the housebreaker cannot be said to be grievous hurt caused while he was committing house-breaking within the meaning of this section. In that case, the Magistrate, before whom the proceedings were originally taken, had held that no offence under the section could be established, and Ashworth J. was at first disposed on reading the section to hold that this was taking too narrow a view of it.

With respect we would say that, in our opinion, the first impression of the learned Judge was correct. The offence of housebreaking is defined in section 431 as follows:—

> "A person is said to commit 'housebreaking' who commits house-trespass if he effects his entrance into the house or any part of it in any of the six ways hereinafter described . . . ."

The offence of housebreaking is founded upon house-trespass, an offence which is committed by entering into or remaining in premises of a certain description with a certain intent. House-trespass may thus be committed in a moment of time or may be a proceeding of some duration. It follows in our view, that the same time factors apply to the offence of house-breaking. While we agree, with respect, with Ashworth J., that the offence is complete when the act of entry is complete, in our view the commission of the offence continues as long as the house-trespass, which follows the act of entering, continues. From the point of view of time we think that the appellant was properly convicted.

The further point was taken that, assuming the law to be as we have stated it to be, the offence of housebreaking had terminated with the first departure of the appellant from the house. It will be borne in mind that the grievous hurt was caused at the front steps of the house to which he had returned. The case of *Enayet Ali v. Emperor*[2] was cited in support. In that case, the accused committed lurking house-trespass and also grievous hurt in a courtyard, but it was not possible to make out from the evidence that the courtyard was a part of the house. Guha J. expressed the opinion that if the courtyard had been proved to be part of the house the act of the accused was an offence against the section. In our opinion, the evidence in this case clearly leads to the conclusion that the spot at which the grievous hurt was caused was part of the house. On this point, too, the appeal fails.

*Appeal dismissed.*

[1] *28 Cr. L. J. 554.*

[2] *36 Cr. L. J. 698.*