



## HIGH COURT OF AUSTRALIA

10 May 2023

BA v THE KING  
[2023] HCA 14

Today, the High Court, by majority, allowed an appeal from a decision of the Court of Criminal Appeal of the Supreme Court of New South Wales. The appeal concerned whether, in order to commit an offence under s 112 of the *Crimes Act 1900* (NSW) by breaking and entering any dwelling-house and committing a serious indictable offence therein, a person must be a trespasser, that is, someone who enters premises without lawful authority.

The appellant and the complainant were in a domestic relationship and were co-tenants of an apartment under a residential tenancy agreement regulated by the *Residential Tenancies Act 2010* (NSW). By about May 2019, the relationship broke down. The appellant moved out of the apartment, removed most of his possessions and ceased paying rent, but remained on the lease as a co-tenant. In July 2019, the appellant demanded to be let into the locked apartment while the complainant was home. When the complainant refused him entry, the appellant kicked in the door, grabbed the complainant by the shoulders, shook her, yelled at her, and seized her mobile phone and threw it on the floor. In the District Court of New South Wales, the appellant pleaded guilty to common assault, intimidation and destruction of property but pleaded not guilty to an offence contrary to s 112. The trial judge directed a verdict of not guilty on this count, holding that the Crown had failed to establish an essential precondition to liability for the offence because, as a tenant at the time of the alleged offence, the appellant had a right to enter and could not be guilty of breaking and entering into his own premises.

The Court of Criminal Appeal allowed an appeal against the appellant's acquittal on a question of law, concluding that an entry into a dwelling-house pursuant to a pre-existing right to enter will nonetheless involve a "break" if made without the consent of the actual occupant, or those entitled to occupy the premises.

The High Court, by majority, allowed the appeal. The Court held that the composite elements of "breaks and enters" in s 112(1)(a) require a trespass, being entry into premises of another without lawful authority. The appellant's right of occupation under the tenancy agreement was not in the nature of a mere permission to occupy qualified by his purpose in entering the apartment or by his conduct in causing damage to the premises. The appellant had lawful authority to enter the apartment by use of force that would constitute a "break" in the absence of such authority. That authority was not conditioned on the complainant's consent, nor removed by the fact the appellant had ceased to occupy the apartment prior to the expiration of the residential tenancy agreement.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*