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Singh v The Queen: A Path Toward Confusion, Redundancy and Doctrinal Inconsistency

KENNETH J ARENSON*

In Walkington v The Queen, the English Court of Criminal Appeal enunciated criteria for determining whether a building contains parts thereof for purposes of ss 76 and 77 of the Crimes Act 1958 (Vic): burglary and aggravated burglary respectively. In Singh v The Queen, the Victorian Court of Appeal was confronted with a situation in which a trespassory entry had been made into a building that, according to the principles enunciated in Walkington, did not consist of any part or parts. Recognizing that there was scant evidence with which to prove that the accused’s entry had been accompanied by an intention to commit one of the crimes specified in ss 76 and 77, the court nonetheless affirmed the applicant’s conviction for aggravated burglary under s 77. In so doing, the court reaffirmed its earlier decision in The Queen v Chimirri which held that a trespassory entry into a building results in continuing trespass for as long as the accused remains in the building. In Chimirri, it was further held that if an accused forms an intention to commit one of the specified crimes subsequent to the initial trespassory entry and enters a part of the building with that intention, he or she has committed burglary, aggravated burglary, or both by virtue of the continuing trespass doctrine. The discussion to follow will demonstrate that the court’s reasoning in both Chimirri and Singh is not only flawed, but flies in the face of the very passages from the judgment of Lane LJ in Walkington that were quoted with apparent approval in Singh. The discussion will further demonstrate that the continuing trespass doctrine adds nothing of value to the law of burglary as it existed prior to Chimirri and Singh; rather, its only effect is to add confusion and uncertainty to what had been a settled area of the law.

1. INTRODUCTION

In R v Walkington,¹ the English Court of Appeal had occasion to resolve several important issues concerning the construction of s 9 of the Theft Act 1968 (UK), the English counterpart to Victoria’s statutory offence of burglary as set out in s 76 of the Crimes Act 1958 (Vic). For present purposes, the key issue raised in Walkington was what constitutes a ‘part of a building’ within the context of s 9 of the Theft Act 1968 (UK). In writing for the court, Lane LJ opined that a building

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1 R v Walkington [1979] 2 All ER 716 (‘Walkington’).
2 Ibid 1174 – 1176 [F]-[C]. Lane LJ’s resolution of this issue is highly persuasive on the same issue for purposes of s 76 of the Crimes Act 1958 (Vic), the Victorian counterpart to
may or may not consist of parts thereof. Specifically, Lane LJ held that a building can only consist of a part or parts if, at the time of entry, there is a partitioned area or areas within the building in which the accused has no permission or lawful privilege to enter and, therefore, his or her presence there would be trespassory in the actus reus sense of that term. Thus, if one has no permission or lawful privilege to enter any portion of a building, the building would not be regarded as consisting of any part(s). In this instance, therefore, one could only be convicted of burglary on the basis that he or she entered a building as a trespasser with the intention of committing one of the offences stipulated in s 9.

In *Walkington*, the accused had entered a department store with the apparent intention of purusing the merchandise and/or making a purchase, both of which

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3 s 9 of the Theft Act 1968 (UK).
4 Ibid 1175 – 1176 [H]-[A]. Lane LJ held that while some sort of partition was required in order for an area of a building to constitute 'a part of a building' in the context of s 9, it was not necessary for the partition to be a physical one such as a closed or locked door. A mere posting of a sign restricting access to persons other than an accused, for example, would constitute enough of a partition to qualify as a part, provided the area was also one in which the accused had no permission or lawful privilege to enter: ibid 1176 [A]-[B].
5 Ibid 1175 [D], *R v Jones & Smith* [1976] 1 WLR 672 ("Jones & Smith"). In *Jones & Smith*, the English Court of Appeal held that one enters 'as a trespasser' if he or she enters with knowledge or recklessness (the mens rea component) that the entry is being made without permission, that is, without permission or, in other words, for a purpose in excess of the scope of whatever permission, if any, was granted (the actus reus component): ibid 674 – 675 [D]-[E]. Presumably, the same test would be used to determine whether a person claiming a lawful privilege to enter would be regarded as having entered 'as a trespasser'; that is to say that one who enters with knowledge or recklessness (mens rea) that he or she is entering for a purpose that exceeds the scope of the whatever common law or statutory privilege is being claimed (actus reus) would likewise enter 'as a trespasser' under s 9 of the Act. This principle was later reaffirmed by the High Court of Australia in *Barker v The Queen* (1983) 47 ALR 1, [6] per Brennan and Deane JJ ("Barker").
6 *Barker* (1983) 47 ALR 1, [19]-[30] per Brennan and Deane JJ. Though Brennan and Deane JJ did not explicitly refer to an entry for a purpose in excess of any claimed permission or lawful privilege as the actus reus component of an entry 'as a trespasser', this is implicit in the joint judgment of Brennan and Deane JJ as well as other case law: see, for example, *R v Collins* [1973] QB 100, 104 – 107 [C]-[C], ("Collins"); *Jones & Smith* [1976] 1 WLR 672, 674 – 675 [C]-[E]. As Collins and Jones & Smith made clear, however, there is an implied mens rea component to the element of entry 'as a trespasser' which requires that the accused be aware that his or her entry is or might be for a purpose that exceeds the scope of any claimed permission or lawful privilege to enter: *Collins* [1973] QB 100, 104 – 105 [H]-[E], ("Collins"); *Jones & Smith* [1976] 1 WLR 672, 675 [B]-[D].
7 *Walkington* [1979] 2 All ER 716, 1175 – 1176 [E]-[A].
8 Section 76 of the Crimes Act 1958 (Vic), Victoria's statutory offence of burglary and the counterpart to s 9 of the Theft Act 1968 (UK), provides:
   (1) A person is guilty of burglary if he enters any building or part of a building as a trespasser with intent
      (a) to steal anything in the building or part in question; or
      (b) to commit an offence
   (i) involving an assault to a person in the building or part in question; or
   (ii) involving any damage to the building or to property in the building or part in question which is punishable with imprisonment for a term of five years or more....
were purposes that fell within the scope of the permission that the store had extended to the public at large. After moving from the basement area to the first floor, the accused entered an area that was comprised of a three-sided moveable counter that was backed up against a wall of the building. Noticing that the this rectangular area was temporarily unattended and had a partially opened cash register drawer in one of the corners, the accused ignored a sign restricting access to employees and entered the area for the purpose of completely opening the register drawer, ostensibly to look for something worth stealing such as money. Upon discovering that the drawer was devoid of money or any other item that was worthy of stealing, the accused vacated the area and was quickly apprehended and charged with burglary under s 9 of the Act. Cognizant of the fact that it was devoid of proof that the accused had entered the store for a purpose in excess of the permission granted to the general public, the prosecution was relegated to proving that the accused had committed burglary by entering a part of a building as a trespasser with the intention of stealing property therein, presumably money or credit card receipts.  

In dismissing the appeal, Lane LJ relied upon the above reasoning and affirmed the conviction for burglary on the basis that the appellant had entered a part of a building with the intention of stealing property therein. The balance of this piece will examine two subsequent decisions of the Victorian Court of Appeal that the writer believes are palpably flawed and, as one might expect, inimical to the objective of maintaining doctrinal consistency in the law.

2. THE FACTS AND ISSUES RAISED IN SINGH V THE QUEEN

In Singh v The Queen, the applicant was convicted of one count of aggravated burglary and three counts of indecent assault. The applicant then sought and obtained leave to appeal his conviction to the Victorian Court of Appeal which dismissed the appeal except insofar as it related to the trial judge’s order requiring the applicant to register as a sex offender under the Sex Offenders Registration Act 2004 (Vic). On appeal, the applicant argued that in instances that involve an initial trespassory entry into what amounts to a mere building under the principles enunciated in Walkington, a conviction for burglary cannot be predicated on the basis that the accused entered a part of a building as a trespasser with intent to commit one of the crimes enumerated in subss 76(1)(a) and (b). The applicant also urged that under the facts presented in Singh, there could be no conviction for burglary unless the accused possessed one or more of the mens rea stipulated

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9 Ibid 1173 [E]-[G].
10 Ibid 1173 – 1174 [E]-[C].
11 Ibid 1175 – 1176 [E]-[C].
12 Ibid 1176 [B]-[C].
13 Singh v The Queen [2013] VSCA 300 (20 December 2013) (‘Singh’).
14 See Crimes Act 1958 (Vic) ss 76 and 77.
15 Crimes Act 1958 (Vic) s 39.
16 Singh, [2013] VSCA 300, [17]-[20].
in those subsections at the time of the trespassory entry. Succinctly stated, the applicant submitted that in the absence of proof that one or more of the enumerated *mens reas* existed at the time of the initial trespassory entry, the prosecution must fail for want of proof of temporal coincidence between the accused’s voluntary act or acts that are causally linked to the trespassory entry and one or more of the *mens reas* stipulated under subss 76(1)(a) and (b) of the Act. 17 By implication, therefore, the accused urged that it is only in instances in which sufficient proof of a trespassory entry is lacking that a conviction for burglary can be predicated on an allegation that the accused subsequently formed an intention to commit one of the stipulated offences and entered a *part* of the building as a trespasser with that intention. 18

In rejecting the applicant’s arguments, Maxwell P, Coghan JA and Dixon AJA reposed great reliance on the court’s earlier decision in *R v Chimirri*. 19 In that case, the applicant had entered the victim’s home as a trespasser, although there was little evidence to suggest that the applicant intended to assault the victim at the time of the initial trespassory entry. 20 As in *Singh*, the Court of Appeal rejected the applicant’s argument that in instances involving a trespassory entry into a mere building, the entrant cannot be convicted of burglary on the basis that he or she thereafter formed an intention to commit one of the specified offences and entered a *part* of the building as a trespasser with that intention. 21 The essence of the applicant’s argument, as in *Singh*, was that unless the initial trespassory entry was accompanied by one or more of the *mens reas* set out in subss 76(1)(a) and (b), the prosecution’s case must necessarily fail due to an inability to prove the requisite temporal coincidence between the accused’s voluntary act or acts giving rise to the entry and one or more of the stipulated *mens reas*. 22 In rejecting this contention and affirming the conviction, the court expressly followed the *Chimirri* precept that a person who makes a trespassory entry into a building remains a trespasser until such time as he or she has exited the building. 23 Thus, if

17 Ibid [6].
18 Ibid. [18] (Quoting Professor Smith’s discussion in *The Law of Theft (Oxford University Press, 3rd ed. 1977) 152*, [329]). It should be noted that in order to satisfy the requirement of temporal coincidence under s 76 (and s 9 of the *Theft Act 1968 (UK)*), the prosecution must also prove that at the time of the relevant voluntary act(s) giving rise to the effective entry, the accused was aware or at least reckless as to the fact that he or she was entering without permission or lawful privilege: *Collins* [1973] QB 100, 104 – 105 [H]-[D], *Jones & Smith* [1976] 1 WLR 672, 675 [D]-[E]. For a brief and insightful explanation of the doctrine of temporal coincidence, see P Gillies, *Criminal Law, 4th edn* (LBC: 1997) 42, 45.
19 *R v Chimirri* [2010] VSCA 57(‘*Chimirri*’).
20 Ibid [11]-[14].
21 Ibid [30]-[32].
22 Ibid [12], [16]. Although the Court of Appeal did not expressly use the term temporal coincidence in its judgment in *Chimirri*, the clear import of the applicant’s argument was that in cases involving an initial trespassory entry into a building, the prosecution cannot satisfy the doctrine of temporal coincidence unless it can adduce sufficient evidence that the accused possessed one or more of the requisite *mens reas* at the time of the trespassory entry into the building: ibid.
23 Ibid. [32].
the entrant forms an intention to commit one of the enumerated crimes subsequent to the trespassory entry and thereafter enters a part thereof with that intention, he or she has committed a burglary. 24

3. WHY THE REASONING OF CHIMIRRI AND SINGH IS ERRONEOUS AND INIMICAL TO DOCTRINAL CONSISTENCY IN THE LAW

The reasoning employed by the Court of Appeal in Chimirri and Singh cannot be reconciled with the judgment of Lane LJ in Walkington. In Singh, the Court of Appeal purported to approve of the key passages from his Lordship’s judgment that delineated clear and concise criteria for determining whether a building is to be regarded as having a part or parts within the meaning of s 9 of the Theft Act 1968 (UK) (and s 76 of the Crimes Act 1958 (Vic)). 25 Paradoxically, however, the court flouted these criteria and held that notwithstanding that an accused enters a building under circumstances that would make him or her a trespasser in all portions of the structure, it is nonetheless possible for the accused to thereafter form an intention to commit one of the specified offences and enter a part of the building, thereby incurring criminal liability for burglary. Yet the court in Singh was conspicuously silent on the question of how an accused can enter a part of a building as a trespasser with one of the requisite criminal intentions when the building into which the alleged trespassory entry was made does not consist of any part or parts as delineated by the passages from the judgment of Lane LJ in Walkington that were ostensibly cited with approval; that is, if an accused affects a trespassory entry into a building under circumstances that render his or her presence in any part thereof a trespassory one, the precepts expressed in Walkington preclude a conviction for burglary or aggravated burglary on the basis that the accused entered a part of a building as a trespasser with the intention of committing one of the offences stipulated in ss 9 and 76 of the Theft Act 1968 (UK) and Crimes Act 1958 (Vic) respectively.

This raises a question as to why the Court of Appeal flouted the very passages from Walkington that were cited with apparent approval in Singh and, just as importantly, whether the Chimirri and Singh notion of continuing trespass 26 has had any meaningful impact on the law of burglary under s 76 as it stood prior to those decisions? In Chimirri and Singh, the court was undoubtedly cognizant of the fact that there was insufficient evidence of temporal coincidence between the applicants’ voluntary acts that were causally linked to the effective entries and the requisite mens rea to commit one or more of the offences specified in subss 76(1) (a) and (b). The court was also cognizant that neither applicant could be convicted of burgling a part of a building that did not exist under the principles set forth in Walkington.

24 Singh, [2013] VSCA 300, [14]-[27].
25 Ibid [18].
26 Chimirri, [2010] VSCA 57, [32].
4. HAS THE NOTION OF CONTINUING TRESPASS IMPACTED THE STATUTORY CRIME OF BURGLARY IN VICTORIA?

When read in their entirety, the Court of Appeal’s judgments in Chimirri and Singh can be summarized as follows. It is only in instances where the prosecution is unable to prove a trespassory entry into a building that it becomes relevant and necessary to determine whether the building in question consists of a part or parts thereof within the meaning of ss 9 and 76 of the Theft Act 1968 (UK) and Crimes Act 1958 (Vic) respectively. Under these circumstances, the law regards it as fair and equitable to convict a person of burglary despite the fact that his or her initial entry into a building was ostensibly non-trespassory. Thus, one who makes an apparent lawful entry into a building and thereafter forms an intention to commit one or more of the enumerated offences under s 76, can still be convicted of burglary if he or she enters a part of the building as a trespasser with such an intention. This was precisely the type of situation presented to the English Court of Criminal Appeal in Walkington.

On the other hand, it was undisputed that the applicants in Chimirri and Singh made trespassory entries into the homes in question, although there was scant evidence to suggest that either entry was accompanied by an intention to commit one of the crimes stipulated in subss 76(1)(a) and (b). Recognising that temporal coincidence was therefore lacking between the voluntary act or acts of the applicants giving rise to the relevant trespassory entries and the subsequently formed intentions to commit one or more of the crimes stipulated in these subsections, the court resorted to a bit of sophistry in order to affirm the applicants’ convictions for aggravated burglary. In particular, the court tepidly reaffirmed its earlier pronouncement in Chimirri and held that one who affects an initial trespassory entry into a building retains the status of a continuing trespasser for the entire duration of his or her time in the building. What the court conveniently overlooked, however, is that the precept of continuing trespass necessarily precludes a finding that the applicants committed burglary or aggravated burglary by entering a part of the homes in question. This observation notwithstanding, the court found that aggravated burglaries were committed in both cases by entering a part of a building that, according to the very passages it quoted with apparent approval from Walkington, did not exist.

Finally, even if it were possible to conclude that the homes in Chimirri and Singh consisted of parts, the reasoning and results in these decisions are still open to severe criticism. In particular, if one examines the statutory crime of burglary under s 76 (and s 9 of the Theft Act 1968 (UK)), it is abundantly clear that

27 Singh, [2013] VSCA 300, [18]-[20].
28 Ibid [14].
29 Walkington [1979] 2 All ER 716, 1174 – 1175 [E]-[E].
30 Section 76 provides in pertinent part:
(1) A person is guilty of burglary if he enters any building or part of a building as a trespasser with intent
there are three actus reus elements of the offence. The accused must: (a) enter; (b) a building or a part of a building; (c) as a trespasser. Although there are differing views on exactly what is required in order to satisfy the requirement of an entry, the English Court of Criminal Appeal construed s 9 of the Theft Act 1968 (UK) to denote that the accused must, whether personally or through the use of an instrumentality such as a pole or an innocent agent such as a dog or young child, penetrate far enough into the relevant building or part thereof so as to place himself or herself in a position to carry out the ulterior offence. The concept of what constitutes a building and any parts it may or may not contain was dealt with earlier in the discussion of Walton. Finally, the phrase ‘as a trespasser’ in the actus reus sense of the term was explained by the High Court in Barker v The Queen. If the express actus reus elements of s 76 are viewed in this light, it is apparent that the elements of entry and as a trespasser are separate and distinct and cannot be conflated into a single element. This point is further buttressed by the Court of Appeal’s acknowledgment in Singh that, as in Walton, an entry can be non-trespassory. As one can affect an entry without necessarily being a trespasser, it follows that the actus reus requirements of entry and as a trespasser are separate and distinct elements that cannot be conflated in this manner.

Though the Court of Appeal did not expressly attempt to conflate these elements in Chimirri or Singh, it is entirely possible that a court might make such an attempt in order to satisfy the requisite temporal coincidence that would otherwise be lacking. Indeed, if the two elements can be viewed as one and the same, the

(a) to steal anything in the building or part in question, or
(b) to commit an offence
(i) involving an assault to a person in the building or part in question, or
(ii) involving any damage to the building or to property in the building or part in question which is punishable with imprisonment for a term of five years or more...

The term, ‘as a trespasser’ in the actus reus sense of that phrase, has been construed as denoting that the accused entered the building or a part thereof without the permission of an occupier who enjoys a greater right of possession than the accused or without any lawful privilege conferred by the common law or statute: Jones & Smith [1976] 1 WLR 672, 674 – 675 [D]-[E]; Barker (1983) 47 ALR 1, [16]-[19]. If a person enters for any purpose that exceeds the scope of the purposes conferred by the consent or privilege conferred by the occupier or law respectively, the entry is regarded as trespassory in the actus reus sense of the term, ‘as a trespasser’: ibid.

See, e.g. CR Williams, Property Offences (LBC Information Services, 3rd ed, 1999) 218. According to CR Williams, an entry is affected by placing any portion of the accused body within the relevant building, and this is true irrespective of whether the portion of the accused’s body was inserted therein for the purpose of committing the intended crime or merely to effectuate the entry: ibid. The phrase, ‘as a trespasser’ has also been construed as containing an implied mens rea component, namely, that at the time of the accused’s volitional act(s) giving rise to the effective entry, he or she must know or at least be reckless as to the fact that the entry is being made without consent or lawful privilege: Collins [1973] QB 100, 104 – 105 [II]-[D], Jones & Smith [1976] 1 WLR 672, 675 [C]-[E].

R v Brown [1985] Crim LR 212 (‘Brown’). In Brown, the English Court of Criminal Appeal used the epithet, ‘effective entry’ to describe an entry that meets this criterion: ibid. See also R v Ryan [1996] Crim LR 320.

See above notes 5 and 7.

See above n 31.
Chimirri and Singh concept of continuing trespass would similarly transform the notion of an effective entry into a continuing one as well. If that view is tenable, it would be possible to convict an accused of burglary or aggravated burglary irrespective of whether his or her intention to commit one or more of the specified crimes was formed subsequent to the time of the initial trespassory entry. This was not, however, the approach adopted by the Court of Appeal in Chimirri and Singh; rather, in those cases the court held that the aggravated burglaries could be predicated on the theory that the accused entered a part of a building as a trespasser with one of the intentions specified in subss 76(1)(a) and (b). \footnote{36}

5. CONCLUSION

Prior to the Victorian Court of Appeal’s decisions Chimirri and Singh, the law of burglary under ss 9 and 76 of the Theft Act 1968 (UK) and Crimes Act 1958 (Vic) respectively appeared to be well-settled. Without rehashing the judicial construction of each and every element of the statutory crime of burglary as defined in s 9 of the Theft Act 1968 (UK) and s 76 of the Crimes Act 1958 (Vic), \footnote{37} suffice it to say that the key principle enunciated in Chimirri and later reaffirmed in Singh is that an initial trespassory entry into a building continues to be a trespassory one for as long as the entrant remains in the building. This raises an important question as to what, if any impact, this doctrine has had on the statutory offence of burglary in the UK and Victoria as it stood prior to these decisions?

The principles relating to the circumstances under which a building may be viewed as having parts within the meaning of ss 9 and 76 were set forth in Walkington in Part 1 of this article. \footnote{38} As suggested by the Court of Appeal in Singh \footnote{39} and

\footnote{36} In Singh, the Court of Appeal reaffirmed its earlier decision in Chimirri in which the court held that once an accused makes a trespassory entry into a building, that trespass continues for as long as the accused remains in the building. The court distinguished this continuing trespass or relation back concept from the one pertaining to the statutory crime of burglary under s 9 of the Theft Act 1968 (UK). The Court of Appeal explained that under s 9, the relation back theory denotes that in instances where an accused actually commits one of the specified crimes consequent to entering a building or a part thereof, the fact-finder is permitted to infer therefrom that the accused had an intention to commit that crime at the moment that he or she entered the building or part thereof. Singh, [2013] VSCA 300, [22]-[24].

\footnote{37} The Crimes (Theft) Act 1973 (Vic), which was incorporated into the Crimes Act 1958 (Vic), was essentially an adoption by the Victorian Parliament of the Crimes (Theft) Act 1968 (UK). The only significant difference is that Victoria opted to enact s 82 (obtaining a financial advantage by deception) as opposed to its then English counterpart, s 16 (dishonestly obtaining a pecuniary advantage by deception). Unlike s 82 of the Crimes Act 1958 (Vic) which speaks in very broad terms of obtaining a financial advantage by deception, subss 16(2)(a), (b) and (c) set forth finite definitions of what constituted a pecuniary advantage. Because of the unfortunate uncertainties and resulting difficulties resulting from these subss, s 16 was repealed by the Fraud Act 2006 (UK) which does not include any comparable offence.

\footnote{38} Walkington, [1979] 2 All ER 716, 1174 – 1176 [F]-[C]; see also Singh, [2013] VSCA 300, [19]-[20].

\footnote{39} Singh, [2013] VSCA 300, [20].
consonant with the facts presented in *Walkington*, it appears that the references in ss 9 and 76 to ‘a part of a building’ were intended to apply only in instances in which the Crown is unable to prove that the accused’s initial entry into a building was trespassory. As Maxwell P, Coghlan JA and Dixon AJA explained:

> The question under consideration by the Court of Appeal [in Walkington]... was quite different from the present question. There, the person said to have committed the offence of burglary had entered the store lawfully, pursuant to the (implied) licence granted by the shopkeeper. It was a non-trespassory entry. The question for determination was whether it was possible, nevertheless, for the person to have become a trespasser (for the first time) once inside the building. The Court concluded, consistently with the academic writings, that this could have occurred if the person had entered a part of the building to which the licence to enter did not extend. For... it is only when a separate “part” of a building can thus be identified that a person who has entered lawfully can subsequently become a trespasser, so as “to make a case of burglary out of the situation presented here” (citation omitted).

As the trespassory nature of the entries in *Chimirri* and *Singh* was not in dispute, the justices were aware that in accordance with the above quotation, it was not reasonably open to them to affirm the applicants’ convictions for aggravated burglary on the basis that the applicants entered a *part* of a building as a trespasser with the intention of committing an assault. For the same reason, and notwithstanding the continuing trespass doctrine, neither was it open to the court to affirm the convictions on the theory that the homes in question consisted of *parts* that were entered in a trespassory manner with the intention of committing one or more of the relevant offences. If anything, the continuing trespass doctrine only strengthens the argument that there were no areas within the homes in which the applicants’ presence could have been non-trespassory. This leads inexorably to the conclusion that the homes in question were mere buildings that did not consist of parts under the principles set forth in *Walkington*. Finally, and for the reasons noted above, the court was loath to attempt to resolve the problem of temporal coincidence in *Chimirri* and *Singh* by conflating the *actus reus* elements of *entry* and *as a trespasser*. Had the court felt that these elements could be conflated, it may have resorted to the continuing trespass doctrine in order to resolve the temporal coincidence dilemma and conclude that the burglaries occurred at the moment the applicants formed an intention to commit one or more of the offences specified under s 76.

The continuing trespass doctrine, therefore, adds nothing of value to the law of burglary under ss 9 and 76 as it existed prior to the Court of Appeal’s decisions in *Chimirri* and *Singh*. That is not to suggest that the doctrine has had no impact on the law in the context of the foregoing sections. To be sure, the law may be

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40 Ibid [20].
adversely affected by any confusion that may arise through the addition of a doctrine that is utterly superfluous in instances where the accused makes an initial non-trespassory entry into a building and a conviction for burglary or aggravated burglary can only be predicated on the basis that the accused entered a part of a building as a trespasser with the intention of committing one of the specified offences. Even if the doctrine could be applied in instances where the initial entry is non-trespassory, it would still be redundant because rarely, if ever, would an accused enter a part of a building with the requisite intention to commit one of the enumerated offences without entering for a purpose in excess of any permission or privilege that may have been conferred by an occupier or the operation of law respectively. Thus, such an entry into a part of a building would, irrespective of the continuing trespass doctrine, constitute a trespass that is accompanied by an intention to commit one of the specified offences. Moreover, it was noted earlier that the doctrine provides a temptation for the courts to conflate the actus reus elements of entry and as a trespasser in instances where there is an initial trespassory entry, but temporal coincidence is lacking for want of proof that the mens rea elements of s 76 existed at the time of the accused’s voluntary act or acts that are causally linked to the actus reus elements. Although the Court of Appeal did not succumb to this temptation, it did leave the law of burglary in a very unsettled and unsatisfactory state by misapplying the passages it had earlier approved from the judgment of Lane LJ in Walkington. 41

In the aftermath of Chimirri and Singh, how are judges to direct juries on the question of whether a building consists of a part or parts when there has been an initial trespassory entry into the same? Did the Court of Appeal implicitly overrule Walkington when it held that subsequent to a trespassory entry unaccompanied by an intention to commit one of the specified offences, an accused could nonetheless be convicted of burglary on the basis that he or she entered a part of the building with an intention to commit one of the relevant offences? If the precept of continuing trespass adds only confusion and redundancy to the law of burglary, what prompted the court to adopt and apply it? When the court commented that the twenty-five year sentence imposed by the trial judge for aggravated burglary could have been achieved by imposing maximum consecutive sentences on each of the three indecent assault charges, any one of which carried a maximum term of ten years imprisonment, 42 was the court tacitly admonishing the judge for allowing the aggravated burglary count to be considered by the jury? All that can be said with total certainty about the continuing trespass doctrine is that it is superfluous, confusing, and practically certain to engender a lack of doctrinal consistency in the law. With all due respect, the Court of Appeal should reconsider its decisions in Chimirri and Singh or, alternatively, the Victorian Parliament should immediately enact remedial legislation to restore certainty and consistency to what was once a settled area of the criminal law.

41 Singh, [2013] VSCA 300, [18]-[20]
42 Ibid [28]