

1946

Present : Dias A.J.

SANGARAM. Appellant, and POLICE, Respondent.

502—M. C. Colombo, 11,114.

*Unlawful possession of housebreaking implement—Ambiguous character of implement—Burden of proof—Penal Code, s 449.*

Where, in a prosecution for possession, without lawful excuse, of a housebreaking implement, the implement possessed is one which is ordinarily used for a lawful purpose but may also be used for housebreaking, it is incumbent on the prosecution, before the accused can be called upon to prove a lawful excuse for possessing the implement, to establish that the accused intended to use the implement for the purpose of housebreaking.

**A** PPEAL against a conviction from the Magistrate's Court, Colombo.

Accused-appellant in person.

T. K. Curtis, C.C., for the Crown, respondent.

*Cur. adv. vult.*

August 12, 1946. DIAS A.J.—

The facts as found by the Magistrate are that at about 1 A.M. on November 27, 1945, Police Inspector A. J. Rajasuriya and other Police officers were patrolling the Hultsdorf area in a motor car. As the vehicle turned into Ferry street, the appellant was observed "getting behind a tree". The Inspector stopped the car and a constable "pulled the appellant from behind the tree". He was searched, and the electric torch P1 was found in his hand, while in his waist were found the knife P2 and an implement P3 which the Inspector describes as "a chisel". The Inspector, who is the only witness called for the prosecution, stated that "as the accused could not give a satisfactory explanation" he was arrested and taken to the Police Station along with the articles found on him.

On these facts, the appellant was charged under section 449 of the Penal Code with possessing, without lawful excuse, instruments of housebreaking, to wit—a chisel, a clasp knife and a torch. The appellant who was represented by counsel gave no evidence and called no witnesses. The Magistrate convicted him. He admitted thirteen previous convictions "for similar offences" and was sentenced to undergo two years' rigorous imprisonment and two years' Police supervision.

The appellant who appeared in person submitted that the torch and the knife were not instruments of housebreaking. He further stated that the "chisel" was not found on his person but was subsequently introduced by the Police.

The latter submission I am unable to entertain. This suggestion was not made at the trial, nor was it put to the Inspector in cross-examination. It is also to be noted that the appellant gave no evidence on his own behalf. I have no hesitation in holding that these three articles were found in the possession of the appellant.

It is settled law that in the case of instruments which are commonly used for housebreaking, once the prosecution has established beyond reasonable doubt the fact that the accused was in possession of them, he must be convicted under section 449, unless he establishes some lawful excuse for their possession—*25 N. L. R. 33*. On the other hand, where the implement possessed is one of an ambiguous character, and is one which is ordinarily used for a lawful purpose, but may also be used for housebreaking, the burden of proof is on the prosecution to prove not only that the accused possessed it, but also that he intended to use it for the purpose of housebreaking—*34 N. L. R. 30*. Under the category of ambiguous implements come keys, a torchlight, a knife, a carpenter's gouge, a gimlet, a screwdriver, &c. See *34 N. L. R. 30*, *12 N. L. R. 198*, *23 N. L. R. 156*. In the case of instruments of this kind, before the accused can be called upon to prove a lawful excuse for their possession, it is incumbent on the prosecution to establish that the accused intended to use them for the purpose of housebreaking. Thus in *12 N. L. R. 198* where the accused was found to be in possession of a carpenter's gouge, the facts that he was found at 9 P.M. at a place to which he was a stranger, that he carried the implement in a "suspicious manner" and that the accused set up a false defence were held to show that he intended to use it for housebreaking.

I cannot hold that the electric torch or the knife are necessarily instruments of housebreaking. I have called for and inspected the "chisel". It has a round wooden handle and is  $7\frac{1}{2}$  inches long. It appears to be more a screwdriver than a chisel, as the cutting edge is quite blunt. It is an unusual implement for a man to carry in his waist at 1 A.M., but I cannot hold that it is so obviously an instrument of housebreaking as to shift the burden of proof to the defence. Like the knife and the torch it is an ambiguous implement which may be used for breaking into houses, besides being used for some lawful purpose.

Has the prosecution, then, established that the accused intended to use these things for housebreaking? The circumstances relied on by the prosecution to establish this fact are that the accused got behind a tree when the Police car turned the corner, and that he had to be pulled out from behind the tree.

Another circumstance relied on is that the head of the accused was "muffled up". Having regard to the presumption of innocence, I cannot say that these circumstances, taken as a whole, establish anything more than a case of suspicion against the appellant. He is a reconvicted criminal and was probably well known to the Police. When the appellant saw the Police car, it is not improbable that he did not want the Police officers to see him. The headlights of the car were on, and it is possible that he was dazzled by their lights and he got to a side. It is not unusual for a man at 1 A.M. in the month of November to muffle his head against the cold north-easterly winds prevalent at this season of the year. When there are explanations which are consistent with the innocence of the appellant, why select those which tend to incriminate him? In my view this is a case in which the learned Magistrate should have entertained a reasonable doubt of the guilt of the appellant.

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In view of these findings it is unnecessary to consider the submission made by the Crown that the sentence imposed on the appellant is irregular.

The conviction of the appellant is set aside, and he is acquitted and discharged.

*Appeal allowed.*

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