1967

*Feb. 23
May 23

FLORIAN LEMIEUX .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Breaking and entering—Trap laid by police—Accused solicited by police informer—Whether offence—Criminal Code, 1953-54 (Can.), c. 51, ss. 292(1)(a), 597(1)(b).

The accused and another man were solicited by a police informer to undertake to break and enter a dwelling house in Ottawa where the police were waiting for them. The police, in order to lay the trap, had secured the key from the owner of the house, who was willing to cooperate in this scheme. The accused had no thought of breaking and entering this house until approached by the informer. The accused was convicted of breaking and entering, and his appeal was dismissed by the Court of Appeal. He was granted leave to appeal to this Court on the following question of law: Did the trial judge err in law in not charging the jury as to whether there was a consent to the breaking and entering?

Held: The appeal should be allowed, the conviction quashed and a verdict of acquittal entered.

On the evidence, it was open to the jury to find that the owner of the house had placed the police officers in possession of it giving them authority to deal with it as they pleased and that they had not merely consented to the informer breaking into it with the assistance of the accused and others, but had urged him to do so. To break into a house in these circumstances is not an offence. On the assumption on which this appeal was argued, *mens rea* was clearly established but

*PRESENT: Taschereau C.J. and Cartwright, Fauteux, Judson and Spence JJ.

it was open to the jury to find that, notwithstanding the guilty intention of the appellant, the *actus* which was in fact committed was no crime at all.

Droit criminel—Introduction par effraction—Piège tendu par la police—Accusé sollicité par un mouchard—Y a-t-il eu offense—Code Criminel, 1953-54 (Can.), c. 51, arts. 292(1)(a), 597(1)(b).

L'accusé et un autre homme ont été sollicités par un mouchard d'entreprendre de s'introduire par effraction dans une résidence à Ottawa où des policiers les attendaient. Dans le but de tendre le piège, les policiers avaient obtenu la clef du propriétaire de la maison, qui avait consenti à coopérer dans le projet. L'accusé n'avait pas eu l'intention de s'introduire par effraction dans cette maison jusqu'à ce que le mouchard le lui eut proposé. L'accusé a été trouvé coupable de s'être introduit par effraction, et son appel a été rejeté par la Cour d'Appel. Il a obtenu permission d'appeler devant cette Cour sur la question de droit suivante: Le Juge au procès a-t-il erré en droit en n'adressant pas le jury sur la question de savoir s'il y avait eu consentement à l'introduction par effraction?

Arrêt: L'appel doit être maintenu, le verdict de culpabilité annulé et remplacé par un verdict d'acquittement.

Sur la preuve, le jury était libre de trouver que le propriétaire de la maison avait mis les policiers en la possession d'icelle, les autorisant d'en faire ce qui leur plairait et que non seulement les policiers avaient consenti à ce que le mouchard s'y introduise par effraction avec l'aide de l'accusé et d'autres, mais qu'ils avaient incité ce dernier à le faire. Dans ces circonstances, l'introduction par effraction dans une maison n'est pas une offense. Selon l'hypothèse en vertu de laquelle cette affaire a été plaidée, la *mens rea* a été clairement établie mais le jury était libre de trouver que, en dépit de l'intention fautive de l'accusé, l'*actus* qui a été en fait commis n'était pas un crime.

APPEL d'un jugement de la Cour d'Appel de l'Ontario confirmant un verdict de culpabilité. Appel maintenu.

APPEAL from a judgment of the Court of Appeal for Ontario affirming the accused's conviction. Appeal allowed.

John F. Hamilton, for the appellant.

C. M. Powell, for the respondent.

The judgment of the Court was delivered by

JUDSON J.:—In October of 1964, the appellant, Florian Lemieux, was tried before a judge and jury on an indictment charging that he did

on the 17th day of November, A.D. 1963, at the City of Ottawa in the County of Carleton, unlawfully break and enter the dwelling house of Benjamin Achbar situated at premises numbered 905 Killeen Avenue in the said City of Ottawa, with intent to commit an indictable offence therein, contrary to Section 292(1)(*a*) of the Criminal Code.

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He was found guilty and sentenced to three years' imprisonment. His appeal to the Court of Appeal was dismissed on February 24, 1965. His appeal to this Court, pursuant to leave granted under s. 597(1)(*b*) of the *Criminal Code* is on the following question of law:

> Did the learned Trial Judge err in law in not charging the jury as to whether there was a consent to the breaking and entering?

The facts of the case which give rise to this suggested defence are very unusual. In November of 1963, the Ottawa Police were very anxious to arrest the members of a gang which was known as the "hooded gang" and which was engaged in a series of break-ins in the Ottawa area. On November 16, 1963, one R. D. Bard telephoned an officer of the Ottawa Police Department to inform him that he had information about this gang. The officer immediately visited Bard at his house and Bard told him that he wanted money for his information. The officer then summoned another officer, who came to Bard's house. Then all three went to see an inspector of the Ottawa Police Department.

Bard and the first two mentioned officers next drove to the west end of the City of Ottawa to look for a house where a feigned break-in could be staged. They went to the neighbourhood of Killeen Avenue and Lenester Street where Bard pointed out a house at 905 Killeen Avenue belonging to Mr. Benjamin Achbar. Bard knew this house because some time before he had paved the laneway. The Police obtained the key to Achbar's house from Achbar himself and then staked out the premises.

On November 17, 1963, at 7.30 p.m., a car owned by Florian Lemieux drove past the house. There were three men in the car. Lemieux was driving under the direction of Bard. The third man was Jean Guindon. The car circled the block and was then parked near the house. Guindon and Bard got out of the car. Lemieux remained behind the wheel. Guindon and Bard went to the side door and Guindon did the actual breaking with a screwdriver. The Police were waiting inside. Bard was arrested on the spot. Lemieux was arrested in the car. Guindon escaped and was arrested a short time later.

Bard was called at trial as a witness for the Crown. On cross-examination he did not remember what was discussed with the police on November 16, 1963; did not remember if

he agreed to take part in the break-in; did not remember if the matter of a reward was discussed and did not remember that he had picked out the Achbar house for the purpose of breaking and entering.

Guindon was also called as a Crown witness and testified that Lemieux knew nothing about the break-in and that he thought that he was driving Bard to the house for the purpose of enabling Bard to collect money owing to him. Guindon was declared a hostile witness and a previous inconsistent statement was put to him in which he had said that he had asked Lemieux to drive him to the house because he and Bard were going to break in. Guindon sought to minimize the effect of this statement by pleading lack of understanding of the contents because of language difficulties, but the two police officers who took the statement both said that Guindon had spoken to them in English that night.

Both Guindon and Lemieux were convicted by the jury. Their appeals to the Court of Appeal were also dismissed. Bard, the informer, pleaded guilty and received a heavy sentence. His appeal to the Court of Appeal was allowed and he was acquitted.

Lemieux's appeal to this Court was argued on the basis that he knew that he was acting as a driver to take Bard and Guindon to a house that he had never seen and that these two were going to break in. What he did not know, however, was that he, along with Guindon, was being led into a trap. It is quite clear that he and Guindon were solicited by Bard, the informer, to undertake this break-in. The police had secured the key from the owner of the house, who was willing to co-operate in this scheme. In the present case Lemieux had no thought of breaking and entering this house until he was approached by Bard, who was acting under police instruction. The police had obtained the consent of the owner to use the premises in the hope that they would be able to arrest certain criminals.

The case is very different from *Rex v. Chandler*[1], where an accused who intended to break into a shop sought a key from the servant of the owner of the shop. This servant informed his master. The key was supplied and the police were waiting for the shop-breaker when he arrived. The key

[1] [1913] 1 K.B. 125 at 127, 8 Cr. App. Rep. 82.

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in this case was supplied by the servant only for the purpose that the criminal might be detected in the commission of the offence. The criminal was guilty of shop-breaking.

But in Lemieux's case, the facts are not at all similar. The police set the whole scheme in motion through Bard. He was to lead a man who at first had no intention of breaking and entering, who went to the scene of the crime at Bard's instigation and who was led into the trap by Bard.

On the evidence it was open to the jury to find that the owner of the house had placed the police officers in possession of it giving them authority to deal with it as they pleased and that they had not merely consented to Bard breaking into it with the assistance of others, but had urged him to do so. To break into a house in these circumstances is not an offence.

For Lemieux to be guilty of the offence with which he was charged, it was necessary that two elements should co-exist, (i) that he had committed the forbidden act, and (ii) that he had the wrongful intention of so doing. On the assumption on which the appeal was argued *mens rea* was clearly established but it was open to the jury to find that, notwithstanding the guilty intention of the appellant, the *actus* which was in fact committed, was no crime at all.

In my opinion, if the jury had been properly charged on this aspect of the matter and had taken the view of the facts which it has been pointed out above it was open to them to take, they would have acquitted the appellant.

Had Lemieux in fact committed the offence with which he was charged, the circumstance that he had done the forbidden act at the solicitation of an *agent provocateur* would have been irrelevant to the question of his guilt or innocence. The reason that this conviction cannot stand is that the jury were not properly instructed on a question vital to the issue whether any offence had been committed.

I would allow the appeal, quash the conviction and direct that a verdict of acquittal be entered.

Appeal allowed and conviction quashed.

Solicitor for the appellant: John F. Hamilton, Toronto.

Solicitor for the respondent: The Attorney General for Ontario, Toronto.