JASPER TUPPER .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1967

*May 5
June 26

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Possession of housebreaking instruments—Whether evidence of possession—Instruments normally used for ordinary purposes—Whether onus on accused to explain—Criminal Code, 1953-54 (Can.), c. 51, ss. 3(4), 295(1).

The appellant was convicted of possession of housebreaking instruments under s. 295(1) of the *Criminal Code*. In the early hours of the morning he had been a passenger in a car which, to his knowledge, was wrongfully out of the possession of its owner. In the car there were found three screwdrivers, a flashlight, socks, nylon stockings, a crowbar and a pair of woollen gloves with leather palms. Some ten days earlier, the police had seen the appellant and the same driver in the same car at about the same hour and had found therein similar articles with the exception of the crowbar. The appellant's conviction was affirmed by the Court of Appeal. He was granted leave to appeal to this Court on the following questions of law: (1) was there any evidence, before the magistrate, of possession by the appellant; and (2) was the Crown obliged to adduce evidence to show suspicious circumstances before the onus was cast on the accused to provide an explanation?

Held: The appeal should be dismissed.

There was evidence on which the magistrate, acting judicially, could convict the appellant of possession.

Once possession of an instrument capable of being used for housebreaking has been shown, the burden shifts to the accused to show on a balance of probabilities that there was lawful excuse for possession of the instrument at the time and place in question.

Droit criminel—Possession d'instruments d'effraction—Preuve de possession—Instruments employés normalement pour des fins ordinaires—L'accusé a le fardeau de donner une explication—Code criminel, 1953-54 (Can.), c. 51, arts. 3(4), 295(1).

L'appelant a été trouvé coupable de possession d'instruments d'effraction sous l'art 295(1) du *Code Criminel*. Aux petites heures du matin, il était passager dans une automobile qui, à sa connaissance, était illégalement hors de la possession de son propriétaire, et dans laquelle ont été trouvés trois tournevis, une lampe de poche, des bas de nylon, un levier et une paire de gants de laine dont les paumes étaient en cuir. Dix jours auparavant, la police avait vu l'appelant et le même conducteur dans la même automobile à peu près à la même heure et y avait trouvé des objets semblables, à l'exclusion du levier. La déclaration de culpabilité a été confirmée par la Cour

*PRESENT: Fauteux, Martland, Judson, Ritchie and Hall JJ.

1967

TUPPER
v.
THE QUEEN

d'Appel. L'appelant a obtenu la permission d'en appeler devant cette Cour sur les questions de droit suivantes: (1) Est-ce qu'il y avait une preuve de possession par l'appelant devant le magistrat; et (2) la Couronne devait-elle produire une preuve montrant des circonstances suspectes avant que le fardeau de fournir des explications ne tombe sur l'appelant?

Arrêt: L'appel doit être rejeté.

Le magistrat, agissant juridiquement, pouvait déclarer l'appelant coupable de possession en se basant sur la preuve existante.

Lorsqu'il a été démontré qu'il y a possession d'un instrument pouvant servir aux effractions, l'accusé a alors le fardeau de démontrer par une balance des probabilités qu'il existait une excuse légitime pour être en possession de l'instrument à ce moment et à cet endroit.

APPEL d'un jugement de la Cour d'Appel de l'Ontario confirmant une déclaration de culpabilité. Appel rejeté.

APPEAL from a judgment of the Court of Appeal for Ontario affirming the appellant's conviction. Appeal dismissed.

B. A. Crane, for the appellant.

D. A. McKenzie, for the respondent.

The judgment of Fauteux, Martland, Judson and Ritchie JJ. was delivered by

JUDSON J.:—The appellant Jasper Tupper was charged under s. 295(1) of the *Criminal Code* with possession of housebreaking instruments. Section 295(1) reads:

295. (1) Every one who without lawful excuse, the proof of which lies upon him, has in his possession any instrument for house-breaking, vault-breaking or safe-breaking is guilty of an indictable offence and is liable to imprisonment for fourteen years.

On October 5, 1965, at 1:50 a.m., the police stopped a car at James and King Streets in Hamilton. One Donald Richardson was the driver and the appellant was a passenger in the front seat. The police found in the vehicle:

(1) a yellow-handled screwdriver in the rear seat;

(2) a Phillips maroon-handled screwdriver on the front seat on the passenger side;

(3) a red flashlight in the glove compartment;

(4) two white socks in the glove compartment;

(5) two nylon stockings in the glove compartment;

(6) a seventeen-inch gooseneck crowbar under the front seat on the driver's side;

(7) a pair of grey woollen gloves with leather palms under the front seat on the driver's side;

(8) a screwdriver with a three and one-half inch blade which was inserted in the right-hand woollen glove under the front seat on the driver's side.

On September 24, 1965, at 1:45 a.m., the same car had been stopped on Birge Street in Hamilton. Richardson was the driver and the appellant Tupper was a passenger, together with one other person. The police had found on this occasion similar articles with the exception of the crowbar. The police did not lay a charge on this occasion.

Both Richardson, the driver, and the appellant, Tupper, were convicted. Tupper appealed to the Court of Appeal. His conviction was affirmed and his sentence increased. With leave, he appeals to this Court on two questions of law:

1. Whether there was any evidence, before the magistrate, of possession of the instruments by the Appellant;
2. If the instruments found are capable of and normally used for ordinary purposes, but may also be used for housebreaking, is the Crown obliged to adduce evidence to show suspicious circumstances before the onus is cast on the accused to provide an explanation?

Question 1.

On the question of possession, my opinion is that there was evidence on which the magistrate, acting judicially, could convict.

This car was owned neither by Richardson nor by Tupper. It had been leased by a third person, Edward Ryckman, from Snelgrove Motors on September 23, 1965, for one day. They got it back a month later with an extra 3,000 miles on the car. The articles were not in the car when it was rented to Ryckman. Ryckman said they belonged to him and his wife.

The car was first stopped the day after it was leased by Ryckman, that is, on September 24, 1965, at 1:45 a.m., with Richardson as driver, Tupper as a passenger, together with a third person. It was stopped again on October 5,

1967

TUPPER v. THE QUEEN

Judson J.

1965, and it was in connection with the articles then found in the car that Richardson and Tupper were charged.

In my opinion, on that occasion, Richardson and Tupper were both in wrongful possession of the car. The fact that Richardson was driving in these circumstances does not give him sole possession of the car. They were both in possession of the car and both as wrongdoers, knowing that the car had been retained by Ryckman beyond the term of its lease, which was one day.

Richardson and Tupper were not going about their ordinary business with screwdrivers, flashlights, nylon stockings and a crowbar in the middle of the day. They were abroad at a highly suspicious time. There was also evidence that one of the screwdrivers was on the seat on which Tupper was actually sitting. Screwdrivers are not left haphazardly on the seats of cars.

On these facts the magistrate could properly find that both Richardson and Tupper were in possession of these instruments. Section 3(4) of the Criminal Code reads:

> (4) For the purposes of this Act,
>
> (*a*) a person has anything in possession when he has it in his personal possession or knowingly
>
> (i) has it in the actual possession or custody of another person, or
>
> (ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person; and
>
> (*b*) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

Question 2.

Leave was given on this question because of a conflict in the jurisprudence between some of the provinces. On the one side there are the cases of *R. v. Smith*[1]; *R. v. Haire*[2]; *R. v. McRae*[3]. These cases held that if the tools, although capable of being used for housebreaking, would normally serve a lawful purpose, the Crown should prove "some event, overt action, or declaration, to identify the tools with a specific unlawful purpose".

[1] (1957), 40 M.P.R. 267, 27 C.R. 107, 119 C.C.C. 227 (Nfld. C.A.).
[2] (1958), 122 C.C.C. 205, 29 C.R. 233, 26 W.W.R. 575 (Alta. C.A.).
[3] (1967), 59 W.W.R. 36, 50 C.R. 325 (Sask. C.A.).

In my opinion, this statement of the law is erroneous and ignores the plain wording of the section. The English version reads: "any instrument for house-breaking"; the French version reads: "un instrument pouvant servir aux effractions de maisons". The French version makes the meaning clear. Both versions mean the same thing. An instrument for house-breaking is one capable of being used for house-breaking.

The principle contended for here is that there is no onus on the accused to provide an explanation until the Crown has adduced some evidence from which an inference might be drawn that the accused intended to use such instruments for the purpose of house-breaking.

I think the law is correctly stated by the Ontario Court of Appeal in *R. v. Gilson*[1] and in the earlier judgment of the Ontario Court of Appeal in *R. v. Kernychne* but unreported; *R. v. Singleton*[2], decided in 1956, and in *R. v. Jones*[3].

Once possession of an instrument capable of being used for housebreaking has been shown, the burden shifts to the accused to show on a balance of probabilities that there was lawful excuse for possession of the instrument at the time and place in question.

I would dismiss the appeal.

HALL J.:—I have read the reasons of my brother Judson and, with respect to question 1, I agree that there was evidence upon which the magistrate, acting judicially, could convict and I would dismiss the appeal.

Question 2 has given me a great deal of concern. I am, with reluctance, compelled by the wording of s. 295(1) which reads:

> 295. (1) Every one who without lawful excuse, the proof of which lies upon him, has in his possession any instrument for house-breaking, vault-breaking or safe-breaking is guilty of an indictable offence and is liable to imprisonment for fourteen years.

to agree that, as stated by my brother Judson:

> Once possession of an instrument capable of being used for housebreaking has been shown, the burden shifts to the accused to show on a balance of probabilities that there was lawful excuse for possession of the instrument at the time and place in question.

[1] [1965] 2 O.R. 505, 46 C.R. 368, 4 C.C.C. 61, 51 D.L.R. (2d) 289.
[2] (1956), 115 C.C.C. 391, 23 C.R. 399, [1956] O.W.N. 455 (Ont. C.A.).
[3] (1960), 128 C.C.C. 230 (B.C. C.A.).

1967

TUPPER v. THE QUEEN

Hall J.

Whether Parliament intended it or not, s. 295(1), as it reads, permits of no other interpretation. It puts the possessor of many necessary tools of trade, automobile accessories and tools and hundreds of similar instruments used and carried daily for routine purposes which might be capable of being used for house-breaking in the position that merely from being in possession under the most innocent circumstances, he can be brought into court and put to the proof that he has a lawful excuse for having a screwdriver, a flashlight or some other such household tool or instrument in his car, boat, tool kit or on his person at any given time or place which includes his home. It can be argued and readily accepted that this may not happen frequently, but it can and may happen if Parliament really intended what the section says when, without any qualification as to time or circumstance, it put the burden of proof on the person in whose possession any such item may be found.

The interpretation which the wording of the section compels should, I think, be drawn to Parliament's attention.

Appeal dismissed.

Solicitors for the appellant: Gowling, MacTavish, Osborne & Henderson, Ottawa.

Solicitor for the respondent: W. C. Bowman, Toronto.