Present : Jayewardene A.J.

1923.

FERNANDO *v.* FERNANDO.

143—P. C. Dandagamuwa, 14,668.

Possession of implement of housebreaking—Jemmy—Penal Code, s. 449.

When an instrument commonly used for housebreaking is found in the possession of a person, it is not necessary for the prosecution to prove, in a charge under section 449 of the Penal Code, that the instrument was intended to be used for housebreaking. Such proof may be required in cases where a person is in possession of an implement ordinarily used for a lawful purpose, but which may also be used for housebreaking.

THE facts appear from the judgment.

H. V. Perera, for accused, appellant.

March 29, 1923. JAYEWARDENE A.J.—

In this case the accused appeals against his conviction under section 449 of the Penal Code and a sentence of six months' rigorous imprisonment. The present section (449), which was substituted in place of the original section by Ordinance No. 12 of 1906, makes it an offence for any person to be found having in his custody or possession, without lawful excuse, the proof of which lies on him, any instrument of housebreaking. The prosecution has proved that a jemmy was found on a loft in a room of the accused's house. This is not denied. The accused in his defence tried to prove that he had obtained the jemmy from a blacksmith to remove barbed wire from posts. The Magistrate has disbelieved the evidence called for the defence, and has rejected the excuse offered by the accused for his possession of the jemmy. We are thus left with the finding of the Magistrate that the accused had in his custody or possession a jemmy, an instrument for housebreaking, without any lawful excuse. It is contended for him that this finding is insufficient to convict a person under section 449, and that the prosecution must prove, and the Court must find that the accused intended to use the instrument for the purpose of housebreaking. In support of this contention *Regina v. Oldham*,[1] *Punchirala Korala v. John*,[2] and *The King v. Ward*[3] have been relied upon. Section 449 as it now stands is almost identical with section 58 of the English Larceny Act, 1861 (24 and 25 Vict., c. 96), which is itself a reproduction of section 1 of an earlier English Act.

[1] *(1852) 2 Denison's C. C. 472.* [2] *(1909) 12 N. L. R. 198.*
[3] *(1915) 3 K. B. 696.*

1923.

JAYEWARDENE A.J.

Fernando v. Fernando

(14 and 15 Vict., c. 19), so that the decisions on the English Act afford authoritative guidance in the interpretation of section 449 of our Penal Code, and they were relied upon in the local case above referred to. I have carefully considered all the decisions, but I cannot find in any of them any support for the contention that when an instrument commonly used for housebreaking is found in the possession of a person, it is necessary for the prosecution to prove that the instrument was intended to be used for housebreaking. Such proof may be required in cases when a person is in possession of an implement ordinarily used for a lawful purpose, but which may also be used for the purpose of housebreaking. In this case the instrument found in the possession of the accused is a jemmy, which is described as "a short steel crowbar used by housebreakers for opening doors," and is not used for any lawful purpose. In *Regina v. Oldham* (*supra*) the instruments found in the possession of the accused were ten keys. At the trial the jury found that the accused intended to use them as implements of housebreaking. When the case came before the Court for Crown Cases Reserved, Lord Campbell C.J. said : "The jury have found that there was an intent on the part of the prisoner to use the keys as implements of housebreaking, and though they may be used for lawful purposes, it is clear that they may also be used for the purpose of housebreaking." Erle J. said : "Any implement capable of being used for the purpose of housebreaking when the jury find that the person with whom they are found has them in his possession, for the purposes of housebreaking, are, in my opinion, within the Statute." Maule J., with whom Cresswell J. agreed, held, that the possession of keys by night was expressly prohibited by the earlier English Act, and that "if a man, therefore, is found in possession of any of these without lawful excuse, they are within the express words of the Act of Parliament." He made no reference to the intention to use the implements for the purpose of housebreaking, as the question of intention, I presume, became immaterial when the implement possessed came within the express terms of the Act. In *Punchirala Korala v. John* (*supra*) the instrument found in the possession of the accused was a carpenter's gouge which is not an instrument of housebreaking, but is capable of being so used, and Wendt J., following *Regina v. Oldham* (*supra*), held that "there were circumstances here, such as the mode in which the gouge was carried, the false defence set up, &c., from which it was open to the Magistrate to infer, as he had done, that the instrument was intended to be used for housebreaking." In *The King v. Perera*,[1] the accused was found in possession of a bunch of keys and in the company of a man armed with a jemmy. He was convicted under section 449. There, in meeting a contention that the accused's intention to commit the offence of housebreaking

[1] *(1913) 16 N. L. R. 456.*

manifested by some overt act, must be proved (which was required under the repealed section 449) Wood Renton A.C.J. said : " The effect of the amendment is to make mere possession of an instrument of housebreaking, without lawful excuse, the proof of which lies on the person charged, a criminal offence. It is no longer incumbent under the new section on the prosecution to prove an intention on the part of the accused to break into a particular building." The learned Judge makes no reference to any general intention to commit housebreaking.

In *The King v. Ward* (*supra*) the accused who was a bricklayer was found in possession of a screw-driver and a chisel, which form part of a bricklayer's outfit. The accused was convicted, the Judge in charging the jury stating that the accused had to satisfy the jury that he was rightly in possession of the tools and that he had no unlawful intention. The conviction was set aside by the Court of Criminal Appeal, and Lord Reading C.J., delivering the judgment of the Court, said : " It is true to say on the authority of *Regina v. Oldham* (*supra*) that a tool which is commonly used for a lawful purpose may become an ' other instrument of housebreaking ' within the meaning of section 58 of the Larceny Act, 1861, if it is in the possession of a person who intends to use it for that purpose. Therefore, one question in this case was, whether it was the intention of the appellant to use this chisel and screwdriver for the purpose of housebreaking, and it was for the appellant to satisfy the jury that, in the words of section 58, he had a lawful excuse for being in possession of these tools. It was stated by the appellant in his evidence, and not disputed by the prosecution, that he was a bricklayer. That being so, and the tools being bricklayer's tools, the appellant has established *primâ facie* that he had a lawful excuse for being in possession of the tools, and the onus was shifted on to the prosecution to prove to the satisfaction of the jury, if they could, from the other circumstances of the case, that the appellant was in possession of the tools not for an innocent purpose, but for the purpose of housebreaking . . . . " The jury should have been directed that it was for the prosecution to satisfy them from the other circumstances of the case that, although the appellant was a bricklayer and the tools were bricklayer's tools, he had no lawful excuse for being in possession of these tools at that particular time and place."

This last case brings out clearly what was laid down in *Regina v. Oldham* (*supra*) that it is only when a person is found in possession of an instrument which is commonly used for a lawful purpose, but which may be used as an instrument of housebreaking, that the prosecution has to prove that he intends to use it for the purpose of housebreaking. That principle has no application where, as here, the accused is found in possession of an instrument which is commonly used, not for any lawful purpose, but for

1923.

JAYEWARDENE A.J.

Fernando v. Fernando

the purpose of housebreaking. As a jemmy is not ordinarily used for any other purpose than that of housebreaking, the conviction is, in my opinion, right, but I reduce the sentence to three months' rigorous imprisonment as the accused appears to have borne a good character hitherto.

Conviction affirmed