

1931

Present : Macdonell C.J.

BURAH v. SUBAYA.

P. C. Kegalla, No. 17,003.

Possession of housebreaking implements—Bunch of keys—Intent—Onus of proof—Explanation unsatisfactory—Penal Code, s. 449.

Where on a charge under section 449 of the Criminal Procedure Code of being in possession, without lawful excuse, of an instrument of housebreaking, &c., the accused is found with a key, a torch light, and a knife, that is, with articles of an ambiguous character, the onus is on the prosecution to prove the intent of the possessor to use them for housebreaking. It is not correct in such a case to draw an inference of criminal intent from an unsatisfactory explanation by the accused of his possession of such articles.

CASE stated by the Police Magistrate of Kegalla under section 353 of the Criminal Procedure Code in P. C. Kegalla, No. 17,003.

Deraniyagala, Acting C.C., for the Attorney-General.

December 3, 1931. MACDONELL C.J.—

This is a case stated by the Police Magistrate of Kegalla under section 353 of the Criminal Procedure Code. The facts were these: The two accused, together with two men who were discharged, were seen walking along the road to Kegalla at various times in the afternoon between 4 and about 5.30. Their presence attracted the suspicion of certain of the authorities who sent word to the police, as a result of which the accused were arrested. When searched keys were found on each of the two accused and on the second of the two accused also a 4-inch pointed knife, a torch light, and a small clasp knife (a kris knife was produced as one of the exhibits in this case but the evidence is not sufficient to connect it with either of the accused). When charged before the Magistrate under section 449, they gave, at the very least, an extremely lame excuse for being in possession of the keys. The question before me is, can they be convicted under section 449 of the Penal Code.

The section reads as follows:—

“Whoever is found having in his custody or possession without lawful excuse, the proof of which lies on him, any instrument of house-breaking, or being armed with any dangerous or offensive weapon, with intent to commit any unlawful act, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both, and such instrument or weapon shall be forfeited to the Crown.”

Now beyond doubt keys can be used for an innocent purpose as well as for breaking open a house. This fact distinguishes keys from such an implement as a *jemmy* which apparently can be used for no other purpose except to break a closed and fastened door, window, or shutter. As, therefore, keys can be used for an innocent purpose this distinguishes the present case from *Fernando v. Fernando*¹ where it was laid down that where 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 that there was an intent on the part of that person to use the instrument for housebreaking. Here the thing found—keys—could be used for an innocent purpose, and, therefore, the onus still lay upon the prosecution to prove the intent on the part of the possessor to use them for housebreaking. I doubt on the evidence that that intent was proved, or could be proved. (The other things found, knives and torch, can also be used for quite innocent purposes.) In the cases cited to me there was always some piece of evidence, such as loitering or being out late at night, or attempting to evade the police, or setting up a wholly false explanation of the possession, from which the intent to commit housebreaking could be inferred, but in the present case such evidence is absent. I think that were one to affirm the conviction

in this case, one would be going very near to deciding that a bunch of keys is *ipso facto* a housebreaking implement which, of course, one cannot do. It is true that the several explanations by the two accused of their possession of keys were not satisfactory, but explanations of what? Of possession of an instrument ambiguous in character since it can be used for an innocent as well as for a felonious purpose, and if so, an inference of criminal intent from an unsatisfactory explanation of possession would be, or would be very like, a *petitio principii*.

For these reasons my answer to the question put must be that the conviction was not correct in point of law since there was not sufficient evidence from which an intent to commit housebreaking could reasonably be inferred. Under these circumstances the conviction must be set aside and the two accused discharged.

Set aside.

