

BANDA v THE PEOPLE (1968) ZR 6 (CA)

COURT OF APPEAL

BLAGDEN CJ, RAMSAY AND WHELAN JJ

13th FEBRUARY 1968

Flynote and Headnote

[1] Criminal law - Housebreaking - Instrument of housebreaking defined.

An "instrument of housebreaking", for purposes of section 275(c) of the Penal Code, consists of an implement capable of being used for housebreaking, either from its common use for that purpose or from the particular circumstances of the case in question.

[2] Evidence - Burden of proof - Shifting of burden of proof from prosecution to defendant under Penal Code, section 275 (c).

In a prosecution for possession of an instrument of housebreaking contrary to Penal Code, section 275 (c), the prosecution must prove that the defendant possessed a certain implement at night and that this implement is a housebreaking implement; if the trial magistrate is "sure" of these elements, the accused then bears the burden of proving lawful excuse for the possession.

Case cited:

(1) *R v Patterson* [1962] 1 All ER 340.

Statute construed:

Penal Code (1965, Cap.6), s. 275 (c)

Daley, Director of Legal Aid, for the appellant.

Zulu, State Advocate, for the respondent.

Judgment

Blagden CJ: The applicant in this case was convicted of possessing a housebreaking implement by night, contrary to section 275 (c) of the Penal Code. He was sentenced to twelve months' imprisonment with hard labour. His appeal to the High Court was dismissed, and he now seeks leave to appeal to the Court of Appeal.

The facts are very simple. He was found at night with a sack containing a brick in his possession close to the ABC Store. It was approximately 2.50 a.m. When questioned by the police and asked why he was carrying this brick and a sack, he said: "I was just carrying it." Before the court of trial he altered that explanation and said that he was carrying the brick to throw at dogs.

Mr Daley, for the applicant, has argued two points. [1] By the first he has attacked the learned trial magistrate's findings that a brick was an instrument of housebreaking. That aspect of the case is well covered by the judgment of Lord Parker, CJ in the case of *R v Patterson* [1], page 343, where the learned Chief Justice says: "It seems to the court that, in the first instance, the prosecution must prove that the prisoner was found in possession by night of . . . an implement capable in fact of being used as a housebreaking implement from its common though not exclusive use for that purpose or from the particular circumstances of the case in question."

In our view, in this case, the applicant's brick was a housebreaking instrument. It is common knowledge that a brick is used in housebreaking cases on frequent occasions and the particular circumstances of this case indicate clearly that that was what the applicant here had this brick for.

Section 275 (c) of the Penal Code casts upon the accused the burden of proving that he had lawful excuse for the possession of the particular implements. [2] Mr Daley's second point is that the learned trial magistrate did not correctly direct himself as to the standard of that proof which the applicant had to discharge.

We think the direction that the learned trial magistrate gave himself here was adequate. He said: "The prosecution must prove that the accused possessed a brick and that a brick is a housebreaking implement, and that it was night. If I am sure of all these things, then it is for the accused to satisfy me that he had lawful excuse." That terminology might have been improved, but it seems to us clear that the learned trial magistrate had the right burden of proof in mind.

In these circumstances the applicant's conviction was clearly right.

Application dismissed.