FRED MIHALCHAN ..... APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1944

* Oct. 16
* Nov. 20

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Burglary—Possession by night of implements of housebreaking—Ordinary tools of the accused's trade as truck driver—Proof of unlawful purpose—Lawful excuse—Onus of proof—Evidence—Sufficiency—Criminal Code, section 464a.

The appellant, a truck driver, was charged with having been found in possession by night, without lawful excuse, of instruments of housebreaking, contrary to section 464a of the Criminal Code and was convicted before a judge of the County Court. The trial judge found that some of the instruments, but not all of them, were tools a truck driver might use in his trade, while all of the instruments so found were capable of being used for purposes of housebreaking. But he further stated that he was satisfied, in all the surrounding circumstances established in evidence, that at that particular time and place the tools were not in the appellant's possession for an innocent purpose, and, "on the whole of the evidence", he found the appellant

*PRESENT:—Rinfret C.J. and and Kerwin, Taschereau, Rand and Kellock J.J.

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guilty. The conviction was affirmed by a majority of the Court of Appeal. The dissenting judge was of the opinion that the trial judge failed to apply the principle in *Rex* v. *Ward* (85 L.J.K.B. 483), where it was held that the accused had *prima facie* satisfied the onus cast upon him of proving that he had a lawful excuse for his possession of the tools and that the onus was then cast upon the prosecution of proving affirmatively that the accused had no lawful excuse for being in possession of the tools at that particular time and place.

Held, Kellock J. dissenting, that, in the circumstances of this case and upon the evidence, the trial judge was legally warranted in drawing the conclusions he arrived at. The decision in *Rex* v. *Ward* (*supra*) does not apply. In that case, the trial judge had directed the jury that it was for the accused to establish to their entire satisfaction that his possession of the implements was lawful; while the Court of Criminal Appeal held that the jury had not been properly directed with regard to the onus of proof. In the present case the trial judge was sitting alone without a jury; it was not necessary for him to expound the law and then verbally apply it to the facts in giving his reasons for judgment; and it should be sufficient if it appears he was alive to the law and that he properly charged himself when reaching his finding upon the evidence. Moreover, the findings alone would be sufficient to take this case out of the application of the *Ward* case.

Per Kellock J. dissenting:—The trial judge did not properly direct himself as to the law applicable as laid down in the *Ward* case. Therefore, the question for decision is as to whether or not he must "inevitably" have come to a conclusion of the guilt of the accused on the evidence, notwithstanding such misdirection; and this must depend upon whether the Crown discharged the onus of establishing beyond reasonable doubt that the accused had possession with guilty intent. The circumstances disclosed in evidence upon which the Crown can rely are not sufficient to make the result, that the accused was guilty, inevitable. There should be a new trial.

APPEAL by Mihalchan, one of the accused, from the judgment of the Court of Appeal for British Columbia (1) dismissing (O'Halloran J.A. dissenting) his appeal from his conviction, on a trial before the County Court of Westminster, Whiteside J., on a charge of being found by night in possession of instruments of housebreaking without lawful excuse, contrary to section 464 (*a*) of the Criminal Code.

The appellant and one Smylski were charged jointly with possession of housebreaking instruments. The implements consisted of a substantial assortment of tools, together with a piece of celluloid, found in the car the

(1) [1944] 82 Can. Cr. Cas. 87

appellant was driving. The trial judge acquitted Smylski but convicted the appellant and sentenced him to six months' imprisonment.

No one appearing for the appellant.

E. Pepler K.C. for the respondent.

The judgment of the Chief Justice and of Kerwin, Taschereau and Rand JJ. was delivered by

THE CHIEF JUSTICE.—The appellant was convicted in the County Court Judge's Criminal Court at New Westminster, B.C., of having been found in possession by night, without lawful excuse, of instruments of housebreaking, contrary to section 464 (*a*) of the Criminal Code.

The conviction was affirmed by the Court of Appeal, but there was a dissent in that Court and the appeal here is on the question on which there has been dissent.

In the formal judgment appealed from the dissent is expressed thus:—

> Mr. Justice O'Halloran dissents from this judgment upon the grounds that the trial judge misdirected himself as to the onus of proof and failed to apply the correct legel principles in considering the explanation of the appellant in relation to his possession of the alleged housebreaking instruments and in discharging the onus placed upon him by section 464 (*a*) of the Criminal Code.

In his reasons the learned dissenting judge stated that, in his opinion, the trial judge failed to apply the principle in *Rex* v. *Ward* (1). The point would be that when once the instruments found in the possession of the accused, although capable of being used for purposes of housebreaking, are also shown to be the ordinary tools which the accused might well use in his trade, the accused thus establishes *prima facie* a sufficient excuse, and the burden shifts upon the prosecution of satisfying the jury, from the other circumstances, that the accused had no lawful excuse for being in possession of these tools at that particular time and place.

In the *Ward* case (1), the Deputy Chairman had directed the jury that it was for the accused to establish to their satisfaction that his possession of the implements in ques-

(1) [1915] 85 L.J.K.B. 483

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tion was lawful. It was held by the Court of Criminal Appeal that the jury had not been properly directed with regard to the onus of proof and the appeal was allowed.

In the present case the trial judge was sitting alone without a jury. It was not necessary for him to expound the law and then verbally apply it to the facts in giving his reasons for judgment. It should be sufficient if it appears he was alive to the law and that he properly charged himself when reaching his finding upon the evidence. (*The King* v. *Frank* (1)).

Here no error in direction, or self-direction, was made manifest and the learned judge's reasons do not warrant the conclusion that he misdirected himself, or that he proceeded upon an erroneous view of the law, and this is not to be assumed.

The appellant is a truck driver and the learned judge found that some of the instruments in the appellant's possession—but not all of them—were tools a truck driver might use in his trade; while all of the instruments so found were capable of being used for purposes of housebreaking. These findings alone would be sufficient to take the case out of the application of *Rex* v. *Ward* (2).

But, moreover, the learned judge was satisfied, in all the surrounding circumstances established in evidence, that at that particular time and place the tools were not in the appellant's possession for an innocent purpose; and, as stated in his judgment, "on the whole of the evidence" the learned judge found the appellant guilty.

It was recognized in the *Ward* case (2) that "other circumstances" might displace the *prima facie* proof, or show a guilty intent, and it was, of course, for the learned trial judge in the present case, acting as judge and jury, to say whether or not, in the particular circumstances, the possession was innocent.

With deference, I do not see here any misdirection on the part of the trial judge and I think, in the circumstances and upon the evidence, he was legally warranted in drawing the conclusions he arrived at.

I would dismiss the appeal.

(2) [1915] 85 L.J.K.B. 483. (1) [1910] 16 Can. Cr. Cas. 237, at 240.

KELLOCK J. (dissenting).—All the members of the Court of Appeal were of opinion that, with the exception of the piece of celluloid, all the tools found in the possession of the accused were tools which the accused might reasonably require in his occupation as a truck driver in Northern British Columbia. The possession of such tools, excepting the celluloid, was then *prima facie* explained. (*Rex* v. *Ward* (1).) The learned trial judge believed the statement of the accused that the celluloid had come into his possession with the car when he purchased the latter some months earlier. O'Halloran J.A. who dissented did so because in his view the learned trial judge had misdirected himself in failing to apply the principle of the above decision with the result that the evidence was never properly considered from the standpoint of the burden under which the Crown came by reason of the explanation furnished by the accused's occupation for his possession of the tools, excepting the celluloid.

A reading of the judgement at trial, coupled with the learned judge's report, satisfies me that the learned judge did not properly direct himself as to the law applicable as laid down in *Rex* v. *Ward* (1). In his report he says that the accused's excuse for being on his way to Port Haney seemed flimsy

> when heard in connection with his explanation of why he happened to have such a complete housebreaking equipment in his truck

(he should have said car). The explanation of the accused for his possession of the tools apart from the celluloid by reason of his occupation was perfectly good, and as I have said, was so regarded by all the members of the Court of Appeal, and as to the celluloid, the learned judge believed the accused when he said it had come with the car. To my mind the above passage indicates that the learned judge paid no attention to the fact that the tools were tools of the accused in connection with his occupation and regarded the burden imposed by section 464 (*a*) Cr. C. as never having been other than throughout on the accused.

If that be so the question for decision is as to whether or not the learned trial judge must inevitably have come to a conclusion of the guilt of the accused on the evidence,

(1) [1915] 85 L.J.K.B. 483.

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notwithstanding the misdirection; *Stirland* v. *Public Prosecutor* (2). This must depend upon whether the Crown discharged the onus of establishing beyond reasonable doubt that the accused had possession with guilty intent.

The circumstances disclosed in evidence upon which the Crown can rely is (1) the presence of the celluloid, (2) the evidence as to the errand in Port Haney upon which the accused was engaged at the time and (3) the evidence of the appellant and Smylski that they had approached the garage thinking it was a place where they could buy cigarettes.

In my opinion there is no "inevitability" about the celluloid in view of the acceptance by the learned trial judge of the explanation with regard to it, and if it amounts to nothing it adds nothing to the other circumstances. As to number 2, its coupling by the learned judge in his report, with the explanation by the accused of his possession of the tools, as already pointed out, makes it impossible for me to say he would not have believed this evidence had he not been in error with regard to the tools. In addition there was a tailor by the name of Mostrenko in Port Haney, and the learned judge has misapprehended this part of the evidence as he refers to "the very inadequate sum" of three dollars paid to the appellant by Smylski "for the trip". It was not paid for the trip but for the gas which would be used on the trip. It was therefore not an inadequate sum at all.

This leaves (3) above. What is the evidence with regard to this? Smylski says:—

> I thought I would go and buy a chocolate bar, or soft drink. We got near the side-walk, and he (the appellant) said "It is closed". And we were talking about it was too far to go back, and then he said "There is someone stealing the car". We ran back.

The appellant said:—

> At that time I did'nt think it was constable Saunders, but we passed the car, walking to the garage. We stopped there and noticed there was —it was not a business place at night, like it was a confectionery; not in our line. We decided to turn back because it was too far to go to town from there. It would be foolish. Either that or we would have to go back. And sudden, I heard the car start, and I said "Joe somebody is stealing our car".

Constable Saunders said that he noticed the car, which later proved to be the appellant's, parked by the roadside

(2) [1944] 2 A.E. 13.

with its lights out. He stopped and got out and before the appellant and Smylski came up he had been there long enough to get into the car, start and stop the engine and get out of the car. As he had driven past the garage previously he had noticed "two figures near the garage and I thought it was somebody just walking by".

The reason given by the accused and Smylski for leaving the car and approaching the garage was that they thought it was a place where they could buy cigarettes. They had previously driven past a number of places where they could have done so.

Would the learned trial judge have refused to believe this as an explanation of the presence of the accused near the garage or should he have done so, had he correctly approached a consideration of all the evidences. With respect I find myself unable to say that such a result was inevitable. I therefore think that there should be a new trial and I would allow the appeal accordingly.

Appeal dismissed.