47/82

SUPREME COURT OF VICTORIA

NOTMAN v OWEN

Starke J

28 May 1982

CRIMINAL LAW – POSSESSION OF IMPLEMENTS OF HOUSEBREAKING NAMELY, A FALSE MOUSTACHE, TWO WIGS, TWO WALKIE-TALKIE SETS AND AN OXY-ACETYLENE SET WHICH INCLUDED A HOSE AND CUTTING TORCH – MEANING OF THE EXPRESSION "OR OTHER IMPLEMENT OF HOUSEBREAKING" – TYPES OF IMPLEMENTS DISCUSSED – CHARGE FOUND PROVED – WHETHER MAGISTRATE IN ERROR: *VAGRANCY ACT* 1966, S7(1)(g).

HELD: Order absolute. Convictions and sentence quashed.
1. The question in the present case was whether the various items namely, a false moustache, two wigs, two walkie-talkie sets and an oxy-acetylene set which included a hose and cutting torch come within the meaning of the expression "or other implement of housebreaking". This alternative is clearly to be construed *ejusdem generis*. The statute is a penal statute. The possession of the items reverses the onus of proof and accordingly, a strict interpretation of the section, including the *ejusdem generis* clause, must be applied. It is not suggested that any of the items found come within the description of the four implements enumerated in the section, that is, 'pick-lock key crow jack or bit'. If they did, then no more would be necessary, and the burden would be cast upon the defendant to establish on the balance of probabilities a lawful excuse. The items mentioned are all items which are physically used for the breaking in to buildings, and when applying the *ejusdem generis* rule that is the first thing one must bear in mind: that the implement alleged to be within the section must be physically capable of being used for breaking in.

2. In relation to the moustache, the wigs and the walkie-talkies, they are not used as implements of housebreaking. In respect of the oxy-acetylene torch there can be no doubt that it is capable of being used as an implement of housebreaking. However, it was not open to the magistrate to find that it is had a common though not exclusive use for the purpose of housebreaking.
***R v Patterson* [1962] 2 QB 429; (1962) 1 All ER 340, applied.**

STARKE J: This is an order to review the decision of a Stipendiary Magistrate made on 15th July 1981, at the Magistrates' Court, Melbourne. The applicant in these proceedings was charged with two offences, one of which was dismissed by the Magistrate and on the other he was convicted and sentenced to one month's imprisonment. The charge with which I am concerned was laid under s7(g) of the *Vagrancy Act* 1966 – Possession of implements of housebreaking. Section 7(1)(g) of the *Vagrancy Act* is in these terms:

> "Any person who has in his custody or possession without lawful excuse (the proof of which will be on such person) any pick-lock key crow jack bit or other implements of housebreaking shall be guilty of an offence."

The facts were, and are not in dispute, that early on the morning of 13th November 1980, two police officers attached to the Breaking Squad came with a search warrant to the applicant's home in Armadale and proceeded to search the premises. There was discovered in various places within the house and out in the yard a false moustache, two wigs, two walkie-talkie sets and an oxy-acetylene set which included a hose and cutting torch – the oxy-acetylene equipment was assembled. The applicant, when asked for an explanation of his possession of these various goods, either said that he just played around with the things or somebody must have left them there, or made no reply. A record of interview was taken from him and in respect of these items he offered no explanation for his possession of them, nor however, did he make any guilty admissions.

The short point then which arises for my determination is whether various items I have enumerated come within the meaning of the expression "or other implement of housebreaking". In my judgment this alternative is clearly to be construed *ejusdem generis*. The statute is a penal statute. The possession of the items reverses the onus of proof and accordingly, in my view, a

strict interpretation of the section, including the *ejusdem generis* clause, must be applied. It is not suggested that any of the items found come within the description of the four implements enumerated in the section, that is, 'pick-lock key crow jack or bit'. If they did, then no more would be necessary, in my opinion, and the burden would be cast upon the defendant to establish on the balance of probabilities a lawful excuse. However, this I think is to be gleaned from the inclusion of these items in the section. They are all items which are physically used – notoriously physically used – for the breaking in to buildings, and when applying the *ejusdem generis* rule I think that is the first thing one must bear in mind: that the implement alleged to be within the section must be physically capable of being used for breaking in.

Now, that is sufficient, in my judgment, to dispose of the moustache and the wigs. If they are used in conjunction with housebreaking they are merely to prevent, if possible, any witness identifying the housebreaker. However, in my view the Crown fail before that point is reached because whilst it is notorious that wigs and moustaches and the like are used in disguise in armed robberies of banks and TABs, they are not, as far as my experience takes me, used by a housebreaker: the reason of course being that it is necessary in a bank robbery for the felon to expose himself, whilst in a housebreaking it is the hope of the villain that he will not be seen at all. I might say, I further very much doubt whether they can be properly described as implements within the meaning of the section and for all those reasons, in my opinion, the moustache and the wigs cannot justify a conviction under this section. Very much the same reasoning, I think, applies to the walkie-talkies. Of course, they are solid objects and I suppose can be regarded as "implements" and I suppose one, if one was inclined to be a little eccentric, might use a walkie-talkie to break a window and so enter a house, but they are not implements that are used for this purpose. They may be used for sophisticated crimes wherein communication between two or more criminals is a necessary part, but that is not the case in regard to housebreakings and I think, whilst they can be regarded as implements, they are not implements of housebreaking.

I think all this Mr Nash in the end recognised although none he conceded. However, the problem, I think, is a more difficult one when one comes to the oxy-acetylene equipment, and it is on this point that I turn for assistance to the authorities. In *R v Patterson* [1962] 2 QB 429; (1962) 1 All ER 340 a special Court of Criminal Appeal assembled consisting of Lord Parker, the Lord Chief Justice, and Slade J, Barry J, Stevenson J and Widgery J. The purpose of assembling five judges apparently was to overcome a decision in *R v Ward* (1915) 3 KB 696. The English section is identical for all present purposes. It provides:

> "Every person who shall be found by night having in his possession without lawful excuse the proof whereof shall lie on such person any key, pick-lock, crow, jack, bit or other implement of housebreaking shall be guilty of a misdemeanour."

The Court having rejected the charge by the Deputy Chairman to the jury and rejected the conclusion arrived at by the Court of Criminal Appeal in *Ward's case* laid down the rule for trial judges in England in these words:

> "There remains, however, the question of what is the proper direction to be given to a jury in these cases. It seems to the Court that, in the first instance, the prosecution must prove that the prisoner was found in possession by night of either an implement which can properly be described as one of those specifically named in the section, or 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."

Having regard to the fact that a wide interpretation of the final words of the sub-section would mean that almost any solid object to be found in the house of a law-abiding citizen could be regarded as an implement of housebreaking, it seems to me that the section must have a restricted construction, having regard to its penal character, and if this is to be achieved it seems to me that the decision of the Court of Criminal Appeal in *Patterson's case*, whilst not binding on me, is one that I should adopt and should be applied in this State unless and until a court of higher authority holds to the contrary.

That being so I return to the oxy-acetylene torch. There can be no doubt that it is capable of being used as a housebreaking implement although I may say that I have not myself heard of such equipment being used for housebreaking although, of course, I have often heard of it being

used on bank safes and the like after the housebreaking has been committed. However, the decisive point in my mind in regards to this limb of the definition in *Patterson's case* are these words:

> "... capable in fact of being used as a housebreaking implement from its common although not exclusive use for that purpose."

I am not at all sure how I can inform myself of what is a common use and what is not. It is a clear conclusion that the police, if they wished to, if they were sufficiently qualified as expert witnesses, could give evidence of the common use of a particular article. No such evidence was led in this case and, as I have said, I have never heard of such equipment being used for housebreaking and, accordingly, it is impossible for me to come to the conclusion that it has a common though not exclusive use for the purpose of housebreaking.

There remains the final alternative limb or from the particular circumstances of the case in question. All I need say in this case, once one excludes the other articles which were discovered in the search, there appear to be no circumstances whatever which point to this equipment being used as a housebreaking implement and, accordingly, in my opinion, the order nisi should become absolute and the conviction and sentence below should be quashed.
