

## 162. Possession of Housebreaking Implements: s 425(1)(c)

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### 162.1 Legislation

[Last reviewed: March 2025]

*Criminal Code*

[Section 425](#) – Possession of things used in connection with unlawful entry

### 162.2 Commentary

[Last reviewed: March 2025]

There are several separate situations which constitute an offence under s 425(1)(a)-(e). This includes possessing an instrument of housebreaking without lawful excuse at night under s 425(1)(c), which is the subject of this commentary and suggested direction.

To be guilty of the offence under s 425(1)(c), the Defendant must have:

- (1) Had in their possession;
- (2) An instrument of housebreaking;
- (3) At night;
- (4) Without lawful excuse;

#### *Meaning of 'night'*

For s 425(1)(c), an offence is committed in the night if it is committed between 9 pm and 6 am: s 1 of the *Criminal Code*.

#### *Meaning of 'possession of an instrument of housebreaking'*

An instrument of housebreaking includes any instrument which, from its nature, is capable of being used for housebreaking, although it may ordinarily be used for a lawful purpose (see *R v Patterson* [\[1962\] 2 QB 429](#)).

To possess an instrument of housebreaking, the defendant must have intentionally had physical control or custody of a thing, plus the knowledge it is under his or her custody or control (*R v Boyesen* [\[1982\] AC 768](#), [773–774] (Lord Scarman)). In *R v Brauer* [\[1990\] 1 Qd R 332](#), [360], Cooper J stated (with reference to *He Kaw The* [\(1985\) 157 CLR 523](#)) that possession:

'is a state of affairs that exists because of what a person who is in possession does in relation to the thing possessed, and involves the state of mind with

respect to that thing. The actus reus of possession is that the thing should be physically in, or under, the control of the accused’.

If possession of an instrument of housebreaking is shown, any lawful excuse for the possession must be proved by the Defendant on the balance of probabilities.

Where two people share the same common purpose of housebreaking, the possession by one person of an instrument of housebreaking is possession of both people (*R v Martin* [1965] NZLR 228).

### 162.3 Suggested Direction

[Last reviewed: March 2025]

**The prosecution must prove beyond reasonable doubt that the Defendant:**

**1. Was found at night.**

**That means that the Defendant was located between the hours of 9pm and 6am.**

**2. In possession of [the object/s identified in the evidence].**

**The essence of the concept of possession is that at the relevant time the Defendant intentionally had control over the object in question [refer to the object/s in question]. (Where relevant, add): The Defendant may have had that control either alone or jointly with some other person or persons.**

**To be in possession of the [object in question], the Defendant must have known that [he/she] was is in possession of it. For example, this means that if the Defendant was carrying a case into which somebody had, without [his/her] knowledge, slipped an object, then [he/she] would not be in possession of that object.**

**It is not necessary for the Defendant to have had the [object in question] in [his/her] hand or on [his/her] person for the Defendant to be in possession of it. Further, it does not matter whether or not the Defendant owned the [object in question]. You do not need to own something in order to be in possession of it. You can possess something temporarily or for some limited purpose.**

**3. [The object] was an instrument of housebreaking.**

**An instrument of housebreaking includes every instrument which, from its nature, is capable of being used for housebreaking, even if it may ordinarily be used for a lawful purpose.**

**If the prosecution has established those three things beyond reasonable doubt; that is, that the Defendant was found at night in possession of an instrument of housebreaking, then the Defendant is guilty of the offence unless [he/she] establishes on the balance of probabilities that:**

- 4. [He/She] had a lawful excuse for possession of the instrument at the time and place alleged.**