

Possession of Housebreaking Implements: s 425(1)(c)

Legislation

425 Possession of things used in connection with unlawful entry

(1) Any person who is found under any of the circumstances following, that is to say—

...

(c) having in the person's possession by night without lawful excuse, the proof of which lies on the person, any instrument of housebreaking;

...

is guilty of a crime, and is liable to imprisonment for 3 years.

(2) If the offender has been previously convicted of a crime relating to property, the offender is liable to imprisonment for 7 years.

Commentary

There are a number of separate situations which constitute an offence under s 425. It is an offence to possess an instrument of housebreaking without lawful excuse at night: s 425(1)(c).

Meaning of 'night'

An offence is committed in the night if it is committed between 9 pm and 6 am: s 1.

Meaning of 'possession of an instrument of housebreaking'

An instrument of housebreaking includes every 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 per Lord Scarman at 773–4.

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.

Suggested Direction

The prosecution must prove that the defendant:

- 1. Was found by night.**

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

- 2. Was in possession of an instrument of housebreaking.**

The essence of the concept of possession is that at the relevant time the defendant intentionally had control over the object in question. The defendant may have that control either alone or jointly with some other person or persons.

To be in possession of the object the defendant must know that he/she is in possession of the object, thus, if the defendant was carrying a case into which somebody had, without his/her knowledge, slipped an object he/she would not be in possession of that object.

If is not necessary for the defendant to have the object in his/her hand or on his/her person for the defendant to be in possession of it. Further, 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. Of an instrument of housebreaking.**

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

- 4. Without lawful excuse.**

Once the prosecution has established beyond reasonable doubt that the defendant was found at night in possession of an instrument of housebreaking the defendant is guilty of the offence unless he/she establishes on the balance of probabilities that he/she had a lawful excuse for possession of the instrument at the time and place alleged.