BRUNO ZANINI .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1967

*May 16
Oct. 3

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Accessory—Possession of house-breaking instruments—Actual physical possession in accused's confederates—Possession charge against confederates withdrawn—Effect on accused's conviction for possession—Whether s. 21(2) of the Criminal Code can support conviction or whether s. 3(4) exhaustive—Criminal Code, 1953-54 (Can.), c. 51, ss. 3(4), 21(2), 292(1)(b), 295(1).

The appellant drove two companions to a house and waited for them while they carried out the admitted common intention to break and enter. The two companions were arrested as they came out of the house and were found to have house-breaking instruments. The two companions pleaded guilty to a charge of breaking and entering, and a second charge of possession of the instruments was withdrawn. The appellant was acquitted of the charge of breaking and entering and stealing on a directed verdict because the property stolen could not be identified as being the property of the owner of the house. However, he was convicted of possession of the instruments. The conviction was affirmed by the Court of Appeal. He was granted leave to appeal to this Court on the questions of law as to whether, in the circumstances, s. 21(2) of the Code could support the appellant's conviction or was the prosecution obliged to rely on s. 3(4) of the Code as being exhaustive.

Held: The appeal should be dismissed.

The Court of Appeal correctly rejected the submission that, since his confederates were not convicted of the offence of possession, the appellant could not be convicted of possession because the Crown could not appeal to s. 21(2) of the Code and was obliged to rely solely upon s. 3(4). Under s. 21(2), the appellant was a party to the commission of the offence of possession of house-breaking instruments. The fact that the charge was withdrawn against the two active principals did not affect the right of the Crown to proceed against the appellant. There is no requirement in s. 21(2) that the active participants must have been convicted of the offence. The question is whether the appellant committed the offence of possession. Furthermore, the acquittal on a directed verdict did not decide in his favour any issue in the possession charge that would be inconsistent with the finding on the evidence that the appellant had formed a common intention with two others to effect a breaking and to assist in its prosecution. It was open to the jury to find that the appellant knew or ought to have known that one of his confederates at least would of necessity be in possession of house-breaking instruments when the three men drove to the house.

The Court of Appeal was correct in maintaining that s. 21(2) of the Code may be applied where the facts warrant the inference that the accused ought to have known that the commission of the offence—possession

*PRESENT: Cartwright, Fauteux, Judson, Ritchie and Hall JJ.

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—would be the probable consequence of carrying out the common purpose. The Crown was not limited to reliance on the provisions of s. 3(4) of the Code.

Droit criminel—Partie à une infraction—Possession d'instruments d'effraction—Possession physique actuelle des complices de l'accusé—Accusation de possession contre les accusés retirée—Effet vis-à-vis de l'accusé—L'article 21(2) du Code Criminel peut-il supporter le verdict ou l'art. 3(4) épuise-t-il les moyens contre l'accusé—Code Criminel, 1953-54 (Can.), c. 51, arts. 3(4), 21(2), 292(1)(b), 295(1).

L'appelant a conduit deux compagnons à une maison et les a attendus pendant qu'ils mettaient en exécution l'intention commune admise de s'introduire par effraction. Les deux compagnons ont été appréhendés alors qu'ils sortaient de la maison et des instruments d'effraction ont été trouvés sur eux. Les deux compagnons ont admis leur culpabilité à une accusation d'effraction, et une seconde accusation de possession des instruments a été retirée. L'appelant a été acquitté de l'accusation d'effraction et d'avoir volé, sur les instructions du juge, parce que la propriété volée ne pouvait pas être identifiée comme étant la propriété du propriétaire de la maison. Cependant, il a été trouvé coupable de possession des instruments d'effraction. Le verdict a été confirmé par la Cour d'Appel. Il a obtenu la permission d'en appeler devant cette Cour sur les questions de droit à savoir si, dans les circonstances, l'art. 21(2) du Code pouvait supporter le verdict de culpabilité ou si la Couronne était obligée de s'appuyer uniquement sur l'art. 3(4) du Code.

Arrêt: L'appel doit être rejeté.

La Cour d'Appel a rejeté avec raison la prétention que, puisqu'il n'y avait pas eu un verdict de culpabilité contre ses complices sur l'accusation de possession, l'appelant ne pouvait pas être trouvé coupable de possession parce que la Couronne ne pouvait pas faire appel à l'art. 21(2) du Code et était obligée de s'appuyer uniquement sur l'art. 3(4). Sous l'art. 21(2), l'appelant était une partie à l'infraction de possession d'instruments d'effraction. Le fait que l'accusation avait été retirée contre les deux parties principales n'affectait pas le droit de la Couronne de procéder contre l'appelant. L'article 21(2) n'exige nullement que les parties principales doivent avoir été trouvées coupables de l'offense. La question est de savoir si l'appelant a commis l'offense de possession. Bien plus, l'acquittement, en raison des instructions du juge, n'a pas eu pour effet de décider en sa faveur aucune question sur l'accusation de possession qui pourrait être incompatible avec la conclusion basée sur la preuve que l'appelant avait formé une intention commune avec les deux autres pour s'introduire par effraction et pour aider à la mise en vigueur de cette intention. Le jury pouvait trouver que l'appelant savait ou aurait dû savoir qu'au moins un de ses complices aurait nécessairement en sa possession des instruments d'effraction lorsque les trois hommes se sont dirigés vers la maison.

La Cour d'Appel a eu raison de soutenir que l'art. 21(2) du Code peut trouver son application lorsque les faits justifient une inférence que l'accusé devait savoir que la commission de l'offense—possession —serait la conséquence probable de la mise en exécution du but commun. La Couronne n'était pas limitée aux seules dispositions de l'art. 3(4) du Code.

APPEL d'un jugement de la Cour d'Appel de l'Ontario[1], confirmant un verdict de culpabilité. Appel rejeté.

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APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming the appellant's conviction. Appeal dismissed.

Stanton Hogg, for the appellant.

D. A. McKenzie, for the respondent.

The judgment of the Court was delivered by

JUDSON J.:—The appellant, Bruno Zanini, was convicted under s. 295(1) of the *Criminal Code* on a charge of unlawful possession of housebreaking instruments. The Court of Appeal[1] dismissed the appeal. This Court granted leave to appeal on two questions of law:

(a) whether the provisions of section 21(2) can support the conviction of the appellant when there was no conviction of his confederates for the very offence and no conviction of the accused for breaking and entering and

(b) even if these circumstances do not affect the application of section 21(2) can that provision, in any event, be invoked for a possession offence or is the prosecution obliged to rely on section 3(4) as being exhaustive for that purpose.

The facts are that on December 20, 1963, the appellant drove a car to 780 Spadina Road, Toronto. He had with him two passengers, Bailey and Hudson. Bailey and Hudson left the car, entered a house at 780 Spadina Road by forcing the back door with a screwdriver. The police arrested them as they came out of the back door and found a screwdriver and a flashlight on one of the men.

Zanini was waiting for the men with the engine of the car running. He denied knowledge of the two other men. The car belonged to one of these men, and the police a week or ten days before had observed the three men driving in the vicinity of the house and observing the house.

All three were charged under s. 292(1)(*b*) with breaking and entering and stealing four fifty-cent pieces, the property of the owner of the house, one Dr. Arnold Iscove, and they were also charged under s. 295(1) with possession of

[1] [1966] 1 O.R. 499, 47 C.R. 195, 2 C.C.C. 185.

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housebreaking instruments. Bailey and Hudson pleaded guilty to the charge of breaking and entering. The charge against them of possession was withdrawn.

Zanini pleaded not guilty to both charges. He was acquitted of the charge of breaking and entering and stealing on a directed verdict, since the four fifty-cent coins could not be identified as being the property of Dr. Iscove.

On the charge of possession of housebreaking instruments, he was found guilty. The learned trial judge instructed the jury that if they found that the appellant had formed a common intention with the other two men to effect an unlawful purpose, that is to say, break into the house, then they could find that he knew or ought to have known that as a result of such common intention he knew or ought to have known that the other men were in possession of instruments of housebreaking and therefore under s. 21 of the *Criminal Code*, the jury could find that the appellant was in possession of a screwdriver found on one of the men who entered the house.

Zanini now submits that, since his confederates were not convicted of the offence of possession, he could not be convicted of possession because the Crown could not appeal to s. 21(2) of the *Criminal Code* and was obliged to rely solely upon s. 3(4). Section 21(2) reads:

> Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

Section 3(4) reads:

> For the purposes of this Act,
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> (*a*) a person has anything in possession when he has it in his personal possession or knowingly
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> (i) has it in the actual possession or custody of another person, or
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> (ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person; and
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> (*b*) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

The Court of Appeal correctly rejected this submission. Under s. 21(2) of the *Criminal Code*, Zanini was a party

to the commission of the offence of possession of housebreaking instruments. The judge's instruction to the jury given pursuant to s. 21(2) of the *Criminal Code* was correct. The fact that the charge was withdrawn against the two active principals does not affect the right of the Crown to proceed against this accused. There is no requirement in s. 21(2) of the *Criminal Code* that the active participant or participants must have been convicted of the offence. The question is whether Zanini committed the offence, i.e. the possession of instruments for housebreaking. It cannot be disputed that one of the two confederates was in fact in possession of instruments for housebreaking. In addition, it was established (and all the facts were agreed upon for the purpose of this appeal and in the Court of Appeal) that the appellant had formed an intention in common with the other two men to break and enter and assist each other for this purpose. There is no principle of law that unless there is a conviction of the confederates for the possession offence, the appellant cannot be convicted for that offence.

On the second question of law on which leave to appeal was given, in my opinion the Court of Appeal was correct in maintaining that s. 21(2) of the Code may be applied where the facts warrant the inference that the accused ought to have known that the commission of the offence, i.e., possession of housebreaking instruments would be the probable consequence of carrying out the common purpose. The Crown is not limited to reliance on the provisions of s. 3(4) of the Code above quoted. The very point was decided by the Court of Appeal of British Columbia in *Rex v. Harris*[1]. The Ontario Court of Appeal in this case followed the reasoning of the British Columbia Court of Appeal, correctly in my opinion.

I now return to the second branch of the first point of law that s. 21(2) cannot support the conviction for the possession offence when there was no conviction of the appellant for breaking and entering. I have already said that the acquittal on the charge of breaking and entering and stealing four 50-cent pieces, the property of Arnold Iscove, was the result of a directed verdict because the owner of the premises entered could not identify the coins.

This acquittal does not decide in favour of the accused any issue in the possession charge that would be inconsist-

[1] (1953), 105 C.C.C. 301.

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ent with the finding on the evidence that the accused had formed a common intention with two others to effect a break-in and to assist in its prosecution. The accused cannot assert that the effect of the acquittal on this directed verdict is equivalent to a determination in his favour that he was not there or that he had no connection with the two active participants and nothing less than this would assist him.

Notwithstanding the directed acquittal on breaking and entering, it is clear on the evidence and the admissions that the accused had formed an intention in common with the other two men to break and enter the house. The possession of housebreaking instruments was a probable consequence of the carrying out of the common purpose. The screwdriver was in fact used to break in by the back door. It was open to the jury to find that the accused knew or ought to have known that one of his confederates at least would of necessity be in possession of housebreaking instruments when the three men drove to the house. There is no "issue estoppel" here on any of these points.

I would dismiss the appeal.

Appeal dismissed.

Solicitor for the appellant: S. Hogg, Toronto.

Solicitor for the respondent: The Attorney-General for Ontario, Toronto.