

Criminal Law - Evidence-Presumption of Intent  
Arising from Possession of Burglarious Tools.  
Nance v. Commonwealth, 203 Va. 428 (1962)

Alfred Swersky

---

Repository Citation

Alfred Swersky, *Criminal Law - Evidence-Presumption of Intent Arising from Possession of Burglarious Tools. Nance v. Commonwealth, 203 Va. 428 (1962)*, 6 Wm. & Mary L. Rev. 227 (1965), <https://scholarship.law.wm.edu/wmlr/vol6/iss2/8>

## CURRENT DECISIONS

**Criminal Law—EVIDENCE—PRESUMPTION OF INTENT ARISING FROM POSSESSION OF BURGLARIOUS TOOLS.** The defendant, along with two co-defendants, was found guilty of felonious possession of burglarious tools and implements with intent to commit a felony. The appeal was founded on the trial court's refusal to grant the defendant an instruction to the effect that unless some evidence of a crime or an attempt to commit a crime was shown there could be no conviction. On appeal it was held that the trial court's refusal of the instruction was correct and the conviction was affirmed.<sup>1</sup>

The court's view that no proof of a crime or an attempt to commit a crime was necessary was predicated on a statutory presumption of intent to commit a felony. In Virginia law, it is provided that "the possession of burglarious tools, implements or outfit . . . shall be prima facie evidence of an intent to commit burglary, robbery, or larceny."<sup>2</sup> In this portion of the statute, the court said, could be found the basis for the presumption. The presumed intent is derived solely from the possession of the type of implements commonly used in the commission of the crime of burglary. In its interpretation of the statute the court said that it was not necessary for the state to prove any intent but that possession must be proved beyond a reasonable doubt. Until the prosecution proves possession by the accused beyond a reasonable doubt the presumption of criminal intent cannot be invoked.<sup>3</sup> Possession of such implements may be proved by circumstantial evidence.<sup>4</sup> The vital issue is not the ownership of the tools but rather the possession of them by the accused. This possession may be joint or several and two or more persons may be in possession if each has the power of control and the intent to control jointly.<sup>5</sup> It was held in *Commonwealth v. Robinson*<sup>6</sup> that the use of burglarious tools was constructive possession by two or more persons engaged in a joint enterprise although actual custody was in an accomplice.<sup>7</sup> This case was decided under a statute similar to Virginia's. It is therefore logical to assume that the burden on the

---

1. *Nance v. Commonwealth*, 203 Va. 428, 124 S.E.2d 900 (1962).

2. VA. CODE ANN. § 18.1-87 (1950).

3. *Burnette v. Commonwealth*, 194 Va. 785, 75 S.E.2d 482 (1953).

4. *Johnson v. State*, 145 So.2d 156 (Miss. 1962).

5. 12 C.J.S. *Burglary*, § 69,754; see also, 9 AM. JUR. *Burglary*, § 87, 282; *State v. McHenry*, 207 Iowa 760, 223 N.W. 535 (1929).

6. 242 Ky. 98, 45 S.W.2d 844 (1932).

7. See also, *People v. Birnbaum*, 208 App. Div. 476, 203 N.Y. Supp. 697 (1924).

state to prove possession of burglarious implements is not a very difficult one to carry.

However, mere possession is not a crime under the statute. It is possession coupled with the intent to commit a crime that is punishable under Virginia law. Once possession of the type of instrument commonly used in burglaries is proved beyond a reasonable doubt the burden of going forward with the evidence to show a lack of the presumed intent shifts to the defendant. This does not, however, shift the ultimate risk of non-persuasion from the prosecution, nor does it deprive the defendant of his right to have the jury instructed on the presumption of his innocence. Furthermore, it does not deprive the accused of any defense he may have against the charge nor does it relieve the court or the jury from their duty to determine all questions of fact from the weight of all of the evidence.<sup>8</sup> The statutory presumption is not conclusive. The accused may overcome the presumption by presenting a reasonable explanation for his possession of the tools. The question of whether or not the defendant has overcome the presumption has been held to be a jury question.<sup>9</sup> In *Wilborne v. Commonwealth*<sup>10</sup> the court held that the unexplained possession by the accused of the identical instrument used in a breaking and entering coupled with possession of other implements commonly used in burglaries and some of the goods stolen from the building burglarized was sufficient to warrant a jury verdict of guilty of housebreaking. The absence of a reasonable explanation for possession of these articles justified the inference that the accused was the perpetrator of the crime.<sup>11</sup> When it appears from the evidence that the accused has reasonably overcome the presumption by explanation of his possession of the implements the jury shall find accordingly.<sup>12</sup> However, when the defendant cannot explain his presence in an area far from his home at 4:30 A.M. and cannot satisfactorily explain his possession of tools adapted for breaking and entering, the court or the jury will be justified in making an inference of burglarious intent.<sup>13</sup>

It can be concluded then that the real function of a presumption is not evidential but rather is procedural. Its procedural effect is to fix

---

8. Burnette v. Commonwealth, *supra* note 2.

9. State v. Smith, 247 Iowa 500, 73 N.W.2d 189 (1956).

10. 182 Va. 63, 28 S.E.2d 1 (1943).

11. *Ibid.*

12. People v. Polenisiak, 26 Ill.2d 317, 186 N.E.2d 271 (1962).

13. People v. Faginkrantz, 21 Ill.2d 75, 171 N.E.2d 5 (1960).

upon the opposite party the burden of at least going forward with evidence of the actual existence, or non-existence, of the presumed fact.<sup>14</sup> In some jurisdictions there seems to be a question as to the extent of the burden placed on the defendant. The duty may be to carry the whole burden of proof, including the overall burden of persuasion, or merely to introduce some evidence that is contrary to the presumption.<sup>15</sup>

The Federal Courts have imposed a stipulation on the statutory presumption. In *Benton v. United States*<sup>16</sup> a statute making it a crime to have possession of any implement which may reasonably be employed in the commission of a crime<sup>17</sup> was held unconstitutional as to any implement which does not in itself give rise to sinister inferences. This followed the line set down in *Tot v. United States*<sup>18</sup> which held that a statutory presumption cannot be sustained if there is no rational connection between the fact proved and the ultimate fact presumed.<sup>19</sup>

In setting down a doctrine of comparative convenience in shifting to the defendant the burden of going forward with the evidence to rebut the presumption the Supreme Court said that the burden may be shifted where such shifting will aid the accuser without subjecting the accused to hardship or oppression.<sup>20</sup> In *Mobile, Jackson and Kansas City Railroad v. Turnipseed*<sup>21</sup> it was held that legislation providing that proof of one fact shall be prima facie evidence of the main presumed fact is merely a rule of evidence and clearly within the scope of the general powers of governments to enact legislation.

The rule as set down by the Virginia Court in *Nance v. Commonwealth*<sup>22</sup> seems to be the best rule as it places upon the defendant the burden of providing a reasonable explanation for the possession of the burglarious implements and seems to meet the reasonable connection and comparative convenience tests of the Federal Courts.

Alfred Swersky

---

14. Hale, *Necessity of Logical Inference to Support a Presumption*, 17 SO. CAL. L. REV. 48 (1943); for a discussion of statutory presumptions in general see Brosman, *The Statutory Presumption*, 5 TUL. L. REV. 17 (1930).

15. Note, 55 COLUM. L. REV. 527 (1955).

16. 232 F.2d 341, (D.C. Cir. 1956).

17. D.C. CODE § 22-3601 (1951).

18. 319 U.S. 463 (1943).

19. For a discussion of the Tot case, see Morgan, *Constitutional Restrictions on Statutory Presumptions*, 56 HARV. L. REV. 1324 (1943).

20. *Morrison v. California*, 291 U.S. 82 (1934).

21. 219 U.S. 35 (1910); *Accord*, *McFarland v. American Sugar Co.*, 241 U.S. 79 (1916).

22. *Supra* note 1.