

COURT OF GENERAL SESSIONS OF THE PEACE,
City and County of New York.

THE PEOPLE

vs.

Sophie Lyons.

ARGUMENT OF THE DEMURRER.

ASSIST. DIST. ATT'Y GORDON BATTLE,

For the People;

FREDERICK HOUSE, ESQ.,

For the defendant.

MR. HOUSE: On the 23rd day of September of this year the Grand Jury of the County brought in an indictment under Section 508 of the Penal Code, charging the defendant, Sophie Lyons, with having a bag in her possession, which was an instrument designed and adapted and commonly used for the com-

mission of the crime of larceny, and to that indictment the defendant has filed a demurrer upon the grounds that the facts stated in the indictment do not constitute or set forth a crime.

Your Honor will observe, upon reading Section 508 of the Penal Code, that it provides as follows:

"A person who makes or mends, or causes to be made or mended, or has in his possession in the day or night time, any engine, machine, tool, false key, pick-lock, bit, nippers or implements adapted designed or commonly used for the commission of burglary, larceny or other crime, under circumstances evincing an intent to use or employ, or allow the same to be used or employed, in the commission of a crime, or knowing that the same are intended to be so used,, shall be guilty of a misdemeanor, and if he has been previously convicted of any crime, he is guilty of a felony."

The position which we take so far as the demurrer is concerned, is, that, assuming for the sake of

argument, that this defendant at the time of her arrest, was in possession of a bag, which the Police Department of this City commonly call a shop-lifter's bag, that the possession of that, even if it were admitted, for use unlawfully by this defendant, does not bring her within the provisions of this statute;---and for what reason and why? The language is very plain---"A person who has in his possession, in the day or night time, any engine, machine, tool, false key, pick-lock, bit, nip-pers or implements"---for what purpose?---"adapted or designed or commonly used in the commission of a crime of burglary or of larceny."

Now, if a person is in possession of a shop-lifters' bag, what is the evident intent and purpose with which that person has that bag upon their person? Certainly, it cannot be seriously contended by my friend on the other side that this is an instrument which is adapted or commonly used for the commission of the crime, but, on the contrary, it is an instrument which is used, if used

for any purpose, to conceal the fruits of the crime. Suppose, for instance, and your Honor may be aware of cases where women go into these large department stores in the City, with a common ordinary bag upon their arm---they may steal property and after they have stolen it, use the bag for the purpose of concealing it. Certainly it would not be contended by my friend on the other side that that bag was used in the commission of the crime. In other words, the minute a person armed with a shop-lifter's bag, if it is such a bag, goes into the store and takes manual possession of property which does not belong to him, but which belongs to some other person, with the avowed intent in their mind of appropriating that property to their own use, the very minute that they lay physical hold upon that property, with that intent in their mind, the crime of larceny is completed. The shop-lifter's bag, up to that time, plays no part in the commission of that crime. It in no wise can be used for

the commission of that crime, but the minute that the crime has been committed, and after the larceny is complete, then they put the stolen property in the shop-lifter's bag to aid and assist them in getting out of the store, more effectually concealing the fruits of their crime. It seems to me that it is not such an instrument as comes within the designation of this statute. Take, for instance, the instruments that are used---a false key. A person is desirous of committing the crime of burglary. He may have doors to go through. If the doors are locked, a false key may be used very well by him to open that door, and the opening of the door itself is aiding and assisting him in the commission of the crime of burglary, because it gives him access to the place where the property is. Take the next instance---nippers. Your Honor knows what they are used for by burglars. A man goes into a house and a door confronts him. He is desirous of opening that door in order to get in to take possession of property that does not belong to

him. He inserts a false key in the lock, but he finds an obstruction, and he looks and discovers a key which fastens the door from the other side, and, therefore, he cannot use his false key. He, therefore, takes these nippers which are very delicately made and at the same time very strong, and he inserts them in the key-hole, and with them turns the key around. That is the instrument which he uses and it is commonly adapted and designed to enable him to commit the crime of burglary.

My friend on the other side will not say that a person in possession of one of these shop-lifter's bags could not go into one of these stores and commit a larceny without the use of that bag. Take, for instance, a pick-pocket; he sees some unsuspecting person upon a car, and he approaches him and takes his watch from him. It is not to be presumed that that pick-pocket, after he has removed the watch from the person of his victim, is going to walk out of the car with the watch exposed in his hand. He either puts it in his pocket,

either the pocket of his coat or the pocket of his trousers. Would my friend on the other side contend seriously for one minute that that pocket of the coat or pocket of the trousers, because it had been made the place in which the fruits of the crime were deposited in order to allow the thief more facility for escape, was such an instrument as is mentioned and described in the provision of this statute?

Take again the language of the statute itself. It simply, it seems to me, sets forth the nature and character of the instruments and implements which the statute was made to cover. Not the receptacle for concealing the fruits of the crime after a crime has been committed; but some instrument which is commonly used by people who are depredators against the property of other people in aiding and assisting, not to carry the fruits of the crime away, but to enable them to commit the crime itself, and for that reason we say that that indictment does not come within the pre-

visions of the statute, and that the article which is mentioned in the indictment is not one which is covered by section 508, and, therefore, this demurrer ought to be allowed, and the indictment dismissed.

MR BATTLE: I have made careful investigation so far as possible, within my limited time, and I find no authorities upon this question. There is no adjudication, I am sure there is none in this State, and have been unable to find any in any of the text books deciding whether the instrument or implement known as a shop-lifter's bag is one of those included under Section 508 of the Penal Code. That section provides that any implement, adapted, designed or commonly used for the commission of burglary, larceny or any other crime, and the possession of such an instrument under circumstances evincing an attempt to use or employ the same, or to allow the same to be used or employed in the commission of a crime, is a misdemeanor, unless the person has been previously convicted of a

crime, and then he is guilty of a felony.

The bag charged in this indictment to be a shop-lifter's bag is a bag of a peculiar character, well known to the police and anyone having anything to do with the enforcement of the criminal law. It is adapted and designed and commonly used for the commission of the crime of larceny, and concealed under the skirts of the shop-lifter, it affords a means for completing the crime of larceny, and in that connection I would call the attention of the Court to the fact that asportation, the taking and carrying away, is the essential element in the crime of larceny. The indictment charges not only the stealing, but the carrying away. The crime can not be complete unless the property is carried away, and this instrument is intended to assist the criminal in the completion of that element of the crime.

I respectfully submit that that section is intended to prevent professional criminals from using implements designed, employed and regularly

used for the commission of crime. It is intended to make the mere possession of such an instrument a crime, and to protect the community through that means.

I respectfully submit that the implement set forth in this indictment is one of those included in this section, and the demurrer should be overruled:

MR. HOUSE: It is the first time I ever knew that, in order to constitute the crime of larceny, a person would have to get away absolutely with the property.

MR. BATTLE: I have not said that.

MR. HOUSE: My friend's argument would import that. He said that asportation is one of the elements of larceny, and indictments always say that "the person did take, steal and carry away." If his argument were to be taken literally, I might go into one of these great apartment stores in this city with the intent and purpose in my mind of stealing a piece of property, and I might live that

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piece of property from the table on which it was placed, with the intent of taking it away. I have actual manual possession of it. If I raise it an inch from the table, it is asportation and it constitutes the crime of larceny, and if I then put it in my coat pocket, for the purpose of stealing it---

THE COURT: You need not discuss that point as to asportation.

MR. HOUSE: Then I have nothing more to say.

THE COURT: It is a little doubtful to my mind whether the question as to whether the bag such as is described here, would come under the definition of the statute as being an implement, is not a question of fact for a jury to determine.

On the other hand, it is a question of law in this aspect: What was the intent of the legislature in enacting this particular section? Now, this section creates a new statutory crime, and of course must be construed strictly as against the People, and liberally as it affects the individual

Now, the caption of the statute is: "Possession of burglar's instruments, etc.", and the section reads:

"A person who makes or mends, or causes to be made or mended, or has in his possession in the day or night time, any engine, machine, tool, false key, pick lock, bit, nippers or implements adapted, designed or commonly used for the commission of burglary, etc."

Now, in the ordinary acceptation of the words of the English language, I think no one would naturally and in ordinary conversation describe a muslin bag as an implement or a tool or an engine or an instrument.

Now, then, the only question of law in the matter is: Did the Legislature, in passing that enactment, mean to include under that somewhat generic word "implement" a bag such as is described in this indictment?

In another section of the Penal Code, where there is a description of the manner and method

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by which an offence may be committed, section 210, in describing or defining assault in the second degree, paragraph 4, reads:

"Wilfully and wrongfully assaults another by the use of a weapon, or other instrument or thing likely to produce grievous bodily harm." If the legislature, in the section under consideration, had employed those words, "or thing" it would most surely cover the offence charged here, and this bag would come under that description; and from the fact that the legislature in one section of the same enactment, the Penal Code, uses a generic word that covers every possible article or contrivance and in another uses a word of much more limited significance, it is fair to infer that the distinction made was intentional.

In this aspect of the case, while in the other I would prefer to submit to the jury as one of fact the question as to whether this bag is an implement adapted, designed or commonly used for the commission of larceny or other crime, I

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will hold that it does not appear from the context
that the legislature had in view that particular
thing in making this enactment; and I, therefore,
sustain the demurrer.
