COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCrApp. No. 212 of 2017

B E T W E E N

THE ATTORNEY-GENERAL
Appellant

AND

KEVIN ANDREWS
Respondent

BEFORE: **The Honourable Sir Michael Barnett, P**
The Honourable Mr. Justice Isaacs, JA
The Honourable Mr. Justice Evans, JA

APPEARANCES: **Ms. Kendra Kelly, Counsel for the Appellant**

Mr. Murrio Ducille, Counsel for the Respondent

DATES: **21 March 2019; 7 May 2019; 2 July 2019; 7 October 2019; 20 November 2019; 13 February 2020; 25 May 2020; 11, 23 June 2020; 21 July 2020; 26 October 2020**

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Criminal appeal – Accessory after the fact – Appeal against a directed acquittal – Hearsay evidence – Reopening of the no case to answer application – Sections 88A and 448 of the Penal Code

The respondent and another, TD, were charged with murder, attempted armed robbery and burglary for the 28 October 2014 home invasion of Emma and Glen Cartwright. During the incident the Cartwrights' son, Robert, was shot and later died of his injuries. Before he died, however, the Crown's case is that Robert was able to fire his shotgun in the direction of the intruders, wounding one of them, the respondent's co-accused, TD.

The prosecution's case is that the respondent and TD left the scene and went to the home of the respondent's girlfriend where the respondent arranged for his girlfriend's roommate to transport

TD to the Princess Margaret Hospital. Upon arrival at the hospital a police officer enquired of TD how he had been injured; he is alleged to have responded that he had been stabbed. A nurse, however, informed the police officer that the wound was a firearm wound, not a stab wound. TD was arrested at the hospital. He and the respondent were later charged with the aforementioned offences.

At their trial, following the close of the prosecution's case, a submission of no case to answer was made. In relation to the respondent the trial judge found that only the lesser offence of accessory after the fact only should be left to the jury for consideration. Two days later the judge allowed the no case submission to be re-opened and ruled that the respondent did not have to be called upon to answer any of the charges. The Crown now appeals that ruling.

Held: appeal dismissed.

Section 88A of the Penal Code defines an accessory after the fact as one who, knowing that another has been a party to an offence, assists that other person for the purpose of enabling that person to avoid the due process of law.

At its essence, the Crown's case is that the respondent was in the company of TD; who was the person shot during the home invasion in Blair. Further, that TD presented himself to the hospital for treatment but lied about his injury. However, there is no evidence linking TD to the scene in Blair and no evidence that TD was the person shot. While there is a statement purportedly from TD placing himself and the respondent at the scene that statement cannot be considered as evidence against the respondent. Upon being arrested the respondent told the arresting officer that he saw blood on TD and therefore asked his girlfriend to take him to the hospital. Considering the Crown's evidence in the round it could not rise above suspicion that the the respondent was aware TD had committed an offence.

To be guilty of the offence of accessory after the fact the evidence must have revealed that the respondent assisted TD to avoid the due process of law, knowing him to have committed an offence. There was no intent by the respondent to assist TD avoid capture or the due process of law disclosed or inferred from the respondent's efforts to get TD to the hospital. The Crown's evidence in this case fell far short of the requisite standard of proof. In the circumstances the judge cannot be faulted for reopening the no case to answer submission and changing her ruling thereon.

Bennett v Benn (1965) 7 WIR 414 applied
Director of Public Prosecutions v Varlack [2008] UKPC 56 considered
Farquharson v R [1973] A.C. 786 considered
Levison v Republic [2015] 1 LRC 626 applied
R v Galbraith [1981] 1 WLR 1039 considered
R v Hayter [2005] UKHL considered
R v Spinks [1982] 1 All ER 587 applied
Taibo (Ellis) v R (1996) 48 WIR 74 mentioned
The State v Abdool Azim Sattaur and another (1976) 24 WIR 157 applied

J U D G M E N T

Judgment delivered by the Honourable Mr. Justice Isaacs, JA:

1. The appellant applies to the Court pursuant to section 12(1)(A) of the Court of Appeal Act, to appeal the decision of Madam Justice Renae McKay ("the Judge") handed down on 21 September 2017, wherein the Judge, having already ruled pursuant to section 129(3) of the Penal Code ("the PC") that the prosecution had satisfied the court that the respondent had a case to answer for the lesser offence of accessory after the fact, contrary to section 448 of the PC, nevertheless allowed Counsel for the respondent, Mr. Ducille, to reopen the no case application. The appellant complains that the Judge allowed this, even though Mr. Ducille provided no reason for the Judge to reconsider her decision other than that he had not been personally present during the testimony of certain witnesses for the Prosecution; and the Judge, having reconsidered the no case application, acceded to it and subsequently directed the jury to unanimously acquit the respondent of the offences with which he had been charged; and failed to leave the lesser offence of accessory after the fact for the consideration of the jury.

2. The solitary ground of appeal is that the decision of the Judge to direct the acquittal of the respondent is erroneous in point of law.

Background

3. Much of what is given by way of background has been gleaned from the facts as the Prosecution believed them to be. So, with that caveat, I begin.

4. Tiano D'Haiti ("D'Haiti") and the respondent were jointly charged with murder, contrary to sections 290(2)(c)(i) and 291(1)(a) of the PC, attempted armed robbery, contrary to sections 83 and 339(2) of the PC, and burglary, contrary to section 363 of the PC.

5. It was alleged that on 28 October 2014, after 1:00 am, D'Haiti, the respondent and others, including the respondent's little brother, Larad Harrison aka "Poo Boy", broke into the home of Emma and Glen Cartwright ("the Cartwrights") which they shared with their son, Robert 'Andre' Cartwright ("Robert"). The men awoke all the residents of the home during their attempt to gain entry into the home; and they were confronted by Robert who was armed with

a shotgun. The intruders shot Robert but he was able to fire his shotgun in the direction of the intruders and wound D'Haiti. Robert later died from his wounds.

6. D'Haiti and the respondent fled the scene and went by the respondent's girlfriend. The respondent arranged for D'Haiti to be taken to the hospital by his girlfriend's roommate. The respondent accompanied D'Haiti and the roommate on the journey to the hospital but at some point, he made the driver stop and he exited the vehicle. On arrival at the Accident and Emergency entrance of the Princess Margaret Hospital ("the PMH") D'Haiti encountered a police officer who enquired of D'Haiti how he had come to be injured. D'Haiti is alleged to have responded that he had been stabbed. As D'Haiti was being taken into the hospital by a nurse, the nurse told the officer the wound was a firearm wound. D'Haiti was arrested while at the PMH. He and the respondent were subsequently charged with a number of offences arising out of the incident.

The Trial

7. After the Prosecution had closed their case, on 18 September 2017, and during a response to the no case submission made by Counsel for the defendants, the Crown submitted that the lesser charge of accessory after the fact, contrary to section 448 of the PC should be left to the jury in relation to the respondent. On 19 September 2017, the Court ruled that D'Haiti be called upon to answer all charges against him and that the respondent be called upon to answer the section 448 offence. On 21 September 2017, after allowing arguments pertaining to the no case submission to be re-opened, the Court ruled that the respondent did not have to be called upon to answer any of the charges, including the section 448 offence.

8. On 26 September 2017, D'Haiti was found guilty on all charges by the jury. On 5 April 2018, he was sentenced to forty-nine years for the count of murder, twenty-five years for the count of attempted armed robbery and twenty years for the count of burglary.

Rulings of the Judge

9. The 19 September 2017 ruling of the Judge on the "first" no case to answer submission made by Mr. Ducille said, inter alia:

> **"I reviewed the evidence of all the Prosecution witnesses and while I accept the submission of Mr. Ducille, with respect to the first limb that there is no evidence which connect (sic) his client Kevin Andrews to the events of that faithful (sic) morning in October. I accept with respect to Mr. Andrews, the submission of Ms. Kelly, with**

respect to (sic) alternative as she put it before the court. That is for the offence accessory after the fact, which is contrary to section 448 of the Penal Code.

So, I call upon Andrews to answer the charges in respect to that…" (page 409 of the transcript)

10. The next day Mr. Ducille persuaded the Judge to re-open the issue of whether his client should have to make a case; and the Judge ruled on the "second" no case submission as follows:

"This is my ruling. I've had benefit of the additional submission (sic) and I've reconsidered the law as well as all of the evidence, with respect to propose (sic) alternative charges of accessory after the fact contrary to section 88(a). "While there is circumstantial evidence to an event, the evidence is of a tenuous nature". And further I must accept Mr. Ducille (sic) submission that there's nothing before the Court to suggest that Mr. Kevin Andrews assisted Mr. D'Haiti for the purpose of enabling Mr. D'Haiti to avoid the due process of the law." (page 465 of the transcript)

11. Interestingly, the application made by the Crown for the Judge to consider calling on the respondent to answer a lesser charge was made pursuant to section 129(3) of the PC. That sub-section reads, inter alia, as follows:

"129. (3) if, when a person is charged with an offence part only of such charge is proved which part amounts to an offence other than that charge, and being in the opinion of the court, an offence committed in execution of the same design as is specified in the charge, he shall be punishable in respect of the offence which he is proved to have committed although he was not charged with or, he may be punishable for an attempt to commit the offence charged although not charged with the attempt…"

12. The Judge had regard to section 88A of the PC and not so much to section 129(3) of the PC although it seems the Judge shared the Crown's view that the section 448 offence was a lesser offence to those charged (see page 411 of the transcript). Section 88A(1) of the PC states:

"88A. (1) An accessory after the fact to the commission of an offence is one who, knowing that a person has been a

> **party to an offence receives, comforts, or assists that person for the purpose of the enabling that person to avoid the due process of the law."**

13. It seems that the Crown's application pursuant to section 129(3) of the PC was misconceived because that section envisages a situation where the evidence adduced in the trial shows that the offence was only partially completed and that the partial offence revealed on the evidence, was committed in execution of the offences of murder, burglary and attempted armed robbery. The Crown did rely on section 88A(1) of the PC for the offence they believed emerged from the evidence at trial (see page 438 of the transcript).

The Appellant's Case

14. The appellant challenges the Judge's ruling on the no case to answer application on two limbs. First, the Judge erred by not calling on the respondent to answer the charges of murder, burglary and attempted armed robbery; and second, the Judge erred by allowing Mr. Ducille to revisit the issue of whether the respondent had a case to answer after the close of the Crown's case and when she did not leave the section 448 offence for the jury's determination although the Prosecution's evidence met the criteria set out in **R v Galbraith** [1981] 1 WLR 1039.

The No Case to Answer Application

15. The appellant submitted that they had adduced cogent evidence against the respondent, sufficient to entitle the jury to draw the inference that the respondent caused the death of Robert while being concerned with D'Haiti and the Judge was wrong to withdraw those charges from the jury. The appellant recognises that their case against the respondent is circumstantial. I would hasten to say that a circumstantial case can provide a strong basis upon which a jury may convict.

16. A court is guided on a no case to answer application by well-known passages enunciated by Lord Lane in **Galbraith**. Lord Lane said at page 1040:

> **"There are two schools of thought: (1) that the judge should stop the case if, in his view, it would be unsafe (alternatively unsafe or unsatisfactory) for the jury to convict; (2) that he should do so only if there is no evidence upon which a jury properly directed could properly convict. Although in many cases the question is one of semantics, and though in many cases each test would produce the same result, this is not necessarily so. A balance has to be struck between on the one hand a**

usurpation by the judge of the jury's functions and on the other the danger of an unjust conviction."

17. Lord Lane went on to expound that "canonical statement of the law" - as it was described by Lord Carswell in **Director of Public Prosecutions v Varlack** [2008] UKPC 56 - at page 1042:

> **"…(b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury..."**

18. **Galbraith** has been cited with approval over the years and, while tweaked by subsequent tribunals, has retained its authoritative position. See also **Taibo (Ellis) v R** (1996) 48 WIR 74 and **DPP v Varlack**.

19. The Crown's case against the respondent is that he was a part of a joint enterprise, viz, he was acting in concert with D'Haiti to commit the offences. Their position may be gleaned from their submissions, some of which I reproduce here:

> **"The evidence of joint enterprise was based … Supt. Goodman was not challenged by the defence."**

20. The Crown relied on the case of **R v Hayter** [2005] UKHL, whose shortened facts may be found on LexisNexis UK; and are reproduced below:

> **"The defendant and two co-defendants, R and B, were jointly charged and tried for murder. It was alleged that the defendant had recruited R, on behalf of B, to kill the deceased. It was common ground that the case against the defendant depended upon the prosecution being able to prove that R was the killer and that B was the procurer. The cases against both R and B were entirely dependent on out of court admissions that they had made to third parties. At the close of the prosecution case, a submission of no answer was made on behalf of the defendant on the ground that the evidence to prove the defendant's guilt, namely the alleged confessions of R and B, was inadmissible against the defendant under**

the general principles of evidence. The judge rejected that submission and the defendant was convicted. On appeal the issue raised was whether, where the guilt of another had to be proved to found a case against a defendant, that guilt could be proved by evidence otherwise inadmissible against the defendant."

The majority of their Lordships (3-2) concluded that:

"A jury could have regard to a conclusion which they had reached on evidence presented in a joint trial in order to prove the existence of a fact that was a pre-condition in law to establishing the guilt of a secondary party."

21. However, I prefer the analyses and conclusions found in the judgments of Lord Roger of Earlsferry and Lord Carswell as their thinking aligns with the law as I understand it to be in The Bahamas.

22. Lord Roger said at paragraph 54:

"54. Wigmore describes this result as 'perfectly and absurdly artificial' and says that it 'negates the claim of courts of justice to be efficient fact-finders': Evidence in Trials at Common Law (1972), Vol 4, para 1076, n 13. There is force in that criticism, especially as regards the field of civil law. Not surprisingly, therefore, the Civil Evidence Act 1995 replaced the common law rules with a new system which includes carefully worked-out safeguards. In considering whether it is appropriate for the House to make significant changes in the rules on extrajudicial confessions of co-defendants in criminal trials, it is important to bear in mind the words of Lord Reid in Myers v DPP [1964] 2 All ER 881, [1965] AC 1001. The case concerned a different aspect of the law of hearsay in criminal proceedings and was decided in 1964, before the Law Commission was established and before the Practice Statement allowing the House to depart from its previous decisions (see [1966] 3 All ER 77, [1966] 1 WLR 1234). Nevertheless, Lord Reid's statement of principle ([1964] 2 All ER 881 at 885–886, [1965] AC 1001 at 1021–1022) as to the inadvisability of the House modifying particular aspects of the law on hearsay evidence, remains as powerful today as when he made it:

'I have never taken a narrow view of the functions of this House as an appellate tribunal. The common law must be developed to meet changing economic conditions and habits of thought, and I would not be deterred by expressions of opinion in this House in old cases; but there are limits to what we can or should do. If we are to extend the law it must be by the development and application of fundamental principles. We cannot introduce arbitrary conditions or limitations; that must be left to legislation: and if we do in effect change the law, we ought in my opinion only to do that in cases where our decision will produce some finality or certainty. If we disregard technicalities in this case and seek to apply principle and common sense, there are a number of other parts of the existing law of hearsay susceptible of similar treatment, and we shall probably have a series of appeals in cases where the existing technical limitations produce an unjust result. If we are to give a wide interpretation to our judicial functions, questions of policy cannot be wholly excluded, and it seems to me to be against public policy to produce uncertainty. The only satisfactory solution is by legislation following on a wide survey of the whole field, and I think that such a survey is overdue. A policy of make do and mend is no longer adequate. The most powerful argument of those who support the strict doctrine of precedent is that, if it is relaxed, judges will be tempted to encroach on the proper field of the legislature, and this case to my mind offers a strong temptation to that which ought to be resisted.'

In R v Blastland [1985] 2 All ER 1095 at 1098, [1986] AC 41 at 52 Lord Bridge of Harwich said that the majority decision of the House in Myers v DPP 'established the principle, never since challenged, that it is for the legislature, not the judiciary, to create new exceptions to the hearsay rule."

23. At paragraphs 73-4, Lord Carswell opined as follows:

"73. The submission advanced by the Crown and accepted in the lower courts was that the jury would be entitled to take into account against Hayter the fact, if they found it to be established, that Ryan killed Commatteo and to add that to the circumstantial

evidence in order to constitute a case of murder against Hayter. In my opinion this approach is flawed and cannot withstand examination. The case against Ryan depended critically on acceptance of the truth of his confessions to Vanessa Salter. To establish that he killed Commatteo it is essential to have regard to the content of that statement. Yet the jury was directed by the judge to disregard its content in considering the case against Hayter, since it was hearsay, but to take into account the fact that they found Ryan guilty on it. This instruction requires them not only to engage in mental gymnastics of an advanced and sophisticated kind which it is hard to expect the average jury to perform, but to indulge in what to my mind is false sophistry. I am quite unable to understand how any tribunal of fact, judge or jury, can legitimately take into account against one defendant a finding of guilt against another which is based almost solely on a confession whose contents are inadmissible against the first. I agree with the view expressed by Lord Rodger at [47] that this would be to turn inadmissible into admissible evidence. Such alchemy should not form part of the criminal law. Nor is it desirable that juries should be given directions which require them to draw such difficult distinctions and which are bound to cause confusion in their minds and misunderstanding. Those concerned with reform of the law of evidence regularly state that the requirements for a rational law are simplicity, certainty and fairness. The approach adopted by the courts below would certainly fail to meet either of the first two criteria.

74. At the direction stage the evidence against each defendant must be considered as it then stands. The judge applies the test whether a reasonable jury properly directed could on that evidence find the charge proved beyond reasonable doubt against that defendant. It has to be borne in mind that only the evidence admissible against each defendant can be taken into account. At that stage the only evidence admissible against Hayter was insufficient to prove his guilt. The only means of linking him with the murder of Commatteo was through the confession made by Ryan, which was inadmissible against him. The way in which the lower courts approached this was by positing that the jury could on the evidence given in the prosecution case consider Ryan's case first, then if they found him guilty use the fact of his

> **conviction to provide the necessary link between Hayter and Ryan's acts. But the only way in which they could find Ryan guilty was to rely on his confession. I am unable to agree with the view expressed by the judge and accepted by the Court of Appeal that the prosecution were not using Ryan's confession to confront any part of Hayter's defence. It seems to me inescapable that that is just what they were doing. Nor can I agree that the legislative policy behind the enactment of s 74 of PACE can give legitimacy to the course regarded as possible by the lower courts. However desirable it may be that rules of law which some might regard as technicalities should not be allowed to stand in the way of the achievement of a just result, that indirect reliance on the confession as against Hayter is in my view an impermissible breach of principle. If it is thought that that principle should be modified in the public interest—as to which there might be widely differing views when all the implications are considered—it is for Parliament to do it. The reasons set out by Lord Rodger at [54]–[57] are in my view compelling." [Emphasis added]**

24. The strength of the Crown's case may be determined by an analysis of the evidence that was adduced at the trial and the Crown's perspective on various aspects of their case. The case for the Crown distilled to its essence is that the respondent was in the company of an individual who had received a gunshot injury and presented himself to others shortly after a shotgun had been discharged, purportedly at intruders in Blair subdivision, and who had lied about the injury. Further, by being found at a hotel this demonstrated guilty knowledge on the part of the respondent that he had participated in the offences himself. His response to the police officer who arrested him that he only arranged for D'Haiti to be taken to the hospital, is also touted as evidence of his guilt. The Crown also rely on D'Haiti's confession which implicates the respondent in the commission of the offences.

25. The suspect link in the chain comprising the Crown's case is their suggestion that D'Haiti was shot by Robert. There is nothing to suggest that Robert's shot found a mark. In fact, the pellet marks in the wall suggests a contrary conclusion. There is no forensic evidence, i.e., blood, flesh, DNA, fingerprints, to link D'Haiti to the scene of the crime. Admittedly, there is a statement purportedly made by D'Haiti placing himself at the scene along with the respondent. The question that must be answered is: can D'Haiti's out of court statement, not accepted as having been made by D'Haiti, be evidence against the respondent or can D'Haiti only confess for himself in the circumstances?

26. The fact that the respondent was apprehended in a hotel room is not material either in the absence of something said or done by him or those he was with to suggest his involvement in the offences.

27. The effort to link the respondent to the offences by his response to Superintendent Goodman made on 29 October 2014, on being told that he was being arrested in connection with the death of Robert Cartwright that, **"Goodman, I was just giving him a ride to the hospital. I saw blood on him. So, I asked my girlfriend to take him"** is also of no assistance to the Crown's case. This is demonstrative of nothing.

28. Section 38 of the Evidence Act provides a definition of hearsay evidence:

> **"38. When a fact is proved by evidence —**
>
> **(a) that a statement as to the fact was made by any person;**
>
> **(b) that a statement as to the fact is contained or recorded in any book, document or other record, the fact is said to be proved by hearsay evidence. "**

29. Section 39 of the Evidence Act provides the exceptions to the hearsay rule in our jurisdiction. It states, inter alia:

> **" 39. (1) Subject to subsection (2) and to this Act, hearsay evidence shall not be admitted in evidence. (2) Hearsay evidence may be admitted —**
>
> **(a) where the statement is a necessary part of any fact or transaction which is being investigated by the court;**
>
> **..**
>
> **(c) where the statement is an admission or confession made by or to the prejudice of the party against whom it is sought to be proved but subject to the provisions of sections 14 to 19;**
>
> **(d) where the statement was made in the presence and in the hearing of the person against whom the evidence is tendered, and where such person had an opportunity of replying to such statement…"**

30. Section 39(1) of the Evidence Act appears to accord with the authorities in England prior to **Hayter**. In **R v Spinks** [1982] 1 All ER 587 the English Court of Appeal considered an appeal

in circumstances where the Crown had to prove one of two co-accused had committed an arrestable offence before it could prove the other co-accused had committed the offence of what is essentially in our law being an accessory after the fact. The only evidence against the alleged accessory was a statement from his co-accused wherein he admitted to committing an arrestable offence. The trial judge told the jury **"that F's admission was 'evidence in the case' and that the jury could act on it when considering the case against the appellant."** Both men were convicted.

31. On appeal, the court held that where the only evidence of the co-accused having committed an arrestable offence came from his admission out of court and not in the presence of the accessory, the trial judge should have discharged the accessory at the close of the Crown's case. At page 589 of the judgment, Russell, J stated:

> **"…In the judgment of this court the offence with which the appellant was charged and the means of establishing it do not provide any exception to the universal rule which excludes out of court admissions being used to provide evidence against a co-accused, whether indicted jointly or separately."**

32. I am unable, therefore, to accept the appellant's submission that D'Haiti's confession could be used evidentially or otherwise by the Crown to prove its case against the respondent. In the premises, this ground of appeal lacks merit.

Did the Judge err by revisiting the no case issue?

33. I have perused the appellant's submissions but I have not been able to find a jot nor tittle to explain or support their position that the Judge was wrong to re-consider arguments on the no case application.

34. On the other hand, the respondent has cited the Guyanese case of **The State v Abdool Azim Sattaur and another** (1976) 24 WIR 157 which may be of some assistance on this point notwithstanding that the issue in **Sattaur** arose from a decision taken on a voir dire pertaining to the voluntariness of a confession.

35. In **Sattaur** the trial judge had ruled that despite breaches of the Judges' Rules a defendant's confession was voluntary. It subsequently emerged through the evidence of three witnesses taken in the presence of the jury, that the circumstances touching the propriety of the admissibility of Sattaur's confession could have impacted the trial judge's decision. The trial judge appears to have thought he could not re-visit the matter as he had already ruled the statement admissible so he left it to the jury to consider the question of voluntariness. The Guyanese Court of Appeal held that in those circumstances the trial judge should have

reconsidered his ruling. In the course of their judgment the court set out a number of authorities which support their view.

36. I accept that the reason given for the Judge to reconsider her ruling may have been thin, but having entered into another hearing on the issue, was she wrong to change her ruling?

37. Did the Judge err by finding the respondent had no case to answer on the section 448 offence?

38. The Crown may take some comfort for their belief that their evidence was sufficiently cogent that the respondent ought to be made to make a case, when the Judge herself so found at the end of the first no case to answer application. Ultimately, however, she can only be faulted in changing her ruling if there was nothing to support the change.

Discussion

39. In the Malawian case of **Levison v Republic** [2015] 1 LRC 626, the appellant was charged with breaking and entering a store from which goods had been stolen. The thieves sold the stolen goods to the appellant. The head note reveals the following:

> **"…There was no evidence that the appellant had agreed or discussed breaking into the shop or the theft from it with any of the other actors. The appellant was convicted of the offence charged. He appealed against his conviction to the High Court. The Director of Public Prosecutions (DPP) conceded that, on the facts and the evidence, the appellant should not have been convicted of the offence charged but contended that the court was entitled to substitute a conviction of receiving stolen goods, pursuant to s 157(1)(a) of the Criminal Procedure and Evidence Code."**

40. The Malawi High Court while addressing the issue whether the appellant could be convicted of the breaking and entering and theft or being an accessory after the fact observed at pages 629-30:

> **"The court below alludes to that the appellant was an accessory after the fact. The appellant was not, if s 407 of the Penal Code is the definition of an accessory after the fact, one:**
>
> > **'A person who receives or assists another who is, to his knowledge, guilty of an offence, in order to**

> **enable him to escape punishment, is said to become an accessory after the fact to the offence …'**
>
> **Section 408 of the Penal Code provides:**
>
> > **'Any person who becomes an accessory after the fact to a felony shall be guilty of a felony, and shall be liable, if no other punishment is provided, to imprisonment for three years.'**
>
> **It is primordial to the definition of an accessory after the fact that the assistance must be for purposes of enabling the offender to escape punishment. There is no evidence to that effect. On the contrary, the evidence shows that all there was is a sale of the property stolen from the shop with no intention to shield the first and fourth accused as fugitives from crime. In any case, accessories after the fact are not principals and cannot, therefore, be charged for the substantive felony or jointly with the substantive felon. Accessories after the fact are not included as those that can be joined together with other offenders under s 127(4) of the Criminal Procedure and Evidence Code.**
>
> **The offence of an accessory after the fact is a distinct crime. It is not cognate or minor to any other crimes. It is of a different genre. The lower court could not, therefore, convict the appellant of the offence of breaking into a building and committing a felony therein because he was an accessory after the fact. The court below could not, without amending the charge, convict the appellant of the offence of being an accessory after the fact, an offence under s 408 of the Penal Code. It is neither minor nor cognate to breaking into a building and committing a felony therein."**

41. The definition contained in section 407 of the Malawi Penal Code is in a material respect identical to our own, namely, the intent to assist the perpetrator from getting caught.

42. The Supreme Court of British Guiana considered an appeal where the appellant had been charged with larceny of a bicycle but the evidence adduced before the magistrate convinced him that the appellant was guilty of receiving; and he convicted the appellant for same. Bollers, J in delivering the decision of the court in **Bennett v Benn** (1965) 7 WIR 414 touched on the issue of what constitutes an accessory after the fact and said at pages 417-8:

> **"Lord DENNING in the recent case of Sykes v Director of Public Prosecutions ([1961] 3 All ER 33, [1962] AC 528 [1961] 3 WLR 371, 45 CAR 230, 125 JP 523, 105 Sol Jo 566, HL, affg sub nom R v Sykes, [1961] 1 All ER 702,**

[1961] 2 QB 9, [1961] 2 WLR 392, 105 Sol Jo 183, CCA, 3rd Digest Supp) gives the latest authoritative definition as to what constitutes being an accessory after the fact ([1961] 3 WLR at p 382):

> **'The classic definition of an accessory after the fact is when a person, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon … But it has been said that, to make a man an accessory, the assistance must be given to the felon personally, in order to prevent or hinder him from being apprehended or tried or suffering punishment … so that if the assistance was not given to the felon personally, but only indirectly by persuading witnesses not to give evidence against him; or if the acts of assistance were done, not to hinder the arrest of the felon, but with another motive, such as to avoid arrest himself or to make money for himself without regard to what happened to the felon, he would not be guilty as an accessory after the fact.'**

And in R v Rose ([1962] 3 All ER 298, [1962] 1 WLR 1152, 126 JP 506, 106 Sol Jo 593, [1962] CLR 252, 3rd Digest Supp), where the prisoner was convicted of being an accessory after the fact for larceny, and the evidence was that on two occasions the prisoner went to look at the stolen property with a view to buying it, the jury was directed that if a person went twice with a view to purchasing or possibly purchasing stolen property or part of it, that would be for the purpose of assisting the principal felon to escape conviction, and therefore the prisoner would be guilty of being an accessory after the fact.

On appeal to the Court of Criminal Appeal it was held that these circumstances did not come within the definition of an accessory after the fact as stated by Lord DENNING and hence there was a clear misdirection, and the conviction was quashed. In a commentary to this report the editor points out that it must be proved that an accessory after the fact gave assistance to the felon with the object of enabling him to evade arrest, trial or punishment. The accused's motive is important, for if he knowingly does acts which have a tendency to enable him to evade justice but with a motive of avoiding his own arrest, he is not an accessory after the fact. See R v Jones ([1948] 2 All ER 964, [1949] 1 KB 19, 113 JP 18, 64 TLR

> **616, 92 Sol Jo 648, 33 Cr App Rep 33, 47 LGR 135, CCA 4 Digest (Repl) 110, 762). A receiver is not as such an accessory after the fact of the theft, and would only become that if he received the goods with the object of enabling the thief to evade arrest, trial or punishment."**

43. It should be noted that Lord Denning's **"authoritative definition as to what constitutes being an accessory after the fact"** represents the accepted common law position. By Lord Denning's definition an accessory after the fact is **"when a person, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon."** However, he continued, **"… But it has been said that, to make a man an accessory, the assistance must be given to the felon personally, in order to prevent or hinder him from being apprehended or tried or suffering punishment."** Does Lord Denning's definition still hold sway in The Bahamas?

44. In **Farquharson v R** [1973] A.C. 786 at p. 795 the Privy Council had this to say, inter alia, with regard to the common law and its relationship to the PC:

> **"Again, in Rolle v. The Queen, Criminal Appeal No. 14 of 1966, the court, while expressing dissatisfaction at the omission from the code of the offence of being an accessory after the fact, did not suggest that the lacuna could be filled by the importation of some common law substitute for a statutory crime.**

45. Section 88A(1) of the PC appears to have been Parliament's response to the perceived lacuna mentioned in **Farquharson**. The wording of the section is consonant with Lord Denning's definition. So, it may be seen that Lord Denning's definition continues to have currency in our jurisdiction and that the cases approving and relying on it may be of assistance for present purposes.

46. The evidence adduced by the Crown could not rise above suspicion that the respondent was aware D'Haiti had committed an offence. As if that was not reason enough for the Judge to find that the respondent did not have a case to answer on the murder and attempted armed robbery counts, there was no intent to assist D'Haiti in avoiding capture or the due process of law disclosed or inferred from the respondent's efforts to get D'Haiti to the PMH. He is not have alleged to have taken D'Haiti to some backstreet clinic or some unregistered "sawbones" so that the injuries could be treated without information pertaining to same coming to the attention of the authorities.

Conclusion

47. In my view, the offence of accessory after the fact would require the Crown to prove that D'Haiti was a person who attempted to commit the armed robbery of the Cartwrights and murdered Robert; and that the respondent, knowing of D'Haiti's involvement in the offences, sought to assist D'Haiti "to avoid the due process of the law". The evidence adduced in the trial fell far short of the requisite standard of proof; and the Judge could not be faulted in so concluding.

48. In the premises, the appeal is dismissed.

The Honourable Mr. Justice Isaacs, JA

49. I agree.

The Honourable Sir Michael Barnett, P

50. I also agree.

The Honourable Mr. Justice Evans, JA