IN THE COURT OF APPEAL [1998] QCA 445

SUPREME COURT OF QUEENSLAND

CA No 223 of 1998

Brisbane

[R v Kirkby]

THE QUEEN

v

GREGORY REX KIRKBY

Appellant

McMurdo P
Thomas JA
Jones J

Judgment delivered 22 December 1998

Separate reasons for judgment of each member of the Court, each concurring as to the orders made.

APPEAL AGAINST CONVICTION ALLOWED. VERDICT BELOW SET ASIDE. NEW TRIAL ORDERED.

CATCHWORDS: **CRIMINAL LAW - parties to criminal offence - principal offender under s7(1)(d) *Criminal Code* - accessory procuring another to commit offence - grievous bodily harm**

CRIMINAL LAW - evidence - certificate of conviction of accomplice tendered at trial under s53 *Evidence Act* 1977 - accomplice not called by Crown to give evidence - accomplice not available for cross-examination by defence counsel - whether law permits proof in criminal proceedings of material fact by means of a certificate of conviciton of a third person in proceeding to which the accused was not a party - rule in *Hollington v F. Hewthorn & Co.* [1943] 1 KB 587 - exception to rule in *R v Carter and Savage; ex parte Attorney-General* [1990] 2 QdR 371 discussed - whether exception in the case of accessories extends to include offenders under ss7(1)(b), 7(1)(c), 7(1)(d) *Criminal Code* - *R v Hutton* (1991) 56 ACrimR 211 overruled

Carter and Savage; ex parte Attorney-General **[1990] 2 QdR 371**
Connell v R (No.6) **(1992) 12 WAR 133**
Cook v Field **(1788) 170 ER 564**
Hollington v F. Hewthorn & Co. **[1943] 1 KB 587**
R v Bartorillo & Bartorillo **(CA Nos 161 and 163 of 1996, 11 October 1996)**
R v Blick **(1830) 172 ER 747**
R v Cowell **(1987) 24 ACrimR 47**
R v Dawson **[1961] VR 773**
R v Hutton **(1991) 56 ACrimR 211**
R v Kempster **[1989] 1 WLR 1125**
R v Moore **(1956) 40 CrAppR 50**
R v O'Connor **(1986) 85 CrAppR 298**
R v Prosser **(1784) 168 ER 247**
R v Robertson **[1987] QB 920**
R v Smith **(1783) 168 ER 247**
R v Turner **(1832) 168 ER 1298**
Rompotis v R **(1996) 18 WAR 54**

Sir Michael Foster, *A Report of Some Proceedings on the Commission for the Trial of the Rebels in the Year 1746, in the County of Surry; and of other Crown Cases: to which are added Discourses Upon a Few Branches of the Crown Law* (1809), 3 ed.

Evidence Act **1977**

Counsel: Mr A Glynn SC for the appellant

Mrs L Clare for the respondent

Solicitors: Baker Johnson for the appellant

Director of Public Prosecutions (Queensland) for the respondent

Hearing Date: 13 October 1998

REASONS FOR JUDGMENT - McMURDO P

Judgment delivered 22 December 1998

1 The appellant was convicted in the District Court at Southport on 12 June 1998 of unlawfully doing grievous bodily harm to Raymond George Randell on 6 May 1988.

2 The Crown alleged that the appellant was a principal offender under s 7(1)(d) of the Criminal Code, claiming that he procured another co-accused, Vogler to organise an attack on the complainant Randell. Randell was an ex-employee and later business competitor of the appellant. The Crown alleged Vogler had another, Bonner, attack Randell.

3 The appellant claims that the learned trial judge erred in admitting the certificate of conviction of Bonner, when Bonner was not called as a witness by the Crown.

4 The appellant admitted that the complainant suffered injuries amounting to grievous bodily harm on 12 June 1998 at the complainant's business address.

5 Vogler gave evidence that the appellant procured him to have Randell seriously assaulted and that Vogler enlisted Bonner to do this. The complainant Randell could not recall the assault upon him which was a violent attack to his head with a weapon. He had worked for the appellant as a painter and then supervisor until leaving in March 1985. Their relationship was then strained. The appellant said to him in February, 1986, "Don't worry Randell. I'll get you one day. If I can't I'll get someone who can."

6 The appellant had withdrawn the sum of $2,500 from his business account. This sum was consistent with the amount Vogler said he paid to Bonner to assault Randell on

the appellant's instructions. The appellant had made the withdrawal of the $2,500 in a way designed to disguise the transaction and on the same day that Vogler claimed to have paid the $2,500 to Bonner.

7 Despite an objection from defence counsel, the Crown did not call Bonner but tendered a certificate of conviction pursuant to s 53 of the *Evidence Act* 1977 ("the Act") which provides:

> "53(1) Where it is sought to prove any of the following matters -
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> (a) ... conviction, acquittal, sentence ... of any court;
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> ...
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> evidence of such matter and, as the case may be, of any particulars relating thereto may be given by the production of -
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> (d) the original of the order, process, act, decision or document; or
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> (e) a document proved to be an examined copy of the order, process, act, decision or document; or
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> (f) a document purporting to be a copy of the order, process, act, decision or document and to sealed with the seal of the court; or
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> (g) a certificate showing such matter and such particulars and purporting to be under the hand of -
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> (i) a Registrar of the court; or
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> (ii) a person having the custody of the records or documents at the court; or
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> (iii) any other proper office of the court; or
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> (iv) a deputy of such Registrar, person or officer."

8 The learned trial judge, following a decision of the Court of Criminal Appeal, Queensland in *R v Hutton*,[1] permitted a certificate of conviction to be tendered under s 53 of the Act, as prima facie evidence of Bonner's commission of the offence of grievous bodily harm upon Randell, without requiring the Crown to call him. The appellant, to be

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1 (1991) 56 ACrimR 211.

successful in this appeal, must show that *Hutton* was wrongly decided.

9 Hutton was convicted of doing grievous bodily harm with intent. The Crown case was that he had counselled or procured Bartorelli to commit the offence. Bartorelli had pleaded guilty and been sentenced. Bartorelli gave evidence at Hutton's trial and evidence was led of his conviction. Hutton attempted to rebut the prima facie evidence of the certificate of conviction, cross-examining Bartorelli. Ryan J, relying upon an earlier decision of the Court of Criminal Appeal, Queensland in *Carter and Savage ex parte Attorney-General*[2] and a decision of the Full Court of Victoria in *R v Dawson*[3] held that proof of Bartorelli's conviction was prima facie evidence against Hutton, open to rebuttal by cross-examination. In citing those cases, his Honour did not advert to any distinction between a counsellor or procurer under s 7(1)(d) of the Criminal Code and an accessory after the fact under s 10 of the Criminal Code.[4]

10 In separate reasons, de Jersey J (as he then was) (Cooper J concurring) noted:[5]

> "The Crown contended first that the appellant counselled Bartorelli to commit the offence which he did commit, that is, doing grievous bodily harm with intent to maim, so that, because of s 7(d) the appellant was also guilty of that offence. To show that, the Crown had first to prove that Bartorelli committed the offence of doing grievous bodily harm with intent. The Crown established that to a prima facie level by evidence of Bartorelli's plea of guilty to that charge: *Carter and Savage; ex parte A-G* [1990] 2 QdR 371 at 380; ... ."

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2 [1990] 2 QdR 371.

3 [1961] VR 773.

4 (1991) 56 ACrimR 211, 212-213.

5 (1991) 56 ACrimR 211, 217.

11 *Carter and Savage* is clear authority only for the proposition that a certificate under s 53 of the Act relating to the conviction of the actual offender is admissible on the trial of an accessory after the fact.

12 The only other recent Queensland case to which reference has been made is *R v Bartorillo and Bartorillo*.[6] The Bartorillos, husband and wife, were charged with four offences of unlawful possession of a motor vehicle and four related charges of false pretences. Certificates of conviction were tendered in respect of Lynde, who stole the cars, and direct evidence was given of the thefts. Defence counsel at the trial objected to Lynde giving evidence on the basis of his unreliability. A *voir dire* was held, in the course of which Lynde claimed privilege. The judge allowed the claim and Lynde was not called to give evidence at the trial and instead Lynde's certificates of conviction were tendered. On appeal, the appellants complained of the lack of opportunity to cross-examine Lynde, whose evidence they had objected to at trial. Pincus JA (with whom Davies JA and Ambrose J agreed) dismissed the appeal, noting:[7]

> "Grounds 2, 3 and 4 in the notice of appeal are to the effect that evidence of association between Lynde and [Bartorillo] should not have been admitted, that the judge should have stayed the indictment on a ground related to Lynde and that the defence was deprived of the opportunity of cross-examining Lynde.
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> It was not, with respect, made perfectly clear what was the essential complaint about Lynde. Undoubtedly the Crown was entitled to tender, as it did, certificates of conviction of Lynde going towards proof that the relevant vehicles were stolen at relevant times."

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6 (CA Nos 161 and 163 of 1996, 11 October 1996).

7 (CA Nos 161 and 163 of 1996, 11 October 1996), 6 .

Mrs Clare, who appears for the respondent in this application, also appeared for the respondent in *Bartorillo*. It seems the argument raised on this appeal was not raised there and consequently little weight can be placed on those obiter remarks.

13 The question for the determination of this Court is: Is the conviction of a co-offender who committed the actual acts constituting the offence (s 7(1)(a) of the Criminal Code) admissible on the trial of the procurer (s 7(1)(d) of the Criminal Code)? In order to answer this question, it is necessary to extensively review the authorities.

14 The general rule of evidence is that the conviction of a third party is ordinarily inadmissible as evidence of the facts on which it is based.[8] A plea of guilty by one defendant is in no sense to be regarded as evidence against a co-defendant.[9]

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8 *R. v. Carter and Savage; ex parte A-G* [1990] 2 QdR 371, per Kelly SPJ, 372.

9 *R v Moore* (1956) 40 CrAppR 50, 54.

15 In *R v Dawson*,[10] relied on both in *Carter and Savage*, and *Hutton*, Dawson, too, was charged as an accessory after the fact to shop breaking and stealing and pleaded not guilty. The Crown called evidence at his trial that McKay, when arraigned, had pleaded guilty to the felony charged against him:

> "for it is a rule long established that upon the trial of a person on a charge of having been an accessory to the commission of a felony, proof of the conviction of the alleged principal offender is admissible, and constitutes prima facie evidence that the felony was committed by him: cf. *Foster,*

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10 [1961] VR 773.

> *Crown Law*, (1809), 3 ed., at p. 365; *Cook v Field* (1788), 3 Esp, 133, at p. 134."[11]

16 Sir Michael Foster discussed this ancient rule in his *Discourses Upon a Few Branches of the Crown Law* (1809)[12] and states the exception to the general rule in this way:

> "When the accessary is brought to his trial after the conviction of the principal it is not necessary to enter into a detail of the evidence on which the conviction was founded. Nor doth the indictment aver, that the principal was in fact guilty. It is sufficient if it reciteth with proper certainty the record of conviction. This is evidence against the accessary sufficient to put him upon his defence; for it is founded on a legal presumption that everything in the former proceeding was rightly and properly transacted; but a presumption of this kind must, I concede give way to facts manifestly and clearly proved; as against the accessary a conviction of the principal will not be conclusive; it is as to him res inter alios acta."

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11 [1961] VR 773, 774.

12 364-366.

17 *R v Smith* (1783)[13] concerned an indictment on the Statutes 3 and 4 Will. & Mary, cl 9, s 4, and 5 Anne cl 31, s 5, charging Smith, again referred to as an accessory after the fact, in receiving a quantity of flour, knowing it to have been stolen. The fact of conviction of the principal offender was held to be properly led at the trial as an exception to the general rule that a record of conviction is only conclusive against the party to it. The principal offender was cross-examined and evidence adduced that the prosecutor had entrusted his servants with the property in such a way as to part with the possession of it,

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13 1 Leach 289; 168 ER 247.

so that the prisoner could not be guilty of the offence. Smith was acquitted. It is significant that the principal offender was called at the trial and cross-examined.

18 In *R v Prosser* (1784),[14] Prosser was indicted as an accessory before the fact in procuring Rothwell to counterfeit a halfpenny. The record of Rothwell's conviction was admitted as evidence, but not conclusive evidence, allowing Prosser to controvert the propriety of such conviction, "for a record is only conclusive evidence against those who are parties to it; but his Lordship gave no positive opinion on the point".

19 In *Cook v Field* (1788),[15] an action for damages for maliciously charging the plaintiff with being accessory to a felony, Lord Kenyon assented to the propositions that:

> "The words stated in the declaration were, for charging the plaintiff with being accessary to a felony; and Bearcroft laid it down as a principle, that though the principal thief had previously been acquitted of the felony, it would be competent for the defendant in this cause to go into evidence to prove his guilt; because what had passed between other parties could not affect him: and he mentioned it as a common case, that where the principal had been convicted, it is nevertheless on the trial of the accessary, competent to the defendant to prove the principal innocent."

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14 Noted at 168 ER 247.

15 3 Esp 132; 170 ER 564.

20 In *R v Blick* (1830),[16] Blick was charged with receiving stolen brass and the indictment stated that "one Edwin Smith, at the General Quarter Sessions etc. was convicted of stealing brass, fixed in the church-yard at Minchinhampton, that being a

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16 4 Car & P.375; 172 ER 747.

'place dedicated to public use' and that the prisoner received it, knowing it to be stolen." To prove that the brass was stolen by Edwin Smith, an examined copy of the record of his conviction was tendered showing he had pleaded guilty. Mr Justice Bosanquet said:

> "There is no doubt that the accessory may controvert the guilt of the principal; but I take it, that whatever is evidence against the principal, is prima facie evidence of the principal felony as against the accessory; and if the principal is convicted on his own confession, that is prima facie evidence of his guilt as against the accessory, but not conclusive."[17]

21 In *R v Turner* (1832),[18] Turner was charged with receiving goods stolen by Sarah Rich. The owner gave evidence of the theft and that Sarah Rich then lived with her as a servant. The prosecutor proposed to prove a confession of Sarah Rich in which she stated various facts implicating the prisoner and others as well as herself. The report states:

> "In Easter term, 1832, all the Judges (except Lord Lyndhurst C.B. and Taunton J.) met, and having considered this case, were unanimously of opinion that Sarah Rich's confession was not evidence against the prisoner; and many of them appeared to think, that had Sarah Rich been convicted, and the indictment against the prisoner stated, not her conviction, but her guilt, the conviction would not have been any evidence of her guilt, which must have been proved by other means; and the conviction was held wrong."

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17 At 748.

18 1 Mood 347, 168 ER 1298.

22 As pointed out by Thomas J.A., whose learned reasons I have had the benefit of reading and with which I am in substantial agreement, the term "accessory" is imprecise. A review of these old cases does not clarify precisely what should constitute an exception to the general rule, that the conviction of a third party is inadmissible as evidence of the facts on which it is based, other than cases of accessory after the fact.

23 The position developed with the English Court of Appeal's decision in *Hollington v F. Hewthorn & Co*.[19] It was there contended that in a civil case for negligence arising out of a motor car collision the plaintiff was entitled to tender the defendant's conviction for careless driving not as conclusive, but as prima facie evidence that the defendant was driving negligently. Goddard LJ said:

> "A judgment obtained by A against B ought not be evidence against C for in the words of the Chief Justice in the *Duchess of Kingston's case [(1776) 2 Sm.L.C., 13th ed., 644]* 'it would be unjust to bind any person who could not be admitted to make a defence or to examine witnesses or to appeal from a judgment he might think erroneous: and therefore ... the judgment of the court upon facts found, although evidence against the parties, and all claiming under them, are not, in general, to be used to the prejudice of strangers.' This is true, not only of convictions, but also of judgments in civil actions. If given between the same parties they are conclusive, but not against anyone who is not a party."[20]

Evidence of the conviction was therefore held to be inadmissible:

> "In many, perhaps in most, cases, the correctness of the conviction would not be questioned, but where it is, its value can be assessed only by a retrial on the same evidence. However convenient the other course may be, it is, in our opinion, safer in the interests of justice that on the subsequent trial the court should come to a decision on the facts placed before it without regard to the result of other proceedings before another tribunal."[21]

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19 [1943] 1 KB 587.

20 [1943] 1 KB 587, 596.

21 [1943] 1 KB 587, 602.

24 *Hollington v. Hewthorn* has been followed in Queensland in a number of civil cases.[22] In *Carter and Savage*,[23] Carter J, with whose reasons Kelly SPJ agreed, stated that:

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22 *Origliasso v Vitale* [1952-53] StRQd 211; *Russell v Craddock* [1985] 1 QdR 377, 385.

23 [1992] QdR 371.

> "Section 79 was clearly designed to avoid the rule in *Hollington v Hewthorn* which was applicable only to civil proceedings."[24]

Derrington J. (dissenting) said:

> "If the evidence is inadmissible in civil proceedings, it should more assuredly be so in a criminal prosecution where the rules of evidence are more strict."[25]

25 In *R v Triffett*,[26] Underwood J discussed *Carter and Savage*, preferring the approach taken by Derrington J. He disallowed the tendering of a certificate of conviction of the principal offender on the trial of an accessory after the fact. With respect, the passage of Goddard LJ in *Hollington v Hewthorn* set out in para 23 of my judgment makes it plain that the rule in *Hollington v Hewthorn* was intended to apply to criminal matters.

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24 [1992] QdR 371 at 385.

25 [1992] QdR 371 at 386.

26 (1992) 64 ACrimR 145.

26 Thomas JA has set out some of the conflicting attitudes in common law jurisdictions to the rule in *Hollington v Hewthorn*: see *Jorgenson v News Media (Auckland) Limited*;[27] *Mickelberg v Director of Perth Mint*[28] and the ensuing controversy about the rule.[29] The Privy Council has, however, affirmed the application of *Hollington v Hewthorn* in criminal proceedings: *Hui Chi-ming v The Queen*.[30]

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27 [1969] NZLR 961.

28 [1986] WAR 365.

29 *Hunter v Chief Constable* [1982] AC 529, 543.

30 [1992] 1 AC 34, 42-44.

27 In Queensland there has been statutory intervention to negate *Hollington v Hewthorn* in civil proceedings. Section 79 of the *Evidence Act* 1977 provides:

> "(2) In any civil proceeding the fact that a person has been convicted by a court of an offence is admissible in evidence for the purpose of proving, where to do so is relevant to any issue in that proceeding, that the person committed that offence.
> (3) In any civil proceeding in which by virtue of this section a person is proved to have been convicted by a court of an offence the person shall, unless the contrary is proved, be taken to have committed the acts and to have possessed the state of mind, if any, which at law constitute that offence."

The section makes it clear that the Queensland legislature decided that s 79 would not apply to criminal proceedings.

28 In discussing the rule in *Hollington v Hewthorn* the Full Court of Family Court of Australia referred to "the difficulties in at least Queensland and the Australian Capital Territory where there are specific statutory provisions which might be described as retaining much of the practical effect of that rule."[31] This supports what in my view is clear: that the rule in *Hollington v Hewthorn* still exists in Queensland where it has not been abolished by s 79 of the Act.

29 There has been statutory intervention to overturn the rule in *Hollington v Hewthorn* in England in respect of criminal and civil proceedings: see *Police and Criminal Evidence Act* 1984 ("the UK Act"). Section 74 provides:

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[31] *Re R* (1994) 119 FLR 202, 212.

> "(1) In any proceedings a fact that a person other than the accused has been convicted of an offence by or before any court in the United Kingdom or by

> a Service court outside the United Kingdom shall be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that that person committed that offence, whether or not any other evidence of his having committed that offence is given.
> (2) In any proceedings in which by virtue of this section a person other than the accused is proved to have been convicted of an offence by or before any court in the United Kingdom or by a Service court outside the United Kingdom, he shall be taken to have committed that offence unless the contrary is proved."

30 Section 78 provides:

> "(1) In any proceedings the Court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the Court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the Court ought not to admit it.
> (2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence."

31 Although the English position is governed by a significantly different statute from that which applies in Queensland, the modern English authorities are nevertheless helpful in ascertaining the correct approach to be taken in this case.

32 In *R v O'Connor*,[32] O'Connor was charged with conspiring to obtain property by deception with Beck. Prior to O'Connor's trial, Beck pleaded guilty to conspiracy to defraud. Evidence of Beck's conviction was admitted under s 74(1) of the UK Act at O'Connor's trial. Beck and O'Connor were each named in the indictment to which Beck pleaded guilty. As it was possible the jury would draw the inference, from Beck's conviction and the details on the indictment which was before them, that not only had

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[32] (1986) 85 CrAppR 298.

Beck conspired with the appellant, but also that the appellant O'Connor had conspired with Beck, the evidence should have been excluded pursuant to s 78 of the UK Act.

33 In *Reg v Robertson*,[33] Robertson was tried on a count of conspiracy with two others to commit burglaries. The other two pleaded not guilty to conspiracy but guilty to 16 relevant burglary counts. At Robertson's trial, leave was given to lead evidence of those convictions. The evidence was properly admitted. Robertson's name did not appear in any of the 16 counts to which pleas had been entered. The court found that even had the two others been called, given full evidence of the offences to which they had pleaded guilty and been cross-examined, nothing to the advantage of the appellant was likely to be gained, so that the admission of evidence of the convictions was not unfair within the meaning of s 78(1). The court commented:

> "Section 74 is a provision which should be sparingly used. There will be occasions where, although the evidence may be technically admissible, its effect is likely to be so slight that it will be wiser not to adduce it. This is particularly so where there is any danger of a contravention of s. 78. There is nothing to be gained by adducing evidence of doubtful value at the risk of the having the conviction quashed because the admission of that evidence rendered the conviction unsafe or unsatisfactory. Secondly, where the evidence is admitted, the judge should be careful, ... to explain to the jury the effect of the evidence and its limitations."[34]

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33 [1987] QB 920.

34 [1987] QB 920, 928.

34 In *R v Kempster*,[35] Kempster was charged with others on four counts of robbery and one count of burglary. Evidence was led of the pleas of guilty of his co-accused. The

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35 [1989] 1 WLR 1125.

Court of Appeal reviewed *O'Connor*, *Robertson*, *R v Lunnon*[36] and *R v Curry*.[37]

In *Curry*, the appellant was charged with two others with conspiracy. One had pleaded guilty. At trial, evidence of the plea of guilty was admitted. The Court of Appeal found the evidence of the guilty plea should have been excluded in the exercise of the discretion pursuant to s 78(1), as the leading of that evidence implied as a matter of fact that the appellant had been party to the conspiracy, even though it did not have that effect as a matter of law: the jury, as reasonable beings, would be bound to use evidence of the guilty plea not only as showing that there had been a conspiracy, but that the appellant was party to it. The Court of Appeal declined to apply the proviso and quashed the conviction, expressly approving the comments in *Robertson* that s. 74 should be sparingly used and adding:

> "We would further say that this is particularly so in relation to joint offences such as conspiracy and affray. Where the evidence that it is sought to place before the jury by virtue of section 74 expressly or by necessary inference imports the complicity of the person on trial it should not be used. Otherwise, as explained by Taylor J. in *O'Connor*, it would enable the allegations of a convicted defendant which were adverse to the person on trial to be put before the jury without the maker of them being cross-examined."[38]

The Court of Appeal in *Kempster* decided that evidence of the co-accused's pleas of guilty should be excluded under s 78, noting that if evidence of a conviction is admitted, the trial judge should be careful to direct the jury as to the purpose for which it has been admitted and to ensure that counsel do not seek to use it for any other purpose, adding:

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36 (1989) 88 CrAppR 71.

37 (unreported, 28 April 1988) referred to in *Kempster* [1989] 1 WLR 1125, 1133.

38 (unreported, 28 April 1988) referred to in *Kempster* [1989] 1 WLR 1125, 1133-1134.

> "... we have paid particular attention to the observation in *Reg. v. Curry* that

> 'where the evidence expressly or by necessary inference imports the *complicity* of the person on trial it should not be used' (our emphasis). The effect of admitting a conviction as evidence of the complicity of the defendant is that the prosecution will not have to call the person convicted as a witness, to give evidence on oath. It may well be true that the other person is unlikely to have pleaded guilty unless he was in fact guilty; but the defence will be deprived of any opportunity to cross-examine him, in particular as to the complicity of the defendant. No doubt such cross-examination may in itself be unlikely in some cases, or else turn out to be a disaster, as Lord Lane C.J. put it in *Reg. v. Golder* [1987] Q.B. 920, 928. But one cannot always assume that. Here [those who pleaded guilty] had made statements to the police implicating Kempster. Those statements were not, in themselves, admissible against him. How does one know that, if called by the prosecution, they would have given evidence on oath to the same effect? The defendant was deprived of an opportunity to find out, unless he himself called [those who pleaded guilty] as witnesses.
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> Since the conclusion of the argument we have considered other decisions of this Court: *Reg. v. Youell [(unreported), 19 February 1988]*, *Reg. v. Bennett [(unreported), 26 May 1988]*, and *Reg. v. Grey [(unreported), 21 October 1988]*. Those may be thought to show that, whilst evidence which of itself establishes complicity should be excluded under section 78, evidence which does not of itself show complicity but is used as a basis for other evidence to that end need not necessarily be excluded."[39]

35 In New South Wales, the Court of Appeal gave some consideration to these issues in *R v Cowell*.[40] Cowell and another were charged with indecent assault upon a woman. The co-accused pleaded guilty before Cowell was tried and at Cowell's trial the Crown opened that the co-accused had pleaded guilty. Later in the trial, the defence requested that the jury be discharged on the basis that the Crown had not called evidence of the co-accused having been charged and pleading guilty. The application was refused and Cowell was convicted. Street CJ (with whom Lee and Wood JJ agreed) cited with approval the

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39 (unreported, 28 April 1988) referred to in *Kempster* [1989] 1 WLR 1125, 1134.

40 (1987) 24 ACrimR 47.

general statement of the law by Goddard LJ in *Moore*[41] adding:

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[41] (1956) 40 CrAppR 50, 53-54.

> "The principle there enunciated is, notwithstanding a suggestion to the contrary, one which has always been recognised in the criminal courts of this State. When, in the course of a trial, one of a number of co-accused pleads guilty, that fact is, of course, inevitably known to the jury who must be invited (but not directed) to return a verdict in consequence of that plea. At the same time, trial judges are astute to ensure that juries are made plainly aware that a plea of guilty by a co-accused is not to be taken into account in the slightest degree in determining the question of guilt of those who remain in charge of the jury.
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> Lord Goddard comments that, even if the plea has not been taken in the presence of the jury, it is very difficult to avoid telling the jury in some way that the other person has pleaded guilty. This is by no means always the case. It is only permissible to tell the jury that another person has pleaded guilty if that is a necessary part of the overall material that the jury must have before them.
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> Reliance is placed in the present case by the Crown upon a statement in the text in Archbold, *Criminal Pleading Evidence and Practice* (41st ed), par 15-60:
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> > "Nor is a plea of Guilty by one defendant in any sense to be regarded as evidence, even of his own guilt, against a co-defendant: *R v Moore* (1956) 40 CrAppR 50, though in the latter's trial the jury may be told that the former has pleaded guilty in order to explain his absence from the dock.'
>
> I have considerable reservations in embracing the unauthenticated observation in the concluding portion of the sentence. It would only be permissible to tell the jury this if, I repeat, it can be seen to be necessary to do so for the purposes of the trial in hand. This observation in *Archbold* is not in any sense to be taken as a blanket endorsement of the permissibility of informing the jury that a co-offender has pleaded guilty. I would not regard that unauthenticated addendum to the earlier portion of the sentence as an entirely accurate statement of the law."
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> In the present case, it is not easy to see how the Crown justified telling the jury that [the co-accused] had pleaded guilty. ...
>
> Plainly enough, it was a highly significant and, as I would regard it, potentially prejudicial piece of information to put before the jury ...
>
> It would, however, have been necessary to ensure that the jury fully

> understood that [the co-accused's] plea of guilty should not be regarded by them as creating an aura of criminality surrounding the events of that night within which the question of the appellant's guilt fell for determination. Even accepting, as I must say I hesitate to accept, that it could be regarded as permissible to have opened it, plainly enough it would have been desirable for the jury to be very specifically informed of the limited use - or one might say non-use - that the jury was entitled to make of this piece of information."[42]

36 The Western Australian Court of Appeal considered these issues in *Connell v The Queen (No. 6)*[43] and *Rompotis v The Queen*.[44] Connell had been charged with two counts of conspiracy. Evidence of the pleas of guilty of two co-accused was opened and lead by the Crown. The prosecutor said in his opening:

> "It is very important for you to appreciate, members of the jury, that you cannot draw any adverse conclusions insofar as the accused is concerned from that fact."[45]

The Court noted that this was a case in which it was necessary for the jury to be informed that the co-accused had pleaded guilty and been dealt with and was no longer dependent on the favour of the Crown. The Crown Prosecutor had made it clear that no adverse inference should be drawn against the appellant because of the plea of guilty of the co-accused. There was no suggestion that the plea of guilty by the co-accused was any part of the evidence against the appellant. In those circumstances, the trial judge was right not to discharge the jury. The trial judge refused to give a direction that the pleas of guilty of the co-accused were not admissible against the appellant to prove that the appellant had been a

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42 (1985) 24 ACrimR 47, 50-51.

43 (1992) 12 WAR 133.

44 (1996) 18 WAR 54.

45 (1992) 12 WAR 133, 161.

party to the conspiracy. The Court noted:

> "... it was clearly desirable for the learned judge to have given the direction which was sought. In our opinion, however, it was not necessary for him to do so or, if we are wrong in that view and it was necessary, there has been no miscarriage of justice as a result."

37 Rompotis was charged with procuring Allen, a public officer, to act upon information obtained by reason of his office so as to gain a benefit for Rompotis and Australiawide Investigations Pty Ltd. Rompotis was convicted and appealed claiming the learned trial judge erred in admitting evidence that Allen had been charged and dealt with in relation to 20 counts of official corruption. The Court noted that in order to prove the charge it was essential to prove beyond reasonable doubt that the appellant had procured the commission of the primary offence by Allen, but said evidence that Allen had been convicted of the relevant offence was not relevant or admissible for that purpose. Evidence that Allen had been charged with the 20 offences and had been dealt with for his part in the transaction tended to show that he had been convicted of them and was equally irrelevant and inadmissible.

38 The Court distinguished its decision in *Connell* which was limited to the unusual nature of the case and the conduct of the trial, noting:

> "Where there is no dispute that a person is an accomplice it does not follow that the fact of a conviction of the accomplice of the offences is necessarily admissible."[46]

and

> "In the circumstances of this particular case, the evidence that Mr Allen had been charged and dealt with in respect of the 20 counts of official

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46 (1996) 18 WAR 54, 64.

> corruption was completely irrelevant. It was not a question whether the prejudicial effect of the evidence outweighed its probative value. The evidence had no probative value. It only had a prejudicial effect. It was no part of the material which was necessary to put before the jury. The position might have been different if there had been any attack by the defence on the credibility of Mr Allen as a witness. There was not. ... [B]y allowing the evidence to be given as part of the Crown case, the learned trial judge allowed the Crown to lead evidence which would inevitably prejudice the defence case."[47]

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47 (1996) 18 WAR 54, 65.

The Court held that as a result the trial had miscarried in a significant way with the result that the appellant lost the chance of an acquittal.

Conclusion

39 In order to prove a charge of accessory after the fact, the following elements must be established:

(a) the accused received or assisted another in order to enable that other to escape punishment;

(b) that the other was then guilty of an offence; and

(c) that the accused then knew the other had been guilty of an offence.[48]

By way of contrast, to establish the guilt of the appellant in this case, it was necessary to show that he:

(a) knowingly;

(b) procured Vogler to do grievous bodily harm to Randell; and

(c) that as a result of this procuring, Randell suffered grievous bodily harm on 6 May 1988 at Gold Coast.

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48 *R v Carter and Savage* [1990] 2 QdR 371, 378.

Whilst the Crown case was that Bonner actually inflicted the grievous bodily harm, this was not an element which the Crown had to prove. This contrasts with the elements to be proved to establish the offence of accessory after the fact.

40 The long established general rule is that the conviction for an offence of a third party is not admissible against an accused person at trial.[49] One exception to that rule seems to be that on a trial of an accessory after the fact, proof of the conviction of the actual offender is admissible to prove an element of the offence.[50] Once the evidence of the conviction is admissible, s 53 of the Act permits a certificate of conviction to be tendered.

41 The only authorities suggesting that evidence of the conviction of the actual offender can be given at a trial of a co-accused charged under s 7(1)(a), (b), (c) or (d) of the Criminal Code are the equivocal comments in 1809 by Michael Foster in *Discourses Upon a Few Branches of the Crown Law*; and *R v Cook and Field* in 1788[51] cited in *Dawson*,[52] *Carter and Savage*;[53] and *Hutton*;[54] *R v Prosser*[55] reported in a very short note of eight

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49 *R v Moore* (1956) 40 CrAppR 50, 54.

50 *R v Carter and Savage; ex parte A-G* [1990] 2 QdR 371.

51 3 Esp 132; 170 ER 564.

52 [1961] VR 773.

53 [1990] 2 QdR 371.

54 (1991) 56 ACrimR 211.

55 168 ER 247.

lines referring to a single judge decision in 1784 and obiter in *Bartorillo*.[56] As Thomas JA points out, it seems likely the effect of the old cases was altered by *Hollington v Hewthorn*.

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[56] (CA Nos 161 and 163 of 1996, 11 October 1996).

42 In *Hutton*, the issue, whether a distinction should be made between the admission of the conviction of the actual offender on the trial of an accessory after the fact and the trial of an offender charged under s 7(1)(a), (b), (c) or (d) of the Criminal Code, does not seem to have been considered. The court in *Hutton* mistakenly accepted *Carter and Savage* as justifying the admissibility of evidence of the conviction of the actual offender on the trial of alleged co-offenders, other than accessories after the fact. *Carter and Savage* is authority allowing evidence to be given of the conviction of the actual offender by way of certificate of conviction tendered under s 83 of the Act only on a trial of an accessory after the fact. It should also be noted that the tendering of the conviction in *Hutton* did not assume the same importance as in this case, as the convicted witness there gave evidence and was able to be cross-examined, something denied the appellant here.

43 *Bartorillo* is of no assistance as the point before this Court was not considered.

44 In Queensland, the rule in *Hollington v Hewthorn* has been statutorily abolished in respect of civil offences only.[57] The rule continues to apply to criminal proceedings, something not apparently appreciated by the majority in *Carter and Savage*.[58] As Thomas

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[57] s 79, *Evidence Act*.

[58] [1990] 2 QdR 371.

JA notes in his reasons, this may mean *Carter and Savage*[59] was wrongly decided. It is unnecessary and unwise to reach a conclusion on that point here: the point, one of complexity, was not argued and is not relevant to the outcome of this appeal. For the moment, one exception to the rule in *Hollington v Hewthorn* in Queensland is that evidence of the conviction of the principal offender is admissible on the trial of the accessory after the fact.[60] Once evidence of a conviction is admissible, it can be proved by a certificate of conviction under s 53 of the Act. Evidence of the conviction of the actual offender should not ordinarily be led on the trial of co-offenders charged by way of s 7(1)(a), (b), (c) or (d) of the Criminal Code. This approach seems consistent with that taken by the Court of Criminal Appeal of New South Wales in *R v Cowell*[61] and the Supreme Court of Western Australia (Appellate Jurisdiction) in *Rompotis v R*.[62]

45 *Hutton* was incorrectly decided, insofar as it purports to apply the principles set out in *Carter and Savage* to those who are allegedly co-accused by way of s 7(1)(a), (b), (c) or (d) of the Criminal Code. Although not lightly done, in the circumstances, this Court should overrule its earlier decision in *Hutton*.[63] Of course, a co-offender can give evidence at the trial of other co-offenders, in the course of which evidence of the witness' guilt, and often conviction, for the offence will arise. The trial judge should generally warn the jury that the co-offender's conviction for the offence is in itself no proof of the

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59 [1990] 2 QdR 371

60 *R v Carter and Savage* [1990] 2 QdR 371.

61 (1987) 24 ACrimR 47.

62 (1996) 18 WAR 54.

63 See *Nguyen v. Nguyen* (1990) 169 CLR 245, 268-9.

guilt of the accused.

46 The learned trial judge in this case was bound by *Hutton*, a case which was in part incorrectly decided. His Honour has therefore erred in law. This error was compounded in his summing-up to the jury, in which he stated the first element the Crown had to prove was "that Bonner did grievous bodily harm to Randell. You may find little difficulty in finding that established, You have the certificate of conviction which is evidence to all the world that he as admitted to having done so, having committed grievous bodily harm."[64] As has been noted, it was not an element to be established in this case that Bonner did grievous bodily harm to Randell.

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64 Record 149.

47 This is sufficient to dispose of the main point of the appeal but some further comments are warranted. Even if the evidence of Bonner's guilt has been admissible in law, his Honour was asked to exclude it.

48 Section 130 of the *Evidence Act* 1997 provides:

> "Nothing in this Act derogates from the power of the Court in a criminal proceeding to exclude evidence if the Court is satisfied it would be unfair to the person charged to admit that evidence."

This is exactly the sort of case referred to by the English Court of Appeal in *Robertson*, *O'Connor*, and *Curry*: the evidence placed before the jury of the conviction of Bonner necessarily imported the complicity of the appellant and should have been excluded. The appellant was denied the opportunity of cross-examination. His Honour gave no warning to the jury that the conviction of Bonner was not evidence of the guilt of this appellant:

indeed, he wrongly told them it was directly relevant to prove an element of the offence which they would find little difficulty in being established. In these circumstances, even if the evidence of the conviction of Bonner had been admissible in law, the learned trial judge should have exercised his discretion to exclude that evidence. Unless the case is one where s 668E(1A) of the Code should be applied, the appeal must be allowed.

49 The case against the appellant was a strong one if the jury accepted the evidence of Vogler which was the essence of the Crown case. The appellant's complaint in this case is, not so much that the certificate of conviction was tendered, as that the appellant was deprived of the opportunity to cross-examine Bonner. Indeed, counsel for the appellant concedes that had Bonner given evidence and been cross-examined, it was almost inevitable that evidence of Bonner's conviction would have emerged, in which case there could be no proper complaint. The cross-examination of Vogler shows that it was the appellant's case that the appellant had nothing to do with Bonner and did not procure Vogler to commit the offence. The Crown decided not to call Bonner as he had given a number of different versions and was regarded by them as unreliable. He was available to be called by the appellant but understandably the appellant had similar concerns, especially if unable to cross-examine. Although the complainant had no memory of the attack and could not implicate Bonner, other evidence led at the trial, apart from the conviction, suggested that Bonner committed the offence, including the booking of plane tickets by Mrs Vogler for Bonner and evidence that Vogler and Bonner were seen together on the night of the assault. Vogler's evidence was supported by the independent evidence of the appellant's concealed withdrawal of $2,500 on the day Vogler claims to have paid this sum to Bonner and by the prior threats Randell claims the appellant made to him. However, the

impact of the evidence of Bonner's conviction of this offence, in a commonsense way, was evidence which it is likely the jury would use to support Vogler's account, and infer the appellant's complicity as discussed in *O'Connor*, *Robertson* and *Curry*. The summing-up by the learned trial judge made this more, not less, likely. The inability of the appellant's counsel to cross-examine Bonner in those circumstances meant that, despite the very considerable strengths of the Crown case, the appellant may have been deprived of the chance of an acquittal by the wrongful admission of the evidence of the conviction of Bonner. It cannot be said that there has been no substantial miscarriage of justice such as would warrant the exercise of the proviso in s 668E(1A) of the Criminal Code.

50 I would allow the appeal, set aside the verdict of the jury below, and order a new trial.

REASONS FOR JUDGMENT - THOMAS JA

Judgment delivered 22 December 1998

1 The appellant was convicted of unlawfully doing grievous bodily harm to one Randell on 6 May, 1988. The appellant did not personally inflict the harm, and the case against him was based upon s.7 (1)(d) of the Code in that he had procured another person to commit the offence. In such a case the Crown may charge the procurer either with commission of the actual offence or with procuring its commission[65]. The Crown case was that the appellant, through an intermediary, one Vogler, procured one Bonner to attack the complainant who was a business competitor of the appellant.

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[65] Code s7 (2).

2 The Crown called Vogler to give evidence that the appellant had recruited him to "do over" Randell, who the appellant claimed had "ripped him off". The evidence included details of the price (i.e. $2,000 plus the cost of an airfare) for which Vogler agreed to engage another person, of the appellant's request for serious harm to be inflicted upon Randell, and of various arrangements which led to the securing of the services of Bonner who was flown from Adelaide to Coolangatta at the appellant's expense. Vogler further gave evidence of Bonner's preparations before the assault on Mr Randell and of his return afterwards. Vogler was not present during the assault. Mr Randell was struck from behind and may have suffered some amnesia, and in the event, apart from the tendering of a certificate of Bonner's conviction, there was no direct evidence that Bonner was the perpetrator of the assault.

3 The appellant admitted at trial that the complainant suffered injuries amounting to grievous bodily harm at his business address on the date charged (6 May, 1988).

4 Before the trial of the appellant, Bonner had been convicted of grievous bodily harm against Randell on the occasion in question and had been sentenced to eight years imprisonment. The learned Crown Prosecutor did not regard Bonner as reliable and was not prepared to call him as a Crown witness despite submissions from defence counsel that he should do so. The Prosecutor's decision not to call Bonner cannot be said to have been unjustified. In the event Bonner's commission of the offence of grievous bodily harm upon Randell on 6 May 1988 was proved by tendering a certificate of conviction of Bonner of that offence. The appellant's objection to this evidence was overruled by the learned trial judge.

5 Prior to the appellant's trial Vogler also had pleaded guilty to grievous bodily harm against Randell on the occasion specified. No doubt his co-operation with the police (which was eventually confirmed by his giving evidence against the appellant in the instant trial) was taken into account in his favour, in that he was sentenced to a wholly suspended term of four and a half years imprisonment. The Crown also led evidence of Vogler's plea of guilty. There was no objection to this as he was available for cross-examination by the defence and in any event it would seem that the defence wished to pursue the issue of Vogler's co-operation with the police, in order to suggest that the evidence he gave against the appellant was untruthful.

6 Leaving aside the question of proof of Bonner's conviction, there was a strong circumstantial case that the grievous bodily harm inflicted upon Mr Randell on 6 May, 1988 (which was admitted by the defence) was inflicted by Bonner. A deal of evidence was called by the Crown, corroborating details of the sequence described by Vogler. There was also substantial evidence of the appellant's withdrawal of $2,500.00 on the day in question by means of cashing a cheque through a third party and that the appellant

caused a false entry to be recorded in relation to the alleged payee. There was strong evidence of the appellant's desire to harm Mr Randell, stemming from an incident some years previously when Mr Randell had succeeded in obtaining the customers of the appellant's painting business.

7 The appellant did not give or call any evidence in his defence.

8 The sole ground of appeal against conviction is "the learned trial judge erred in admitting the certificate of conviction of Bonner when Bonner was not to be called as a witness by the Crown".

9 The thrust of the defence cross-examination of Vogler was to suggest that Bonner had not met the appellant after arriving at Coolangatta, and that Vogler was more involved in the assistance of Bonner than he admitted. Counsel also put to Vogler that the appellant had not asked him to arrange to have Randell assaulted. These propositions were all denied and no evidence was called to the contrary.

10 Counsel for the appellant indicated at trial and on appeal that his objection was to the combination of proof of Bonner's involvement by proof of his conviction and his inability to cross-examine Bonner unless Bonner were called as a Crown witness. If Bonner had been called it is difficult to see how cross-examination of Bonner along the lines foreshadowed could have had any impact on the uncontradicted evidence that Vogler's acts, and in turn Bonner's, were the result of the appellant's procurement. But at all events objection was taken to the admission of Bonner's conviction unless Bonner was called, and cross-examination of Bonner might have had some effect upon the general credit of the principal Crown witness, Vogler. These factors may become relevant if application of the proviso to s668E of the Code needs to be considered. I therefore turn to the validity of the objection to the tendering of Bonner's conviction.

Elements of the offence

11 In this case the following elements were necessary to prove the Crown case:-

(a) Grievous bodily harm was caused to Randell on 6 May, 1988 (this was admitted);

(b) that the appellant procured Vogler to cause grievous bodily harm to be inflicted upon Randell; and

(c) that the grievous bodily harm suffered by Randell was a result of the appellant's procuring in (b) above.

12 The fact that Bonner actually inflicted the harm to Mr Randell was not an element of the offence, although the evidence produces the virtually inescapable inference, even leaving aside the certificate of conviction of Bonner, that Bonner was the perpetrator. However the Crown's burden was to show causation between the original procurement and the end result. The nature of every link in the chain or the actual identity of the final perpetrator would not necessarily need to be known for the necessary inference to be drawn of cause and effect. An offender under s7(1)(b), 7(1)(c) or 7(1)(d) of the Code may be convicted even though the principal offender is acquitted[66], but of course there must be proof in the trial of the procurer that his procurement results in the commission of the crime.

13 It is desirable to identify in passing two matters which *do not arise* in the present case although the learned Crown Prosecutor attempted to raise one of them during trial. This may assist in preventing their re-agitation if there is a retrial.

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66 cf *Morris v Toliman* [1923] 1 KB 166; *R v Williams* [1932] 32 SR (NSW) 504, 508; *R v Anthony* [1965] 2 WLR 748; *R v Darby* (1982) 148 CLR 668; *R v Burnett* (1994) 76 A Crim R 148.

(a) Although it was alleged that the appellant "counselled *or* procured" the essence of this case was procurement rather than counselling. Accordingly recourse to the tests under s9 of the Code (including whether the result was a probable consequence of carrying out the counsel) is not appropriate. The direct causation issue addressed by the learned trial judge was appropriate.

(b) Contrary to certain submissions at trial, the case was simply one of an accessory procuring commission of an offence; it was not a case of common purpose involving the application of s8. The reasons why principles applicable to cases of common purpose are inapplicable in a case such as the present are clearly set out in *Stokes and Difford*[67], and need not be here repeated.

Admissibility of certificate of conviction

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67 (1990) 51 A Crim R 25, 35-36 per Hunt J.

14 Section 53 of the *Evidence Act* permits a conviction to be proved by the production of a certificate under the hand of a person having custody of the relevant records or documents. That section facilitates proof of the fact of conviction, but of course the primary matter is the relevance of the conviction in the particular proceedings. In the present case the fact that Bonner seriously assaulted Randell on the day in question was a material fact although not an actual element of the offence. The question is whether the law permits proof in criminal proceedings of such a fact by means of a certificate of conviction of a third person in proceedings to which the present accused was not a party.

The rule in *Hollington v Hewthorn* ("the rule")

15 The rule in *Hollington v Hewthorn*[68] suggests that in principle such evidence should not be received. The rule is that the conviction of a person in a criminal court is not admissible in civil proceedings as proof of the fact that the convicted person committed the offence. One would think that the rule would apply a fortiori in criminal cases. The maxim *res inter alios acta alteri nocere non debet* generally calls for the protection of a party from the consequences of proceedings over which he or she has no control. However courts and legislators alike have both before and after *Hollington v. Hewthorn* identified conflicting policy factors relevant to the question whether proof de novo should be required in each case, or whether it is preferable to avoid considerable cost and inconvenience by permitting parties to use the results of the due process of litigation as at least prima facie proof of something that is relevant in a subsequent trial.

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68 *Hollington v F Hewthorn & Co* [1943] KB 587.

16 In Queensland the rule has been abolished in respect of civil but not criminal proceedings. Section 79 of the *Evidence Act* 1977 provides that in a civil proceeding the fact that a person has been convicted of an offence is admissible in evidence for the purpose of proving that the person committed the offence, where to do so is relevant to any issue in that proceeding, and that unless the contrary is proved, the offender is to be taken to have committed the acts and to have possessed the state of mind (if any) which at law constitutes that offence. One would think that the fact that the rule has *not been* abolished in criminal proceedings means that it still applies to such proceedings. However, a majority decision of the Court of Criminal Appeal (*R v Carter and Savage, ex parte Attorney-General*[69]) has held otherwise. This will be referred to as *Carter*. It was

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69 [1990] 2 Qd R 371 (per Kelly SPJ and Carter J, Derrington J dissenting).

on the basis of that decision and of a later decision that followed and extended it *(Hutton*[70]) that the learned trial judge admitted evidence of Bonner's conviction in the present case. Counsel for the appellant did not submit that *Carter* (which allows evidence to be given of the conviction of the principal offender against a person charged as accessory after the fact) was wrongly decided. But he submitted that the later decision in *Hutton* which admits such evidence in cases against accessories of all kinds is erroneous and ought not to be followed. It will be necessary to re-examine both *Carter* and *Hutton* in considering these submissions.

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70 (1991) 56 A Crim R 211.

17 Leaving aside for the moment the present state of the law, strong arguments exist both ways on the question of whether such evidence *should* be received, at least as prima facie evidence in both criminal and civil matters. The respective arguments are helpfully collected in the Australian Law Reform Commission's report no. 26[71] and the respective arguments are likewise discussed by the authors of the Australian edition of *Cross on Evidence*[72]. It has been pointed out that a legal determination that is the result of a proper trial requiring proof beyond reasonable doubt or even after a plea of guilty should be regarded as reasonably probative evidence. To treat the conviction as having no probative value carries the suggestion that a conviction is as likely to be wrong as it is right. In *Hollington v. Hewthorn* itself the plaintiff failed because his essential witness had died, notwithstanding the conviction of the defendant. The rule is said to offend the primary objective that the rules of evidence should enable and ensure that all evidence which will

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71 ALRC Annual Report 1985 at pp441-443.

72 Australian Edition paras 5180-5235.

assist the court to make accurate findings as to the facts should be received. It is also recognised that there is a waste of community resources and undue expense for litigants in requiring the re-litigation of matters already decided.

18 On the other hand, considerations of fairness require that a party have an adequate opportunity to test and counter the evidence led at his trial. Where a party has not been involved in the earlier proceedings and there does not exist the means of having the persons involved called for cross-examination, a trial may be considered unfair.

Does the rule apply to criminal proceedings in Queensland?

19 The general rule in criminal proceedings may be taken to be that stated by Goddard LCJ in *Moore:* "[T]he fact that [a co-offender] has pleaded guilty is no evidence against his co-prisoner..., the accepted principle being that a man's confession is evidence only against himself and not against his accomplices[73]". The same may be said of the conviction of a co-offender after a trial[74].

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73 (1956) 40 Cr App R 50, 54; cf *Cowell* (1987) 24 A Crim R 47.

74 *R v Kempster* [1989] 1 WLR 1125.

20 However some early decisions in the United Kingdom and some relatively recent decisions in Australia (many of which have been canvassed in the reasons of the President which I have had the advantage of reading) suggest that there is, at least in some jurisdictions, a recognised exception to the rule in the case of accessories after the fact[75]. One decision in particular holds that the exception includes other accessories such as persons who aid, counsel or procure[76]. There is also a corresponding body of authority to

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75 *R v Dawson* [1961] VR 773, 774; *R v Carter & Savage ex parte Attorney-General* [1990] 2 Qd R 371; *Hutton* (1991) 56 A Crim R 211.

76 cf. *Hutton* above.

the contrary[77].

21 Many of the decided criminal cases are concerned with the problem of how to deal with evidence which for one reason or another is received concerning the conduct of a co-offender such as how he or she has been dealt with by the court. Issues of this kind have arisen in cases including *Burnett*[78], *Connell*[79], *Cowell*[80] and *Moore*[81]. In such cases the rule is distinguished and the evidence is received for a limited purpose, but not as evidence of the fact that the offence was committed. The overall effect of those decisions seems to be that on such occasions it is incumbent upon the trial judge to indicate to the jury the limited relevance of the evidence, and to instruct that the conviction of such a person is not evidence against the accused and should not be allowed to affect the position of the accused.

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77 *Rompotis v The Queen* (1996) 18 WAR 54; *R v Triffett* [1992] 1 Tas R 293; *Cowell* (1987) 24 A Crim R 47.

78 (1994) 76 A Crim R 148; *Cowell* (1987) 24 A Crim R 47.

79 (1992) 12 WAR 133.

80 (1987) 24 A Crim R 47.

81 (1956) 40 Cr App R 50.

22 Counsel for the appellant, Mr Glynn SC, submitted that there exists in Queensland a well recognised though limited exception to the rule confined to cases where a person is charged as accessory after the fact. In such cases he submitted that the commission of the principal offence by the principal offender may be proved by proof of the conviction of that person. That is the ratio of the Court of Criminal Appeal decision in *Carter*[82]. The present case of course is not brought on the basis that the appellant is an accessory after

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82 [1990] 2 Qd R 371 (per Kelly SPJ and Carter J, Derrington J dissenting).

the fact - he is charged as a procurer under s7(1)(d). Mr Glynn submitted that it was erroneous to extend the exception recognised in *Carter* to cover the case of other accessories such as persons who aid, enable or counsel or procure under s7(b), (c) and (d) of the Code. The learned trial judge in the present case ruled that such an extension was appropriate, following another Court of Criminal Appeal decision, namely *Hutton*[83].

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83 (1991) 56 A Crim R 211.

23 I may say that the term "accessory" no longer has a sufficiently precise meaning to be useful in the present discussion. At common law an accessory before the fact was one who although absent during the actual commission of the offence, could be shown to have assisted, counselled, procured or abetted the felony of the principal offender[84]. The term applied only to felonies. Those who assisted or were otherwise secondary parties to misdemeanours were regarded as principals and were indicted as such[85]. Those who were present during commission of the offence and who aided or enabled its commission were described as principals in the second degree. The term principal in the first degree was reserved for the person who performed the actual act or omission by which the offence was committed[86]. Since the abolition of the distinction between felonies and other offences the distinctions between these terms are no longer of practical importance. I have mentioned the terms to highlight the potential ambiguity in the use of the term "accessory" and the fallacy of assuming that "accessory before the fact" means any accessory other than an accessory after the fact. The true question that now needs to be

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84 1 Hale 615.

85 4 Bl Com 36.

86 *Stacey v Whitehurst* (1865) 18 CBNS 344, 355; *R v Brown* (1878) 14 Cox CC 144; *R v Webbe & Brown* [1926] SASR 108, 112; *R v Ready & Manning* [1942] VLR 85.

considered is whether any distinction should be drawn between the rules of evidence applicable to persons charged as offenders under s7(1)(a), (b), (c) and (d) and those applicable to persons charged as accessories after the fact under s10 of the Code.

24 We are here concerned with a rule of evidence rather than a principle of substantive law. The decision of the majority in *Carter* was based upon reasoning accepted in the Victorian case of *R v Dawson.* It was said in *Dawson*[87] "it is a rule long established that upon the trial of a person on a charge of having been an accessory to the commission of a felony, proof of the conviction of the alleged principal offender is admissible, and constitutes prima facie evidence that the felony was committed by him." That case involved an accessory after the fact. Reference was made in that case to the 1809 edition of *Foster, Crown Law* and to three cases decided between 1783 and 1788. Those sources suggest that a practice along those lines did develop, although no clear discussion of principle is to be found in them. It might be thought that the principle, if any, underlying that practice deserved reconsideration when it was held in *Hollington v. Hewthorn*[88] that it was inappropriate in civil proceedings to receive such evidence as evidence of the facts upon which the conviction was based. The need for independent proof of such matters might be thought to be even greater in criminal proceedings.

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87 [1961] VR 773, 774.

88 [1943] KB 587.

25 The need for such reconsideration may to some extent have been diverted in the United Kingdom by reason of legislation. The *Civil Evidence Act of 1968* largely abolished the rule in civil proceedings but the rule continued to apply in criminal proceedings. This was followed by the *Police and Criminal Evidence Act* (1984) and a

number of decided cases under that Act. That Act expressly makes evidence of a conviction admissible to prove that that person committed that offence, and "he shall be taken to have committed that offence unless the contrary is proved". Notwithstanding this, the courts have maintained a very careful attitude towards admitting such evidence. S78 of the Act requires the courts in the UK to consider whether the admission of such evidence would have such an adverse affect on the fairness of the proceedings that the court ought not to admit it. A trend has emerged[89] suggesting that unfairness will be identified if the Crown attempts to prove facts of this kind in such a way that an accused person is deprived of the opportunity of cross-examining the alleged offender. It would seem that where complicity between the alleged principal offender and the accused is in issue, and a conviction has a tendency to prove such complicity, such evidence will be excluded in the exercise of the court's discretion, notwithstanding that the Act prima facie authorises the reception of such evidence[90]. The relevance of the decisions in the United Kingdom, to my mind, is to show that notwithstanding statutory authorisation, the criminal courts have not embraced the reception of such evidence. They also suggest to me that the reliance in *Dawson*, and in turn in *Carter*, upon the work described as Foster, *Crown Law* (1809) 3 ed. [91] and upon other 18th and early 19th century decisions in the UK may not necessarily be a sure guide for the appropriate rule of evidence to govern such matters.

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89 Discernible particularly in *R v Kempster* [1989] 1 WLR 1125, 1134 and *R v Spinks* (1982) 74 Crim App R 263, 266.

90 *R v Kempster* above at 1134.

91 Sir Michael Foster's "A Report of Some Proceedings on the Commission for the Trial of the Rebels in the Year 1746, in the County of Surry; and of other Crown Cases: to which are added Discourses Upon a Few Branches of the Crown Law".

26 In New South Wales the rule has recently been legislatively reinforced both in civil and criminal proceedings[92] after consideration of the reports of the ALRC and of the NSW Law Reform Commission.

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92 *Evidence Act* 1995 (NSW) s91 which provides inter alia "evidence of the decision, or of a finding of fact, in an Australian or overseas proceeding is not admissible to prove the existence of a fact that was in issue in that proceeding".

27 It does not ever seem to have been seriously thought in that state that such an issue could be proved in criminal proceedings by tendering a certificate of conviction[93]. "[The Crown] must establish by evidence admissible against the accessory that the principal offence was in fact committed by the principal offender. Proof of that fact is fundamental..."[94]. The rule in *Hollington v Hewthorn* seems to have been accepted in both criminal[95] and civil[96] proceedings, and that position has now been confirmed by statute.

28 By contrast the rule has been disapproved in New Zealand[97] and in Western Australia[98], and obiter statements have been made by Lord Diplock[99] that *Hollington v Hewthorn* was "generally considered to have been wrongly decided". The rule however was recently applied by the Privy Council as a subsisting part of the common law in *Hui*

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93 Compare *R v Williams* [1932] SR (NSW) 504 and *Buckett* (1995) 79 A Crim R 302, 308.

94 *Bucket* at p308 per Hunt CJ at CL.

95 *Ex p. Mavromatis; Re Windsor* (1956) 73 WN (NSW) 420.

96 *Rakay v MacFarlane* (1961) 78 WN (NSW) 488.

97 *Jorgensen v News Media (Auckland) Limited* [1969] NZLR 961.

98 *Mickelberg v Director of Perth Mint* [1986] WAR 365.

99 *Hunter v Chief Constable* [1982] AC 529, 543.

Chi-Ming v The Queen.[100] Although often distinguished and sometimes criticised, the rule for the most part seems to have survived in Australia[101] as a subsisting principle of the common law.

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100 [1992] 1 AC 34.

101 See *Cross* above, paras 5195-5205; *Gillies Law of Evidence in Australia* (2nd edition) p669.

29 I turn then to the decisions of the Court of Criminal Appeal in *Carter* and in *Hutton.* 30 In *Carter* upon a reference by the Attorney-General, the majority (Kelly SPJ and Carter J) held that upon the trial of an accessory after the fact, proof of the conviction of the principal offender is admissible and constitutes prima facie evidence that the principal offender did the acts and possessed the state of mind (if any) necessary to constitute the principal offence. The reasoning acknowledges that it is only in respect of civil proceedings that the rule has been abolished but concludes that "the old cases referred to above and the decision in *R v Dawson* indicate that the statutory rule now applicable in civil proceedings had long since been in place in relation to criminal proceedings, at least in cases involving an accessory after the fact and the principal offender"[102]. With respect, no consideration seems to have been given to the fact that *Hollington v Hewthorn* may be thought impliedly to have over-ruled "the old cases". Derrington J, who dissented, pointed out that proof of the commission of an offence by the principal offender was no mere technical matter and that the difficulty of proving this against the accessory, particularly where the case against the principal offender consists mainly of admissions made by him, do not justify abrogation of principles which provide safeguards against the misuse of evidence. His Honour further observed that if the

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102 *Carter* above at 385.

evidence is inadmissible in civil proceedings, it should more assuredly be so in criminal prosecutions[103].

Should *Carter* and *Hutton* be followed?

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103 Ibid p376.

31 It is enough for present purposes to say that having regard to the divergent authorities to which reference has been made, I prefer the dissenting view of Derrington J. However an intermediate Court of Appeal does not lightly overrule its own previous decisions or those of its predecessors although not strictly bound by such decisions[104]. In any event, I would not be disposed to join in a decision declining to follow this previous decision unless it were necessary to do so for the purposes of the immediate decision. In the present case, consistently with the submissions of counsel for the appellant, it is possible to leave to another day the question whether *Carter* should be not followed, as it is confined to cases concerning accessories after the fact. It is however necessary to confront the question whether *Hutton* was rightly decided.

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104 *Nguyen v Nguyen* [1990] 2 Qd R 153; (1989-1990) 169 CLR 245, 268.

32 In my view there was no ground for extending the decision in *Carter* to cases involving offenders under s7(1)(b), 7(1)(c) and 7(1)(d) of the Code. If necessary I would hold that both *Carter* and *Hutton* were wrongly decided. But it is sufficient to say that *Hutton* is an unwarranted extension of *Carter.* The Victorian decision of *Dawson* was an accessory after the fact case, and whilst it may afford an arguable basis for sustaining *Carter*, neither it nor in turn *Carter* can sustain the extension in *Hutton.* No grounds are stated in *Hutton* for the extension of the principle to s7 offenders beyond statements to the effect the conviction of the principal offender constituted prima facie evidence against the

accused, followed by reference to *Carter* and to *Dawson*[105]. In fairness to the members of that Court, the point does not seem to have been directly in issue, as the principal offender had in fact been called by the Crown, and perusal of the Notice of Appeal in that case fails to record any complaint concerning the reception of evidence of his conviction. It therefore seems highly likely that the point was not directly raised or argued. Despite the convenience to the Crown of such a rule there is in my view no principle in the law of evidence which makes evidence of the conviction of a third party admissible against an accused in criminal proceedings to prove that the third party did the acts that amount to the offence. In the prosecution of a procurer, proof that the principal offence was in fact committed is of fundamental[106] importance. I am firmly of the view that the better view of the matter is that taken in *Cowell*,[107] *Triffett*[108] and *Rompotis*[109] and that in a case of this kind a certificate of conviction should not without consent of the accused be received as evidence of the principal offender's commission of the offence.

33 The learned trial judge must therefore be treated as having been in error in admitting the evidence.

Proviso

34 Counsel for the Crown submitted that the Crown case was strong and that the jury would have convicted in any event. The case certainly was strong, but I cannot say that

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105 (1991) 56 A Crim R 211 at 212 and 217 per Ryan J and de Jersey J (as he then was) respectively.

106 *Buckett* above at 308.

107 (1987) 24 A Crim R 47 (a NSW decision).

108 [1992] 1 Tas R 293.

109 (1996) 18 WAR 54.

the admission of this evidence thereby effectively depriving defence counsel of the opportunity of cross-examining Bonner, was devoid of practical effect[110]. Whilst I think that there was already an adequate circumstantial case that Bonner inflicted the grievous bodily harm, it is possible as Mr Glynn contends, that the tendering of the certificate of conviction may have tended to bolster Vogler's evidence. In these circumstances the proviso cannot be applied and there must be a re-trial.

35 The appeal should be allowed and the verdict of the jury should be set aside with a direction that there be a new trial.

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110 See above at para 10.

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

CA No 223 of 1998

Brisbane

Before McMurdo P
Thomas JA
Jones J

[R v Kirkby]

THE QUEEN

v

GREGORY REX KIRKBY

Appellant

REASONS FOR JUDGMENT - JONES J

Judgment delivered 22 December 1998

1 I have had the advantage of reading the reasons for judgment of McMurdo P and Thomas JA. I agree with their separate reasons and with the orders proposed.