JAMAICA

IN THE COURT OF APPEAL
SUPREME COURT CRIMINAL APPEALS Nos. 6 and 10 of 1972

BEFORE: The Hon. President.
The Hon. Mr. Justice Smith, J.A.
The Hon. Mr. Justice Hercules, J.A.

ALFRED WILLIAMS v. R.
CONSTANTINE BLACKWOOD v. R.

F.M.G. Phipps Q.C. and Richard Small for applicant Williams.

Applicant Blackwood unrepresented.

J.S. Kerr Q.C. (Director of Public Prosecutions), R.O.C. White Q.C. and W.L. Morris for the Crown.

1972 - Nov.27.28.29.30. Dec.1. 1973 - May 4.

SMITH, J.A.:

After a trial lasting thirty-five days before Melville J. and a jury, the applicants were convicted in the Manchester Circuit Court on January 24, 1972 on an indictment which charged Blackwood for the murder of John Morgan on March 19, 1971 and Williams for being an accessory before the fact to the same offence. Blackwood was convicted of Manslaughter and Williams was convicted as an accessory before the fact to that offence. Blackwood was sentenced to be imprisoned for life and Williams to imprisonment for fifteen years with hard labour. Each of the applicants applied for leave to appeal against his conviction and sentence but Williams subsequently abandoned his application in respect of sentence.

The deceased, John Morgan, was a medical practitioner. He lived and practised his profession at No.3 Manchester Street, Spanish Town in Saint Catherine. He was said to be of the age of 75 years, at least, at his death. The deceased was married. His wife Pearl Morgan was said to have been of about 40 years old. They had four children - three girls and a boy, Rudyard, who was thirteen years old at the time of the trial. There was evidence that the deceased and his wife had frequent quarrels and that during a quarrel on or about February 22, 1971 he struck her a blow which broke an arm. A report was made to the police on that date and on March 18, the day before he was killed, the deceased was served with a summons which charged

him with assaulting his wife thereby occasioning actual bodily harm to her. The wife had left the deceased on Ash Wednesday, February 24, 1971, and lived elsewhere with their three daughters. Rudyard remained with his father, the deceased, at No.3, Manchester Street.

The applicant Williams was a friend of the deceased, his wife and family. He was chief engineer at the Bernard Lodge sugar factory in Saint Catherine and lived with his wife and children at Bernard Lodge. The sugar factory was said to be 2½ miles from Spanish Town. The applicant Williams was on the panel of jurors which served during the 1968 Michaelmas sittings of the Saint Catherine Circuit Court. He was the foreman of a jury which tried the applicant Blackwood and four others who were charged with him at that Circuit Court. Sidney Jones, called "Pope", who was a key prosecution witness at the trial of the applicants, was charged on a separate indictment with five others at the same Circuit Court. Blackwood and his co-defendants were acquitted on November 28, 1968 while a nolle prosequi was entered on December 2, 1968 in respect of the charge against Sidney Jones et al.

On March 19, 1971 the deceased and his son Rudyard left their home in the deceased's car at 5.30 p.m. They returned home at 7 p.m. Rudyard gave evidence that while in the garage he heard someone calling the deceased. The deceased and himself left the garage together. Rudyard said that he went and opened the front door of the house which led into the waiting room of the deceased's office. He saw a man cross the street and go towards him at the door. Though the man passed under a street light he could not discern his features. As the man approached the door he (Rudyard) left and went to the drawing room to watch the television. After about an half an hour, he said, he heard the deceased running inside the house and saying: "Ruddy, somebody stab me, call the hospital." He went and saw the deceased in a bedroom bleeding from his neck. He went to the telephone and when he returned he saw the deceased lying on the floor of the library. He ran out into the street and called for help. The deceased was dead by the time the first policeman arrived at about 7.55 p.m. A large quantity of blood was seen in the deceased's examination room and there was a trail of blood from there through the consulting room to the spot where the deceased's body lay. The deceased's wallet with $627.15 in it was in a pocket of his trousers as well as an envelope with U.S.$305.50. From this it was concluded that robbery

was not the motive for the attack.

Dr. Roy Saunders, who performed the post-mortem examination on the body of the deceased, found a one inch incised wound at the right side of the neck. The wound had penetrated to a depth of three and a half inches, completely severing the right sub-clavian artery and entering about one inch into the apex of the right lung. Dr. Saunders said that moderate force would be required to inflict the injury he saw and that the deceased died as a result of haemorrhage from the severed artery.

The prosecution's case against the applicant Williams depended almost entirely on the evidence of the witness Sidney Jones. The suggested motive for his complicity was mainly revenge for the injury which the deceased had inflicted on deceased's wife, with whom Williams was alleged to be having an affair.

In the case of the applicant Blackwood, though Sidney Jones gave some evidence which tended to implicate him, the prosecution relied mainly on the evidence of two witnesses who said they saw Blackwood in or near the deceased's house at the relevant time and on a confession which was admitted in evidence. Errol Williams gave evidence that on March 19 at about 7.05 or 7.10 p.m. he was walking on Manchester Street, Spanish Town and saw a man standing by the steps outside the deceased's house. Dorothy Brown said that in walking by the deceased's house on Manchester Street at about 7.30 p.m. on March 19 she saw a window of the deceased's surgery open. There was a light on in the surgery and she saw in it the deceased and another man. Both of these witnesses, Williams and Brown, subsequently pointed out Blackwood on an identification parade as the man they said they saw.

Detective superintendent Jez Marston, who was in charge of the investigations, gave evidence that when Blackwood was taken into custody he voluntarily gave a statement which was written by Mr. Marston in the presence of a justice of the peace. In this statement Blackwood said, in outline, that as a result of the applicant Williams asking him to "beat up" the deceased he was driven by Williams on the night the deceased was killed near to the deceased's house. On Williams' suggestion he entered the deceased's house and pretended to be a patient. He had a knife in a sheath with him. The deceased took a specimen of his urine and went away to have it tested. He continued: ".... on his returning to me I approached him and

I stabbed him during a struggle. I did not know where the stab caught him. I ran out of the building leaving him in the room." Before the jury, Blackwood denied giving the statement. He said that he was severely beaten by the police and thereby forced to sign a statement which Mr. Marston wrote. He said that the statement was never read to him and he did not know what it contained. The justice of the peace gave evidence for the prosecution and detective sergeant Richards, who witnessed the statement, also gave evidence in support of the prosecution's allegation that the statement was freely and voluntarily given. The learned trial judge directed the jury to disregard the statement if they believed either that Blackwood did not give it or he gave it because he was beaten. By finding the applicant Blackwood guilty of manslaughter the jury must be taken to have found that the statement was freely and voluntarily given. A verdict of manslaughter was left to them solely on the basis of the concluding sentence in the statement: "I have nothing more to say, only that I did not mean to kill him."

The defence of Blackwood was an alibi and he called witnesses in support of it. Both on his behalf and on behalf of the applicant Williams the prosecution witness Sidney Jones was accused of being the person who killed the deceased. Witnesses were called by the prosecution in support of Sidney Jones' denial that he had committed the offence. These witnesses and Jones were subjected to searching cross-examination and a witness was called by Blackwood who said that he saw Jones in the deceased's house at the relevant time. The question whether or not it was Jones who killed the deceased was specifically left to the jury. By convicting the applicant Blackwood the jury exonerated Jones. There is no merit whatever in Blackwood's application, which is, accordingly, refused.

The evidence given by Sidney Jones was to the following effect. He is a mason and in March of 1971 he lived at Ethel Avenue in Central Village, Saint Catherine. On the night of March 10 the applicant Williams went to see him at his home. Williams was in the company of Herbert Wilks and Denzil Harrow. Williams asked if Jones remembered him as the foreman of the jury who tried the case involving Blackwood and the witness. Jones said he did not. Williams said he was looking for him (Jones) for the past month. He went to Blackwood in town and Blackwood had directed him to where he (Jones) was living but he did not find him. Williams then said to him: "Pope I have a job.

I have a rass man to give a beating but like how I find you I don't want these people outside to hear what I am saying to you so I am going to drop them and come back." Williams went away with Wilks and Harrow and returned alone in about fifteen minutes. Jones had, after Williams left, called his neighbour Winston Brown and he and Brown were together in the lane outside of Jones' house when Williams returned. Jones told Williams that Brown was his friend. Williams then said to them: "Fellows, I have a job, I have a man to give a rass claut beating; we can't stay here and discuss the matter." They went with Williams to his car and the car was driven by Williams to the main road leading to Spanish Town and towards Spanish Town. On the way to Spanish Town Williams said: "I have a man to give a rass claut beating but he is a wicked man and is a mean man, when him finish work at nights he cook and wash his clothes himself." Williams said that he and the man were good friends but he is a wicked man. He asked Jones how much a job like that would cost. Jones told him that he (Williams) had done something for them so he will leave it to him. Williams told them that he and the man's wife were "in friendship, he love her so much." He drove them to Spanish Town, pointed out a building and told them that that was where the man lived - and that he was a doctor. On the way back to Central Village, Williams said that one night the doctor's wife went out and returned at 6 o'clock in the morning; the doctor let her in and struck her with a piece of burglar bar breaking her hand; that she telephoned to him (Williams) and he took her to the Linstead hospital where her hand was dressed and placed in plaster. He said "the man is a wicked man, that is the reason why I would like him to get a beating." While on the way back to Central Village Williams also said "the main reason why he would like him to get a beating is because where the lady is living now she has three daughters there with her; one of them is eleven and she is damn sensitive because when he leave work and go to the gate and saw the lady and start to hug her up and kiss her and then went in bed starting to make love, that little girl say 'how mummy and Mr. Williams so loving and daddy and mummy not so loving.' " That is one of the main reasons, Williams said, "why I would like him to get a beating, possible bruk him up and dig out his two eyes." Jones said that he and Brown were taken back to Central Village and Williams told him that if he was interested he should get in touch with him at Bernard Lodge.

Herbert Wilks and Denzil Harrow gave evidence supporting Jones about the visit paid to him by Williams on March 10. Wilks said that before March 10 Williams had gone to his home asking for "Pope" (Sidney Jones) and that he had told him to return on March 10. He went with Williams in the latter's car to Big Lane in Central Village. He saw Denzil Harrow who got in the car with them and showed them where Jones lived. They said that Williams went into Jones' premises with him and was there for about ten minutes. He returned and took them back in his car out to the main road and said he was going back because he had some business with "Pope". Winston Brown also gave evidence of having accompanied Jones in Williams' car to Spanish Town, of hearing Williams say: "I have a rass man to beat. That man is a very wicked man because him beat him wife and 'bruk' her hand" and he had to carry her to hospital. He heard Williams tell a[illegible] the daughter saying how he (Williams) and her mother "live so nice" and she and daddy can't agree and Williams adding "that is why he want the man to get a rass beating." That Williams said the man was a doctor and pointed out the house where he lived.

Sidney Jones' evidence continued: On March 13 Williams went back to his (Jones') house and told him that Blackwood was there. He went with Williams and saw Blackwood. All three went into Williams' car and were driven by Williams towards Spanish Town. On the way Williams said, inter alia: "What happen man, this thing is getting on my nerves. ------ What happen Pope? What you fellows expect to do a job like this, how much it will cost?" Jones replied that he had told him already what he had in mind. Williams then said: "What about you Blackwood, what you have to say?" Blackwood said: "I leave it to you." Williams drove to Spanish Town and parked about two chains from the house which he had pointed out on the 10th. Blackwood and Jones left Williams in the car and went towards the house. They had a conversation and went back to the car. Blackwood told Williams that people were inside the house. Williams said they were patients and would soon be gone. Blackwood and Jones walked back towards the house. They had a discussion on whether they should go into the house then or not. They eventually went back to the car and Blackwood said to Williams: " 'Pope' have suggest something a while ago. 'Pope' said like how you have a job as this all three of us should not be here." Williams replied:

"You know he is blasted right!" They got back into the car and were driven back to Central Village where Jones was let out of the car. On the way back Williams said: "Fellows, when is this going to get through?" Blackwood replied: "Leave it to us, we will take care of it."

On the night of March 16, Jones said, he was awakened late at night at his home. He went out and saw Alphonso Patterson, who lived next door to him. Patterson spoke to him and he went out into the lane where he saw Williams. Williams said: "What happen 'Pope', what happen man? You see what time of night it is? It is now 11 o'clock, I should be on the work. This thing is on my brain, getting me down. What happen? Why you not interested? Is it because you don't get no money?" Jones replied: "No sir, is not so me do things you know!" Williams then said if he (Jones) was interested he should "check him out" at Bernard Lodge. He then left.

The witness Sidney Jones denied that he ever agreed to do what Williams proposed. He gave evidence accounting for his movements on March 19. The learned trial judge left the issue accomplice vel non for the jury to decide and gave them adequate directions in the event they found that Jones was an accomplice or a person with an interest to serve. He also directed them to scrutinize Jones' evidence with care as he was admittedly a person with a prison record and, therefore, a person of bad character.

The applicant Williams denied having anything to do with the deceased's death. He denied taking either 'Pope' or Winston Brown or Blackwood in his car to Spanish Town. In addition to the evidence of the visits paid by Williams to Sidney Jones at Central Village, there was evidence that he went on March 16 and again on March 17 to Payne Avenue in Saint Andrew where Blackwood worked enquiring after him. This evidence was given by the prosecution witness Charles Barrett. Williams admitted all the visits to Jones and those to Payne Avenue. He said that he looked after premises at No.37, Lincoln Road in Saint Andrew for Mrs. Morgan, the wife of the deceased. The wall in front of the premises was broken down and needed replacing. On March 5, 1971 he was driving on Lincoln Road when a man stopped him. It was Blackwood. He did not know him at the time. Blackwood introduced himself as the person who was involved in a case in Spanish Town in which Williams was the foreman of the jury. During the conversation Blackwood told him he was a contractor. He asked Blackwood if

he could get a mason to do some work (replacing the wall) at the Lincoln Road premises. Blackwood eventually directed him to 'Pope' telling him that 'Pope' may do the work cheaper since he was also involved in the case in Spanish Town. Williams said that Blackwood told him that 'Pope' lived at Central Village but did not tell him where in Central Village. This is how he came to go to the witness Herbert Wilks to assist him in finding 'Pope'. He said that all the visits he paid to 'Pope', and subsequently to Blackwood, were in connection with the mason work which 'Pope' had undertaken to do on March 10 when he first saw him.

At the hearing of Williams' application before us, several complaints were made of deficiencies in the summing-up of the learned trial judge. Firstly, it was said that the learned judge failed to direct the jury that the case against Williams was to be considered separately from the case against Blackwood. We found this ground of complaint to be without merit. In the way that the several issues which arose at the trial were dealt with in the summing-up there was, in our view, no risk of the jury using evidence which was admissible only against Blackwood in deciding the case against Williams, as was contended. Nor, as was also contended, was there any risk of the jury convicting Williams merely because Blackwood was convicted.

Of the other six grounds of complaint argued, four were complaints against the summing-up. Three of these, together with a ground that the verdict was unreasonable and cannot be supported having regard to the evidence, all revolve around the questions: (1) whether what the applicant Blackwood was proved to have done was within the scope of the counselling it was alleged he received from the applicant Williams and (2) whether the jury were properly directed on this issue. From the summary of the evidence which has been made it will be seen that there was no direct evidence of the counselling which Blackwood is alleged to have received from the applicant Williams. It could reasonably be inferred from the conversation which Sidney Jones said took place between Williams, Blackwood and himself on the journey to and from Spanish Town on March 13 that Williams had told Blackwood what the "job" was that he wanted Jones and Blackwood to do for him. The applicant Williams had, admittedly, been in contact with Blackwood before he saw Jones. The prosecution sought to prove the terms of the counselling of Blackwood by inference from the counselling Sidney Jones said he received from Williams.

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Before us, it was conceded by Mr. Phipps that this was an inference which the jury could legitimately draw. During cross-examination by attorney for Williams, when being questioned about what Williams had told him he wanted him to do, Jones said that on the 16th (of March) Williams "even say to kill him too." It was pointed out to the jury that this was then being said for the first time but it was nevertheless left for their consideration. So the words of counsel which the jury had to consider in relation to what Blackwood actually did were: "I have a rass man to give a beating" - "I have a man to give a rass claut beating" - "I would like him to get a beating" - "I would like him to get a beating, possible 'bruk' him up and dig out his two eyes" - "even kill him." It was left to the jury to decide whether Jones was to be believed that any or all of these expressions were used by Williams.

First as to the law regarding the scope of the counselling by an accessory before the fact. It was submitted that the trial judge misdirected the jury by failing to direct them that they could only convict the applicant Williams if he knew that Blackwood in the circumstances would arm himself with a knife. It was said that although Williams would be liable criminally for unusual consequences of authorised acts, such as death, he cannot in law be liable for consequences of unauthorised acts. It was submitted that the tests applicable to principals at the scene of a crime are the same to be applied to accessories before the fact "on the question of vicarious liability." It was said that the directions given were based on the old authorities without incorporation of the principle stated in R. v. Anderson and Morris (1966), 2 All E.R.644. Reference was also made to R. v. Wesley Smith (1963) 3 All E.R. 597 and R. v. Betty (1963) 48 Cr. App. R. 6.

The learned Director of Public Prosecutions did not agree that the tests applicable to principals were the same to be applied to accessories before the fact. He contended that a principal is present and can exercise a certain amount of control over the proceedings and that there are circumstances where an unexpected turn of events cause a departure from the pre-arranged plan that would embrace a principal in the second degree which could not touch the absent accessory. It was submitted that in this case it was unnecessary and would be confusing for the jury to be directed on unusual consequences of authorised acts and the consequences of unauthorised acts. It was argued that the Anderson and Morris case (supra) dealt with

common design from concerted action; that when one of the parties indulge in a violent departure the inference of common design is destroyed and each man is responsible for what he did. But in the case of accessories, the argument continued, it is the perpetrator carrying out the dictates of the accessory and the crucial question is whether what was eventually done resulted in the desired consequences.

The learned trial judge defined who is an accessory before the fact and explained the definition. He then went on to tell the jury the law which they had to apply insofar as the applicant Williams was concerned. He based this part of his directions on an extract from the statement in Foster's Crown Cases (3rd edn.) p.369. This is what he told the jury (at p.14 of the record):

> "Much has been said upon cases where a person supposed to commit a felony at the instigation of another have (sic) gone beyond the terms of such instigation or have, in the execution, varied from them. If the principal totally and substantially varies, if being solicited to commit a felony of one kind, he wilfully and knowingly committed a felony of another, he will stand single in that offence and the person soliciting will not be involved in his guilt. But if the principal in substance complies with the temptation, varying only in circumstances of time or place or in the manner of execution, in these cases the person soliciting to the offence will, if absent, be an accessory before the fact, if present, a principal."

These are the directions which the learned attorney for the applicant Williams said were based on the old authorities and his submission implied that this is not, today, an accurate statement of the law.

In R. v. Wesley Smith (supra), Slade,J., in delivering the judgment of the full court of five judges, said (at p.601): "The terms 'agreement', 'confederacy', 'acting in concert', 'conspiracy', all presuppose an agreement express or by implication to achieve a common purpose, and so long as the act done is within the ambit of that common purpose anyone who takes part in it, if it is an unlawful killing, is guilty of manslaughter." The terms referred to here, as well as the term "common design" and others are used to describe the essential element on the basis of which a principal in the second degree as well as an accessory before the fact is made liable for a crime committed by a principal offender. The principles by which it is determined

whether or not a principal offender has acted beyond the scope of the common purpose are, therefore, basically the same for a principal in the second degree and an accessory before the fact. The authorities show that this is so. The concluding sentence in the passage from Foster's Crown Cases cited above seems to suggest this. Though the passage in Foster's occurs where an accessory before the fact was being dealt with, it was relied on by the Court of Criminal Appeal in England in a case concerning a principal in the second degree (see R. v. Betts and Ridley (1930), 22 Cr. App. R. 148 at p.155). In Stephen's Digest of the Criminal Law (9th edn.), the following statements appear in Article 17 (p.17) dealing with "common purpose":

> " When several persons take part in the execution of a common criminal purpose, each is a principal in the second degree, in respect of every crime committed by any one of them in the execution of that purpose.
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> If any of the offenders commits a crime foreign to the common criminal purpose, the others are neither principals in the second degree nor accessories unless they actually instigate or assist in its commission."

In Professor Glanville Williams' Criminal Law - the General Part (2nd edn), para. 133 (p.396) deals with "Acts beyond the scope of the common purpose" and embraces both principals in the second degree and accessories before the fact without distinction. The passage from Foster's Crown Cases already referred to is cited in that paragraph. Finally, Smith & Hogan's Criminal Law (2nd edn.) states (at p.89) that as respects liability of secondary parties for unforeseen consequences the same principles govern liability by counselling as by aiding and abetting. Here again the passage in Foster's is cited.

The principle of law stated in R. v. Anderson and Morris (supra) which it was said should have been incorporated in the statement from Foster's is as follows:

> "Where two persons embark on a joint enterprise, each is liable criminally for acts done in pursuance of the joint enterprise, including unusual consequences arising from the execution of the joint enterprise; but if one of them goes beyond what has been tacitly agreed as part of the joint enterprise, the other is not liable for the consequences of the unauthorised act."

This was no new principle of law. It was a formulation by counsel for the applicant Morris in simple, succinct language of the existing principle applicable to joint offenders, which was accepted by the Court.

That no new principle of law was being laid down is evident from a passage in the judgment of Lord Parker, C.J. After stating the principle enunciated by counsel, Lord Parker continued (at p.647):

> "In support of that, he refers to a number of authorities to which this court finds it unnecessary to refer in detail, but which in the opinion of this court shows that at any rate for the last 130 or 140 years that has been the true position. This matter was in fact considered in some detail in R. v. Smith (supra) ..... on Nov.6, 1961. ..... That case was referred to at some length in the later decision in this court of R. v. Betty (supra). It is unnecessary to go into that case in any detail. It followed the judgment of Slade, J., in R. v. Smith (supra), and it did show the limits of the general principle which counsel for the applicant Morris invokes in the present case."

As we understand it, the passage which the learned judge quoted from Foster's Crown Cases is still a correct statement of the law applicable to accessories before the fact. It was cited as representing the law in R. v. Bainbridge, (1959) 43 Cr. App. R. 194 at 197. The second edition of Smith and Hogan's Criminal Law was published in 1969, after the Anderson & Morris case (supra) was decided. As indicated above, the learned editors of Smith & Hogan cited the passage from Foster's (on p.89) in dealing with the topic of "liability of secondary party for unforeseen consequences." That passage is cited without qualification though the Anderson & Morris case is referred to earlier (at p.88) under the same topic.

So the principle to be applied is well settled. Where the difficulty usually lies is in the application of the principle to the facts of a particular case. The agreed common purpose must first be ascertained. If violence to the person is used in the commission of an offence and the principal offender is charged as a result of this violence, the liability of a principal in the second degree or an accessory before the fact for the principal's offence depends upon whether or not the use of the particular type of violence was within the scope of the common purpose. In the case of a principal in the second degree the common purpose is generally identified by inference from the circumstances in which the offence was committed. In this respect the weapon, if any, which was used is of special importance. If an offence which does not necessarily involve the use of violence to the person is committed with such violence, the liability of a principal in the second

degree for that violence usually depends upon whether or not he himself is armed and whether the principal offender is armed and known by him to be so armed. If the offence necessarily involves the use of personal violence the liability of the principal in the second degree for the degree of violence used will depend upon whether the use of a particular weapon was within the contemplation of the participants.

In the case of an accessory before the fact, the counselling and procurement necessarily occurs before the offence is committed. So it is the terms of the counselling that generally identifies the agreed common purpose. The circumstances of the offence committed as a result of the counselling are, therefore, usually irrelevant for this purpose. When the object or purpose of the counselling is ascertained the circumstances of the offence are then relevant in order to determine whether or not the principal offender acted outside the scope of the common purpose. If the object or purpose of the counselling is achieved in substance the means used by the principal to achieve it is usually irrelevant on the question of the liability of the accessory. On this all the authorities are agreed. Hale's Pleas of the Crown, (1778) Vol 1 contains the following statement at p.617:

> " A. commands B. to poison C. B. kills him with a sword, yet A. is accessory, for the substance of the thing commanded was the death of C. and in the differing in the manner of its execution from the command doth not excuse A. from being an accessory."

We cite again a part of the passage from Foster's Crown Cases and add the passage which follows directly upon it, which is of special significance. It is stated at p.369 as follows:

> "But if the principal in substance complieth with the temptation, varying only in circumstances of time or place or in the manner of execution, in these cases the person soliciting to the offence will, if absent, be an accessory before the fact, if present a principal. For the substantial, the criminal part of the temptation, be it advice, command, or hire, is complied with. A. commandeth B. to murder C. by poison, B. doth it by a sword, or other weapon, or by any other means. A. is accessory to this murder: for the murder of C. was the object principally in his contemplation, and that is effected."

The same principle is stated in Blackstone's Commentaries (21st edn.) (1844), Vol. 4 at p.37 as follows:

> " .... But if the felony committed be the same in substance with that which is commanded, and only varying in some circumstantial matters; as if, upon a command to poison Titius, he is stabbed or shot, and dies: the commander is still accessory to the murder, for the substance of the thing commanded was the death of Titius, and the manner of its execution is a mere collateral circumstance."

And in Hawkins' Pleas of the Crown (8th edn.), Vol. 4 pp.443, 444:

> "It seems to be agreed, that if the felony committed be the same in substance with that which was intended, and variant only in some circumstance, as in respect of the time or place at which, or the means whereby it was effected, the abettor of the intent is altogether as much an accessory as if there had been no variance at all between it and the execution of it; as where a man advises another to kill such an one in the night, and he kills him in the day ..... or to poison him, and he stabs or shoots him."

To come to more modern times, the following passage appears in Stephen's Digest of the Criminal Law (9th edn.) Art. 19, p.19:

> "When a person instigates another to commit a crime, and the person so instigated commits the crime which he was instigated to commit, but in a different way from that in which he was instigated to commit it, the instigator is an accessory before the fact to the crime.
>
> Illustration
>
> A. advises B. to murder C. by shooting, B. murders C. by stabbing. A. is accessory before the fact to the murder of C."

Professor Glanville Williams' book, op. cit. p.403, contains the following brief statement: "A mere difference in the mode of performing the crime (e.g. shooting instead of poisoning) is immaterial." For this Foster, op. cit. p.369, is relied on.

It will be seen that in the case of an accessory before the fact the type of weapon used is largely irrelevant once the counselling is complied with in substance. So also is the knowledge on the part of the counsellor that the principal would use the type of weapon he eventually used. However, if the counsellor specifies an instrument or weapon this may be relevant in identifying the common purpose i.e. the object of the counselling. This is well illustrated by the example given in Hale's Pleas of the Crown Vol.1 at p.436:

> "If A. counsel or commands B. to beat C. with a small wand or rod, which could not, in all human reason, cause death, if B. beats C. with a great club, or wound him with a sword, whereof he dies, it seems that A. is not an accessory, because there was no command of death, nor of anything that could probably cause death, and B. hath varied from the command in substance, and not in circumstance."

Here the use of a small wand or rod identifies the object and intention of the counselling as the commission of simple battery upon C. which was not likely to have serious consequences. All the authorities establish that if a principal commits a crime different from the one which he was counselled or instigated to commit but which was a probable consequence of that which was counselled or instigated, the counsellor or instigator is liable for the principal's offence as an accessory before the fact even though the offence committed is beyond the counsellor's or instigator's original intention. It was, therefore, conceded by Mr. Phipps for the applicant Williams that if what Blackwood did can legally be held to be within the scope of the alleged counselling by Williams, the latter would be liable as an accessory before the fact to murder or manslaughter, whichever Blackwood was guilty of.

It was contended, however, that there should have been a direction to the jury that, if Blackwood was found guilty of manslaughter, in order to determine the guilt of Williams the jury should ask themselves the question whether the act done by Blackwood was within the scope of the instructions or command given by Williams; that they must decide whether the instructions to beat would embrace the one act of stabbing committed by Blackwood; that if they found that the stabbing was not within the scope of the authority or command Williams must be acquitted. It was put another way. It was said that unless the jury could find as a fact as distinct from law that stabbing was the same as beating or, if not the same, it was embraced within it Williams was entitled to be acquitted. It was said further that the question was whether stabbing was merely a different method in the manner of executing a beating as distinct from a substantial variation from a beating. This view of the matter, it was said, was never put to the jury adequately or at all. It was submitted that on principle and authority stabbing is a substantial variation from a beating when such a beating is considered without looking at the consequences. In the argument on these submissions emphasis was placed on the act commanded and committed - beating as against stabbing - as distinct

from the consequences. In the light of the analysis we have made of the relevant law these submissions are fallacious. As we have endeavoured to show, the act committed is not usually relevant in determining the scope of the common purpose contained in the counselling. And in order to ascertain the common purpose what must be identified in the counselling is the crime which the principal was counselled, procured and commanded to commit, not the means by which it was to be committed.

It was contended by the Director of Public Prosecutions that the crucial question for the jury's determination was the effect of the counselling allegedly given by inference to Blackwood by Williams - what was the desired consequences expressed therein. It was said that what the jury were asked to say is whether or not the counselling by Williams was that serious bodily injury should be inflicted on the deceased. It was submitted that if it was found that what was desired and expressed was that serious bodily injury should be inflicted then whatever means were employed by Blackwood to effect that desired end would be within the ambit and scope of the counselling. We are bound to say that this submission is supported by, and completely consistent with, the authorities.

We can find no fault with the learned trial judge's directions on this aspect of the case. He told the jury, at p.278 of the record:

> "Williams is charged with counselling, procuring and commanding Blackwood to commit this offence. Now, here again, this is where circumstantial evidence, as I explained to you, is very important because, members of the jury, bear in mind that all the evidence that 'Pope' has given here about, if you accept it, what he is saying that Williams is inciting him, telling him to give this man a rass beating, a rass cloth beating, whatever it is. First you have to interpret these words. Bear in mind he is not charged before you with counselling, procuring or commanding "Pope"..... there is no direct evidence before you that Williams has said one word to Blackwood. But you look at all the circumstances."

At p. 280:

> "So you say, having regard to what he is telling 'Pope', give this man a beating to the extent of digging out his eyes and 'brucking' him up, what did he mean. Was he there counselling him, agitating him to cause serious injury to the doctor? Or was he telling him to kill him? Well,

> members of the jury, if you draw that inference, that that was what Williams was asking, soliciting, agitating Blackwood to do, then in that case, members of the jury, you can find him guilty as charged.

Finally, at pp. 282, 283:

> "So if you think - having regard to what Williams is alleged to have told 'Pope', having regard to the meeting between 'Pope', Williams and Blackwood on the 13th of March, and going to the doctor's house - if you accept it - these are all things you have to take into consideration. What must he have told him? Is he telling him the same thing, 'give him a rass beating', or 'give him a beating'? Members of the jury, remember, if I tell you to beat a person and you beat him to the extent that he dies, then you are still liable for the consequences of that beating. The law says that. So it is for you. Here Mr. Blake is saying the difference is stabbing as against a counselling to beat. You say, members of the jury. Remember that I told you what the law is here. Is it a substantial variation from what he was counselled and procured to do? Or is it merely a different method in the manner of execution of what he was counselled to do? It is for you to say; because, in any event, if you think that what he was counselling him to do was to cause serious injury to this man, or to kill him, then it doesn't matter what kind of method he uses, whether he said beat, if he stabs him at that stage, or takes a gun and shoots him, the law is that he is responsible. ..... You say what the words 'rass beating', or whatever it is you think Williams said to Blackwood means, and then you ask yourselves, was he intending to cause him serious injury which was likely to kill him, or to kill him? If that is so, whether he stabs him, shoots him, hangs him ..,.... if he kills him it doesn't matter, he is only varying there the method of carrying out what he is counselled to do. So it is for you to say."

In our judgment, in these passages the jury were left with correct directions on the issues they had to resolve and the law which they had to apply. The complaint in this connection is, therefore, without substance.

After reminding the jury of the words of counselling on which the prosecution relied and telling them that they would have to interpret those words and say what they meant, the learned trial judge (at pp.280 & 281 of the record) explained the various offences starting from assault and battery through wounding to the felonies of wounding and causing grievous bodily harm with intent. Then he said this (at p.281): "Now, a battery in the legal

acceptance of the word includes beating and wounding." Exception is taken to this statement. It is said to be an inaccurate direction in law because not every beating includes a wounding. But this is not what the learned judge said. We agree with the submission on behalf of the Crown that as a statement of the law the statement is right. It is taken from para. 2633 of the 36th edn. of Archbold's Criminal Pleading, Evidence & Practice. It was submitted that the jury having been told that battery includes wounding they inevitably would have convicted the applicant Williams because the wounding committed by Blackwood would then be within the scope of Williams' instructions to beat. It was said that this direction took away from the jury their right to determine the meaning of the word "beating" as a matter of fact, the trial judge having made it a matter of law and answered the question himself. The statement complained of was followed directly by a definition of the words "to beat" in the terms stated in para. 2633 of Archbold's (op. cit.). This definition did not include wounding. In our view the jury could not have been misled into thinking that they were being directed either as a matter of law or otherwise that a wounding was a beating. A wound had previously been described to them and the difference in meaning between "beating" and "wounding" must have been clear to them. In any event, both before and after these definitions, the learned judge had given clear directions to the jury that what they had to decide was whether the words allegedly used by the applicant Williams amounted to instructions to Blackwood to inflict serious injury on the deceased, in which event certain legal consequences followed. He nowhere told them that they should decide whether when Williams said "beating" he also meant "wounding."

Next, it was argued that the learned trial judge wrongly left the issue of manslaughter to the jury so far as the applicant Williams was concerned on the hypothesis that Williams had intended something less than to cause serious bodily injury or to kill, which was a different hypothesis for manslaughter with respect to the applicant Blackwood. It was submitted that as it was necessary to establish a common purpose existing between the two applicants it was not permissible to leave to the jury a possible verdict of manslaughter with respect to each applicant based on two different sets of facts. As we have indicated, a verdict of manslaughter in respect of Blackwood was left to the jury on the basis of the concluding sentence in the

statement he is alleged to have given to the police. In respect of this sentence the trial judge directed the jury as follows (at p.278 of the record):

> " 'I did not mean to kill him'. What does it mean? Did he intend to give him slight injuries not enough to cause him serious bodily injury to result in death, if death resulted and you are satisfied that some injury would have been done to the doctor, then in that case .... it is manslaughter."

This direction is, perhaps, unnecessarily favourable to Blackwood. In respect of the applicant Williams manslaughter was left on two bases. It was left firstly on the basis that if Blackwood was convicted only of manslaughter Williams could not be convicted as accessory to murder even if he intended and advised serious bodily injury or death. In those circumstances the jury were told that they would be obliged to convict Williams as accessory to manslaughter. If this was all we do not think any complaint would be made. But the trial judge left accessory to manslaughter in respect of Williams on this other basis (at p.283 of the record):

> "If you think that he (meaning Williams) intended something less than to cause serious bodily injury or to kill him, yet if what Blackwood is doing is a carrying out of this counselling as Williams told him, then, members of the jury, in that case you may say he is an accessory before the fact to manslaughter - he didn't have any intention to kill the doctor, yet give him a beating, and if he dies as a consequence of it then he may be guilty of accessory before the fact of manslaughter."

On the case against the applicant Williams as presented by the prosecution it could, perhaps, also be said that the learned judge was being generous to him in this direction. But the direction has a foundation in law. It is within the principle stated in R. v. Creamer (1965) 49 Cr. App. R.368 in which it was held that "a person is guilty of being accessory before the fact to involuntary manslaughter if he counsels or procures an unlawful act likely to do harm to another person and death results which was neither foreseen or intended." The unlawful act in this case would be the infliction of bodily injury (not serious) on the deceased. We cannot say that the learned trial judge was wrong in leaving the issue of manslaughter on this basis. The applicant Williams would, in that event, be responsible for the infliction of serious bodily injury on the deceased, and his death

a result, because this was a probable consequence of that which was counselled or instigated.

The ground of complaint that the verdict in respect of the applicant Williams was unreasonable and cannot be supported having regard to the evidence was based on the same arguments put forward in support of the grounds already dealt with regarding the question whether or not Blackwood's act was within the scope of the counselling. The contention in support of this ground had a legal basis rather than a factual one. We need add nothing to what we have already said except to say that it must have militated strongly against the applicant Williams that if the prosecution's case was accepted, as it undoubtedly was, he had instigated the use of violence against the deceased, an old man, and left it for Blackwood to interpret from his instructions the degree of violence and to decide the means whereby it was to be inflicted. There is no ground on which we could justifiably hold that the verdict which the jury returned was unreasonable or not supported by the evidence.

The two remaining grounds of complaint can be said to be technical grounds. The first of these is that the learned trial judge failed to direct the jury as to the legal position of the applicant Williams should they find that he was present at the scene of the crime. The foundation of this ground was the contention that there was evidence from which the jury could have inferred that Williams was present at the scene of the crime. In disposing of this ground, it is sufficient to say that in our view there was no evidence admissible against Williams from which it could reasonably be inferred that he was present at the scene. In the circumstances it is not necessary to express any opinion on the very interesting legal arguments which the learned Director of Public Prosecutions addressed to us under this ground.

Lastly, it was contended that "the verdict from guilty of manslaughter was a nullity. The Court ought not to have received a verdict on the issue of manslaughter unless and until the jury had returned a unanimous verdict on the issue of murder for which offence the applicant had been indicted." When the verdict of the jury was taken, they returned a unanimous verdict of not guilty of murder and a majority verdict of guilty of manslaughter in respect of the applicant Blackwood. The Registrar then asked: "Members of the jury, how say the majority of you, have you found the accused Alfred Williams guilty as being an accessory before the fact to

manslaughter?" The foreman answered: "Guilty." The complaint is that the jury had not finally pronounced on the charge of murder in respect of Williams and until they did so a verdict in respect of manslaughter concerning him could not properly be taken. It was argued that this amounted to a defect in the receiving of the verdict and that where there is an error on the face of the record affecting a verdict any judgment which flows from the defect is a nullity. R. v. Simmonds (1965) 9 W.I.R. 95 was cited and sought to be distinguished on the ground that that case dealt with an error in the recording of the verdict, which may be amended by this court, whereas here there was an error in the receiving of the verdict and there was, therefore, nothing which can be amended. We do not agree with this interpretation of the judgment in R. v. Simmonds. The court there ordered the record amended to record verdicts of the jury which should have been taken expressly and were not but which could be implied from the verdict which they expressly returned. In this case, in view of the directions in law given to the jury, once they found Blackwood not guilty of murder they were bound to return a similar verdict in respect of the applicant Williams. Implicit, therefore, in the verdict in respect of murder against Blackwood is a finding of not guilty on this charge in respect of Williams. R. v. Simmonds (supra) is clearly authority for the record to be amended accordingly.

No ground has been advanced on which, in our judgment, the applicant Williams' application for leave to appeal is entitled to succeed. The application is, therefore, refused. It is ordered that the record be amended so that it reflects a verdict of not guilty on the charge of being an accessory to murder laid against the applicant Williams.

In all the circumstances, it is further ordered that the sentence passed on the applicant Williams take effect from 15th January, 1973.