MOHAMMED ISAQ *v.* THE POLICE

[Appellate Jurisdiction (Hyne, C.J.) December 15th, 1953]

Larceny—accessory after the fact—conviction of.

On the 26th June, 1953, a bullock was stolen by two men who after the theft went to the house of the appellant and asked him for a knife. The appellant lent his knife to the men and participated in killing the bullock.

The appellant was convicted by the Magistrate's Court at Lautoka of the offence of larceny of the bullock.

On appeal against conviction and sentence.

HELD.—Under the provisions of the law in Fiji the accused though not charged with being an accessory after the fact to larceny, could be so convicted when charged with that offence alone.

Cases referred to:—

R. v. Fallon, 169 E.R. 1370.

R. Kermode for the appellant.

W. G. Bryce, Solicitor-General, for the respondent.

HYNE, C.J.—It is agreed that the appellant was wrongly convicted on the charge of stealing. It was submitted by Mr. Kermode, however, that on his own statement there is a prima facie case against the accused of being an accessory after the fact, and Mr. Kermode referred to the case of *Reg. v. Fallon,* English Reports, 169 p. 1370. He also referred to *Halsbury* Vol. 9 p. 39 para. 39 and note (*c*).

His submissions are to the effect that a person who is indicted as a principal cannot be found guilty of being an accessory after the fact to the felony. The indictment must charge him with being an accessory after the fact.

In the case of *Reg. v. Fallon, Pollock, C.B.* said:—

> "The prisoner ought to have been indicted for the substantive felony of being an accessory after the fact, of which he was guilty. A man cannot be indicted as a principal and then be convicted of being an accessory after the fact to that crime for which he is so indicted."

The learned Solicitor-General, while agreeing that this is English law, pointed out that the decision was based on section (3) of 24 and 25 Vic. Cap. 94, which reads:

> "Whosoever shall become an accessory after the fact to any felony, whether the same be a felony at common law, or by virtue of any Act passed or to be passed, may be indicted and convicted, either as an accessory after the fact to the principal felony together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in like manner as any accessory after the fact to the same felony, if convicted as an accessory, may be punished."

Halsbury in the note to which I have made reference, says that the substantive felony of which an accessory after the fact may be convicted is that of being an acessory after the fact. The Solicitor-General pointed out, however, that while this is good English law, there is in our Criminal Procedure Code a section, namely 167, which provides that when a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it. He submitted, therefore, that if the evidence justified it the appellant might have been found guilty of the minor offence of being an accessory after the fact.

Learned Counsel for the appellant suggested that section 167 must be read and construed in conjunction with other sections under the heading to which section 167 belongs. As to this it is only necessary to refer to section 183 of the Code which says that the provisions of sections 168 to 182 of this Code shall be construed as being without prejudice to the generality of the provisions of section 167.

In the present case there is, I think, evidence sufficient to satisfy the Court that the appellant was an accessory after the fact. On his own statement he took part in the killing, and according to Constable Akariva the hide was seen near the house of the appellant. The appellant said he had been awakened at night by the second accused who came to his house and the appellant gave him the knife and went back to bed. Against this, as I have pointed out, there is his own statement that he took part in the killing.

The Solicitor-General submitted that, alternatively, the appellant could have been found guilty of receiving. As, however, I am satisfied that he was an accessory after the fact, there is no necessity to consider this alternative suggestion.

The appellant is not guilty of stealing and, by virtue of the powers vested in the Court under section 352, the decision of the Magistrate is varied by the substitution of a conviction of being an accessory after the fact for the conviction of stealing.

The conviction of stealing is therefore quashed and the appellant is found guilty of being an accessory after the fact.

For the offence of which he was convicted the Magistrate imposed a sentence of three months' imprisonment with hard labour. As the appellant is now convicted of a minor offence the sentence of three months' imprisonment with hard labour is quashed and a sentence of one month's imprisonment with hard labour is substituted.

The conviction and sentence are varied accordingly.