1948 JOHN PRESTON ..... APPELLANT;

*Oct. 18, 19, 20

AND

1949 HIS MAJESTY THE KING ..... RESPONDENT.

*Jan. 7

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Arson—Accessory—Aiding and abetting—Active part—Presence during commission of crime—Failure to leave or protest—Charge to jury—Duty to review evidence—Comments and suggestions by trial judge—Criminal Code, ss. 69, 511, 1014(2).

Appellant was charged with having set fire to a school. At trial before a jury, the contention of the Crown was that (*a*) he had actually set the fire, or (*b*) he had formed a common intent with one Bryan to burn the school, or (*c*) he had aided, abetted, counselled or procured Bryan to set the fire pursuant to section 69 of the Criminal Code. On the offence of aiding and abetting, there was evidence that they had a conversation respecting the burning of schools, that he drove with Bryan to the scene of the crime, that some gasoline was purchased and that accused made statements in a restaurant to the effect that they were out to burn schools. Although accused was there when the crime was committed, he alleged that he was unaware of the intention of Bryan to fire the building, took no active part and remained in the car. The majority of the Court of Appeal affirmed the conviction.

*PRESENT: Rinfret C.J. and Kerwin, Kellock, Estey and Locke JJ.

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Held, Kellock and Locke JJ. dissenting, that the trial judge's charge, as a whole, properly directed the jury that they must find some act of participation on the part of the accused before they can find him guilty of aiding and abetting.

Held also, that the trial judge has a duty to review the evidence in relation to the issues and he has the privilege of making such comments and suggestions as will be of assistance to the jury, provided that he does not seek to impose his views upon nor in any way relieve the jury of their responsibility to find the facts.

Per Kellock and Locke JJ. (dissenting): The portion of the charge dealing with aiding and abetting tended to lead the jury to understand that mere presence at the scene of the crime, the failure of the accused to get out of the car earlier in the evening when his companion had made some general statements to the effect that he approved the burning of schools and his failure to telephone the police, constituted aiding and abetting and there should be a new trial.

Mohun's case (1693) Holt K.B. 479; *Reg.* v. *Coney* (1882) 8 Q.B.D. 534 and *Rex* v. *O'Donnell* (1917) 12 Cr. App. R. 219 referred to.

APPEAL from the judgment of the Court of Appeal for British Columbia dismissing (O'Halloran J.A. dissenting) the appellant's appeal from his conviction, at trial before Manson J. and a jury, on a charge of having set fire to a school.

The material facts of the case and the questions at issue are stated in the above head note and in the judgments now reported.

Thomas F. Hurley for the appellant.

George R. McQuarrie for the respondent.

The judgment of the Chief Justice and Kerwin and Estey, JJ. was delivered by:—

ESTEY J.:—The appellant and Nick Bryan were charged jointly with having set fire to the Queen Elizabeth School House on Lulu Island in New Westminster, January 31, 1948, contrary to sec. 511 of the Criminal Code. At their trial before a jury, after a number of witnesses had been heard, the learned trial Judge directed that the case be continued against the appellant only and that of Bryan adjourned. The appellant was convicted and upon his appeal to the Court of Appeal in British Columbia the majority of the learned Judges in that Court affirmed the

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conviction. Mr. Justice O'Halloran dissented and by virtue thereof the appellant appeals to this Court under sec. 1023 of the Criminal Code.

The evidence left no doubt but that either appellant or Bryan set fire to the Queen Elizabeth School. There was evidence upon which the jury might have found that the appellant actually set the fire. However, the main contention of the Crown was that appellant and Bryan had formed a common intention, either in Vancouver or prior to the setting of the fire, to burn one or more school houses; or alternatively, if that common intention did not exist and Bryan set the fire that the appellant had aided, abetted, counselled or procured Bryan to set the fire and was, therefore, under the provisions of sec. 69 of the Criminal Code, a party to the offence.

The evidence established that the Queen Elizabeth School was set on fire about 11.30 Saturday night, January 31, 1948, by either the appellant or Nick Bryan. These two had been together from the time they met in Vancouver, at the office where Nick Bryan was employed, at about 4.40 that afternoon, until they were apprehended in Bryan's automobile a few minutes after the burning of the Queen Elizabeth School. The contention on behalf of the appellant was that he knew Bryan only as a real estate agent and that they had set out from Vancouver at about 8.45 that night in order that Bryan might show him some properties in or near New Westminster that the appellant might accept at least in part payment for a rooming house, which he deposed he owned in Vancouver and which he had listed for sale with Bryan; that he was not in any way a party to setting fire to the school house.

Appellant in giving evidence on his own behalf stated that on the way to New Westminster they stopped at a filling station where Bryan purchased a can of gasoline. This can, when purchased at the filling station, was by the attendant placed just behind the front seat in Bryan's two-door coach while the appellant was sitting in the front seat. He deposed that he did not see that can so placed nor the bottle of motor oil that the attendant said he saw either appellant or Bryan pass over the front seat. Eventually Bryan's car was parked opposite the Queen Elizabeth School, the can of gasoline purchased at the filling station

taken therefrom and the fire set. Hamilton, driving a taxi with three passengers, came up in time to see the party who set the fire go from the school house, get into the automobile and drive away at an increasing speed. Hamilton pursued them and notified the police.

The issues were defined and the evidence reviewed in relation thereto by the learned trial Judge. The objections to his charge in the dissenting opinion of Mr. Justice O'Halloran are set out in six paragraphs of the formal judgment.

First, that the charge confused in the minds of the jury the evidence relating to the appellant as the one who actually set the fire and that of one aiding and abetting, as the learned trial Judge treated the case against the appellant as if it were one of common intention from the outset and that it did not matter whether Bryan or the appellant set the fire. The evidence upon which the jury might have found the appellant guilty of having actually set the fire was very short and will be more fully discussed later. It was reviewed by the learned trial Judge but not in any way did he relate it to or discuss it in relation to the appellant as one who was acting pursuant to a common intent (although if he did set the fire it might have been in carrying out a common intent), or as one who aided and abetted. More than once the learned trial Judge made it plain that the appellant could be found guilty as one aiding, abetting, counselling and procuring only if they found that Bryan actually set the fire. It is possible in explaining and discussing aiding, abetting, counselling and procuring that the learned trial Judge interposed remarks relative to the main contention of the Crown, that the appellant and Bryan were acting pursuant to a common intent, with such emphasis that the jury may have concluded, in order to find the appellant did aid, abet, counsel or procure, they must find that he had a common intention with Bryan up to and at the time of the setting of the fire. Instructions to that effect would be in error. In order to find the appellant guilty of aiding, abetting, counselling or procuring, it is only necessary to show that he understood what was taking place and by some act on his part encouraged or assisted in the attainment thereof. *Re Bernard*

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Albert Kupferberg (1). In so far, however, as such confusion may have been created in this regard, it favoured rather than prejudiced the appellant.

The second ground is that the learned trial Judge did not put to the jury the weaknesses of the evidence of the Crown witnesses relative to the appellant starting the fire instead of Bryan. The only evidence indicating that the appellant had set the fire was that of the two ladies in the back seat of Hamilton's taxi. They said the man who ran from the school entered the automobile on the side opposite to that of the driver, or the side upon which appellant was seated. The learned trial Judge in referring to this evidence not only stated that it was suggested one of them had made a contrary statement at the preliminary hearing, although that was not proved, but pointed out that Hamilton's evidence was to the effect that the man had entered the driver's side, and commented favourably on his credibility. He also referred to the other man in the taxi who, while he had seen the man running, had not observed upon which side he entered the automobile. It would appear that the learned trial Judge not only indicated the possible weakness in the Crown's evidence, but rather emphasized Hamilton's contrary evidence.

The third ground of dissent is on the basis of the omission of the learned trial Judge to instruct the jury that mere passive presence is not aiding and abetting. In discussing the meaning of aiding and abetting the learned Judge plainly indicated that in order to find the appellant guilty of aiding, abetting, counselling or procuring they must find that he took some active part. He emphasized this when dealing with the defence, which at one point he summarized as follows: "I'm not guilty. I hadn't anything whatever to do with this. The other man was wholly responsible. I was just an unwilling passenger." Other statements to like effect in his charge are quoted in dealing with the fifth ground. In referring to a slightly different matter, but also important in this connection, the learned trial Judge pointed out that the Crown directed the attention of the jury to the active acts rather than to the mere acts of omission on appellant's part. Mere presence does not constitute aiding and abetting but presence under

(1) (1918) 13 Cr. App. R. 166.

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certain circumstances may itself be evidence thereof. *Mohun's Case* (1); *Reg.* v. *Young* (2); *The Queen* v. *Coney* (3). In this case the appellant admitted and explained his presence. If the jury accepted his explanation as above summarized then the effect of the learned Judge's direction was that they should find the appellant not guilty. In determining whether they would accept his explanation the jury would properly take into account all the facts, including the conversations relative to burning schools, first at the office in Vancouver and later in the evening, the protests and threats which the appellant deposed he had made to Bryan, as well as his assuring Bryan a short time before the fire was set that if the latter did anything wrong he would tell the truth. Under the circumstances of this case the jury would take into account appellant's conduct in relation to the other events during the evening and it was the duty of the learned trial Judge in reviewing the evidence to place before the jury both the contentions of the appellant and of the Crown. If appellant's explanation was not believed by the jury there was evidence in addition to his mere presence upon which they might well conclude that he was guilty of aiding, abetting, counselling or procuring. In this regard the charge to the jury read as a whole was to the effect that before the jury could find the appellant guilty of aiding, abetting, counselling or procuring they must be satisfied of some act of participation on his part. In relation to the evidence and the issues the charge in this regard is not subject to exception on the part of the appellant.

The fourth ground of dissent is based upon the contention that the learned trial Judge neglected to charge the jury that if they accepted the evidence of the appellant he was entitled to be acquitted. These precise words were not used but the charge as a whole, and particularly those portions contrasting the evidence of appellant with that of the Crown, would leave but one impression upon the minds of the jury that if they believed appellant's evidence to the effect that he was throughout concerned only with a real estate deal and was but a passenger who never realized what Bryan had in mind, then and in that event

(1) (1693) Holt K.B. 479; 90 E.R. 1164.

(2) (1838) 8 Car. & P. 64; 173 E.R. 655.

(3) (1882) 8 Q.B.D. 534.

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he was not guilty of the offence as charged. In this regard it is appropriate to quote the language of the Lord Chief Justice speaking for the Court of Criminal Appeal in *Rex* v. *Stoddart* (1):

> Every summing-up must be regarded in the light of the conduct of the trial and the questions which have been raised by the counsel for the prosecution and for the defence respectively. This Court does not sit to consider whether this or that phrase was the best that might have been chosen, or whether a direction which has been attacked might have been fuller or more conveniently expressed, or whether such topics which might have been dealt with on other occasions should be introduced. This Court sits here to administer justice and to deal with valid objections to matters which may have led to a miscarriage of justice.

The charge upon this point left no doubt in the minds of the jury that they were to find the appellant not guilty unless they were satisfied that he either set the fire, acted throughout with a common intent or aided, abetted, counselled or procured Bryan to commit the offence.

Counsel for the appellant at the hearing of this appeal particularly stressed the fifth ground of dissent—to the effect that the charge as a whole suggested the guilt of appellant, discounted his evidence, minimized his real defence and did not state his contention in a way that brought out the real force and effect of his defence. The learned trial Judge defined the issues and reviewed the evidence in relation thereto. He reviewed the appellant's evidence and concisely stated the contention of the defence. In reviewing the latter's evidence he pointed out that as a witness the appellant was an interested party and discussed his evidence in relation to what might be expected under all of the circumstances. The learned Judge was not apt in one of his comparisons, but he went on immediately to state: "Just because this man has an interest, you must not for a moment say his story is untrue. It may be true, that is to say, apart from other circumstances, the fact that he tells it doesn't render it untrue." He reviewed the history of the appellant as he, himself, had stated it, which set forth a commendable record, including a reference to the fact that the appellant did not adhere to the Dukhobor faith and was not a member of the Sons of Freedom. The learned trial Judge concluded his review: "Now, there is the summary of it. 'I had no common intent with Bryan to burn this school. I did not take any active part in

(1) (1909) 2 Cr. App. R. 217 at 246.

setting a fire.' That is the defence." Then when giving further instructions, he again stated that the appellant says: "I'm entirely innocent. True, I was there all the time and I made these statements in the restaurant and all that, but despite all that, I wasn't in it. I was just an unwilling spectator of what occurred." Appellant's evidence was directed to two main points (1) Bryan set the fire and (2) that appellant did not realize the possibility of Bryan setting a fire and was in no way a party thereto. The foregoing summary briefly, effectively and forcefully emphasizes the real defence. The learned trial Judge unfortunately did state that the Crown could not have called Bryan as a witness, but here again he went on to point out that they were not trying Bryan, that Preston alone was before the Court and made it plain that it was only the evidence before them that the jury could take cognizance of.

Counsel for the appellant took exception to the fact that the learned trial Judge expressed the view that Bryan in making the statement at appellant's rooming house that "the house is going to be sold tonight" in the presence of Mrs. Dodderidge sounded like liquor and thereby depreciated that evidence to the prejudice of the appellant. The evidence disclosed that they had been drinking whiskey and beer and this comment on the part of the learned trial Judge was but an expression of his view, which the jury need not have accepted.

It is the duty of a trial Judge to review the evidence in relation to the issues and it is his privilege to make such comments and suggestions as will be of assistance to the jury in arriving at their verdict, always subject to this, that he must not seek to impose his views upon nor in any way relieve the jury of their responsibility to find the facts. *Rex* v. *O'Donnell* (1). Throughout he impressed upon the jury that the facts were to be found by them and that in so doing they should not act upon any view he might express unless they agreed therewith, and further, that if he neglected to mention any portion of the evidence they should, nevertheless, take it into consideration in arriving at their verdict.

The sixth ground of dissent is to the effect that the learned trial Judge did not instruct the jury that the

(1) (1917) 12 Cr. App. R. 219.

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evidence against the appellant was inferential and entirely circumstantial, that his defence was consistent with truth and that of aiding and abetting pointed to a rational hypothesis of innocence. The learned trial Judge correctly pointed out that the evidence of aiding and abetting was not inferential and entirely circumstantial. Apart from any other item of evidence, the remarks in the restaurant constituted direct evidence against the appellant. Notwithstanding this, the learned trial Judge did instruct the jury with regard to circumstantial evidence and that if their verdict depended upon circumstantial evidence, he stated: "Before you can find the prisoner 'guilty' on circumstantial evidence, you must be satisfied not only that the circumstances proved are consistent with his having committed the act, but you must also be satisfied that the facts are such to be inconsistent with any other rational conclusion than that the prisoner is the guilty person." This language is almost identical with that in *Hodge's* Case (1) which has been repeatedly approved. *McLean* v. *The King* (2).

The foregoing objections cannot, with respect, be supported. The charge of the learned trial Judge read as a whole set forth the issues and reviewed the facts in relation thereto in a manner that placed the case for the defence fully and fairly before the jury.

The appeal should be dismissed.

KELLOCK J. (dissenting):—I desire to refer to two only of the grounds of the dissenting judgment of O'Halloran J.A. The third, with which I shall first deal, is as follows:

3. The learned Judge did not instruct the jury upon the legal meaning of aiding and abetting directed to the evidence presented by the Crown and the defence; for example, he did not instruct the jury that passive presence is not aiding and abetting.

The jury, having deliberated some two hours after having been charged by the learned trial judge, returned to the court room, the foreman stating that they would like the court to explain to them the meaning of the word "accessory".

Thereupon the learned trial judge told them that an accessory before the fact was a person "who does or omits

(1) (1838) 2 Lewin C.C. 227; 168 E.R. 1136.

(2) [1933] S.C.R. 688.

an act for the purpose of aiding anyone to commit the offence; abets, that is assists or encourages any person in the commission of the offence; or who counsels or procures any person to commit the offence."

In elaboration of that he said that if they were satisfied that Preston and Bryan set out with a common intention of burning a school (subsequently he told them it was not necessary that the two had had the common intention from the outset) and that Preston "assisted in any way either by active part or by *omission*" he would be an accessory and as guilty as the man who actually lit the match. The learned judge then said that he did not recall that there was anything in the way of omission which had been suggested but that the Crown had directed attention to Preston's "active acts". Very shortly after so stating, however, he said:

> Then the Crown directs your attention to the fact that he didn't do anything about it despite the statements of this man (Bryan) out across the bridge beside a school, and that he didn't protest or do anything at the time of the actual setting of the fire. They say, "Look at his conduct. Is that the conduct of an innocent man?"

In his original charge he had referred to this matter as follows:

> I perhaps missed one thing in presenting the Crown's case. The Crown laid stress on the point—that point was well enough taken by Mr. McQuarrie—The Crown says "Well, why did this man not get out of the car and leave him, particularly when they came back to Westminster from across the Fraser River bridge?" Why in the world didn't he say "Bryan, I don't like the way you are behaving". Or, why didn't he telephone the police? The Crown makes that point. You will have it in mind.

While it was perfectly in order for the learned trial judge to direct the jury's attention to the appellant's conduct as a whole for the purpose of determining what weight they should give to his evidence, I think that when it came to an explanation of the meaning of abetting in relation to the evidence the jury may well have been misled into an understanding that they might find in the things the appellant did not do, and which were enumerated to them, evidence which *in itself* amounted to abetting. In this I think there was error.

To constitute a person a party to a criminal offence within the meaning of section 69 (1) (*c*) of the Criminal Code, it is necessary that there be "participation" in the crime and although a person is present while a crime is

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being committed, yet if he takes no part in it and does not act in concert with those who commit it, he is not a party merely because "he does not endeavour to prevent the felony or apprehend the felon"; per Cave J. in the *Queen* v. *Coney* (1). That learned judge quoted from "Foster's Crown Law", where the author states that "if A happeneth to be present at a murder, for instance, and taketh no part in it, nor endeavoureth to prevent it, nor apprehendeth the murderer, nor levyeth hue and cry after him, this strange behaviour of his, though highly criminal, will not of itself render him either principal or accessory". I take it that the word "criminal" is here used in the sense of "morally reprehensible".

Hawkins J. in the same case (1) said at 557:

> It is no criminal offence to stand by, a mere passive spectator of a crime, even of a murder. Non-interference to prevent a crime is not itself a crime.

The omission of the appellant to do any of the things to which the learned trial judge referred on his charge, were not, in themselves, evidence of abetting. In my opinion the jury may well have understood the contrary from what was said and have been influenced by it. I do not find it possible in the circumstances of this case to apply the provisions of section 1014 (2) of the Criminal Code.

The first ground of dissent is:

> 1. The learned Judge's charge led naturally to confuse in the minds of the jury, the evidence relating to the appellant setting the fire with the evidence relating to his aiding and abetting, in that the learned Judge treated the case against the appellant as if it were one of common enterprise and common intention from the outset, and instructed the jury it did not matter whether Bryan or the appellant started the fire.

With respect to this what is said by A. T. Lawrence J. in giving the judgment of the Court in *Rex* v. *Kupferberg* (2), is relevant. That learned judge said:

> To prove conspiracy against the appellant, it is necessary that an agreement, express or implied, should be proved to the satisfaction of the jury, but it is quite unnecessary to prove such agreement where the charge is one of aiding and abetting. In the latter case, it is only necessary to show that the appellant appreciated what was going on and did something to further it.

I do not repeat all that was said by the learned trial judge in the case at bar with respect to "common inten-

(1) (1882) 8 Q.B.D. 534 at 539.

(2) (1918) 13 Cr. App. R. 166 at 168.

tion". I think that the distinction above described was not very clearly explained to the jury with relation to the facts as they might find them. Further, I think that subsection 2 of section 69 of the Code was irrelevant and the repeated references to it could only have tended to confuse. I would not however, having regard to the charge as a whole, have thought a new trial necessary on this ground alone.

I would therefore allow the appeal and direct a new trial.

LOCKE J. (dissenting):—The appellant was charged that "he did on the 31st day of January, 1948, with Nick Bryan, unlawfully and wilfully without legal justification or excuse and without colour of right, set fire to a certain building, to wit, the Queen Elizabeth School belonging to the Corporation of the City of New Westminster." The evidence enabled the prosecution to contend that (*a*) it was Preston who had actually fired the building, or (*b*) in advance of the commission of the offence he had conspired or agreed with Bryan to fire the school and that it was the latter who had actually set the blaze, or (*c*) he had, within the meaning of sec. 69(*c*) of the Criminal Code, abetted Bryan in committing the offence or conceivably as a branch of this latter aspect of the case that he had done some act for the purpose of aiding Bryan to commit the offence, or counselled or procured him to do so within subss. (*b*) and (*d*) of sec. 69.

It is sufficient to say without reviewing the evidence that there was some evidence upon which the jury might have found under (*a*) that the appellant had actually fired the building. There was also evidence upon which they might have found that prior to the time when the offence was actually committed he had conspired or agreed with Bryan to commit the indictable offence of arson (an offence in itself under sec. 573 of the Code), and that Bryan had fired the building in pursuance of such conspiracy or agreement. As to (*c*) restricting it to subsec. (*c*) of sec. 69, the fact that the appellant had proceeded to the place where the offence was committed with Bryan and remained in the latter's automobile while he set fire to the school, if unexplained, was some evidence from which the jury might have drawn the inference that the

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appellant was abetting Bryan in committing the offence (*The Queen* v. *Coney* (1)). As Cave, J. there expresses it, "where presence may be entirely accidental, it is not even evidence of aiding and abetting. Where presence is *prima facie* not accidental it is evidence, but no more than evidence, for the jury."

From the fact that the learned trial judge in his charge to the jury pointed out and commented upon the evidence which might justify the jury in finding the accused guilty under either headings (*a*) or (*b*) above and also defined the term "abet", it is apparent that all three aspects of the matter were submitted to the jury and, in my opinion, the real matter to be determined in deciding the question raised by the first and third grounds of dissent expressed in the formal judgment of the Court of Appeal is as to the sufficiency of the charge in instructing the jury as to the law applicable to the charge of abetting and its application to the evidence. I have come to the conclusion that the dissent of Mr. Justice O'Halloran upon this ground is well founded. The learned trial judge in explaining the meaning of the word "abets" said that it meant "encourages, pushes them on, that is about as good a way I think as I can put it—abets any person in the commission of the offence or counsels or procures any person to commit the offence. You must keep that section in mind here." After summarizing the evidence for the prosecution he then said:—

> Now that is the Crown's case. The Crown asks you to take all these circumstances and the final fact that one or the other of them burnt the school or set it on fire, and the Crown says to you, "Don't worry who started the fire, but come to the conclusion that they were engaged in a common enterprise and that regardless of who set the match or lit the match, the other is guilty." The particular one before us today is Preston and the Crown says upon that basis, "We ask you to bring in a verdict of guilty against him."

As a summary this was not complete since it did not state fully the three contentions of the Crown as mentioned above and it is clear that the jury recognized this as after retiring and being out for some two hours they returned and the foreman said that they would like the court to explain to them the meaning of the word "accessory", which clearly related to the charge of abetting Bryan in committing the offence or of aiding, counselling or procuring him

(1) (1882) 8 Q.B.D. 534 at 539-540.

to do so. In reviewing the evidence for the defence the learned trial judge said that the evidence of the appellant was to the effect that he had no idea of burning a school or being a party to burning a school and that while he had been with Bryan in his car he did not grasp the seriousness of the situation, saying in part:—

> That is the defence. I cannot elaborate on it anymore. It is very fresh in your memory. His defence is this: "While I was with this man I admit, throughout the hours preceding, I did not have anything whatever to do with the buying of the gasoline in preparation for the making of the fire, or the oil. I didn't know that he seriously intended to burn a school. I didn't have any hand in it and I didn't leave the car when the fire was set." Now that is the defence. He says: "I had no common intent with this man to burn this school". Now there is the summary of it. "I had no common intent with Bryan to burn this school. I did not take any active part in setting a fire." That is the defence.

Immediately following the above quoted statement he said that the Crown laid stress upon a point which he had theretofore failed to mention: that the Crown said: "Well, why did not this man get out of the car and leave him and particularly when they came back from Westminster from across the Fraser River bridge? Why in the world didn't he say: 'Bryan, I don't like the way you're behaving.' Or why didn't he telephone the police? The Crown makes that point. You will have it in mind." When the jury returned for further instructions, after defining an accessory before the fact and saying: "abets, that is, assists or encourages any person in the commission of the offence," and again summarizing the evidence for the defence he said:—

> Then the Crown directs your attention to the fact that he didn't do anything about it despite the statements of this man out across the bridge beside a school, and that he didn't protest or do anything at the time of the actual setting of the fire. They say, "Look at his conduct. Is that the conduct of an innocent man?"

The learned trial judge had thus pointedly directed the attention of the jury to the failure of the appellant to quit Bryan's company after the remarks made by the latter when they were out at the property upon the Pacific Highway, his failure to telephone the police and his failure to protest or do anything at the time of the actual setting of the fire. These circumstances were perhaps evidence from which the jury might infer that Preston had conspired or agreed with Bryan to fire the building, but I think it

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much more likely that the jury understood from the charge that it was suggested that these facts afforded evidence upon which they might act in finding the appellant guilty of abetting the commission of the offence. I think this was peculiarly a case where after explaining the nature of the defendant's evidence the trial judge should have explained to the jury the application of the law as to aiding or abetting to the facts as they might find them. It was not sufficient, in my opinion, to define the legal meaning of the term "abet", to state the nature of the evidence for the defence and to leave it to the jury to decide whether, assuming the evidence of the appellant was true, he was guilty of the offence. In the absence of a clear direction, the jury was left to decide for themselves whether these various acts or omissions amounted in law to abetting. As to the necessity of carefully explaining to the jury the application of the law as to abetting to the facts as the jury might find them, I agree with what was said by Robertson, C.J.O. in *Rex* v. *Dick* (1).

In Stephen's Digest of the Criminal Law, 8th Ed. p. 17, the learned author, summarizing the authorities, says that mere presence on the occasion when a crime is committed does not make a person a principal in the second degree (that is, as abetting the commission of the offence) even if he neither makes any effort to prevent the offence or to cause the offender to be apprehended, though his presence may be evidence for the consideration of the jury of an active participation in the offence, and that when the existence of a particular intent forms part of the definition of an offence, a person charged with aiding or abetting its commission must be shown to have known of the existence of the intent on the part of the person so aided. The appellant's position was, assuming that his story was the truth, that he did not know that Bryan contemplated committing any offence. As expressed by Cave, J. *The Queen* v. *Coney, supra,* at 539:

> Now it is a general rule in the case of principals in the second degree that there must be participation in the act, and that, although a man is present whilst a felony is being committed, if he takes no part in it, and does not act in concert with those who commit it, he will not be a principal in the second degree merely because he does not endeavour to prevent the felony, or apprehend the felon.

(1) (1947) 87 Can. C.C. 101 at 115.

In the same case Hawkins, J. said (p. 557):

> In my opinion, to constitute an aider and abettor some active steps must be taken by word, or action, with the intent to instigate the principal or principals. Encouragement does not of necessity amount to aiding and abetting, it may be intentional or unintentional, a man may unwittingly encourage another in fact by his presence, by misinterpreted words, or gestures, or by his silence, or non-interference, or he may encourage intentionally by expressions, gestures, or actions intended to signify approval. In the latter case he aids and abets, in the former he does not. It is no criminal offence to stand by, a more passive spectator of a crime, even of a murder. Non-interference to prevent a crime is not itself a crime. But the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition to it, though he might reasonably be expected to prevent and had the power so to do, or at least to express his dissent, might under some circumstances afford cogent evidence upon which a jury would be justified in finding that he wilfully encouraged and so aided and abetted. But it would be purely a question for the jury whether he did so or not.

The onlookers at the prize-fight whose position was considered in Coney's case were present and did not protest against the prize-fight being held and stayed at the scene and did not inform the police but they were not guilty of any offence, and, in my view, the learned trial judge should have instructed the jury that these matters in themselves did not amount to abetting the commission of the offence in the present case. In 9 Hals. p. 30, the effect of the authorities is summarized as follows:—

> All who are present aiding and abetting, when a crime is committed, but who take no part in the actual perpetration of it, are principals in the second degree.
>
> To constitute a principal in the second degree mere presence at the crime is not enough; there must be a common purpose, an intent to aid or encourage the persons who commit the crime and either an actual aiding or encouraging or a readiness to aid and encourage them, if required.

The evidence of the appellant was to the effect that he had left Vancouver that evening in company with Bryan, in the latter's automobile, to examine some property in the vicinity of New Westminster, and while the latter had made various wild remarks about burning schools and expressed his sympathy with the actions of a fanatical sect of the Doukhobors which engaged in such activities, that he (Preston) did not realize at the time they stopped in front of the Queen Elizabeth School, or at any time prior to the actual firing of the building by Bryan, that the latter intended to set fire to that or any other building

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and that he had taken no part in committing the offence or done anything that might be construed as abetting Bryan in its commission. If the jury accepted this as the truth and if they had been properly instructed as to the application of the law to these facts, I would assume they would have acquitted the appellant. Upon the record as it is, I consider that it is impossible to say whether the jury found the appellant guilty as having abetted the commission of the offence or as having fired the building himself or as having been a party to an agreement with Bryan to commit the offence, the latter being the one who actually set the blaze. As was said by Lord Reading in *Isaac Schama and Jacob Abramovitch* (1):

> We must not be too critical in dealing with the summing up of a judge after a lengthy trial and speeches by counsel. Nevertheless, the Court must be satisfied that when the jury find the prisoner guilty they have applied the right principle of law to the facts before them.

The prisoner was entitled as a matter of right to have the jury instructed as to the application of the law to the facts as found by them and the failure to do this was a substantial wrong. I think, therefore, sec. 1014 (2) of the Criminal Code does not apply.

In my opinion, this conviction should be set aside and a new trial directed.

Appeal dismissed.

Solicitor for the appellant: *Thomas F. Hurley.*

Solicitor for the respondent: *E. Pepler.*