

In my opinion, therefore, the section cannot be given the meaning sought to be put upon it by the plaintiff, and our judgment on this demurrer must be for the defendants.

JAMES J. concurred.

Solicitors : *Abram Landa ; Fred W. Bretnall* (Solicitor for Railways).

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v.
RY. COM.
FOR
N.S.W.

Ferguson, J.

R. v. KALINOWSKI.

R. v. TIMBURY.

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Dec. 17, 22.

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Halse
Rogers J.
Stephen J.

*Criminal law—Principal in second degree—Common design—
Direction to jury—Evidence.*

K. and T. set out with the common purpose of robbing a bank. T., at about 12.0 midnight, entered the bank premises and struck Th., an officer of the bank sleeping there, with a heavy instrument. Th. pretended to be unconscious and T. left the room. Th. then heard whispering and shortly afterwards T. returned with another man, who was not identified, but who may have been K. Th.'s hands and ankles were then tied and he felt a hand at his throat placing pressure on his windpipe. He pretended to choke and T. and the other man left the room carrying with them a bag of heavy implements which presumably had been brought by K. K. and T. were subsequently arrested under circumstances which indicated, beyond doubt, a disturbed attempt to open the bank's strong room. Both men were subsequently indicted upon, and convicted of, a charge of maliciously inflicting grievous bodily harm.

Held, that so far as K. was concerned, the jury should have been asked, as a question of fact, whether in all the circumstances, including the conduct of both the accused immediately before and after the commission of the crime charged, it was part of the common design that each should do any act that might become necessary to the furtherance or completion of their purpose, including acts of violence and, in particular, the infliction of grievous bodily harm with the intent to do grievous bodily harm.

CRIMINAL APPEAL.

The following facts are taken from the judgment of Davidson J. :—"The appellants were convicted upon a charge of maliciously inflicting grievous bodily harm with intent

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to do grievous bodily harm. The facts, very briefly stated, which were submitted as the basis of the argument in support of the appeal, were as follows :

Admittedly both accused, Kalinowski and Timbury, set out with a common purpose of robbing a bank in a country town. Timbury in the first instance entered the premises alone, apparently through an open door leading into the building from a yard. At the far side of the room almost opposite the door was a bed in which one Thomas, an official of the bank, was lying asleep. The time was about 12 o'clock at night. Thomas in his evidence stated that at about 11.15 p.m. he was disturbed by what he thought was a flash of light across his face, and that he left his bed and looked round, but seeing nothing returned and went to sleep. He was subsequently awakened by finding Timbury in his room, and was attacked with some instrument, which he believed to be a heavy file that was produced at the hearing. The attack resulted in Thomas being struck on the head and elsewhere so that he received several cuts. He pretended to be unconscious, and Timbury left the room for a few minutes. Thomas said he then heard whispering, and the first man returned with another. Someone shortly afterwards tied his hands and ankles with bootlaces, and he felt a hand at his throat placing some pressure on his windpipe. Upon his pretending to choke the men left. Thomas subsequently escaped and procured the assistance of the police and others, and both appellants were arrested in circumstances indicating beyond any doubt a disturbed attempt to open the strong room. When the men left the bedroom they carried with them a bag of heavy implements, which presumably had been brought by Kalinowski. Both the appellants were unarmed when arrested, and although Kalinowski is said to have fired shots at the police before his arrest, he used a revolver which was the property of the bank and which must have been found in the banking chamber.

Thomas in cross examination said that the struggle with him was over when he heard the whispering, and he did not know how long afterwards it was that he saw the second man, but it appeared to be a few minutes, and may have been ten minutes, or longer.

Upon this evidence, it was contended that, as Kalinowski was not present when the attack was made on Thomas, and as the only common purpose proved was to rob the bank, he could not be convicted of the offence charged, which involved the proof of a separate intent. A second argument was submitted that, in any event and particularly in the circumstances connected with questions asked by the jury at the trial, the real legal position was not accurately or sufficiently stated in the learned Judge's summing up."

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Roper, for the appellant.

Weigall K.C. (Solicitor-General), for the Crown.

Cur. adv. vult.

Dec. 22.

The judgment of THE COURT (DAVIDSON, HALSE ROGERS and STEPHEN JJ.), was delivered by

DAVIDSON J. [who, after stating the facts, continued:] The case offered against Kalinowski was that he was a principal in the second degree, and the law as to the liability to conviction in such circumstances is quite clear. "A man to become amenable to the law," says Lord *Reading* L.C.J., "must take such a part in the commission of the crime as must be the result of a common design to commit the offence": *R. v. Gray* (12 C.A.R. 244 at 246). It is undoubted also that a jury may draw an inference, from the circumstances disclosed by the evidence, that a concerted design existed.

So where M. assaulted S. with intent to rob him, it was decided, in *R. v. Dunn* (30 S.R. 210) that D. was properly convicted of assault with intent to rob, although he was not present at the assault, but was proved to have been seen driving in his car earlier in the evening with M., and that when M. was pursued immediately after the assault he took refuge in D.'s car, in which D. was seated and which was stationary by the roadside, with the lights off, in a dark spot close to where the assault was committed.

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There is some difficulty, however, when a common purpose or design to a particular end is clearly established, but the actual offence charged is one that is either quite foreign to it, or not so allied as to be necessarily in its furtherance. For instance, assuming a common design on the part of two persons to rob a dwelling, and that one, after entering it in furtherance of their purpose, but in the absence of the other, commits a sexual felony, there it would hardly be possible to convict the absent one of such an offence. The criminal act in such a case would be quite foreign to the original purpose. *R. v. Pridmore* (8 C.A.R. 198) supplies an example of an offence being committed in conditions more allied to the main design. In that case it was held that, if two persons are engaged in a common unlawful enterprise, and one of them to avoid apprehension attempts murder, both may be found guilty of the felony, if the jury are satisfied, from their conduct at the time, that at any moment there was a determination on the part of each to aid the other in avoiding arrest. Mr. Justice *Avory*, also, is stated to have said, in his summing up in the case of *R. v. Brown* (Trial of Brown and Kennedy, by W. Shore, 1930, pp. 182, 183), that the attitude of mind of a person who is charged as a principal in the second degree might be judged by his conduct before, or after, the event, and that it would not be necessary to show that he knew that the other, who actually committed the crime charged, had a weapon in his possession, or that he intended to use it, or that there was any actual agreement or conversation on the subject of the use of the weapon in case of interruption : see Hamilton & Addison, 3rd Ed., p. 318 ; cf. also the Victorian case *R. v. Dowdle* (26 V.L.R. 637) ; *R. v. Cruse* (8 C. & P. 541).

Applying the above authorities to the facts under discussion before the Court, in my opinion it was necessary to submit to the jury the question of fact whether, in all the circumstances, including the conduct of both the accused immediately before and after the commission of the crime charged, it was part of the common design that each should do any act that might become necessary to the furtherance, or completion, of their purpose, including acts of violence and, in particular, the infliction of grievous bodily harm with intent to do grievous bodily harm.

The learned Judge, in submitting the case to the jury, stated : " I am going to direct you according to what I have always understood to be the law, and I think remains the law, that if two persons such as the accused take part in the execution of a common felonious purpose each may be a principal in the second degree in respect of any felony, committed by one of them, which formed part of that purpose in the execution of that purpose. So that if you find upon the evidence here, and their own admissions supply part of the evidence, that they were there that night for the purpose of breaking into the strong room of the Bank of N.S.W. in Coonabarabran, and that they were both at the bank for the purpose of effecting that purpose, then, if violence was used by either one of them, they would both be regarded in law as principals, and could be indicted as they have been indicted here, as principals in the first degree, because that is the practice in N.S.W., and that they are both equally responsible for the felonious infliction of bodily harm in the carrying out of that purpose."

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At a later stage in the summing up his Honour also said : " If Kalinowski was thereabout at the time, and this was done in carrying out their common purpose, then I direct you that he would be liable as a principal in the second degree. He would be as guilty as the other man of the violence used."

After the jury had retired they returned, and asked the following question : " If we are satisfied that the prisoner Kalinowski was not either in the room or near the room, at the time the man Thomas was injured by some weapon, are we competent to bring him in not guilty on the first count."

The first count in the indictment was that on which both were subsequently convicted, and included the element of intent to do grievous bodily harm.

His Honour, in reply to the jury, said : " I have told you, no. If you are satisfied on the evidence that these two men started out on a common unlawful purpose, and to effect that purpose, and during the carrying out of that purpose, violence was done, they are both principals either in the first or second degree . . . If he was in the vicinity he was as guilty as the

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other man, and if the other man had an intent to inflict grievous bodily harm on Thomas he can be held to have a similar intent."

The jury in returning their verdict found both guilty, but said that they did not consider that Kalinowski was guilty to the same extent as Timbury. His Honour stated that he could not pay attention to the rider so added, but whether the jury then withdrew it or not does not appear from the transcript. In the circumstances abovementioned, and with every respect to the learned Judge, it appears to me that the directions given to the jury were too wide and should have been qualified by a further direction in the terms already indicated.

The accused were represented at the trial by counsel, but no objection seems to have been taken at the time, to the summing up, as it should have been. Ordinarily speaking, such an omission would debar the accused, after conviction, from taking advantage of the point on appeal. But it is possible and most probable in this case, that the jury, having regard to their question and rider, did not apply their minds to the facts upon the right principle and, therefore, that there may have been mistrial and a miscarriage of justice.

In such circumstances the Court should be prepared to interfere : *R. v. Glover* (28 S.R. 482, at 488).

In my opinion, therefore, leave to appeal should be granted, the conviction set aside, and a new trial granted.

The other appellant only claims consideration in regard to the sentence imposed upon him. Whilst we in no way criticise the remarks of the learned Judge in dealing with the subject, we think that a term of eight years' penal servitude would be a sufficient punishment, and that the sentence should be reduced accordingly.

Solicitor for the appellant : *N. S. Garland* (Binnaway),
by his agents, *Cleary & Callachor*.