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No redaction required*



**AN CHÚIRT UACHTARACH
THE SUPREME COURT**

S:AP:IE2022:000111

Neutral Citation: [2024] IESC 23

BETWEEN

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

Prosecutor/Respondent

AND

GARY MCAREAVEY

Accused/Appellant

JUDGMENT of Mr Justice Maurice Collins delivered on 17 June 2024

PRELIMINARY

1. The circumstances in which this appeal comes before the Court, and the issues presented by it, are set out in the judgment I have just given in *People (DPP) v Smyth*.
2. For the reasons set out in detail in that judgment (with which O' Donnell CJ, Barniville P and Dunne, Charleton and O' Malley JJ agreed), I conclude that the disputed traffic and location data was properly admitted in evidence here. I accept the argument made on Mr McAreavey's behalf that the evidence was obtained in breach of the Charter and I also accept that it follows from the principle of equivalence that the admissibility of that evidence falls to be determined by the application of the *JC* test. In my view, in the particular circumstances here, and having regard to the nature of the breach, that exercise can and should be undertaken by this Court and does not require a retrial. Applying *People (DPP) v JC* [2015] IESC 31, [2017] 1 IR 417 ("*JC*"), the evidence was properly admitted. It was not taken in deliberate or conscious violation of any Charter rights of Mr McAreavey and the breach of rights involved derived from subsequent legal developments, specifically the striking down of the relevant provisions of the 2011 Act as incompatible with EU law. Insofar as the decision in *JC* contemplates any broader assessment, such assessment weighs decisively in favour of admissibility here in my view.
3. Accordingly, Mr McAreavey's appeal on the admissibility issue fails.

4. However, a further and distinct issue arises in this appeal, namely as to what are the constituent elements of the offence created by section 7(2) of the Criminal Law Act 1997 (as amended) (*“the 1997 Act”*). Section 7(2) provides as follows:

“Where a person has committed an arrestable offence, any other person who, knowing or believing him or her to be guilty of the offence or of some other arrestable offence, does without reasonable excuse any act, whether in or outside the State, with intent to impede his or her apprehension or prosecution shall be guilty of an offence.”

5. The particular issue presented here is as to the proper interpretation of *“some other arrestable offence”* and, in particular, whether it is sufficient to ground a conviction for such an offence for the prosecution to prove that the accused assisted the principal offender knowing or believing that offender to be guilty of *“some other arrestable offence”*, without having to plead or prove what that *“other arrestable offence”* was or otherwise having to specify the offence, or category of offence, involved.
6. That issue is addressed in this Judgment. For the reasons to be set out, I conclude that section 7(2) of the 1997 Act requires the prosecution to allege and prove that the accused knew or believed *either* that the principal offender was guilty of the offence actually committed by them *or* that he or she was guilty of some similar offence, arising from the same circumstances in which the actual offence was committed. That was not established by the prosecution here and, accordingly, I would allow Mr McAreavey’s appeal and set aside his conviction.

PROSECUTION, TRIAL AND APPEAL

7. The background facts are set out in detail in my judgment in Mr Smyth’s appeal. Mr McAreavey was charged with the offence of assisting an offender (Mr Smyth) contrary to section 7(2) and 7(4) of the 1997 Act.¹ The prosecution’s case against him was that, shortly after the shooting of Mr Gately, Mr McAreavey had driven in convoy with the black Lexus (driven by Mr Smyth) to a remote location near Newrath, Co Louth where the Lexus was burned out for the purpose of destroying evidence, using petrol that Mr McAreavey had bought earlier that day (which was also recorded on CCTV). This was reflected in the particulars of the offence set out in the indictment, which alleged that Mr McAreavey “*knowing or believing another person to have been guilty of an offence of attempted murder or of some other arrestable offence, did without reasonable excuse an act, with intent to impede his apprehension or prosecution, namely purchased petrol and assisted in the burning out of a vehicle used in the attempted murder.*”² Mr McAreavey was tried on that charge alongside Mr Smyth.
8. Before the Special Criminal Court (SCC), Mr McAreavey unsuccessfully contested the admissibility of the mobile phone traffic and location data sought to be adduced by the Director. He also submitted that the evidence was not sufficient to convict him of an offence under section 7(2) of the 1997 Act, properly construed.

¹ Section 7(2) of the 1997 Act has already been set out above. Section 7(4) provides for the penalty that may be imposed on conviction.

² The form of indictment provided to the Court omits the words “*or of some other arrestable offence*”. However, an amended indictment appears to have been served at the commencement of the trial and it is clear from the transcript that the indictment before the SCC included those words.

9. For the reasons explained in its detailed Judgment, which is considered more fully below, the SCC was not satisfied that the evidence established beyond reasonable doubt that Mr McAreavey knew or believed that Mr Smyth was guilty of the offence of attempted murder. However, the court considered that the evidence established beyond any doubt that Mr McAreavey knew or believed that Mr Smyth had committed an arrestable offence of some description when he helped Mr Smyth to destroy the vehicle used in the shooting of Mr Gately. In the court's view, that was sufficient to ground a conviction under section 7(2) of the 1997 Act: section 7(2) permitted the prosecution to rely on alternatives by proving either knowledge or belief of the offence committed, which was specific, *or* some other arrestable offence, which was not. No specific alternative was required as part of the second limb of the provision (SCC Judgment, page 60).

Appeal to the Court of Appeal

10. Mr McAreavey appealed his conviction to the Court of Appeal and his appeal was heard with Mr Smyth's appeal (the panel comprising the President and Edwards and Kennedy JJ) and addressed in a single judgment of the Court, delivered by the President on 28 July 2022 ([2022] IECA 182).
11. As regards Mr McAreavey's appeal in relation to the ingredients of the section 7(2) offence, the Court of Appeal essentially upheld the reasoning and conclusions of the SCC.

12. In the result, Mr McAreavey's appeal was dismissed.

APPLICATION FOR LEAVE AND DETERMINATION

13. Mr McAreavey applied for the leave to appeal to this Court. The Director opposed that application. However, by a Determination dated 16 December 2022 ([2022] IESCDET 138), the Court granted leave on the issue of admissibility of the mobile traffic and location data and also in relation to the issue of the proper construction of section 7(2).

THE ISSUES IN THE APPEALS

14. In the course of the case-management of the appeals, the parties agreed a statement of issues as follows:

“1. Noting that it is common case that the provisions of the Communications (Retention of Data) Act 2011 relating to

- a. General and indiscriminate retention of phone location and call data, such as that at issue in this case, for the purpose of the investigation of crime, and*
- b. access to such retained data for the purpose of the investigation of crime on the authorisation of a member of An Garda Síochána*

are, for the reasons stated in the judgment of the Court of Justice of the European Union of the 5th April 2022 in Case C-140/20 GD v Commissioner of An Garda Síochána ECLI:EU:C:2022:258 in breach of EU law, in what circumstances is such data admissible in evidence against an accused?

- a) Is the test for admissibility that set out in People (DPP) v JC [2015] IESC 31, [2017] 1 IR 417 or is some other test applicable?*

b) *In considering the admissibility of the phone location and call data here, what is the significance (if any) of the fact that neither appellant asserted or accepted ownership of the 691 phone or the 773 phone?*

c) *Did the Special Criminal Court err in admitting the phone location and call data in evidence in the circumstances here?*

2. *Where in a prosecution under Section 7(2) of the Criminal Law Act 1997 the prosecution fails to prove that the accused knew or believed that the principal offender was guilty of the arrestable offence proven to have been committed by that offender, does the reference to “some other arrestable offence” in that subsection require the prosecution to identify some specific “other arrestable offence” and to prove that the accused knew or believed that the principal offender was guilty of that specific offence in order to ground a conviction or is it sufficient for the prosecution to prove that the accused knew or believed that that person was guilty of an unspecified offence of sufficient gravity as to constitute an “arrestable offence” ?”*

15. The first set of issues (relating to admissibility) have been addressed in my judgment in Mr Smyth’s appeal. This judgment is concerned with the second issue only.

THE SECTION 7(2) OFFENCE

The SCC's Analysis and Conclusions

16. The SCC identified as the “*central matter in issue*” whether the prosecution had established that Mr McAreavey knew or believed at the time of assisting Mr Smyth that he (Mr Smyth) had committed the offence of attempted murder. It noted that, unlike many such cases, there was not a large body of evidence of dealings or meetings between Mr McAreavey and Mr Smyth “*as to what Mr Smyth was about on the 10th of May*” (Judgment, page 59). Having considered the available evidence, the SCC thought it “*probable*” that Mr McAreavey knew what Mr Smyth was about but that level of certainty was insufficient to convict based on the “*first option*” relied on by the prosecution (Judgment, pages 59-60). However, the Court considered that the evidence established beyond any doubt that Mr McAreavey knew or believed that Mr Smyth had committed “*an arrestable offence of some description*” at the time he helped Mr Smyth to destroy the vehicle used in the shooting of Mr Gately (Judgment, page 62). Any jury (and the court was here acting as a jury) would be aware as a matter of common experience that getaway cars are used and disposed of only in connection with the commission of “*serious crimes such as murder, robbery, false imprisonment or firearms offences committed in the context of such other offences*”. The use of getaway cars universally occurred “*fully within the broad range of arrestable offences and almost always as part and parcel of offences at the top of that scale.*” Accordingly, the SCC was satisfied that Mr McAreavey knew well that Mr Smyth had committed “*a serious crime of the type listed above*” to need assistance of the kind provided by him

and “*the statutory threshold of knowledge or of belief in the commission of some arrestable offence has been comfortably passed*” (Judgment, page 62). It was also satisfied that Mr McAreevey had performed the acts he did “*with the intention of impeding the arrest or prosecution of Mr Smyth for whatever serious arrestable offence required the use and organised destruction of a getaway car in a secluded rural location*” (Judgment, page 63). It therefore proceeded to convict him on the section 7(2) offence.

17. The SCC had earlier explained its understanding of what section 7(2) required in terms of the knowledge or belief of the accused. It began by addressing the submission made by Mr Hartnett SC on behalf of Mr McAreevey to the effect that the provision was ambiguous:

“Having considered the matter thus, we are satisfied that there is in fact no such ambiguity in the section which was drafted to amend the common law to cater precisely for situations such as arose in this case. Under previous law relating to the charging of an accessory after the fact, it was necessary to specify both the precise felony which had been committed and this was known to the accessory. The words “or some other offence” were designed in our view to provide an expanded alternative to knowledge of a precise offence. The words “some other” simply signify any of the various alternatives within the limitation that the alternative must also be an “arrestable offence”. The combined effect of the words used in the subsection is simple and straightforward and that is that the

prosecution must prove knowledge or belief on the part of the assistant of the commission of an arrestable offence. The section as drafted permits the prosecution to rely on alternatives by proving knowledge or belief of the offence committed which is specific or some other arrestable offence which is not. In our view the clear legislative intention as expressed in the words used in the statute is to bring about a change in the previous law. Had a specific alternative been required as part of the second limb of the statutory definition that would have been expressed by different words importing that requirement of specificity, otherwise the section would in effect have failed to change the previous law. It seems to us that the deliberate policy of the Oireachtas was those that who assist offenders with knowledge or belief of offending do so at their own risk, subject to the threshold that they do so in the context of knowledge or belief of arrestable offending of some variety on the part of the principal offender.

....

Therefore, in a trial with a jury in the ordinary courts the jury would have to be directed as to the definition of an arrestable offence and as to the state of mind required in relation to the commission of some arrestable offence, either the one actually committed by the principal or some other offence available on the facts of the case. A lay jury would presumably have to be instructed as to the kinds of things that comprise arrestable offences. In this case proof is required that Mr McAreavey knew or believed that Mr Smyth had committed an

arrestable offence, even if that knowledge or belief could not be proved beyond reasonable doubt to extend to the crime of attempted murder. In an exceptional case a jury in the ordinary courts might be asked to specify the offender's state of mind on this point in their verdict. Such an option is unnecessary in this court which attempts to provide a detailed explanation of the very basis of our verdicts.” (Judgment, pages 60-61)

It is not clear what the SCC meant in referring to “*some other offence available on the facts of the case.*” The SCC did not refer to any authority in its ruling but aspects of its analysis appear to reflect the judgment of the Court of Appeal of England and Wales in *R v Morgan* [1972] 1 QB 436 to which further reference is made below.

Appeal

18. In its Judgment, the Court of Appeal gave a detailed account of the evidence against Mr McAreavey, including CCTV evidence and the mobile phone data evidence and set out in detail the SCC’s analysis of section 7(2). In the Court of Appeal’s view, the phrase “*some other arrestable offence*” was telling and appeared to mandate that the section be interpreted in the way contended for by the Director (para 39). At the time that assistance is offered, neither the assister nor the offender may be aware of what precise offence has been committed and, in fact, that may not yet be determined (as for instance where it was unclear if a victim would recover from their injuries, so that it could not

be determined whether the principal offence was one of murder or attempted murder) (para 40).

19. Finally, the Court of Appeal did not consider that the decision of the Supreme Court in *DPP v AC* [2021] IESC 74, [2022] 2 IR 49 assisted Mr McAreavey's appeal (para 41).

Argument

20. On Mr McAreavey's case, both the SCC and the Court of Appeal misconstrued and misapplied the statutory provision. His fundamental contention is that, on its proper construction, section 7(2) required the Director to prove beyond reasonable doubt that he acted with intent to impede the apprehension or prosecution of Mr Smyth while either knowing or believing him (Mr Smyth) to be guilty of the offence of attempted murder (which, the SCC held, had not been proved to the requisite standard) or knowing or believing him to be guilty of some other offence within the same category/of the same nature.³
21. According to Mr McAreavey, the question under appeal is whether (and, if so, to what extent) the Oireachtas, in enacting section 7(2), intended to alter the *mens rea* requirements that applied to the common law accessory offence (which, Mr McAreavey submits, required the prosecution to prove knowledge or belief of an offence within the same category or of the same nature as the offence actually committed by the principal offender, here an offence of attempted murder). Criminal offences must be expressed

³ Written submissions, paras 41-44.

with precision and without ambiguity, and where there is ambiguity it must be resolved in favour of the accused (citing *People (DPP) v Moorehouse* [2005] IESC 52, [2006] 1 IR 421). Here, he says, the prosecution’s construction of section 7(2) makes it impermissibly vague as regards the requisite *mens rea* and that vagueness undermines his right to a fair trial under Article 38 of the Constitution and Article 6(3) ECHR. The vagueness inherent in section 7(2) is reflected in a flawed indictment which breached the requirement for clarity in section 4(1) of the Criminal Justice (Administration) Act 1924.⁴ He argues that a consideration of section 7(4) – the penalty provision – supports his contention that proof of a specific offence is required. Mr McAreavey also relies on the judgment of O’Donnell CJ in *DPP v AC* [2021] IESC 74, [2022] 2 IR 49. In that case, where one purpose of the legislation in question was clear (permitting the evidence of a registered medical practitioner to be given by certificate rather than *viva voce*), the Chief Justice regarded as “*implausible*” the suggestion that, by the same language, the Oireachtas had intended to achieve a further objective, involving a significant change to the law (permitting the giving of evidence that was not within the personal knowledge of the witness and which otherwise would be inadmissible hearsay). Here, it is said, the Oireachtas had no “*dual purpose*” either. Its sole objective was to fill the gap in the law arising from the abolition of the felony/misdemeanour distinction.

⁴ Which provides that “*Every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge.*”

22. In response, the Director reminded us that the essential function of a court in construing legislation was to ascertain the intention of the legislature. The primary route by which such legislative intention is ascertained is by ascribing to the words used in the statute their ordinary or literal meaning. The principle of strict construction of penal statutes does not override all other rules of statutory interpretation (citing *DPP v TN* [2020] IESC 26, para 119). Here, it was said, the intention of the Oireachtas can be clearly discerned from the words and no issue of “*dual purpose*” arises. An offence under section 7(2) may be established in circumstances where the principal offender commits an arrestable offence and the secondary accused knowingly impedes the principal offender’s apprehension or prosecution, knowing or believing that the principal offender is guilty of either (1) the offence that the principal offender has committed or (2) some other offence which carries a maximum penalty of not less than 5 years imprisonment. According to the Director, section 7(2) does not require the prosecution to identify the precise “*other arrestable offence*” where it is not possible to prove knowledge by an accused of the specific offence committed, though she accepts that the prosecution must prove that the “*other arrestable offence*” must be one of “*particular gravity*”, given that it must carry a potential penalty of at least 5 years imprisonment. The accused “*need not be familiar with the full surrounding circumstances*” provided that the evidence permits an inference to be drawn, beyond reasonable doubt, that the accused knew that the principal offender had committed an offence of the requisite gravity. The necessary *mens rea* can be inferred “*from the nature and quality of the act carried out by the accused and from the surrounding circumstances*” and the Director says that the SCC rightly drew such an inference on the evidence here. Whether the accused was right or wrong about the nature of the

offence actually committed by the principal offender is irrelevant. It would, the Director says, be absurd if the accused could avoid criminal liability by simply “*blinding themselves*” to the precise nature of the principal offender’s offence.

The Proper Approach to the Construction of Section 7(2)

23. There is no want of authority on the proper construction of statutory provisions creating a criminal offence. The classic statement is that of Henchy J in *Inspector of Taxes v Kiernan* [1981] IR 117, at 122, where he stated that “*if a word or expression is used in a statute creating a penal or taxation liability, and there is looseness or ambiguity attaching to it, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language*”.

24. While that principle of strict construction of penal statutes – or, as it is also referred to, the principle against doubtful penalisation – is of continuing vitality, this Court’s recent jurisprudence emphasises that it should not be applied to the exclusion of all of the other principles of construction. Statutory construction is a unitary exercise that, in all cases, has the same objective, namely the ascertainment of the intention of the legislature from the text adopted by it (which is the starting point and primary focus), read in its proper context: *Heather Hill Management Company CLG v An Bord Pleanála* [2022] IESC 43, [2022] 2 ILRM 313, as well as *A, B and C (a minor) v Minister for Foreign Affairs* [2023] IESC 10, [2023] 1 ILRM 335.

25. Thus, in *Director of Public Prosecutions v Moorehouse* [2006] 1 IR 421, Kearns J (McCracken J agreeing), having referred to the principle that “*the court should lean against the creation or extension of penal liability by implication*”, also made it clear that that was not to say “*that a penal statute cannot be construed in a purposive manner, or that the court should readily adopt a construction which leads to an artificial or absurd result*” (at 444). Similarly, in *People (DPP) v Brown* [2019] 2 IR 1, McKechnie J (dissenting as to the result) approved the approach taken by O’ Higgins J in *Mullins v Hartnett* [1998] 4 IR 426, to the effect that a penal statute must be construed with due regard to the principle against doubtful penalisation “*along with all other relevant criteria*” and that the rule of strict construction applies “*only where there is ambiguity in the statute which all of the other canons of interpretation fail to solve*” (para 99). *Dunnes Stores v Revenue Commissioners* [2019] IESC 50 is a concrete illustration of that approach. It involved the statutory provisions imposing the “*plastic bag levy*” which, McKechnie J considered, had to be regarded as taxation measures (at para 62). Even so, and notwithstanding the “*considerable interpretative difficulties*” presented by the way that the provisions had been drafted, the court rejected the interpretation advanced by Dunnes Stores largely because it “*would have made very little sense for the Oireachtas*” to have legislated to that effect: unless “*absolutely compelled*” to adopt that interpretation, the court would have to reject it (at para 80).
26. McKechnie J also spoke for the court (comprising also O’ Donnell CJ and Dunne, Charleton and O’ Malley JJ) in *People (DPP) v TN* [2019] IESC 50, in which he emphasised that the strict construction rule “*operates in addition to, and not in substitution for, the other canons of construction.*” Thus understood, the principle “*did*

not alter the fundamental objective of the Court in construing legislation, which is to ascertain the will or intention of the legislature” and did not “automatically supplant or trump all other interpretive approaches” (para 118). It did not mean that where there were two potentially plausible readings of a statute available, the court must automatically adopt the interpretation favouring the accused: rather, it meant that “where ambiguity should remain following the utilisation of the other approaches and principles of interpretation at the Court’s disposal, the accused will then be entitled to the benefit of that ambiguity” (para 119).

27. Finally, there is the decision of this Court in *People (DPP) v AC* [2021] IESC 74, [2022] 2 IR 49, on which Mr McAreavey placed significant reliance. It did not concern a provision creating a criminal offence but rather a provision of the Non-Fatal Offences Against the Person Act 1997 (section 25(1)) providing for proof by certificate from a medical practitioner in proceedings alleging harm or serious harm. The issue was whether that provision made admissible a certificate prepared by a medical practitioner who had not examined the injured party and who had prepared the certificate in reliance on clinical records. The Circuit Court judge had excluded the certificate as inadmissible hearsay and directed the acquittal of the accused. On a without prejudice appeal by the DPP the Court of Appeal reversed, holding that section 25(1) was unqualified on its face and did not stipulate that the certificate had to be completed by a medical practitioner who had examined the injured party. This Court allowed the defendant’s appeal.

28. O' Donnell CJ, Charleton J and Woulfe J all delivered judgments and the remaining members of the Court (MacMenamin and O' Malley JJ) agreed with all three judgments. Mr McAreavey placed particular reliance on the analysis of the Chief Justice. Having referred (*inter alia*) to *Dunnes Stores v Revenue Commissioners* and *TN*, the Chief Justice observed that “*if, when viewed in context, having regard to the subject matter and the objective of the legislation, a single, plain meaning is apparent, then effect must be given to it unless it would be so plainly absurd that it could not have been intended*” (para 7). In his view, however, the words of section 25(1) did not admit of a single, precise and unambiguous meaning. While the DPP had laid emphasis on the absence of any statement that the examination referred to in the sub-section had to have been carried out by the medical practitioner providing the certificate, that was “*only a very limited interpretative tool*” – in almost every case where there was doubt as to the meaning of a statutory provision, it was possible to suggest a form of words which would have made an interpretation clearer but that would rarely be a decisive factor (para 8). Turning to the purpose of the provision, the Chief Justice considered that it had “*one obvious purpose at least*”, which was to permit the evidence of the medical practitioner to be given by certificate, rather than by *viva voce* evidence. The question, therefore, was whether the section had a *further* objective, namely – by the same language – to facilitate proof by a person other than the person who had examined the injured party, which would otherwise be inadmissible hearsay. For the various reasons set out in the remainder of his judgment – including the fact that, on the DPP's construction, the section involved a significant change to the existing law which would raise questions of compatibility with the Constitution – O' Donnell CJ concluded that the section should not be interpreted to have that additional effect.

29. Charleton J also considered that the state of the law prior to the enactment must be taken into account and placed reliance on the extent to which the DPP's construction would involve "*an utterly changed regime*" of admissibility (para 48). Woulfe J regarded the section as ambiguous but considered that, read in the context of the Act as a whole, and in particular sections 3 and 4 (creating respectively offences of assault causing harm and assault causing serious harm) the intention of the Oireachtas was clearly to obviate the necessity for the medical practitioner who had examined the injured party to attend court, not to allow one medical practitioner to certify another practitioner's records (paras 104-105).

The Position Prior to the 1997 Act

30. The state of the pre-existing law is a relevant consideration in the exercise of statutory construction: see generally *Heather Hill* and *A, B and C (a minor)*, as well as the judgments in *People (DPP) v AC* just referred to. The pre-1997 Act legal position was the subject of considerable discussion at the hearing of the appeal.
31. Prior to the enactment of the 1997 Act, the elements of criminal liability for assisting the principal offender differed depending on whether the principal offence was a felony or misdemeanour. As regards felonies, an assister could be liable as an accessory *before* the fact or as an accessory *after* the fact: see generally the discussion in *Charleton & McDermott's Criminal Law and Evidence* (2nd ed; 2020) ("*Charleton & McDermott*"), Chapter 8.

32. The Court was referred to two decisions in particular in this context, that of the Court of Criminal Appeal in *People (DPP) v Egan* [1989] IR 681 and the decision of this Court in *People (DPP) v Dekker* [2015] IESC 107, [2017] 2 IR 1. However, these decisions were concerned with the liability of an accessory *before* the fact. They establish that, for that purpose, it was sufficient for the prosecution to establish that the accessory assisted the principal “*in the commission of the crime proved to have been committed by the principal, or the commission of a crime of a similar nature known to the accused to be the intention of the principal when assisting him*” (the formulation used by the Court of Criminal Appeal in *People (DPP) v Madden* [1977] IR 336, which was referred to extensively in *Egan* and approved by this Court in *Dekker*).
33. Thus, in *Madden*, it was enough to establish that the accused knew that the principal intended to inflict serious injury on the deceased in order to convict them as an accessory before the fact to murder. In *Egan*, it was held to be sufficient to prove that the accused assisted the principal offender knowing that an offence involving the “*theft of goods*” was planned in order to establish his liability as an accessory before the fact to the offence actually committed, which was robbery. In *Dekker* – a section 23 appeal from a directed verdict of acquittal – this Court held that the trial judge had erred in withdrawing the case from the jury in circumstances where there was evidence that the accused knew that the principal intended to give the deceased “*a hiding*” and also knew that the principal had a garden shears with him which, in this Court’s view, could properly have led a jury to infer that he had knowledge of the “*nature of the crime*” to be committed (which was in fact murder). The law in England and Wales was broadly

to the same effect and the Irish jurisprudence drew significantly on the decision of the Court of Criminal Appeal (of England and Wales) in *R v Bainbridge* [1960] 1 QB 129 and that of the House of Lords in *R v Maxwell* [1978] 1 WLR 1350.

34. However, none of these cases addressed the elements of liability as an accessory *after* the fact of a felony and in particular the extent to which it must be shown that the accessory knew of the specific offence actually committed by the principal offender.
35. *Archbold's Pleadings, Evidence and Practice in Criminal Cases* (36th ed; 1966) indicates that to constitute that offence it was necessary that, at the time of providing assistance or comfort to the felon, the accessory "*should have notice, direct or implied, that [the principal] committed a felony*" (para 4155). That the accused should have known the actual felony committed by the felon is evident from the discussion that follows. So much is clear from the specimen indictments and the discussion of the direction to the jury. The proper direction to be given to the jury was that "*if the jury are satisfied that the accessory did the act alleged to constitute him an accessory knowing that the principal was guilty of the felony charged against him and did so for the purpose of assisting the principal to escape conviction they should find him guilty*" (para 4164). The decision of the Court of Criminal Appeal of England and Wales in *R v Levy* [1912] 1 KB 158 is cited as authority for a direction in such terms, as indeed it is.
36. Glanville Williams, *Criminal Law – The General Part* (2nd ed, London; 1961) is to the same effect, the author suggesting that the accessory must know not merely that the

given act has been done by the principal offender but that it was a crime (though presumably not that it was “*a crime of the grade of felony*”) (page 413).

37. *Charleton & McDermott* refers to a number of cases relating to accessories after the fact, including *R v Tevendale* [1955] VLR 95, in which a majority of the Supreme Court of Victoria (Full Court) rejected the suggestion that it was sufficient to constitute the offence to prove knowledge on the part of the accused that the principal offender “*was guilty of some felony, of the precise nature of which he did not have knowledge or notice*” (at 98). Knowledge of the actual felony committed had to be proved. That strict approach was subsequently re-affirmed in Victoria (*R v Stone* [1981] VR 737) and appears to have been adopted in New South Wales also (*Gall v R* [2015] NSWCCA 69, noting, at paras 253-254, recommendations for reform made by the NSW Law Reform Commission).
38. Quinn, *Criminal Law in Ireland* (2nd ed; 1993) states that an accessory after the fact is one who, having no prior connection with the felony “*but who knowing that the felony has been committed*” provides assistance to the felon in order to secure their escape from justice. The author goes on to explain that “*it is necessary that the felony be completed at the time the assistance is given and that the accessory, at the time he assists or comforts the felon, should have notice, direct or implied that he had committed the felony*” (at page 21).
39. Finally, as appears below, the judgment of the Court of Appeal in *Morgan* recites that it was common case that under the “*old law*” (i.e. the law prior to the enactment of the

Criminal Law Act 1967) “*when charging an accessory after the fact to felony it was necessary to specify both the particular felony which had been committed and that this was known to the accessory*” (my emphasis). The SCC made a statement to the same effect in these proceedings (Judgment, page 60).

40. The 1997 Act was substantially based on the Criminal Law Act 1967 in England and Wales. Section 2(1) of the 1997 Act abolished the distinction between felonies and misdemeanours. The Act created a new category of offence – the “*arrestable offence*” – being an offence for which an offender of full capacity and without any previous convictions could, on conviction, be sentenced to a term of imprisonment of 5 years or more. The abolition of felonies meant the effective abolition of the offences of being an accessory before or after the fact of a felony and so section 7 of the Act created new statutory offences of assisting offenders. Section 7(1) created a new statutory offence of aiding, abetting, counselling or procuring the commission of an indictable offence, Section 7(2) then provides:

“(2) Where a person has committed an arrestable offence, any other person who, knowing or believing him or her to be guilty of the offence or of some other arrestable offence, does without reasonable excuse any act whether in or outside the State, with intent to impede his or her apprehension or prosecution shall be guilty of an offence.”

Section 7(4) makes provision for penalty. It provides for a graduated scale of maximum prison sentences “*according to the gravity of the offence that the other person has*

committed or attempted to commit". Section 7(2) and 7(4) are, respectively, in materially identical terms to section 4(1) and 4(3) of the Criminal Law Act 1967 (EW).⁵

41. If liability as an accessory *after* the fact of a felony required proof that the accused *knew* of the actual offence committed by the principal offender – as the analysis above indicates – it follows that, contrary to the position urged by Mr McAreavey, section 7(2) was indeed intended to alter the pre-existing law. Whatever the precise meaning and scope of the words “*or of some other arrestable offence*” in section 7(2), it necessarily contemplates that an accused may be convicted of an offence in circumstances where he or she did *not know* of the offence actually committed by the principal offender and instead believed that the principal had committed an offence other than the offence actually committed by them. It is therefore not plausible to suggest that section 7(2) was intended to apply the pre-existing law to a post-felony world. Having said that, the interpretation of section 7(2) of the 1997 Act urged by the Director would involve a very significant change to the pre-existing law relating to the liability of accessories after the fact and a very significant expansion of the scope of potential criminal liability for assisting an offender.

⁵ The (UK) Serious Organised Crime and Police Act 2005 abolished the concept of “*arrestable offence*” and the references to “*arrestable offence*” in the 1967 Act, including section 4, were replaced by “*relevant offence*”. That did not involve any substantive alteration to the offence.

R v Morgan and Textbook Commentary

42. But, the Director says, her construction of section 7(2) is supported by the decision of the Court of Appeal of England and Wales in *R v Morgan* [1972] 1 QB 436. *Morgan* was not referred to in the Judgments of the SCC or Court of Appeal in these proceedings (though, as I have already noted, aspects of the SCC’s analysis appear to echo it). No reference was made to it in the written submissions to this Court either but it was produced by the Director in the course of the hearing of the appeals. As a result, the discussion of it was rather limited.
43. In *Morgan*, the indictment against the defendant (M) alleged that he had assisted another (P) with intent to impede his apprehension for “*the arrestable offence of murder*” which P had committed, “*then knowing or believing [him] to be guilty of the said arrestable offence*”.⁶ M had assisted P by arranging a hide-out for him. At trial, P argued that he had been provoked by the victim and, on that basis, the jury was invited by his counsel to convict him of manslaughter rather than murder. In response, the prosecution applied to amend the particulars in the indictment by substituting “*unlawful killing*” for murder (so that the indictment then alleged that the accused had assisted P with intent to impede his apprehension “*for the arrestable offence of unlawful killing*”). Leave to amend was granted. The jury then found P guilty of murder and M was convicted of the section 4(1) offence. M appealed on the basis that the amended count

⁶ The indictment originally referred to two principal offenders but one was acquitted by direction.

was defective as there was no arrestable offence of “*unlawful killing*”. That was the only substantive point in the appeal.

44. Rejecting the appeal, the court stated:

“The submission made on behalf of the defendant is that it is essential when charging an offence under section 4 (1) of the Act of 1967, to specify correctly the particular offence actually committed by the person whom the accused has assisted. It is common ground that under the old law when charging an accessory after the fact to felony it was necessary to specify both the particular felony which had been committed and that this was known to the accessory. The statute clearly changes the law in the latter respect. Under section 4 (1) it matters not that the assistant does not know the nature of the other person's offence. But we see nothing in the language of the subsection to suggest an intention to change the law so that it should no longer be necessary to specify the particular offence committed. ... Accordingly, counsel for the defendant makes good his complaint that count 2 as amended was defective” (439).

45. The court then considered whether that irregularity had led to a miscarriage of justice. It concluded that there had been no injustice on the basis that no amendment of the indictment was necessary because the situation was covered by another provision of the 1967 Act (section 6(3)) permitting alternative verdicts. The jury should have been directed to convict M if satisfied that P was guilty of murder *or* manslaughter and that M had assisted him knowing or believing that P was guilty of one or other of those

offences or of any other arrestable offence. Had that route been followed, the same result would have been reached and so there was no prejudice to M.

46. The court then addressed a further submission made on M's behalf:

“We wish to refer to a further submission made by [counsel for M]. He says that in any case under section 4(1) the court must know before passing sentence not only what offence was committed by the person assisted, but also what the assistant knew or believed it to be; and to this end, he submits, the jury must be asked for a special verdict. We cannot accept this. It appears to us that the deliberate policy of the legislature embodied in section 4 is that those who assist fugitives from justice act at their peril. The graver the fugitive's offence the heavier is the punishment to which the assistant renders himself liable irrespective of his state of knowledge. We do not, of course, mean to imply that the state of mind of the accused may not be a material factor in mitigation or that the court might not in an exceptional case think it useful to invite the jury to return a special verdict on the point. But this cannot be the norm and it was wholly unnecessary in the present case.

It is fair to add, however, that [counsel for M's] submission on this point derives some support from the actual form of the indictment, which, by alleging that the defendant acted with intent to impede Phillips' apprehension 'for the arrestable offence of murder', appeared to make the defendant's knowledge of the nature of the offence material. This allegation went beyond what was necessary to

prove an offence under the subsection. A count in an indictment particularising an offence under section 4 (1) will be sufficient if it states that the other person has committed a specified arrestable offence and that the accused, knowing or believing him to be guilty of that or some other arrestable offence, has without lawful authority or reasonable excuse done the act particularised with intent to impede the other person's apprehension or prosecution.” (440-441)

47. This passage from *Morgan* has since been read in strikingly different ways. We were referred to *Blackstone's Criminal Practice 2024 (2023)* (“*Blackstone*”), in which it is stated that it “*must be proved that X did indeed commit the specified offence or some other offence for which X might have been convicted on an indictment alleging the specified offence*”, citing *Morgan* (B14.60). As to the requisite knowledge or belief of the assistor, *Blackstone* states:

*“By analogy with decisions concerning the offence of handling stolen goods (where knowledge or belief is similarly a mens rea element), it is clear that D must either know or positively believe in the guilt of the person assisted. Mere suspicion, however strong and well-founded, would not suffice. On the other hand, the CLA 1967, s.4(1), expressly provides that D may be guilty even if mistaken about what offence the person assisted has committed; and the language used is wide enough to embrace cases where D knew that the person assisted must have committed a serious offence but had no idea what offence it may have been (*Morgan* [1972] 1 QB 436).” (B14.65; emphasis added)*

48. That was, in substance, the approach taken by the SCC and the Court of Appeal here. It should be said, however, that *Morgan* did *not* involve a defendant who knew that the person he was assisting had committed a serious offence but “*had no idea what offence it may have been.*” It is clear from the judgment in *Morgan* that M knew that P had killed a third party: page 439A. The only uncertainty in *Morgan* was whether that killing was, in law, murder or manslaughter. No doubt, if M had mistakenly believed that P was guilty of murder rather than manslaughter (or *vice versa*) or mistakenly believed that the victim had not been killed and that P was “*only*” guilty of attempted murder or assault, he would nonetheless have been liable to conviction under section 4(1). That clearly follows from the language of the subsection. But it is not at all obvious that that language is “*wide enough to embrace cases where D knew that the person assisted must have committed a serious offence, but had no idea what offence it may have been*” or that *Morgan* actually supports such a sweeping interpretation of the subsection. Furthermore, it is not immediately obvious how a defendant might “*know or positively believe in the guilt of the person assisted*” while at the same time having “*no idea*” what offence that person may have committed.

49. *Archbold Criminal Pleading, Evidence and Practice 2024* (2023) (“*Archbold*”) takes a similar approach. It sets out a specimen indictment for the offence reflecting what was said in *Morgan*. As to the elements of the offence, the editors state:

“*Whereas it is not necessary that the defendants be proved to have known the nature of the principal offence, his state of mind may be a material factor in mitigation and, in an exceptional case, it might be appropriate to invite the jury*

to return a special verdict on the point: Morgan (MM), above. The policy of the Act, however, is that those who assist offenders do so at their own peril, the punishment being directly related to the nature of the principal offence, not to the knowledge of the defendant” (18-41).

50. The section 4(1) offence is also discussed in *Smith, Hogan and Ormerod’s Criminal Law* (15th ed; 2018). The authors explain that there are two elements in the *mens rea* of the offence: (a) D must know or believe the offender to be guilty of the relevant offence which he had actually committed or some other relevant offence and (b) D must intend to impede the apprehension or prosecution of the offender. Here, of course, we are concerned only with element (a). As to that, the authors suggest that the subsection is “*unduly narrow*” in requiring knowledge or belief which, they say, may not capture a situation where D suspects that O is an offender but, shutting his eyes to an obvious means of knowledge, assists O (para 7.1.2.1).⁷

51. As to the import of the phrase “*some other relevant offence*”, the authors state:

“‘Some other relevant offence’ must refer to an offence which O has not committed, for otherwise the words are redundant. If D thinks he has seen O commit a robbery and acts with intent to conceal this, he will be guilty, though

⁷ Though if a jury concluded that a defendant had deliberately closed his or her eyes to the obvious because he or she did not want to be told the truth, that fact would be evidence capable of supporting a conclusion that the defendant knew or believed the fact in question: *R v Sherif* [2008] EWCA Crim 2653. This statement was cited with evident approval by Charleton J in *Sweeney v Ireland* [2019] IESC 39, [2019] 3 IR 431.

O had in fact committed a murder and not a robbery. This is obviously correct, where, as in this example, D's belief relates to the transaction which constituted the actual offence. Suppose, however, that unknown to D, O committed murder last week. D believes, wrongly, that O committed bigamy two years ago. If D does an act with intent to impede O's prosecution for bigamy – such as burning O's letter – it would seem very odd indeed that D should be liable only because O committed murder last week – his murder has nothing to do with the case. This suggests that the offence D supposes O to have committed must have arisen from the same transaction as the actual offence (and, undoubtedly, this will normally be the case) but to so hold would require the imposition of some limitation on the express words of the section” (para 7.1.2.3; my emphasis).

52. *Halsbury's Laws of England (Criminal Law (2020))* also discusses section 4(1). It explains that the reference to “*some other relevant offence*” does not require it to be proved that the accused knew that the facts of which they have knowledge constituted an “*arrestable*” offence but merely that the accused “*should have known all the facts which constitute the offence*” (para 84). That again appears to suggest that the accused must know what the principal offender did, and that it constituted a criminal offence, even if he did not know that the offence amounted to a relevant offence (or, as it would be here, an arrestable offence) and/or mistakenly believed that it amounted to offence X when in fact it involved offence Y (provided that offence X was an arrestable offence).

53. The section 4(2) offence was also considered by the (EW) Court of Appeal in *R v Saunders* [2011] EWCA Crim 1571. The decision is of particular interest because it considers the question of jury instruction in this context. The approach taken by the Court of Appeal is not readily reconcilable with *Morgan* (which does not appear to have been cited). *Saunders* appears to indicate that section 4(1) is to be read narrowly, requiring the prosecution to prove that the accused assisted the principal in the knowledge or belief that he had committed a specific offence, whether the offence charged or some other specific offence (or category of offence, such as an offence involving serious violence), arising from the same facts. If such an approach had been adopted here, Mr McAreavey would have had to have been acquitted.
54. *Morgan* was considered by Hutton J (as he then was) sitting in the Northern Ireland Crown Court in *R v Donnelly* [1986] NI 54. *Donnelly* involved an alleged offence of withholding information under section 5 of the Criminal Law Act (Northern Ireland) 1967. That offence also refers to the accused knowing or believing “*that the offence or some other arrestable offence has been committed*” (section 8 of the 1997 Act here is similar, though not identical to section 5 and also uses the language of “*some other arrestable offence*”).
55. The accused in *Donnelly* (D) was a farmer who had become aware that someone had placed beer kegs containing explosives in an outhouse on his farm. He contacted a person he believed to be a member of the Provisional IRA who confirmed that the kegs contained explosives and told him that the kegs would be taken away that night. On the following day, an explosion on a road near the accused’s farm killed a number of

soldiers. D was charged with withholding information. The particulars of the offence set out in the indictment stated that (unidentified) persons having committed the arrestable offence of murder and “*knowing or believing that the said arrestable offence or some other arrestable offence had been committed*” and that he had information likely to secure or assist in securing the apprehension etc of any person “*for that offence*”. D had failed without reasonable excuse to give the information to a constable. D sought a direction at the conclusion of the prosecution case. In response, the prosecution indicated that it was advancing a case in the alternative against him, namely that, even if he did not have the required knowledge or belief in relation to the murder of the soldiers, he knew or believed that “*some other arrestable offence*” – the possession of explosives by men on the run on the day before the murder - had been committed and that he had relevant information in relation to that offence. The judge was doubtful that the alternative formulation constituted an offence under section 5(1) but in any event he ruled that if the prosecution wished to pursue that alternative case, it should have been specifically set out in the particulars to the existing count in the indictment or in the particulars to an alternative count, so that the accused would have notice of the case being made against him. It was, Hutton J ruled, too late to permit any amendment of the indictment at that stage as all of the police witnesses had been cross-examined and an amendment would work injustice to the accused.

56. That ruling was given in the course of the trial. In a detailed written judgment given after the conclusion of the trial, Hutton J noted that, in giving that earlier ruling, he had not been referred to *Morgan*. But, he explained, consideration of *Morgan* had not caused him to alter his previous opinion. Having cited a lengthy passage from that

judgment, Hutton J observed that *Morgan* related to a different situation where, the EW Court of Appeal had held, “*the belief of the accused in relation to ‘some other arrestable offence’ is a belief which relates to the principal offence specified in the particulars which has actually been committed. In other words, where the actual crime committed by the principal offender was the murder of A, it did not matter if the accused believed that the principal offender in killing A was guilty only of the manslaughter of A*” (63G). That, in Hutton J’s view, was what Bridge J meant by his observations in *Morgan*, at 187, which have been set out above.

57. Hutton J went on:

“I further consider that the judgment in Morgan's case confirms the doubt to which I referred in giving my ruling, and I am of opinion that the words "or some other arrestable offence" in paragraph (a) of section 5(1) are intended to cover the situation where the accused knows the facts or some of the facts of the actual offence which has been committed by the principal offender, but believes that those facts constitute a different offence from the offence in truth committed, as where, for example, the actual offence is robbery and the accused believes it to be theft, or the actual offence is manslaughter and the accused believes it to be murder. But I consider that the words "or some other arrestable offence" in paragraph (a) do not cover the situation where the accused believes that some offence has been committed by reason of facts of which he is aware but those facts are quite separate and distinct from the facts which constitute the actus reus of the offence actually committed by the principal offender.

Therefore, in this case, if the Crown wished to prosecute a charge under section 5(1) on the ground that the accused believed that the offence of possession of explosives had occurred on 12 July 1983, the indictment should have contained an additional count, the particulars of which should have stated:

'Hugh Francis Donnelly on a date unknown between, 12 day of July 1983 and the 19 day of May 1984, in the County Court Division Fermanagh and Tyrone, persons having committed an arrestable offence, namely the possession of explosive substances with intent, knowing or believing that the said arrestable offence or some other arrestable offence had been committed and that he had information which was likely to secure or be of material assistance in securing the apprehension, prosecution or conviction of any person for that offence, did fail without reasonable excuse to give that information within a reasonable time to a constable.'

For the reasons stated in R. v. Morgan the words "or some other arrestable offence" would mean that the accused could be guilty, even if he believed that the offence committed was possession of the explosives under suspicious circumstances and not possession with intent to endanger life or cause serious injury to property." (64-65).

58. *Donnelly* (which was not referred to by the parties) clearly involves a much narrower reading of *Morgan* than is, for instance, suggested in *Archbold* or *Blackstone*. Although

Donnelly was concerned with an offence of withholding information under section 5, rather than the section 4(1) offence of assisting an offender at issue in *Morgan*, the substance of Hutton J’s analysis does not appear to turn on any distinction between the two offences.

59. Were the approach adopted in *Donnelly* to be applied to the section 7(2) offence, it would inevitably follow that Mr McAreavey ought not to have been convicted. Here, the Director neither alleged nor proved that Mr McAreavey knew the facts or some of the facts of the actual offence committed by Mr Smyth but believed that those facts involved the commission of a different offence. The Director alleged, but failed to prove, that Mr McAreavey knew or believed that Mr Smyth had committed the offence of attempted murder. He was nonetheless convicted of assisting Mr Smyth in the knowledge or belief that he had committed “*an arrestable offence of some description*”, one with no necessary factual nexus whatever to the offence actually committed. Indeed, on the SCC’s analysis, the “*other arrestable offence*” had no tangible form or concrete factual foundation (it was, as Mr McAreavey’s counsel puts it, “*free-floating*”) beyond being an unspecified arrestable offence of sufficient seriousness to warrant the use, and subsequent deliberate burning-out, of a getaway car.

60. Section 7(2) is discussed in a number of Irish textbooks. None makes reference to *Morgan*. *Charleton & McDermott* states (at para 8.97) that two possible answers are open as to what degree of knowledge is sufficient to fix the accused with liability. The first – said to be consistent with *Egan* – is “*that the accused need merely know of the general category of offences perpetrated.*” On that basis, the authors explain, if the

accused thinks the principal offender committed theft, he is not an accomplice after the fact to murder. The second theory – characterised by the authors as “*less attractive*” and as “*incompatible with s7(2)*” – is that the prosecution must prove “*an accurate knowledge of the precise offence.*”

61. The narrower theory identified in *Charleton & McDermott*, requiring proof that the accused knew the precise offence committed by the principal, was not advanced by any of the parties. That is unsurprising. Such a construction of section 7(2) would indeed be at odds with the language of the subsection. As regards the broader theory, it appears to be implicit in it that the accused must have at least *some* knowledge of the factual circumstances in which the actual offence was committed by the principal offender. That was true in *Egan* and it was also true in *Madden* and in *Dekker*. What is clear, however, is that whatever the precise parameters of the broader theory supported by the learned authors, it would not extend to the conviction of an accused for a section 7(2) offence in circumstances where he or she “*had no idea*” what offence had actually been committed by the principal offender.
62. In MacAuley & McCutcheon, *Criminal Liability* (2nd ed; 2023) the authors note, without comment or criticism, the Judgment of the Court of Appeal in these proceedings: page 838.
63. Finally in McIntyre et al, *Criminal Law* (3rd ed; 2012) the authors note that the mental element is not confined to the offence that was in fact committed and that the *mens rea* extends to other arrestable offences that the accessory believes the principal has

participated in. Thus (the authors go on) if a person believes that he is assisting the principal in evading arrest for burglary but, in fact, the principal has committed the more serious offence of aggravated burglary involving the use of a knife, the person assisting will nonetheless be liable. Though not cited in the text, that approach is consistent with the approach suggested in *Donnelly*. It is also consistent with the approach favoured by *Charleton & McDermott*.

The Correct Construction of Section 7(2)

64. Section 7(2) undoubtedly presents real difficulties of construction. It is clear that a person (A) who assists the principal offender (P) who has committed arrestable offence X will be guilty of a section 7(2) offence if he or she provides that assistance *knowing* that P had committed that offence. A will also be guilty if he or she assists P, even if A does not *know* that P had committed offence X, provided that A *believed* that P had done so (as for instance where A is told by P that he had committed offence X but does not have any independent knowledge of that fact).

65. It is also clear that A may be guilty of an offence under section 7(2) where he or she assists P in the (mistaken) *belief* that P has in fact committed “*some other arrestable offence*.” “*Some other arrestable offence*” clearly refers to an offence *other than* the offence actually committed by P. But that leaves for resolution the difficult issue of whether and to what extent A’s belief must relate to a specific “*other arrestable offence*” or category of such offences.

66. One potential reading of “*some other arrestable offence*” is that the prosecution must allege and prove that A assisted P in the (mistaken) belief that P had committed a specific and identified “*arrestable offence*” (other than the offence actually committed by P). However, it seems implausible that, in enacting section 7(2), the Oireachtas intended to limit the scope of the assisting offence to such an extent. Notably, Mr McAreavey does not contend for such a narrow reading of the sub-section.
67. At the other end of the spectrum, “*some other arrestable offence*” may be read – as the SCC and Court of Appeal did – as importing “*an arrestable offence of some description*” or “*some offence of the requisite gravity*” without any requirement for the prosecution to establish that A believed that P had committed any particular offence or an offence of a particular nature or category. On this reading of section 7(2), A could be convicted of an offence where he assisted P believing that P had committed some arrestable offence, even though he may have had “*no idea*” what that offence was.
68. Between these outer bounds, there is the construction urged by Mr McAreavey. On his reading, A could be convicted under section 7(2) if he assisted P in the belief that P had committed an offence within the same category or of a similar nature as the actual offence. As already noted, that is the reading favoured by *Charleton & McDermott*. It derives from cases such as *Madden, Egan and Dekker*. Implicit in those cases, as I have said, is that A must have had at least *some* knowledge of the factual circumstances in which the actual offence was committed by the P. That requirement is made explicit in *Saunders*, and especially *Donnelly*, so that “*other arrestable offence*” would be construed as covering a “*situation where the accused knows the facts or some of the*

facts of the actual offence which has been committed by the principal offender, but believes that those facts constitute a different offence from the offence in truth committed.” That is, in essence, also the approach suggested in *Smith, Hogan and Ormerod’s Criminal Law* – the “*other arrestable offence*” must arise from the “*same transaction as the actual offence*”. While *Donnelly* does not in terms state that the offence which A (mistakenly) believed had been committed by P must be an offence within the same category or of a similar nature to the offence actually committed, that appears to follow from Hutton J’s analysis and is consistent with the statement (at 65-66) that A could be guilty “*even if he believed that the offence committed was possession of the explosives under suspicious circumstances and not possession with intent to endanger life or cause serious injury to property.*”

69. The SCC considered that there was no ambiguity in section 7(2). I disagree. Each of the readings set out above is plausible. I also respectfully disagree with the SCC insofar as it stated that, if section 7(2) is interpreted as importing a requirement of specificity, the subsection fails to change the law. Even if section 7(2) were to be construed so as to require the prosecution to specify (and prove) the “*other arrestable offence*” (or category of offence) that A *believed* had been committed by B, the offence is nonetheless broader in scope than the common law offence of being an accessory after the fact, which as I have explained required proof that the accessory *knew* of the actual offence committed by the principal offender. Thus – and this is significant in light of what the SCC stated at page 60 of its judgment and what the Court of Appeal said at paragraph 40 of its judgment – if it was established that Mr McAreavey had assisted Mr Smyth in the mistaken belief that Mr Smyth had in fact succeeded in murdering Mr

Gately, he *would* have been liable to conviction under section 7(2). Equally, if Mr McAreavey assisted Mr Smyth in the knowledge or belief that he had attempted to murder Mr Gately but had not succeeded in doing so, the fact that Mr Gately subsequently died from his injuries (if that had been the case) would not have excluded Mr McAreavey's liability. It is not necessary to adopt the broad construction of section 7(2) adopted by the SCC, and endorsed by the Court of Appeal, to accommodate uncertainties and contingencies of that kind.

70. A further and curious feature of the SCC's analysis of section 7(2) is that, on its approach, the subsection has two limbs, one of which is highly specific (knowledge on the part of the accused of the actual offence committed by the principal offender) while the other is wholly lacking in specificity (belief on the part of the accused that the principal must have done something "*really serious*"), such that the accused can be convicted without "*the other arrestable offence*" ever being specifically identified either by the prosecution or the court. If that is indeed the effect of section 7(2), one may wonder why, in a case such as this, the prosecution would ever seek to make the case based on the first limb, given the much less challenging threshold of proof presented by the second limb.

71. The approach adopted by the SCC, and endorsed by the Court of Appeal, also appears to me to be problematic at a more fundamental level. How can a court be sure that an accused *believed* (or, as *Blackstone* puts it, *positively* believed) that the principal offender was guilty of "*some other arrestable offence*" without first identifying what that offence was? In effect, the SCC appears to have proceeded on the basis of a form

of *constructive* belief (he *must* have believed) which it attributed to Mr McAreavey essentially by reason of the nature of the acts of assistance said to have been undertaken by him (assisting in the destruction of the getaway car) and not by reference to any knowledge of the offence committed by Mr Smyth and/or the factual circumstances in which that offence was committed.

72. Here the trial took place in the Special Criminal Court. But in a prosecution before a jury, how should the jury be instructed? Would they have to agree on what was the offence that the accused believed had been committed? If the SCC's approach is correct, it would appear not. It would, it seems, be enough if the jury were of the view that, whatever the offence that the accused may have believed to have been committed, it *must* have been a serious one, given the nature of the steps subsequently taken to avoid the offender's apprehension or prosecution. But without having some specific offence in mind, how could a jury be satisfied, beyond a reasonable doubt, that the offence met the threshold of seriousness (i.e. that it was an *arrestable* offence)?

73. Such an interpretation of section 7(2) would lend an essentially arbitrary character to this provision. It would mean that in the case of a jury trial the jury would be invited to engage in an essentially speculative exercise which would appear difficult to reconcile with fundamental requirements of a trial in due course of law for the purposes of Article 38.1. Clear words would be required for this purpose before one could properly ascribe such an intention to the Oireachtas. *Morgan*, it bears repeating, did not involve any such exercise. The only uncertainty in *Morgan* was whether the unlawful killing which M *knew* had been committed by P was, as a matter of law, murder or manslaughter.

Neither does *Saunders* support the approach of the SCC here. To the contrary, *Saunders* indicates that, in order to establish the criminal liability of A, it must be proved that he or she acted to assist P knowing or believing that P had committed a specific offence or an offence within a specific category (offences involving serious violence) even if that P was not charged with such an offence (and even if, as was the case in *Saunders*, P was not convicted of *any* offence). Furthermore – and significantly – *Saunders* suggests that such other offence must arise from the circumstances in which the P’s offence was allegedly committed. That is also said explicitly in *Donnelly*.

74. Here the Director alleged that Mr McAreavey assisted Mr Smyth knowing or believing him to have been guilty of the attempted murder of Mr Gately. However, the SCC found that that allegation had not been established to the requisite standard of proof. The SCC made no finding that Mr McAreavey knew anything of the factual circumstances in which Mr Smyth committed the offence of attempted murder or that he believed that those factual circumstances involved the commission of a different offence to the offence actually committed by Mr Smyth. Furthermore, and as already observed, the Director never actually identified – either in the indictment or in submission – what “*different offence*” Mr McAreavey believed Mr Smyth to have committed.

75. The construction of section 7(2) urged by the Director (and accepted by the SCC and the Court of Appeal) would involve a radical expansion of secondary liability for assisting an offender after the fact, compared to the pre-existing legal position. Of course, as Murray J observed in *Heather Hill*, one would expect that every statute ‘*changes*’ the law and there is no general presumption otherwise. But, as he explained,

there is a presumption that imprecise language will not be interpreted so as to impose significant changes to the pre-existing law. That presumption operates here – the language of section 7(2) is, in this respect, ambiguous – and weighs against the construction advanced by the Director.

76. There was also, he observed, a related presumption that legislation will be strictly construed when it interferes with vested rights. While that is not the position here, as a provision imposing criminal liability (and providing for very serious penalties on conviction) section 7(2) is subject to the rule of strict construction (or, as it is also put from time to time, the rule against doubtful penalisation). As the authorities discussed make clear, that is not a trump card that overrides all other rules of interpretation but, in the particular circumstances here, it is a significant element in the analysis. The expansive construction of section 7(2) urged by the Director does not, in my view, derive any support from a consideration of the purpose of section 7(2) or the context in which it was enacted. The principal purpose of the provision was to make provision for criminal liability for assisting an offender after the fact, in light of the abolition of the felony/misdemeanour distinction. While the Oireachtas broadened the scope of the offence, there is nothing in the Act to suggest that it intended to radically recast the offence in the manner suggested by the Director.

77. Whether an offence of such sweeping and uncertain scope would be consistent with Article 38 of the Constitution and/or Article 6 ECHR is certainly questionable. But in my view it is unarguable that the clearest and most express language would be required in order to give section 7(2) such a construction. The language actually used by the

Oireachtas – “*or some other arrestable offence*” – is certainly not apt to compel such a construction. Of course, in every dispute about statutory construction, the 20:20 vision of hindsight will almost always reveal how the disputed provision “*could have been expressed more clearly, or in words which resolve the particular issue found to arise*” but, as O’ Donnell CJ explained in *AC*, that is rarely a decisive factor. Even so, in this particular context, involving as it does a provision creating a serious criminal offence, it is in my view legitimate to observe that, if the Oireachtas intended to provide for the imposition of criminal liability where on the basis contended for by the Director here, it could – and should – have said so in clear terms. It has in fact done in other contexts. Thus, for instance, section 72 of the Criminal Justice Act 2006 (as amended), which criminalises participation in and/or contribution to the activities of a criminal organisation, provides expressly that the prosecution does not have to prove “*knowledge on the part of the defendant of the specific nature of any offence*” which the activities of the defendant contributed to or facilitated.

78. Absent such clear language, and having regard to the proper approach to the construction of a statutory provision creating a criminal offence, the Director’s construction of section 7(2) must be rejected. It follows that it is not sufficient for the prosecution to prove that the accused knew or believed that that person was guilty of some unspecified and unidentified offence of sufficient gravity as to constitute an arrestable offence.

79. What then is the correct construction of that sub-section? In my view, it would be unduly restrictive to interpret section 7(2) as requiring the prosecution to prove that A

assisted P in the belief that P had committed a specific identified “*other arrestable offence*”. The better reading, in my view, involves reading “*some other arrestable offence*” as an offence within the same category or of a similar nature to the offence actually committed by P and arising from the same transaction. The reference to “*some other arrestable offence*” thus covers “*the situation where the accused knows the facts or some of the facts of the actual offence which has been committed by the principal offender, but believes that those facts constitute a different offence from the offence in truth committed*” (per Hutton J in *Donnelly*). There is support both in commentary (*Smith, Hogan and Ormerod* and *Halsbury*) and in the cases (*Saunders* and *Donnelly*) for reading section 7(2) in that way and such an approach is also consistent with the pre-1997 Act caselaw relating to liability as an accessory before the fact such as *Madden, Egan* and *Dekker*. While that caselaw is not directly applicable (because it related to accessories before rather than after the fact), the language of section 7(2) is entirely consistent with a legislative intention to broaden the liability of those assisting offenders in that way. Any narrower reading of section 7(2) – one requiring the prosecution to prove a belief on the part of A that P had committed a specific identified arrestable offence – would significantly constrain the practical utility of section 7(2) by placing on the prosecution a burden which, in practice, could be very difficult to discharge. Of course, it may be suggested that the reading of section 7(2) I have suggested places too onerous a burden on the prosecution, particularly in the context of organised crime. If the Oireachtas is persuaded of that view, then - subject of course to the provisions of the Constitution - it will be open to it to amend section 7(2) and/or legislate so as to provide for some alternative offence.

80. Here, the Director alleged that Mr McAreavey assisted Mr Smyth knowing that he had committed the offence of attempted murder but failed to make that allegation out to the requisite standard of proof. The Director did not allege, and the SCC did not find, that Mr McAreavey knew the facts or some of the facts of the actual offence which had been committed but believed that those facts constituted a different offence within the same category of offence or an offence of a similar nature, such as an offence of violence and/or an offence involving the use of a firearm. Instead, the SCC effectively inferred from Mr McAreavey's involvement in the burning-out of the black Lexus that he must have believed that Mr Smyth had committed an arrestable offence of some kind. For the reasons just set out, that was not a sufficient basis on which to convict Mr McAreavey of an offence under section 7(2).
81. Accordingly, Mr McAreavey's conviction must therefore be quashed. Any question of consequential orders should be the subject of further argument.