

ACCESSORY BEFORE THE FACT

Section 2 of chapter 274 of our General Laws provides for the punishment of any person who:

“is accessory [to a felony] before the fact
by counseling, hiring or otherwise procuring
such felony to be committed”

The phrase “before the fact” refers to time; the defendant is accused of having been an accessory to a felony before that felony was committed.

To prove the defendant guilty of being an accessory before the fact to a felony, the Commonwealth must prove three things beyond a reasonable doubt:

First: That someone other than the defendant committed a felony;

Second: That the defendant was an accessory to that felony by counseling, hiring, or in some other way arranging for that person to commit the felony; and

Third: That the defendant did so with the same intent that the principal person was required to have to be guilty of the felony.

As to the first element, a “felony” is a crime for which a person may

be sent to state prison. Other, lesser crimes are called “misdemeanors.” I instruct you as a matter of law that [relevant felony] is a felony. Before you may find the defendant guilty of being an accessory before the fact to that felony, the Commonwealth must prove beyond a reasonable doubt that the principal person whom the defendant is accused of aiding, did in fact commit that felony.

Here charge on the elements of the underlying felony.

Second, the Commonwealth must prove that this defendant counseled, or hired, or otherwise procured or encouraged or assisted that person in committing the felony. This requires a greater involvement than merely knowing about the crime, but it does not require that the defendant physically took part in the crime itself. It is enough if the Commonwealth proves that the defendant joined the criminal venture and took some significant role in it; that he (she) encouraged the principal person to commit the crime, or helped to plan or commit the crime, or stood by to help with the crime if he (she) were needed.

Thirdly, the Commonwealth must prove that the defendant had the

same intent that the principal person is required to have had to be found guilty. The defendant must not only have had knowledge of what was being planned; he (she) must have intended to be part of it.

For an elaboration of the intent requirement, see Instruction 4.200 (Joint Venture).

SUPPLEMENTAL INSTRUCTION

Where principal and accessory tried together.

I have instructed you

that, as part of its case against the defendant, the Commonwealth must prove beyond a reasonable doubt that the principal person is guilty of the felony which this defendant is accused of having aided or encouraged. Therefore, if your verdict is that the accused principal person, _____, is not guilty of the felony, you are also required to find this defendant not guilty on this charge of being an accessory before the fact.

NOTES:

1. **Accessory or principal?** A person who “counsels, hires or otherwise procures a felony to be committed may be [charged] and convicted as an accessory before the fact, either with the principal felon or after his conviction” G.L. c. 274, § 3, and upon conviction may be punished as a principal, G.L. c. 274, § 2.

At common law, an accessory before the fact is a person who advises, aids or abets another to commit a felony and is absent from (or present but not participating at) the crime scene, as distinguished from a principal in the second degree, who is a person present at a felony scene aiding and abetting the person actually committing the

offense. *Commonwealth v. Mannos*, 311 Mass. 94, 109-110, 40 N.E.2d 291, 299-300 (1942); *Commonwealth v. Bloomberg*, 302 Mass. 349, 352-353, 19 N.E.2d 62, 64 (1939); *Commonwealth v. DiStasio*, 287 Mass. 347, 356-357, 8 N.E.2d 923, 928-929, cert. denied, 302 U.S. 683 (1937). General Laws c. 274, §§ 2-3 were amended by St. 1968, c. 206 to require that accessories before the fact be charged and tried as principals, see *Commonwealth v. Morrow*, 363 Mass. 601, 667, 296 N.E.2d 468, 475 (1973); *Commonwealth v. Benjamin*, 358 Mass. 672, 679-681, 266 N.E.2d 662, 667-668 (1971); *Commonwealth v. Perry*, 357 Mass. 149, 151, 256 N.E.2d 745, 747 (1970), but that 1968 amendment was later repealed by St. 1973, c. 529.

A defendant can be charged both as a principal and as an accessory before the fact in alternate counts, *Commonwealth v. Merrick*, 255 Mass. 510, 513, 152 N.E.2d 377, 378 (1926), but it is no longer common to do so, since G.L. c. 274, § 3 now permits an accessory before the fact to be tried either: (1) as an accessory before the fact, whether with the principal or separately, or (2) as a principal on the substantive felony. See *Commonwealth v. James*, 30 Mass. App. Ct. 490, 498 n.9, 570 N.E.2d 168, 174 n.9 (1991) (“[I]t seems accepted, under G.L. c. 274, § 2 . . . that a person [charged] as a principal may be convicted on a showing of accessorial, or joint venture, involvement”). If the principal felon and the accessory before the fact are tried together, the jury should be instructed that if they find the principal felon not guilty, they must find the accessory not guilty as well.

One may be charged as an accessory before the fact only to a felony; an accessory before the fact to a misdemeanor must be charged as a principal. See *Commonwealth v. Sherman*, 191 Mass. 439, 440, 78 N.E. 98, 99 (1906).

2. **Proving guilt of principal.** General Laws c. 274, § 3 has eliminated the common law requirement that the principal felon must already have been convicted prior to any prosecution of an accessory before the fact. However, in any prosecution for being an accessory before the fact, the principal's guilt must be proved beyond a reasonable doubt. *Commonwealth v. Reynolds*, 338 Mass. 130, 135, 154 N.E.2d 130, 134 (1958); *Bloomberg, supra*; *Commonwealth v. Kaplan*, 238 Mass. 250, 253-254, 130 N.E. 485, 486 (1921). The principal's guilt cannot be proved by producing the record of conviction or by offering testimony that the principal has pleaded guilty, *Commonwealth v. Tilley*, 327 Mass. 540, 546-549, 99 N.E.2d 749, 753-755 (1951); *Commonwealth v. Alicea*, 6 Mass. App. Ct. 904, 905, 378 N.E.2d 704, 705-706 (1978), nor by statements of the principal that are inadmissible as to the accessory, *Reynolds, supra*.

3. **Intent.** An accessory before the fact must share the criminal intent required of the principal, *Commonwealth v. Stout*, 356 Mass. 237, 240, 249 N.E.2d 12, 15 (1969); *Commonwealth v. Adams*, 127 Mass. 15, 17 (1879), although it is enough if the intent is conditional or contingent, *Commonwealth v. Richards*, 363 Mass. 299, 307-308, 293 N.E.2d 854, 860 (1973); *Commonwealth v. Fillipini*, 1 Mass. App. Ct. 606, 612-613, 304 N.E.2d 581, 585 (1973).

4. **Participation.** An accessory need not have physically participated in the crime, but active association with the venture and some significant participation by counseling, aiding or abetting is required. Conspiracy alone is not sufficient. *Commonwealth v. French*, 357 Mass. 356, 391-393, 259 N.E.2d 195, 222-223 (1970), judgments vacated as to death penalty sub nom. *Limone v. Mass.*, 408 U.S. 936 (1972); *Commonwealth v. Perry*, 357 Mass. 149, 152, 256 N.E.2d 745, 767 (1970). Knowledge, acquiescence and later concealment are not sufficient. *Commonwealth v. Raposo*, 413 Mass. 182, 595 N.E.2d 311 (1992) (evidence must show not only knowledge and shared intent, but also some sort of act that contributed to its happening); *Continental Assurance Co. v. Diorio-Volungis*, 51 Mass. App. Ct. 403, 409, 746 N.E.2d 550, 555 (2001). The accessory may be prosecuted for acts that took place outside Massachusetts if he or she intended them to have effect here. *Commonwealth v. Fafone*, 416 Mass. 329, 330, 621 N.E.2d 1178, 1179 (1993). An accessory before the fact need not have been the sole cause of the crime, *Merrick*, 255 Mass. at 515, 152 N.E.2d at 379, and need not have had direct contact with the principal; indirect contact through a third party can suffice, *Commonwealth v. Smith*, 93 Mass. 243, 256-257 (1865).

5. **Statute of limitations.** The statute of limitations for prosecution as an accessory before the fact runs from the date of the completed substantive felony. *Commonwealth v. Geagan*, 339 Mass. 487, 518-519, 159 N.E.2d 870, 891, cert. denied, 361 U.S. 895 (1959).