



6-1-1976

## Testimony of Accessory after the Fact Need Not Be Corroborated.

Claude M. McQuarrie III

Follow this and additional works at: <https://commons.stmarytx.edu/thestmaryslawjournal>



Part of the [Criminal Law Commons](#), and the [Evidence Commons](#)

---

### Recommended Citation

Claude M. McQuarrie III, *Testimony of Accessory after the Fact Need Not Be Corroborated.*, 8 ST. MARY'S L.J. (1976).

Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol8/iss2/11>

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in St. Mary's Law Journal by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact [egoode@stmarytx.edu](mailto:egoode@stmarytx.edu), [sfowler@stmarytx.edu](mailto:sfowler@stmarytx.edu).

that of the welfare recipient whom the Court favored with a pretermination hearing in *Goldberg*.

The holding in *Eldridge* is troubling. While not the first major case since *Goldberg* to deny a predeprivation hearing,<sup>54</sup> the decision in *Eldridge* appears to presage a significant departure from the Court's recent concern with the rights of individuals in social welfare cases. The decision to deny a hearing to disability benefits recipients invites new challenges to the constitutionality of a summary termination of disability benefits and to the Court's sense of procedural due process.

*William R. Crow, Jr.*

**CRIMINAL PROCEDURE—Evidence—Accomplice Testimony—  
Testimony of Accessory After the Fact  
Need Not Be Corroborated**

*Easter v. State,*

536 S.W.2d 223 (Tex. Crim. App. 1976).

Wilmer Easter was convicted of murdering his ten month old daughter. At trial, the State relied heavily on his wife's uncorroborated testimony, and the court overruled his requested instruction to submit to the jury the issue of whether his wife, who had temporarily concealed the crime, was an accomplice witness. Easter contended on appeal that the court erred in refusing his instruction, urging that his wife was an accessory, and therefore an accomplice witness, which necessitated corroboration of her testimony. Held—*Affirmed*. An accessory is not an accomplice witness, and his uncorroborated testimony alone may support another's conviction.<sup>1</sup>

The statutory requirement of corroboration of an accomplice witness' testimony has long been in effect in Texas.<sup>2</sup> Although the Court of Criminal Appeals at an early date adopted a broad definition of the term

---

54. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 611 (1974) (pretermination hearing held unnecessary where full and immediate posttermination hearing provided).

1. *Easter v. State*, 536 S.W.2d 223, 229 (Tex. Crim. App. 1976).

2. Tex. Code Crim. P. art. 718 (1925); Tex. Code Crim. P. art. 781 (1895). The current statute, TEX. CODE CRIM. PROC. ANN. art. 38.14 (1965), provides: "A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense."

"accomplice witness,"<sup>3</sup> its interpretation disregarded the definition of "accomplice" found in the Penal Codes then in effect.<sup>4</sup> The enactment of the 1974 Texas Penal Code revised the law concerning parties to offenses,<sup>5</sup> setting forth a separate statute for accessorial conduct.<sup>6</sup> As a result, under the generally adopted test for determining whether a witness is subject to the corroboration rule, the court in *Easter v. State*<sup>7</sup> was confronted with interpreting the effect of the new Penal Code provisions on the procedural corroboration statute.

The rationale underlying the distrust and suspicion which has surrounded accomplice testimony had its basis in the theory that one accused of criminal activity may seek to procure clemency or immunity from the state by assisting in the conviction of others.<sup>8</sup> Even where no immunity or clemency had been promised, hope or expectation of procuring it was generally

---

3. *Williams v. State*, 53 Tex. Crim. 396, 399, 110 S.W. 63, 64 (1908). In *Williams*, the court held that an accomplice, for purposes of the corroboration rule, included principals, accomplices, accessories, and all *participes criminis*; that the term had a broader meaning for evidentiary purposes than was given in the then existing penal statutes; that it meant, generally, anyone *connected* with the crime by unlawful act or omission occurring before, at the time of, or after the offense, regardless of whether he was present or participated in the crime. *Id.* at 399, 100 S.W. at 64; *accord*, *Singletary v. State*, 509 S.W.2d 572, 575 (Tex. Crim. App. 1974); *Johnson v. State*, 502 S.W.2d 761, 763 (Tex. Crim. App. 1973); *Gausman v. State*, 478 S.W.2d 458, 460 (Tex. Crim. App. 1972); *King v. State*, 135 Tex. Crim. 513, 515, 121 S.W.2d 338, 339 (1938); see *Chappell v. State*, 519 S.W.2d 453, 460 (Tex. Crim. App. 1975); *Brown v. State*, 505 S.W.2d 850, 853 (Tex. Crim. App. 1974).

4. The wording of Tex. Pen. Code art. 79 (1895) was identical to that of Tex. Pen. Code art. 70 (1925), which provided:

An accomplice is one who is not present at the commission of an offense, but who, before the act is done, advises, commands or encourages another to commit the offense; or

Who agrees with the principal offender to aid him in committing the offense, though he may not have given such aid; or,

Who promises any reward, favor or other inducement, or threatens any injury in order to procure the commission of the offense; or,

Who prepares arms or aid of any kind, prior to the commission of an offense, for the purpose of assisting the principal in the execution of the same.

5. TEX. PENAL CODE ANN. §§ 7.01-.02 (1974).

6. *Id.* § 38.05, which provides:

(a) A person commits an offense if, with intent to hinder the arrest, prosecution, conviction, or punishment of another for an offense, he:

(1) harbors or conceals the other;

(2) provides or aids in providing the other with any means of avoiding arrest or effecting escape; or

(3) warns the other of impending discovery or apprehension.

(c) An offense under this section is a Class A misdemeanor.

7. 536 S.W.2d 223 (Tex. Crim. App. 1976).

8. *Oxenbergh v. State*, 362 P.2d 893, 896 (Alas.), *cert. denied*, 368 U.S. 56 (1961); *State v. Spruill*, 106 A.2d 278, 280 (N.J. 1954); 7 J. WIGMORE, EVIDENCE § 2057 at 322 (3d ed. 1940). One court, in discussing the suspicion surrounding an accomplice witness, characterized the extension of leniency as "bribery." *Newman v. State*, 334 N.E.2d 684, 686-87 (Ind. 1975).

suspected as being sufficient to motivate an accused who faced severe penalties to falsely testify against others in order to win the state's favor.<sup>9</sup>

Parties to crime in the modern common law were labeled as either principals or accessories.<sup>10</sup> A principal was either of the first or second degree.<sup>11</sup> An accessory, generally one who aided or encouraged the principal at a time or place other than that of the offense, was classified as either before or after the fact, depending upon when the aid or encouragement was given in relation to the crime's commission.<sup>12</sup>

There was a significance to the distinction between accessories before and after the fact. The modern common law recognized a lesser degree of culpability on the part of an accessory after the fact,<sup>13</sup> defining such a person as one who, knowing that a felony had been committed by another, intentionally shielded the felon from the law.<sup>14</sup> Additionally, while in the older common law an accessory after the fact was punished as a principal, in more recent times penalties have been reduced.<sup>15</sup>

Common law treatment of the term "accomplice" has been varied and confusing. Generally, it applied to all persons concerned with the commission of the offense, whether they were principals in the first or second degree or accessories before or after the fact.<sup>16</sup> The term was used generally to describe principals and accessories when discussing parties to crime and competency or admissibility of their testimony. In early practice little distinction was necessary when using the term in a cautionary instruction, for accessories after the fact, punishable as principals, evoked the same distrust of the court because of a suspected motivation to procure clemency.<sup>17</sup>

As punishments became less harsh and accessories after the fact were distinguished in degree of culpability from principals, definitions began to

9. *E.g.*, *People v. Leemon*, 328 N.E.2d 645, 648 (Ill. Ct. App. 1975); *State v. Guy*, 105 N.W.2d 892, 896 (Minn. 1960); *State v. Nice*, 401 P.2d 296, 297 (Ore. 1965); *see* 7 J. WIGMORE, *EVIDENCE* § 2057 at 322 (3d ed. 1940).

10. R. PERKINS, *CRIMINAL LAW AND PROCEDURE* 324 (4th ed. 1972).

11. *Id.* A principal of the first degree was one who actually did the act, and a principal of the second degree was one who, while actually or constructively present during the crime's commission, aided, encouraged, or abetted another in committing a crime. *Id.* at 326-27. There was little legal significance to this distinction, as prosecution of either could proceed independent of the other, and punishments were usually identical. *See id.* at 325-26.

12. *Id.* at 323-24.

13. *See People v. Jordan*, 91 N.E. 482, 484 (Ill. 1910).

14. *Skelly v. United States*, 76 F.2d 483, 487 (10th Cir.), *cert. denied*, 295 U.S. 757 (1935).

15. R. PERKINS, *CRIMINAL LAW AND PROCEDURE* 326 (4th ed. 1972).

16. *See Tomlinson v. United States*, 93 F.2d 652, 655 (D.C. Cir. 1937), *cert. denied*, 303 U.S. 646 (1938); *State v. Quinlan*, 41 N.W. 299, 300 (Minn. 1889). *See generally* 23 C.J.S. *Criminal Law* § 786(1) (1961).

17. R. PERKINS, *CRIMINAL LAW AND PROCEDURE* 326 (4th ed. 1972); 7 J. WIGMORE, *EVIDENCE* § 2058 at 325 (3d ed. 1940).

vary<sup>18</sup> according to the differing views regarding the degree of criminal involvement necessary for one to be an accomplice.<sup>19</sup> A few jurisdictions, including Texas, distinguished between the terms "accomplice" and "accomplice witness," holding the latter to have a broader meaning.<sup>20</sup> The problem of determining whether accessories after the fact fall within the meaning of "accomplice" as used in the corroboration rule has usually been solved by invoking the general rule that unless one could be indicted for the same offense for which the person aided was on trial, he could not be an accomplice witness.<sup>21</sup>

Because the common law rule required only a cautionary instruction as to the credibility of accomplice testimony,<sup>22</sup> many jurisdictions have effected by statute the requirement of corroborative evidence.<sup>23</sup> Most of these statutes retain the common law term "accomplice" as it was used in the cautionary instruction,<sup>24</sup> though a few define it in terms of principals, accessories, or other participants to crime.<sup>25</sup> Subsequent judicial interpreta-

18. Compare *Mills v. State*, 17 S.E.2d 719, 724 (Ga. 1941), with *Rector v. State*, 17 P.2d 519 (Okla. Crim. App. 1932), and *State v. Turnbow*, 193 P. 485, 487-88 (Ore. 1920). See generally 23 C.J.S. *Criminal Law* § 786(1) (1961).

19. Compare *State v. Johnson*, 165 N.E.2d 814, 824 (Ohio Ct. App. 1960) (one must have freely and voluntarily engaged with another in commission of crime), with *Palmer v. State*, 228 P.2d 391, 392 (Okla. Crim. App. 1951) (one need only have been culpably implicated in commission of crime charged), and *Gausman v. State*, 478 S.W.2d 458, 460 (Tex. Crim. App. 1972) (person connected with crime by unlawful act or omission).

20. See *People v. Basch*, 365 N.Y.S.2d 836, 838-39 (1975); *Williams v. State*, 53 Tex. Crim. 396, 399, 110 S.W. 63, 64 (1908). *Contra*, *State v. Weston*, 219 P. 180, 186 (Ore. 1923).

21. E.g., *Kearce v. State*, 172 S.E. 643, 644 (Ga. 1934); *State v. Jones*, 88 N.W. 196, 198 (Iowa 1901); *State v. Edlund*, 160 P. 534, 535 (Ore. 1916); accord, *Gordon v. State*, 533 P.2d 25, 30 (Alas. 1975); *State v. Johnson*, 139 N.W.2d 232, 236 (S.D. 1965).

22. *Caminetti v. United States*, 242 U.S. 470, 495 (1917); *United States v. Bermudez*, 526 F.2d 89, 99 (2d Cir. 1975); *United States v. Cady*, 495 F.2d 742, 745 (8th Cir. 1974). About half of the states, having no statute requiring an accomplice's corroboration, still follow the common law rule that accomplice testimony may be less worthy of belief, but it need not be corroborated. E.g., *Rich v. State*, 322 So. 2d 468, 469 (Miss. 1975); *Commonwealth v. Tervalon*, 345 A.2d 671, 677-78 (Pa. 1975); *Kutchera v. State*, 230 N.W.2d 750, 758 (Wis. 1975).

23. To date, almost one-half of the states have such statutes. E.g., CAL. PENAL CODE § 1111 (Deering 1976); GA. CODE ANN. § 38-121 (1974); MINN. STAT. § 634.04 (1945); N.Y. CRIM. PROC. LAW § 60.22 (McKinney 1971). There is no comparable federal statute, and none of the federal courts now requires corroboration. E.g., *United States v. Bermudez*, 526 F.2d 89, 99 (2d Cir. 1975); *United States v. Micciche*, 525 F.2d 544, 546 (8th Cir. 1975); *United States v. Beasley*, 519 F.2d 233, 242 (5th Cir. 1975). *But see* *United States v. Cravero*, 530 F.2d 666, 670 (5th Cir. 1976) (corroboration not required unless testimony unbelievable on its face).

24. E.g., GA. CODE ANN. § 38-121 (1974); MINN. STAT. § 634.04 (1945); TEX. CODE CRIM. PROC. ANN. art. 38.14 (1965).

25. E.g., CAL. PENAL CODE § 1111 (Deering 1976) ("indictability" test); MONT. REV. CODES ANN. § 95-3012 (Supp. 1975) (persons legally responsible for same crime); N.Y. CRIM. PROC. LAW § 60.22 (McKinney 1971) (persons who participated in offense

tions almost invariably have excluded accessories after the fact from the definition of an accomplice within their jurisdictions' statutes requiring corroboration of an accomplice witness.<sup>26</sup> Only a small minority of jurisdictions specifically included accessories after the fact in the definition, primarily through judicial construction of statutes which made accessories after the fact punishable as principals.<sup>27</sup>

Since 1895, the Texas Codes of Criminal Procedure have required that the testimony of an accomplice be corroborated.<sup>28</sup> Despite distinctions between "accomplice" and "accessory,"<sup>29</sup> Texas courts repeatedly held that, for purposes of the corroboration rule, the term "accomplice" included accessories after the fact.<sup>30</sup> It is of significance that while those codes were in effect, "accomplices" were punishable by the same penalty as were principals,<sup>31</sup> and "accessories" were punishable only to the extent of the lowest penalty to which the principal would have been liable.<sup>32</sup>

The 1974 Penal Code, however, significantly changed the law relating to parties to crime, particularly with respect to accessorial conduct.<sup>33</sup> It abolished the distinction between principals and accomplices,<sup>34</sup> effectively

---

charged or offense based on same or some of same facts or conduct constituting offense charged). The practice commentary to the New York statute takes the position that the "indictability" test is too restrictive and at odds with the purpose of the doctrine. Denzer, *Practice Commentary*, N.Y. CRIM. PROC. LAW § 60.22 (McKinney 1971).

26. See, e.g., *People v. Tewksbury*, 127 Cal. Rptr. 135, 140 (1976); *Ford v. State*, 207 S.E.2d 494, 499 (Ga. 1974); *State v. Swynigan*, 229 N.W.2d 29, 32 (Minn. 1975); *Edmondson v. State*, 532 P.2d 81, 84 (Okla. Crim. App. 1975).

27. *Odom v. State*, 533 S.W.2d 514, 516 (Ark. 1976); *Singletary v. State*, 509 S.W.2d 572, 575 (Tex. Crim. App. 1974); *State v. Callaway*, 267 P.2d 970, 979 (Wyo. 1954) (cautionary rule only); cf. *People v. Basch*, 365 N.Y.S.2d 836, 838 (1975) (by inference rejecting "indictability" test). Effective January 1, 1976, Arkansas repealed its statutes enabling punishment of accessories after the fact as principals. Ark. Acts 1975, No. 928, § 3. The replacing statutes separately proscribe after the fact accessorial conduct under a hindering statute, thus placing into doubt the validity of the past cases with regard to an accessory after the fact being an accomplice witness. ARK. STAT. ANN. § 41-2805 (Supp. 1976).

28. TEX. CODE CRIM. PROC. ANN. art. 38.14 (1965); Tex. Code Crim. P. art. 718 (1925); Tex. Code Crim. P. art. 781 (1895).

29. Tex. Pen. Code arts. 70, 77 (1925); Tex. Pen. Code arts. 79, 86 (1895). When one compares Tex. Pen. Code art. 70 (1925) with 4 W. BLACKSTONE, COMMENTARIES \*36-37, it will be seen that the definition of "accomplice" followed generally the common law definition of an accessory before the fact. Likewise, when one compares Tex. Pen. Code art. 77 (1925) with 4 W. BLACKSTONE, COMMENTARIES \*37-38, it will be evident that the definition of "accessory" followed very closely the common law definition of an accessory after the fact.

30. E.g., *Singletary v. State*, 509 S.W.2d 572, 575 (Tex. Crim. App. 1974); *Wade v. State*, 367 S.W.2d 337, 338 (Tex. Crim. App. 1963); *Orr v. State*, 124 Tex. Crim. 252, 257, 61 S.W.2d 490, 492 (1933); *Williams v. State*, 53 Tex. Crim. 396, 399, 110 S.W. 63, 64 (1908).

31. Tex. Pen. Code art. 72 (1925); Tex. Pen. Code art. 81 (1895).

32. Tex. Pen. Code art. 79 (1925); Tex. Pen. Code art. 88 (1895).

33. See TEX. PENAL CODE ANN. §§ 7.01-02, 38.05 (1974).

34. *Id.* § 7.01(c).

making a common law accessory before the fact a principal chargeable with the commission of the offense.<sup>35</sup> Additionally, it included a provision which, according to the court in *Easter*,<sup>36</sup> makes the conduct of a common law accessory after the fact a separate offense punishable as a class A misdemeanor in all cases.<sup>37</sup> This provision, however, falls short of encompassing the conduct of accessories after the fact as formerly defined in Texas and at common law by not requiring knowledge by the defendant that the person he aided had committed a crime.<sup>38</sup>

The legislature, which deleted the definition of "accomplice" from the penal laws of the state, should have foreseen the potential ambiguity which was to result when attempting to implement the accomplice corroboration rule found in article 38.14 of the Code of Criminal Procedure. The explanation for this oversight may be the legislature's observation that the Court of Criminal Appeals, in applying the corroboration rule up to that time, had not followed the Penal Code's definition of "accomplice," but had instead used their own broader "accomplice witness" interpretation.<sup>39</sup> Regardless of the cause, the absence of adequate statutory definitions in the 1974 Penal Code, coupled with the lack of coordination between the applicable provisions of the 1974 Penal Code and existing Code of Criminal Procedure, provided a clear opportunity for the court to bring Texas within the majority rule that an accessory after the fact is not an accomplice witness.

In *Easter v. State*<sup>40</sup> the court took advantage of that opportunity by holding that an accessory after the fact no longer falls within the definition of an accomplice witness.<sup>41</sup> The court's rationale was based upon the test already used in a majority of jurisdictions for determining whether a witness is an accomplice witness under the procedural corroboration statute. This test, the use of which in Texas the court said was "well settled,"<sup>42</sup> is known as the "indictability" test, and it makes the corroboration requirement dependent on whether the witness could be indicted and convicted of the

---

35. Compare TEX. PENAL CODE ANN. §§ 7.01(a), 7.02(a)(2) (1974), with 4 W. BLACKSTONE, COMMENTARIES \*36-37.

36. *Easter v. State*, 536 S.W.2d 223, 229 (Tex. Crim. App. 1976).

37. Compare TEX. PENAL CODE ANN. § 38.05 (1974), with 4 W. BLACKSTONE, COMMENTARIES \*37-38.

38. Searcy & Patterson, *Practice Commentary*, TEX. PENAL CODE ANN. § 38.05 (1974); see *Easter v. State*, 536 S.W.2d 223, 229 (Tex. Crim. App. 1976); *Clark v. State*, 159 Tex. Crim. 187, 194, 261 S.W.2d 339, 344, *cert. denied*, 346 U.S. 855 (1953). Compare TEX. PENAL CODE ANN. § 38.05 (1974), with Tex. Pen. Code art. 77 (1925), and 4 W. BLACKSTONE, COMMENTARIES \*37.

39. See cases cited note 30 *supra*.

40. 536 S.W.2d 223 (Tex. Crim. App. 1976).

41. *Id.* at 228-29.

42. *Id.* at 227. The court supported this conclusion with two older Texas cases and several cases from other jurisdictions. *Id.* at 227.

crime for which the accused was being tried.<sup>43</sup> By citing *Liegois v. State*,<sup>44</sup> which had relied on substantially the same test, the court implied that the test had been continuously in effect in Texas.<sup>45</sup> A closer examination of more recent case law would have revealed, however, a slight but significant difference in the state of the law.<sup>46</sup>

First, the test relied on by the court has not been used consistently in Texas. The test more frequently used defined an accomplice witness as one who, as a principal, an accomplice, or an accessory, was connected with the crime by unlawful act or omission on his part, transpiring before, at, or after the commission of the offense, whether or not he was present and participated in the crime.<sup>47</sup> In 1972, when the court mentioned the "indictability" test, it indicated that the test was not an all-inclusive one, inferring that others who may not meet its requirements may still fall within the definition of an accomplice witness.<sup>48</sup> Since principals, accomplices, and accessories were all indictable under the former penal provisions,<sup>49</sup> the use of "indictability" seems to have been a logical *result* of the definition already in use.<sup>50</sup> Texas cases have not indicated that "indictability" alone was either the source of the term's definition or the controlling factor in problems involving interpretation.

The "indictability" test, as used in Texas, was not whether the accessory could have been tried for the *same* offense for which the aided person was on trial. Instead, it was whether the witness could be tried as a principal, an accomplice, or an accessory to the crime for which the aided person was being tried.<sup>51</sup> Accomplice witnesses were repeatedly held to be those who could be tried under the old penal codes as accessories to the person aided.<sup>52</sup>

---

43. *Id.* at 227-29. The inference is that the complicity of a witness indictable for a lesser crime, hence his potential punishment and consequent motivation to avoid punishment, is not of such a degree as to justify suspicion of the veracity of his testimony. *See id.* at 227-29.

44. 73 Tex. Crim. 142, 164 S.W. 382 (1914).

45. *Easter v. State*, 536 S.W.2d 223, 227 (Tex. Crim. App. 1976).

46. *See cases cited note 30 supra.*

47. *Singletary v. State*, 509 S.W.2d 572, 575 (Tex. Crim. App. 1974); *Brown v. State*, 505 S.W.2d 850, 853 (Tex. Crim. App. 1974); *Johnson v. State*, 502 S.W.2d 761, 763 (Tex. Crim. App. 1973); *Gausman v. State*, 478 S.W.2d 458, 460 (Tex. Crim. App. 1972); *Williams v. State*, 53 Tex. Crim. 396, 399, 110 S.W. 63, 64 (1908).

48. *Gausman v. State*, 478 S.W.2d 458, 460 (Tex. Crim. App. 1972) where the court said, "[f]requently, the test . . . is . . . ." (emphasis added). *Id.* at 460.

49. Tex. Pen. Code arts. 65, 72, 79 (1925).

50. *See Gausman v. State*, 478 S.W.2d 458, 460 (Tex. Crim. App. 1972); *Williams v. State*, 53 Tex. Crim. 396, 399, 110 S.W. 63, 64 (1908).

51. *Williams v. State*, 464 S.W.2d 842, 844 (Tex. Crim. App. 1971); *Devault v. State*, 449 S.W.2d 235, 236 (Tex. Crim. App. 1970). Indictments were required to accurately allege the accused's status. *Jones v. State*, 505 S.W.2d 903, 906-07 (Tex. Crim. App. 1974).

52. *E.g.*, *Singletary v. State*, 509 S.W.2d 572, 575-76 (Tex. Crim. App. 1974); *Ysaga v. State*, 444 S.W.2d 305, 308 (Tex. Crim. App. 1969); *Welch v. State*, 153 Tex. Crim. 416, 418, 219 S.W.2d 804, 805 (1949).



These same persons, under the 1974 Penal Code, are still liable to prosecution, the only difference being that they may be tried under a different section than that under which principals are tried.<sup>53</sup> The court's basing of its rationale on this technical, "separate offense" distinction is questionable since there were also separate articles in the old penal codes, each of which independently proscribed the conduct of principals, accomplices, and accessories.<sup>54</sup> Accessories after the fact were not technically chargeable for the same offense as the principal even under the old codes; instead, they were chargeable as accessories to the particular crime.<sup>55</sup>

A difference between the old and new statutes which may be relevant to the corroboration rule's rationale<sup>56</sup> and which may justify the court's distinction is that the punishment for an accessory was the same or similar as that for the principal under the old codes,<sup>57</sup> while it is different (usually less) under the new code.<sup>58</sup> Whether the difference in severity of punishment alone should remove the requirement of corroboration is at least arguable, however, since the requirement of corroboration arises out of suspicion of accomplice testimony because of the accomplice's fear of being punished, not necessarily his fear of receiving the same punishment received by the principal.

The "indictability" test's logic has been attacked in a few decisions.<sup>59</sup> For example, a New Jersey case, *State v. Spruill*,<sup>60</sup> reversing the lower court opinion which was relied upon in *Easter*,<sup>61</sup> calls attention to the underlying rationale justifying the corroboration requirement: the witness' interest in and his ability to influence the outcome of the litigation arouses suspicion of accomplice testimony.<sup>62</sup> That the witness is punishable for his complicity and may try to win immunity or leniency in exchange for his testimony would seem to be the more logical and dispositive consideration, not whether he is subject to indictment or information under the same penal article as is

53. TEX. PENAL CODE ANN. § 38.05 (1974).

54. Tex. Pen. Code arts. 65, 70, 77 (1925); Tex. Pen. Code arts. 74, 79, 86 (1895).

55. *Jones v. State*, 505 S.W.2d 903, 906-07 (Tex. Crim. App. 1974); *Weaver v. State*, 112 Tex. Crim. 546, 548, 17 S.W.2d 1066, 1067-68 (1929).

56. See text accompanying note 43 *supra*.

57. Tex. Pen. Code art. 79 (1925); Tex. Pen. Code art. 88 (1895).

58. Under TEX. PENAL CODE ANN. § 38.05(c) (1974), an accessory is punishable always as a class A misdemeanor.

59. *Egan v. United States*, 287 F. 958, 964 (D.C. Cir. 1923) (cautionary instruction); *State v. Spruill*, 106 A.2d 278, 281-82 (N.J. 1954) (cautionary instruction).

60. 106 A.2d 278 (N.J. 1954).

61. *Easter v. State*, 536 S.W.2d 223, 227 (Tex. Crim. App. 1976).

62. *State v. Spruill*, 106 A.2d 278, 281 (N.J. 1954). Holding the state's witnesses, who had been indicted only for *other related* offenses, to have been accomplice witnesses for purposes of the cautionary instruction, the New Jersey Supreme Court said, "[l]egal discretion does not mean arbitrary action, but judgment reasonably exercised . . ." *Id.* at 282. The *Easter* court's use of *Spruill* in supporting the adoption of the "indictability" test is, therefore, questionable.

the principal against whom he testifies. Several courts have voiced similar reasoning, requiring complicity in only some part of the offense by an accomplice witness.<sup>63</sup> The majority of the courts in the country have, however, employed the "indictability" test in excluding accessories after the fact from the category of accomplice witnesses.<sup>64</sup>

An inconsistency in the logic of the *Easter* decision arises from an aspect of the "indictability" test's past use in Texas. Formerly, by statute certain persons because of their domestic status could not be charged as accessories.<sup>65</sup> By judicial decision, however, those same persons were held to be accomplice witnesses during the same period that the well-settled "indictability" test was supposedly in effect in Texas.<sup>66</sup> It does not, therefore, appear that Texas saw a need to adhere rigidly to the test. The court in *Easter* was non-committal toward the prior validity of those cases but concluded that they were "no longer viable."<sup>67</sup> Whatever their present viability, their mere existence illustrates the error of the court's expression of what the test formerly has been in Texas.

The effect of the unqualified adoption of the test is ironically to be found in the opinion itself, where the court distinguishes between "accomplice" and "accomplice witness," saying that the latter has a "much broader meaning."<sup>68</sup> The obvious effect of the decision, however, is to *restrict* the meaning of an accomplice witness to common law principals and accessories before the fact.<sup>69</sup> Since common law accessories before the fact were statutorily designated in Texas as accomplices, the court's holding in *Easter* effectively redefines an accomplice witness as one who was, under the old penal codes, either a principal or an accomplice.<sup>70</sup> The "broader meaning" referred to in the opinion is thus ignored. "Indictability" is now apparently the exclusive test for determining whether one is an accomplice witness.<sup>71</sup> It

63. The inference is that the punishments faced by accomplice witnesses for the lesser crimes with which they were chargeable, though less than those faced by the principal against whom they testified, were nevertheless sufficient to warrant suspicion of their motivations in testifying for the state. *Egan v. United States*, 287 F. 958, 964 (D.C. Cir. 1923) (cautionary instruction); *People v. Basch*, 365 N.Y.S.2d 836, 838 (1975) (corroboration); see *Odom v. State*, 533 S.W.2d 514, 516 (Ark. 1976) (corroboration); *State v. Callaway*, 267 P.2d 970, 979 (Wyo. 1954) (cautionary instruction).

64. Cases cited note 21 *supra*. New York recently rejected the "indictability" test as too restrictive and not consistent with the corroboration rule's underlying rationale. See Denzer, *Practice Commentary*, N.Y. CRIM. PROC. LAW § 60.22 (McKinney 1971).

65. Tex. Pen. Code art. 78 (1925).

66. *Reynolds v. State*, 489 S.W.2d 866, 871 (Tex. Crim. App. 1972); *Jones v. State*, 160 Tex. Crim. 479, 481, 272 S.W.2d 368, 369 (1954); see *Gonzales v. State*, 441 S.W.2d 539, 540-42 (Tex. Crim. App. 1969).

67. *Easter v. State*, 536 S.W.2d 223, 229 (Tex. Crim. App. 1976).

68. *Id.* at 227 n.4.

69. Compare *Easter v. State*, 536 S.W.2d 223, 229 (Tex. Crim. App. 1976), with TEX. PENAL CODE ANN. §§ 7.01(a), 7.02(a)(2) (1974).

70. See *Easter v. State*, 536 S.W.2d 223, 227-29 (Tex. Crim. App. 1976).

71. See *id.* at 227-29.

follows that an accomplice witness would be defined as anyone falling within the purview of section 7.01 of the 1974 Penal Code. The court, however, specifically refused to draw this conclusion.<sup>72</sup>

An additional question of interpretation results from the court's construction of section 38.05 of the Penal Code, which sets out the separate offense of hindering apprehension or prosecution.<sup>73</sup> That section attempts to combine under the same heading the conduct of an accessory after the fact with that of someone who interferes with the administration of justice.<sup>74</sup> The court noted that under section 38.05 knowledge that a crime has been committed by the aided person is not required of an individual in order for him to be subject to the section.<sup>75</sup> In actuality, a mere intent to aid the person in avoiding the legal consequences of his conduct, which infers a requirement of knowledge of either *wrongdoing* or an *accusation of wrongdoing*, is sufficient.<sup>76</sup> For one to be an accessory after the fact at common law, however, one must have had knowledge that the person aided had *committed a crime*.<sup>77</sup>

Without challenging the legitimacy of the need to reserve unto the judicial system the resolution of criminal accusations, the question nonetheless remains whether section 38.05 was intended to include in the same category an accessory after the fact and one who hinders an arrest. The court's interpretation of the statute places in the same category a person who, as an accessory after the fact, assists a murderer in disposing of the body in an attempt to conceal the crime and one who hinders the arrest of another whom he believes has been falsely accused.<sup>78</sup> The old statutory definition of accessory, a term which has previously been used in defining "accomplice witness," required knowledge of a crime's commission.<sup>79</sup> Since, according to the court in *Easter*, the language of section 38.05 requires none, whether the statute proscribes what was formerly known in Texas as accessorial conduct is unclear. Nevertheless, using the "separate offense" theory (wherein an accessory would not be indictable for the *same* offense and thus fail the "indictability" test), it was this questionable section upon which the court in part based its holding, although it failed to attach any significance to the language regarding the section's adequacy.<sup>80</sup>

Many jurisdictions expressly require that an accessory must first have had

72. *Id.* at 229.

73. TEX. PENAL CODE ANN. § 38.05 (1974).

74. *Id.*

75. *Easter v. State*, 536 S.W.2d 223, 229 (Tex. Crim. App. 1976).

76. See TEX. PENAL CODE ANN. §§ 6.02(a), 6.03(a), 38.05(a) (1974).

77. *Clark v. State*, 159 Tex. Crim. 187, 194, 261 S.W.2d 339, 344, *cert. denied*, 346 U.S. 855 (1953); 4 W. BLACKSTONE, COMMENTARIES \*37.

78. See *Easter v. State*, 536 S.W.2d 223, 228-29 (Tex. Crim. App. 1976).

79. Tex. Pen. Code art. 77 (1925).

80. *Easter v. State*, 536 S.W.2d 223, 229 (Tex. Crim. App. 1976).

knowledge that another has committed a crime.<sup>81</sup> While there is no authority concerning the legislative intent of section 38.05, it is quite possible that it was intended to include both accessories and hinderers within the same category, and that they are to be similarly punishable.<sup>82</sup> If that is so, the separate offense aspect of the court's reasoning would not be unsound by reason of the uncertainty surrounding the adequacy of section 38.05.

Given the ambiguous and indefinite relation between article 38.14 of the Code of Criminal Procedure and sections 7.01 and 38.05 of the Penal Code, the court in *Easter* capitalizes on the opportunity to bring Texas within the majority of jurisdictions regarding who an accomplice may be within the rule requiring corroboration of accomplice testimony. Its utilization of the widely used "indictability" test, however, without even discussing the underlying rationale that serves as the justification for the corroboration rule, necessitates legislative action. Whether the test, while easily and conveniently applied, adheres to the long-established reasons which justify article 38.14 and whether it best serves the ends of justice are questions which, having been ignored by the court, deserve careful scrutiny.

The problem precipitated by the legislature's amending the Penal Code would, of course, be nonexistent were article 38.14 to contain, for purposes of that article's application, a definition of "accomplice." A measure including such a definition would avoid the uncertainty resulting from revision of the Penal Code sections pertaining to parties to crime. Confusion could easily be avoided by following the procedural example of some jurisdictions that have added to their corroboration statutes a paragraph which defines who, for purposes of those statutes, is an accomplice.<sup>83</sup> While so doing, a close examination of the validity and extent of applicability of the deep-rooted justifications for the rule requiring corroboration of accomplice witnesses would well serve as a guide to ensure the best result.

A clarification of section 38.05 as to what guilty knowledge is required of a person accused under that article is also essential to resolve the problems which arise in *Easter*.<sup>84</sup> The determinative question in that effort lies in

81. *E.g.*, *Fajeriak v. State*, 439 P.2d 783, 789 n.17 (Alas.), *cert. denied*, 393 U.S. 881 (1968); 18 U.S.C. § 3 (1970); LA. REV. STAT. § 14:25 (1974) (knowledge or reasonable grounds to believe); MISS. CODE ANN. § 97-1-5 (1972). *But see* N.Y. PENAL LAW §§ 205.50, .55, .60, .65 (McKinney 1975) (hinging punishment on extent of accomplice's knowledge and type of crime committed by person receiving aid of accomplice).

82. *See* Searcy & Patterson, *Practice Commentary*, TEX. PENAL CODE ANN. § 38.05 (1974).

83. *E.g.*, CAL. PENAL CODE § 1111 (Deering 1976) (one indictable for same offense); MONT. REV. CODES ANN. § 95-3012 (Supp. 1975) (persons legally responsible for same crime); N.Y. CRIM. PROC. LAW § 60.22 (McKinney 1971) (persons who participated in offense charged or offense based on same or some of same facts or conduct constituting offense charged).

84. Because intent implies knowledge of some form, the type of knowledge should