

**IN THE COURT OF APPEALS  
OF THE  
STATE OF MISSISSIPPI  
NO. 95-KA-01220 COA**

**MICHAEL JOHNSTON A/K/A MICHAEL LYNN  
JOHNSTON**

**APPELLANT**

**v.**

**STATE OF MISSISSIPPI**

**APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED,  
PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	11/03/95
TRIAL JUDGE:	HON. FORREST A. JOHNSON JR.
COURT FROM WHICH APPEALED:	AMITE COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	WILLIAM F. VICK BRENT M. BRUMLEY
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: JEFFREY A. KLINGFUSS
DISTRICT ATTORNEY:	ALONZO STURGEON
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	BURGLARY & LARCENY OF A DWELLING HOUSE ACCESSORY AFTER THE FACT: SENTENCED TO SERVE A TERM OF 5 YRS IN THE MDOC & ORDERED TO PAY ALL COURT COSTS
DISPOSITION:	REVERSED AND REMANDED - 02/24/98
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	4/7/98

BEFORE BRIDGES, C.J., COLEMAN, AND DIAZ, JJ.

DIAZ, J., FOR THE COURT:

Michael Johnston was convicted of accessory after the fact of burglary and larceny of a dwelling house. On appeal, Johnston argues that the trial court erred in granting the State's jury instructions

for the crime of accessory after the fact when Johnston was indicted for the separate and distinct crime of burglary and larceny of a dwelling house. Finding that the trial court committed reversible error in causing Johnston to be convicted of a crime for which he was never indicted, we reverse and remand for a new trial in accordance with this opinion.

## FACTS

Michael Johnston was charged and subsequently indicted for the January 31, 1995 burglary and larceny of a dwelling house. At trial, Johnston denied any involvement in the crime. The State then submitted jury instructions S-5 and S-6 to the court, which permitted the jury to consider convicting Johnston of accessory after the fact of burglary and larceny. The court granted the instructions, notwithstanding the objection of Johnston's counsel. The trial judge ruled that in this case, accessory after the fact was a lesser included offense to the crimes of burglary and larceny and that because Johnston would suffer no prejudice, the instruction would be granted. As a result, the jury convicted Johnston of accessory after the fact. It is from this verdict that Johnston appeals.

## DISCUSSION

Our Mississippi Constitution confers a right of indictment upon any person criminally accused. **Miss. Const. art. 3, § 27**. That section provides, in part: "No person shall, for any indictable offense, be proceeded against criminally by information, except . . . where a defendant represented by counsel by sworn statement waives indictment; . . ." *Id.* The supreme court has repeatedly held that an indictment must give the accused notice of the charges pending against him. ***State v. Berryhill, No. 95-KA-00289-SCT, 1997 WL 660471, at \*6 (Miss. Oct. 23, 1997)*** (citations omitted). This notice requirement protects the accused from "trial by ambush" while providing him with a reasonable opportunity to prepare a defense. *Id.* Our inquiry then is whether the indictment in the present case afforded Johnston proper notice that he was being prosecuted as an accessory after the fact.

The grand jury indicted Johnston as a principal in the commission of the burglary and larceny of a dwelling house. The trial court then provided the jury with instructions enabling them to find Johnston guilty of the crime of accessory after the fact. By granting these instructions, the trial court totally disregarded the critical distinction between a principal and an accessory after the fact, namely that a principal actively participates in the commission of the crime while an accessory after the fact assists the principal in escaping or avoiding punishment after the crime has been completed. **Miss. Code Ann. § 97-1-3 (Rev. 1994); Miss. Code Ann. § 97-1-5 (Rev. 1994)**. The court, over objection by Johnston's counsel, proceeded to characterize the crime of accessory after the fact as a lesser included offense of burglary and larceny. However, our supreme court has held that accessory after the fact is a separate and distinct crime for which a person can only be punished if he has first been indicted. ***Johnson v. State, 477 So. 2d 196, 215 (Miss. 1985)***.

The State would have this Court apply the rationale of *Gangl v. State* to justify the trial court's actions. In *Gangl*, the supreme court held that a *defendant* is entitled to a lesser offense instruction if that lesser offense "arises out of a nucleus of operative fact common with the factual scenario giving rise to the charge laid in the indictment." ***Gangl v. State, 539 So. 2d 132, 136 (Miss. 1989)*** (citing *Griffin v. State, 533 So. 2d 444, 447-48 (Miss. 1988)*). However, in the present case, it was the State--not the defendant--who requested the lesser offense instruction. In such a case, the trial court has no authority to grant the State's lesser offense instruction unless it be a pure lesser included

offense. *Jefferson v. State*, 556 So. 2d 1016, 1020 (Miss. 1989). "[A] prosecutor has no power to alter the substance of an indictment, either through amendment or variance of the proof at trial without the concurrence of the grand jury." *Berryhill*, 1997 WL 660471, at \*9. To hold otherwise would essentially allow the State to disregard the main purpose of an indictment, which is to give the accused notice of the charges against him. *Jefferson*, 556 So. 2d at 1021.

By granting accessory after the fact jury instructions, the trial court in this case permitted Johnston to be convicted of a crime for which he was never indicted and for which he never had an opportunity to prepare a defense. Clearly, the trial judge erred; therefore, we reverse and remand this case for a new trial in accordance with this opinion.

**THE JUDGMENT OF THE AMITE COUNTY CIRCUIT COURT IS REVERSED AND REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS ARE ASSESSED AGAINST AMITE COUNTY.**

**BRIDGES, C.J., McMILLIN AND THOMAS, P.J.J., COLEMAN, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, J.J., CONCUR.**