21/79

HIGH COURT OF AUSTRALIA

R v STOREY and ANOR

Barwick CJ, Gibbs, Stephen, Mason, Jacobs, Murphy and Aickin JJ

22 February, 12 October 1978

[1978] HCA 39; (1978) 140 CLR 364; 22 ALR 47; 52 ALJR 737 (Noted 7 Adel LRev; 5 QL 78; 11 UQLJ 168)

CRIMINAL LAW – ISSUE ESTOPPEL – DISTINGUISHED FROM *AUTREFOIS ACQUIT* AND *RES JUDICATA* – APPLICATION TO CRIMINAL PROCEEDINGS – TRIAL FOR RAPE AFTER ACQUITTAL OF FORCIBLE ABDUCTION – WHETHER EVIDENCE TENDING TO SHOW GUILT OF ABDUCTION ADMISSIBLE – DIRECTION TO JURY: *CRIMES ACT* 1958 (VICT.), SS62, 568(1).

The respondents S. and G. were presented on charges of abduction, theft and rape. It was alleged that they forcibly took the prosecutrix from a railway station and conveyed her to a pavilion in a nearby park where they raped her. They were acquitted by the jury on the charge of abduction but the jury was unable to agree on the counts of rape. The respondents were tried again on two counts of rape. At the second trial, it was submitted that the Crown could not lead evidence that the prosecutrix was forcibly taken from the railway station on the ground that the acquittal on the abduction charge raised an issue estoppel against the Crown. The trial judge rejected this submission, and the jury found the respondents guilty. They appealed to the Court of Criminal Appeal, which ruled that the doctrine of issue estoppel applied in the Criminal law in Australia and that the Crown was precluded from leading evidence on the second trial that was inconsistent with acquittal on the count of abduction, even though it was ostensibly directed to the question of the consent of the prosecutrix to intercourse. The convictions were set aside and a new trial was ordered. The Crown was granted special leave to appeal to the High Court on the questions:
(a) whether the doctrine of issue estoppel is applicable in criminal proceedings;
(b) what are the limitations on its use in such proceedings.

HELD: Per Barwick CJ, Gibbs and Mason JJ (Murphy, Stephen and Aickin JJ *contra)*: The doctrine of issue estoppel is not applicable to criminal proceedings.

BARWICK CJ: The Court granted to the Crown in these proceedings special leave to appeal limited to grounds which would raise two questions:

> (a) whether the doctrine of issue estoppel is applicable in criminal proceedings; and
> (b) what are the limitations on its use in such proceedings.

Consequently, the grounds of appeal assert error on the part of the Court of Criminal Appeal of Victoria in applying the doctrine of issue estoppel in the appeal of the respondents against their conviction for rape: and in holding that evidence relevant to the charge in the present proceedings was inadmissible because of the acquittal of the respondents on a former occasion of the offence of abduction of the prosecutrix. The evidence being relevant to that charge had been admitted before the jury which had acquitted the accused.

The evidence so held to be inadmissible, the history of the proceedings and the relevant parts of the summing up may be found in the reasons for judgment of other Justices. I need only recite what, to my mind, are the facts essential to what I wish to say in dealing with the appeal.

The elements of the offence of abduction were (a) the forcible taking away of a woman against her will and (b) a contemporaneous intent that she be carnally known.

The evidence which was given in support of the indictment for abduction and which was repeated in the present proceedings for rape was in itself enough, if accepted, to establish that the prosecutrix was taken away from the waiting shed at the railway station against her will. Whether without the evidence of the subsequent rape it would have established a then present intention that the prosecutrix be carnally known by someone, not necessarily the accused, is to my mind a question.

The sole defence to the charges of rape was consent on the part of the prosecutrix. Thus, the evidence of the circumstances in which the prosecutrix came into the company of the accused was clearly relevant. That the prosecutrix went with the accused unwillingly when first they met was not only relevant but of considerable moment to the Crown in seeking a conviction. I have carefully considered whether the evidence of the event in the waiting shed at Clifton Hill railway station was capable of limitation to some part account of the circumstances which did not assert that the prosecutrix went unwillingly under threat by the accused. I have come to the conclusion that the evidence does not lend itself to such treatment.

In this connexion, the majority of the Court of Criminal Appeal said:

> "In this case, because most of the prosecutrix's evidence about events on the railway station tended to show both that the applicants took her by force against her will and that they took her with intent that she be carnally known, her evidence on these events should have been stringently limited. It was open to her to give evidence that she met the men on the station and that Storey told her that he had a gun and showed it to her. It could have been explained to the jury that the applicants had been acquitted of the charge of abduction and that this was conclusive of their innocence of that charge. Then the detailed evidence could have commenced with the first taxi journey. Such a course might have made convictions less likely, but, if so, it would simply have been because the prisoners had been acquitted of the abduction. They were entitled to the full benefit of that acquittal."

I am unable to accept such a course as doing justice to the prosecution's case in light of the defence of consent. I find the proposal quite inadequate and, indeed, as stripping the event at the waiting shed of all its significance on the issue of consent. The case is, in this respect, unlike *Garrett v R* [1977] HCA 67; (1977) 139 CLR 437; 18 ALR 237; 52 ALJR 206 in which I was of opinion that it would have been possible to confine the evidence relating to the earlier charge. As that would have been possible, the tendency of the whole of the evidence given in that case by the prosecutrix as to the circumstances of the earlier intercourse by the accused was to challenge the earlier acquittal, and, indeed, directly to assert the accused's guilt of the former charge.

The case, to my mind, is therefore one in which the whole account of the meeting at the railway station should either have been excluded by reason of the earlier acquittal or have been admitted. If admissible, the remaining question, as will appear from what follows, is whether its admission along with the terms of the summing up deprived the respondents to any extent of the benefit of their acquittal on the charge of abduction.

The decision of the Court of Criminal Appeal was that the verdict of acquittal of the charge of abduction involved a finding that the respondents had not forcibly removed the prosecutrix from the Clifton Hill railway station and that the Crown was estopped by that finding from asserting that the respondents did so remove the prosecutrix and from tendering evidence of the circumstances in which she met and "went" with the respondents at and from that railway station.

This decision involves two questions: first, was there such a finding and, second, even if there were, was the evidence of the event in that railway station therefore inadmissible, though relevant in the trial of the respondents for rape.

It was said by counsel for the respondents with the concurrence of counsel for the applicant – and accepted by the Court of Criminal Appeal – that the only "issue" fought and placed before the jury in the trial of the respondents for abduction of the prosecutrix was whether the prosecutrix was forcibly taken or went voluntarily with the accused from the Clifton Hill railway station. But even such a mutual concession by counsel does not furnish a basis for a conclusion as to what the jury have found by the verdict of acquittal. They were not bound by counsel's conduct of the case. They were bound, under the judge's proper direction, to consider all the necessary elements of the offence in order to decide whether or not they were satisfied to the requisite extent that those elements had been made out.

Where an accused may and does make a formal admission of an element or elements of an offence, it may be possible to narrow the area of the jury's determination to a single issue of fact, i.e. to the question whether the jury were satisfied to the requisite degree of that fact. But even in such a case, though we do not have a verdict of "not proven", the verdict of acquittal is not necessarily explicable only on the footing that the jury have made a positive finding of fact:

they may just have not been satisfied to the requisite degree. The jury in a criminal trial, unlike a judge or jury in a civil trial, is not required positively to find facts, except for the purposes of a verdict of guilty. Thus, all that can certainly be said of a verdict of acquittal is that the accused was acquitted. The implications of a verdict of guilty may be quite different.

In my opinion, it cannot properly be said in this case that the jury made any finding of a fact in issue in the abduction trial. That this should be so, as in my opinion it is, makes it impossible, in my opinion, in any case, to maintain that any issue estoppel arises out of a verdict of acquittal.

But, as appears, I am of opinion that the technical and often involved principle described as issue estoppel has no place in the administration of the criminal law. The Court of Criminal Appeal were quite properly content to follow the decisions of this Court by which that court is bound rather than those of the House of Lords by which that court is not bound. But the Crown in this appeal challenges the validity of those decisions of this Court and expressions of opinion of some of its Justices as to the use of issue estoppel in criminal proceedings.

I think it is important to observe that the question has relation only to the case of an acquittal. Questions as to the effect of a conviction on a plea of guilty in relation to an act or acts which could amount to different though cognate offences, such as, for example, were described in *R v Thomas* (1950) 1 KB 26; [1949] 2 All ER 662 and in the Canadian cases of *Kienapple v R* (1974) 44 DLR (3d) 351; 26 CRNS 1; (1974) 15 CCC (2d) 524 and *R v Loyer* (1978) 85 DLR 101 do not arise.

The question whether the civil doctrine has a place in the criminal law has been under consideration, both in Australia and in England. The decided cases and the writings of academic lawyers have been fully canvassed, particularly in the speeches of the several Law Lords who participated in the decision of *DPP v Humphrys* (1977) AC 1; [1976] 2 All ER 497; (1976) 63 Cr App R 95; [1976] 2 WLR 857. The principal Australian decisions are there canvassed. There is therefore no need for me to discuss any of the decisions or the articles in contemporary journals to which their Lordships made reference in order to explain my conclusions.

Suffice it to say that, having refreshed my recollection of the earlier cases and having read the writings in the journals, I find that the reasons given by Lord Dilhorne in *Humphrys' Case* (1977) AC at pp15-21 for concluding that resort to the principles of issue estoppel ought not to be had in the trial of criminal offences quite convincing. In my respectful opinion, both the reasons and the conclusion are correct. For my own part, I find the principles of issue estoppel as utilized in civil proceedings wholly inappropriate to criminal proceedings and, as well, more likely if used to complicate criminal trials than to make any contribution to the administration of criminal justice.

The matter is not, in my opinion, simply a question of nomenclature: merely the description of an admissible principle by an inappropriate name. It is a case of introducing into the criminal law an inadmissible principle.

The correct principle relevant to the admissibility in a subsequent trial of evidence given in an earlier trial which has resulted in an acquittal is, in my opinion, no more than this: that a verdict of acquittal shall not be challenged in a subsequent trial: the accused in the hearing of a subsequent charge must be given the full benefit of his acquittal on the earlier occasion. Evidence which was admissible to establish the earlier offence is, in my opinion, not inadmissible merely because it was tendered in the earlier proceedings: but it may not be used for the purpose of challenging, or diminishing the benefit to the accused of the acquittal. Such evidence will be admissible, provided it is relevant to the subsequent charge or to a defence to it but must only be allowed to be used to support that charge or negative a defence. Where evidence which would tend to prove the earlier charge or some element of it is admitted in the subsequent charge, the jury must be duly warned that they must accept the fact of the earlier acquittal and not use the evidence in any wise to reconsider the guilt of the accused of the earlier offence or to question or discount the effect of the acquittal. ...

I conclude therefore that issue estoppel was not involved in this case. In any case, the

majority of the Court of Criminal Appeal were, in my opinion, in error in acting on the footing that the acquittal could only be explained on the footing that the jury had found that the prosecutrix had not been forcibly taken away by the accused.

The treatment of the matter by the majority highlights the difficulty of attempting to apply in criminal proceedings the doctrine of issue estoppel as it is known in the civil law and of endeavouring to deduce positive findings from a verdict of not guilty. Also the decision in *R v Hogan* (1974) QB 398; [1974] 2 All ER 142, rightly in my opinion overruled in *DPP v Humphrys* (1977) AC 1; [1976] 2 All ER 497; (1976) 63 Cr App R 95; [1976] 2 WLR 857, illustrates the inappropriateness of issue estoppel, of its nature mutual, in criminal proceedings. The whole of the evidence in question was therefore, in my opinion, admissible.
