17/98

SUPREME COURT OF VICTORIA

JONES v TYSOE and ANOR

McDonald J

25 February, 13 March 1998 — (1998) 27 MVR 218; (1998) 100 A Crim R 218

CRIMINAL LAW – ABUSE OF PROCESS – ACCUSED ACQUITTED OF CULPABLE DRIVING CHARGES IN COUNTY COURT – LESSER DRIVING CHARGES SOUGHT TO BE PROCEEDED WITH IN MAGISTRATES' COURT – WHETHER ACCUSED DEPRIVED OF FULL ADVANTAGE OF ACQUITTAL BY MATTERS PROCEEDING – WHETHER PROSECUTION OF CHARGES VEXATIOUS OR OPPRESSIVE – WHETHER PROCEEDINGS AN ABUSE OF PROCESS.

J. was acquitted in the County Court of two charges of culpable driving and two charges of causing serious injury by the negligent driving of a motor car. The evidence was that J. drove her motor car on leaving an hotel in North Melbourne. The vehicle travelled along Flinders Street, Melbourne in an erratic manner and some time later was involved in a collision with another motor vehicle in East Malvern whereby two persons were killed and two injured. The question in issue at the trial was whether J. was the driver of the motor vehicle at the time of the collision. Some time after the acquittal, the prosecution sought to proceed in the Magistrates' Court with four charges including drink-driving at Caulfield and careless driving at Melbourne. At the hearing, J. submitted that the charges should be permanently stayed as an abuse of the process of the court. The magistrate rejected this submission. Upon appeal—

HELD: Appeal dismissed.
Although evidence of the driving at the hotel, in Melbourne and prior to the collision was given at the trial as relevant to the issue whether J. was the driver of the vehicle at the time of the collision, the earlier alleged driving some 8-9 kilometres away from the scene could not be fairly or reasonably seen or accepted as being part of the same "transaction" the subject of the charges on which J. was acquitted. To prosecute J. on the charges before the Magistrates' Court did not deprive J. of the full advantage of her acquittal in the County Court. Nor did the prosecution of the charges constitute an abuse of the process of the court, was neither vexatious or oppressive nor gave rise to unfairness to J.

McDONALD J: [*After setting out the charges in the Magistrates' Court, the relief sought in the originating motion and the charges on which J. was presented before the County Court, his Honour continued*] … **[7]** The charges laid against the plaintiff as provided by the presentment and which were the subject of the trial before the County Court arose out of a collision which occurred in the early morning of 2nd May 1993 between a motor vehicle owned by the plaintiff in which she was travelling and a motor vehicle driven by one Featherstone at the intersection of Malvern Road and Darling Road, Malvern. The collision occurred when the motor vehicle owned by the plaintiff entered the intersection travelling east in Malvern Road and was in the course of making a right-hand turn when it came into collision with the motor vehicle driven by Featherstone which was travelling west in Malvern Road. At her trial the plaintiff contested the allegation and it was very much in issue, that she was driving her motor vehicle at the time of the collision. It was further in issue that if she was the driver of her motor vehicle whether the deaths of the two deceased or the injuries to the two other persons named was caused by any fault on her behalf. Before the plaintiff's trial in the County Court, Featherstone had been prosecuted on a charge of driving at a dangerous speed at the time of the collision. He was convicted of that offence on 7 November 1994. Counsel for the plaintiff, who also appeared for her on her trial, informed the court in these proceedings that at her trial before the County Court the live issue was whether **[8]** the plaintiff was driving her motor vehicle at the time of the collision.

On the trial before the County Court a witness, Scott Tiedgen, gave evidence that on the evening of 1 May 1993 he was at the British Hotel in North Melbourne with a group of other people. The plaintiff was one of this group. He gave evidence that at about 2.00 am on 2 May he left the hotel in a motor vehicle driven by the plaintiff. He gave evidence that the deceased, Juanita Coco and Brad Lacey, were seated in the back of the motor vehicle with him, one Kayne was seated in the front passenger seat and that Tim Hunter travelled in the rear portion of the vehicle which was a hatchback, station-wagon type vehicle. He gave evidence that they left the

hotel, to travel to East Malvern to the home of Brad Lacey. He said that the motor vehicle driven by the plaintiff travelled through the City of Melbourne towards East Melbourne and that it travelled along Flinders Street. He said that he could not recall which way the vehicle travelled after leaving the city and had no recollection of travelling in Wellington Parade. He gave evidence that he had no recollection of the collision. He sustained injuries in the collision. Evidence of this witness as to the manner in which the plaintiff drove the motor vehicle along Flinders Street in the City of Melbourne, which was generally described before **[9]** this court as erratic, was not admitted as part of the evidence on the plaintiff's trial before the County Court. This was in consequence of a ruling of the trial judge to the effect that the manner in which she drove the motor vehicle at that time was not sufficiently proximate to the plaintiff's alleged driving of her motor vehicle immediately before and at the time of the collision as to permit that evidence to be admitted as evidence on the trial. It was common ground, on the hearing of these proceedings, that the point of collision at the intersection of Malvern Road and Darling Road, East Malvern was some eight to nine kilometres from the City of Melbourne.

The witness Hunter gave evidence at the trial that he left the hotel in the plaintiff's motor vehicle, travelling in the rear compartment of the same. He said that there was no safety restraining belt in that section. He gave evidence that at the time of the collision he was lying down in the rear compartment of the vehicle. He sustained injuries in the collision which he said were sustained by him as a result of being flung about the compartment in which he was at the time of the collision. He gave evidence that after the collision he got out of the motor vehicle through the back hatch door. He said that when he got out of the vehicle everyone else was still in the vehicle apart from the driver, the plaintiff, who he saw wandering up the road. In cross-examination Hunter **[10]** agreed that on the night of the collision he had no memory of the collision and had no memory of the events of the collision for some time after it happened. He denied that he was wearing a seat belt. He denied that he was driving the motor vehicle at the time of the collision.

Mr Waxman, a surgeon, gave evidence concerning the injuries sustained by Tiedgen. On examining photographs taken of the witness Hunter, subsequent to the collision, he said that some of the injuries depicted were consistent with having been caused by a seat belt. Another medical practitioner, Dr Bradshaw, gave evidence that she had examined Hunter following the collision. She said he told her that he could not recall the events of the accident other than sitting on the kerb after it. She said that she had previously said that Hunter's chest had been examined and that she felt that there was no clear evidence consistent with seat belt bruising. She conceded that one injury sustained by Hunter could be consistent with his body sliding into and partly under a seat belt. She also agreed that the injuries to Hunter's knees were more consistent with him being in one or other of the seats in the front seat compartment of the motor vehicle rather than being in the back compartment of it at the time of the collision.

A person who lived in a house at the intersection where the collision occurred, Conway, gave evidence that he **[11]** attended the scene of the collision soon after it occurred. He said that he went to the motor vehicle, which was identified as the plaintiff's, and observed a male sitting in the driver's seat. He said also that he observed a male seated in the front passenger seat of the vehicle and three persons in the rear seat, being two males and a woman who was seated between the men. He said further that he observed a male in the rear compartment of the vehicle. These persons, he said, were the only people in the motor vehicle. He gave evidence that he assisted the male person who he observed in the driver's seat out of the motor vehicle. He rejected the suggestion that the person in the rear compartment may have been a woman. He also gave evidence that sometime subsequent to the collision he saw the male person who he recognised as being the person in the driver's seat of the motor vehicle when he attended the scene of the collision. The plaintiff was interviewed by the police formally on 21 October 1993. In answer to questions, she said she had no recollection of the collision happening, that her last recollection before the happening of the collision was at about 12.30 am at the hotel and that her next recollection was being in a hospital. From questions asked of the plaintiff during this interview, it would appear that it is alleged that at 3.59am on 2 May 1993 the plaintiff furnished a sample of her **[12]** breath for analysis at the Caulfield Police Station. It also appears that it was alleged that following the collision and at the scene of the same, the plaintiff was asked by a police officer "Who was driving the car?" to which she replied that she did not know; that she identified the car involved as her car but that she said that she did not know whether she was in the car and that when asked whether she was the driver of the car, she replied "No".

There was no direct evidence put before this Court as to the time that it is alleged that the collision occurred. In the affidavit of the plaintiff filed in these proceedings she has deposed to the fact that in addressing the Magistrates' Court, counsel who appeared to prosecute stated that, "the time frame was that the car departed from the hotel at about 2.00 am and the collision occurred between 2.30 and 3.30 am". Counsel for the plaintiff asserted before this Court that the latter time was the time that the police arrived at the scene. Bearing in mind that the scene of the collision was some 8-9 kilometres distant from the City of Melbourne and to get to the scene of the collision the motor vehicle would have needed to traverse a number of suburbs, one would expect that the collision would have occurred somewhere at or about the time referred to in the plaintiff's affidavit. On behalf of the plaintiff it was submitted that in respect of each count on which the plaintiff stood trial **[13]** before the County Court, it was necessary for the Crown to prove that the plaintiff was the driver of the motor vehicle in which the two deceased and other persons were travelling at the time of the collision. Clearly this issue was very much in contest on the plaintiff's trial in the County Court.

It was submitted that on the plaintiff being acquitted on each of the four counts, she was entitled to the full benefit of her acquittal. It was submitted on behalf of the plaintiff that as the prosecution had led evidence at her trial that she was driving the motor vehicle on leaving the hotel and in Flinders Street, Melbourne, as relevant to the issue as to whether she was the driver at the time of the collision, that such driving formed part of the whole or the one transaction that occurred that night and that to now prosecute the plaintiff with respect to her driving at the hotel and in the City of Melbourne it would deprive her of the full benefit of her acquittal at trial.

Counsel for the first defendant stated that each of charges 1, 2 (as amended) and 4 which are now sought to be prosecuted relate only to and are limited to the plaintiff's alleged driving of her motor vehicle at the hotel and in the City of Melbourne and that they do not in any way relate to the plaintiff's alleged driving of her motor vehicle in Malvern at or immediately prior to the collision. **[14]** It is to be observed that each of the counts on which the plaintiff was acquitted at trial alleged that the offences occurred at Malvern. The charges, numbered 1 and 4, on their face, refer to alleged offences which occurred at Melbourne. I accept the assurance of counsel for the first defendant that the alleged driving, the subject of charge 2, is limited to the plaintiff allegedly driving at the hotel and in the City of Melbourne on 2 May 1993 and that in consequence the time period relevant to that offence must relate to such driving. Counsel for the first defendant further stated to the Court that the Crown did not and can not assert, as relevant to the charges sought to be prosecuted before the Magistrates' Court, that the plaintiff was driving the motor vehicle at Malvern, stating that to do so would deprive her of the advantage of acquittal on the counts on which she was presented before the County Court.

When considering the matter the subject of these proceedings, the starting point is the proposition of law that the doctrine of issue estoppel as has been developed in civil proceedings has no application to criminal proceedings: *Rogers v R* [1994] HCA 42; (1994) 181 CLR 251; (1994) 123 ALR 417; (1994) 68 ALJR 688; 74 A Crim R 462. In his judgment in that case Mason CJ at p254 said:

> "I adhere to the view which I expressed in *R v Storey* [1978] HCA 39; (1978) 140 CLR 364 at pp400-401; 22 ALR 47; 52 ALJR 737 that the doctrine of issue estoppel as it has developed in civil proceedings is not applicable to criminal proceedings. The reasons which **[15]** compel acceptance of that view are set out in the judgments of Barwick, CJ, Gibbs, J and myself in that case. The availability of *res judicata*, the defences of autrefois acquit and autrefois convict and the rule against double jeopardy and the doctrine of abuse of process make it unnecessary to introduce the doctrine of issue estoppel into the criminal law. Moreover, the introduction of issue estoppel and all its complexities would serve only to make the criminal law more convoluted. This view accords with the position reached in other common law jurisdictions."

In *Storey's case* Mason, J was the only member of the majority of the Court, which dismissed the appeal, to considr that issue estoppel was not applicable to criminal proceedings. The other members of the majority Stephen, Jacobs and Aickin JJ accepted that the principle of issue estoppel as known in the common law had application in criminal proceedings. Barwick CJ and Gibbs J who were in dissent in *Storey's case* also concluded that the doctrine of issue estoppel was not applicable to criminal proceedings. In his judgment, Barwick CJ at p372 said:

> "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."

Barwick CJ in his judgment further said at p372 when addressing the matter of the admissibility in a subsequent trial of an accused's evidence which had been given in an earlier trial of that person which had resulted in an acquittal:

> **[16]** "... a verdict of acquittal shall not be challenged in any 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 proceeding: 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 the 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."

In *R v Young* (1996) 90 A Crim R 80, Ormiston, Charles JJA and Vincent AJA in their judgment at p100 expressed the view that the statement of Barwick CJ last cited, "may be thought to have made the most comprehensive statement of the relevant principles" there being addressed. In *Rogers* the majority of the court held that a record of interview the tender of which had been rejected by the judge in an earlier trial on the grounds that it had not been made voluntarily could not be tendered on a subsequent trial of the accused as in the circumstances such course would be an abuse of process. In *Rogers case* at p255 Mason CJ said –

> "The concept of abuse of process is not confined to cases in which the purpose of the moving party is to achieve some foreign or ulterior object, in that it is not that party's genuine purpose to **[17]** obtain the relief sought in the second proceedings. The circumstances in which abuse of process may arise are extremely varied and it would be unwise to limit those circumstances to fixed categories. Likewise, it would be a mistake to treat the discussion in judgments of particular circumstances as necessarily confining the concept of abuse of process."

In *Walton v Gardiner* [1993] HCA 77; (1993) 112 ALR 289; (1993) 67 ALJR 485; (1993) 112 A Crim R 289; (1993) 177 CLR 378, Mason CJ, Deane and Dawson JJ at CLR p392-3 said –

> "The inherent jurisdiction of a superior court to stay its proceedings on grounds of abuse of process extends to all those categories of cases in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness."

At p393 their Honours further said –

> "... proceedings before a court should be stayed as an abuse of process if, notwithstanding that the circumstances do not give rise to an estoppel, their continuance would be unjustifiably vexatious and oppressive for the reason that it is sought to litigate anew a case which has already been disposed of by earlier proceedings."

The primary issue to be determined by the jury in the trial of the plaintiff before the County Court was whether it had been proved by the prosecution that she was, immediately before and at the time of the collision, the driver of her motor vehicle in which the two deceased and the two other persons referred to in the presentment before the County Court were travelling as passengers. Her acquittal on each of the four counts entitles her to the full advantage of that verdict. In any subsequent trial of the plaintiff it could not be alleged or maintained that she was driving her motor vehicle immediately before and at the time of the subject collision. Nor could any subsequent charge be laid **[18]** against her reliant on such allegation. To do so would be to deprive her of the full advantage of her acquittal before the County Court.

Although evidence of the plaintiff's early driving of her motor vehicle at the hotel and in Melbourne was admitted on her trial as relevant to the issue as to whether she was driving her motor vehicle at Malvern immediately before and at the time of the collision, the acquittal of the

plaintiff at trial on each of the four counts relating to her driving her motor vehicle at Malvern was not and could not be reasonably be said to be determinative of whether the plaintiff was driving her motor vehicle at the hotel and at Melbourne. To rely on evidence alleging that the plaintiff was driving her motor vehicle at the hotel and at Melbourne in the early hours of 2 May 1993 to found the charges now sought to be prosecuted against her before the Magistrates' Court and to rely on that evidence at trial on those charges could not reasonably or fairly be said to diminish or fail to give the plaintiff the full advantage of her earlier acquittal on the four counts which related to her allegedly driving her motor vehicle at Malvern subsequently and some eight to nine kilometres away from the City of Melbourne. It was made clear by counsel for the first defendant that it was not intended, at the plaintiff's trial before the Magistrates' Court, to lead evidence from which it may be inferred that she was **[19]** driving her motor vehicle at the time of the collision as relevant to charges before that court. Such evidence could not be led in the proceedings before the Magistrates' Court, for to do so would be to deprive the plaintiff of the full advantage of her acquittals before the County Court.

It was submitted, however, on behalf of the plaintiff that the plaintiff's alleged driving at the hotel and in Melbourne in the early hours of the morning of 2 May 1993 and preceding the collision at Malvern was all part of the one transaction and to separate her alleged driving at the hotel and in Melbourne from that at and about the intersection at Malvern where the collision occurred would be excessively technical and would not give the plaintiff the full advantage of her acquittal. In *Storey's case*, Mason J, after considering the decision of the Judicial Committee in *Sambasivam v Public Prosecutor, Federation of Malaya* [1950] AC 458 and *Garrett v R* [1977] HCA 67; (1977) 139 CLR 437; 18 ALR 237; 52 ALJR 206, said at CLR p396 –

> "Both these decisions establish, quite independently of the doctrine of issue estoppel, that the principle of *res judicata* as applied in criminal proceedings will preclude the Crown from challenging the effect of a previous acquittal, not merely in proceedings for the same or a substantially similar offence but also for proceedings for a different offence when evidence of the transaction the subject of the acquittal is sought to be relied upon. In its application in this fashion res judicata gives expression to the notion that once a person is acquitted of an offence, the acquittal must be recognized fully and without qualification for all purposes in criminal proceedings."

[20] Although evidence of the plaintiff driving her motor vehicle at the hotel and in Melbourne on 2nd May 1993 and before the happening of the collision was given at her trial in the County Court as relevant to the issue as to whether she was the driver of her motor vehicle immediately before and at the time of the collision, the earlier alleged driving some eight to nine kilometres away from the scene of the collision cannot, in my view, be fairly or reasonably seen or accepted as being part of the same "transaction" the subject of the charges on which the plaintiff was acquitted on her trial before the County Court.

The conclusion I have reached is that to prosecute the plaintiff before the Magistrates' Court on the three charges now sought to be proceeded with does not constitute an abuse of process of the Court. To prosecute the plaintiff on charges 1, 2 and 4 presently pending before the Magistrates' Court at Melbourne does not deprive the plaintiff of the full advantage of her acquittal before the County Court in the proceedings referred to. To prosecute the plaintiff on these three charges subsequent to her acquittal before the County Court is neither vexatious or oppressive, nor gives rise to unfairness to the plaintiff. Further, to proceed with that prosecution does not bring justice into disrepute. The plaintiff is not entitled to any of the relief sought in these proceedings whether by way of a declaratory **[21]** order, as sought in the terms referred to or to relief of any other nature as sought by the originating motion and summons in these proceedings. The proceedings must be dismissed.

APPEARANCES: For the plaintiff Jones: Mr S Langslow, counsel. Kenna Croxford & Co, solicitors. For the defendant Tysoe: Mr W Morgan-Payler QC, counsel. P Wood, solicitor for Public Prosecutions.
