HIGH COURT OF AUSTRALIA

King

Vs.

Willes

(Latham C.J.(1), Rich(2), Dixon(3) and McTiernan(4) JJ.)

21 September 1948

CATCHWORDS

Criminal Law - Special leave to appeal - Three counts in information - Acquittal on two counts - Conviction on third count - Inconsistency - Pleas - Issue estoppel - Conviction quashed by Court of Criminal Appeal - Discretion of Court of Criminal Appeal to refuse new trial - Discretion of High Court to grant special leave to appeal.

HEARING

Adelaide, 1948, September 21. 21:9:1948 APPLICATION for special leave to appeal from the Court of Criminal Appeal of South Australia.

DECISION

The following judgments were delivered: -LATHAM C.J. I have the misfortune to differ in opinion, though not very by granting special leave to appeal in this case. It was held by the Full Court that the learned trial judge should have directed the jury that if they acquitted upon counts one and two, they could not convict upon count three because their decision in relation to each of the counts depended upon the evidence given by the accomplice Prior. The Full Court has also held that in the circumstances it would be useless from a practical point of view to order a new trial because a jury upon the new trial must be told, it was said, that "as between the Crown and the accused it had been conclusively established" (that is, by the acquittals) "that they" (that is, Wilkes and his wife) "did not kill Mrs. Boulton, and, further, that they did not conspire with Prior and Mrs. Boulton to procure her miscarriage." I am not aware of any authority which shows that an acquittal conclusively establishes more than that some element, which often it would be quite impossible to identify, which is necessary to constitute the offence charged has not been proved. (at p515)

2. The basis of the reasoning in the judgment of the Full Court is that the conviction on the third count is really inconsistent with the acquittal on the first two counts. In my opinion, as at present advised, there is no necessary inconsistency. It seems obvious that a jury might quite well find that A, B and C were guilty of concealing a body or placing a body in such a position that it would be difficult to ascertain where it had come from in order to hinder the course of justice without holding that the persons who did that were concerned in the death of the person whose body it was. The persons who concealed the body might have had nothing to do with the death. Here there was no direct evidence as to Wilkes and his wife procuring the abortion. The proposition that Wilkes and his wife procured the abortion rested entirely on inference, and it was open to the jury to accept the evidence given by Prior and to reject the inferences which the Crown sought to draw from that

evidence. (at p515)

3. As to the second count, conspiring to bring about an unlawful miscarriage, that count depended on acceptance, particularly of the initial part, of Prior's evidence, which was to the effect that he made some arrangement with Wilkes over the telephone which was of such a character as plainly to suggest that an abortion was contemplated, to be accomplished either by Wilkes or by someone with whom Wilkes was in contact. The whole of Prior's evidence, with the possible exception of the initial part, appears to me to be consistent with some other person having procured the abortion. If that is so, then there is no inconsistency between a finding of guilty in relation to the disposal of the body and a refusal to convict in relation to abortion and conspiracy to procure abortion. It appears to me that the proposition which I have read from the reasons for judgment of the Full Court means either that the acquittals prevent any reliance by the Crown in any proceedings by the Crown against the applicants here upon the whole of Prior's evidence, or, alternatively, that in some way the acquittals prevent the Crown relying in any other proceedings against the same persons upon some part of Prior's evidence - some unspecified and unspecifiable part of that evidence. I know of no authority for any such proposition. I wish to add that in my opinion the summing up of Abbott J., except in one small minor point perhaps, as to whether Mrs. Wilkes heard or overheard part of a certain conversation, appears to me to satisfy all the requirements of the law, and particularly in respect of his very full directions as to the caution to be observed in accepting the evidence of an accomplice. Accordingly, with some doubt, in view of the contrary opinion of my learned brothers, I would have granted special leave to appeal in order to deal with the statement of the proposition to which I have referred, but I would have done that without expressing or forming any concluded opinion as to the probable success of the appeal. (at p516)

RICH J. In agreeing that special leave should be refused, I venture to add that I think that Abbott J.'s summing up was subjected to a somewhat hypercritical analysis. (at p516)

DIXON J. I think this application should be refused in the exercise of the discretion of the Court. An application for special leave to appeal from a judgment of acquittal is a rare thing. According to the decision of this Court in Lloyd v. Wallach [1915] HCA 60; (1915) 20 CLR 299 , the terms of the Constitution are sufficiently wide to enable us to entertain an appeal from a judgment of acquittal. The judgment of acquittal in this case is the judgment of the Supreme Court as a court of criminal appeal and is contrary to the verdict of the jury and not in accordance with the verdict of the jury. We would not, of course, go behind a verdict of not guilty. In Secretary of State for Home Affairs v. O'Brien (1923) AC 603 , the House of Lords construed the Appellate Jurisdiction Act, 1876 in a way which is not quite consistent with the interpretation which this Court placed upon s. 73 of the Constitution. This Court nevertheless has continued to act upon that interpretation and has entertained applications by the Crown for special leave to appeal from judgments of acquittal given by courts of criminal appeal. We should, however, be careful always in exercising the power which we have, remembering that it is not in accordance with the general principles of English law to allow appeals from acquittals, and that it is an exceptional discretionary power vested in this Court. Looking at the substance of the present case, it appears to me to be one in which the Court of Criminal Appeal was called upon to consider whether the verdict found by the jury convicting the prisoners on the third count was not of such an unsatisfactory description that it ought not to be allowed to stand. (at p517)

2. The facts of the case I do not propose to recapitulate beyond saying that the Crown presented a case upon three counts depending upon the view that the prisoners and the principal witness for the Crown, who was an accomplice but received a pardon, had been engaged in a series of steps

directed to procuring the abortion of a pregnant woman, and that in the attempt to procure the abortion they, or one or more of them, had killed her and then had attempted to conceal their crime by telling a lying story accounting for the body. The jury found a verdict of not guilty on the first two counts, the first being manslaughter and the second conspiracy to procure the miscarriage of the woman. On the third count, which was a count of conspiracy to defeat the course of justice, the jury convicted the prisoners. On the case made for the Crown it was difficult for the jury to convict on the third count consistently with their acquittal on the first two counts. Logical possibilities have been suggested as to the manner in which the jury might have arrived at the result. It is suggested that they might have failed to believe substantial parts of the story to which the accomplice deposed and have combined the rest with part of the account given by the accused, which they may have been inclined to accept. The suggestion is that in some such way the jury may have supposed that the attempted abortion which caused the deceased's death was carried out, not by the accused, but by an unnamed and unknown person who would be a fifth actor in the drama. (at p517)

3. It must be conceded of course that, as logical possibilities, such hypotheses are conceivable. But the case made for the Crown did not contemplate any such supposition, and it would in my opinion be entirely unsatisfactory to leave a verdict of guilty on the third count standing on the assumption that the jury took such a view. It is a view which is contrary to all the probabilities, as I see them, and it is contrary to the substance of the case presented to them by the learned judge in his summing up, and, as I have no doubt, by the Crown. To set aside a verdict of such a description is an ordinary example of the proper use of the power conferred upon the Court of Criminal Appeal. It is an exercise of the discretion of the court from whose order we ought not to grant special leave to appeal. After quashing the conviction, the Supreme Court went on to say that they would not order a new trial, and their Honours gave a number of reasons why they would not order a new trial. Again, I think that it was for them to decide in the exercise of their discretion whether they would or would not order a new trial. I myself most certainly would have come to the same conclusion, namely, that in the circumstances a new trial should not be granted. I would have done so because it would necessitate the presentation by the Crown either of the case on which the accused had substantially been acquitted or of a new case which had not been made at the first trial, a case moreover which, I should have thought, was highly improbable and a desertion of the assumptions which the jury's previous verdict seems to require. However, in the course of giving their reasons for their decision not to grant a new trial, their Honours made the following observation: "It will also be necessary to tell them" (the jury) "that, as between the Crown and the accused, it has been conclusively established that they did not kill Mrs. Boulton and further that they did not conspire with Prior and Mrs. Boulton to procure her miscarriage." I take the words "they did not kill" to mean they did not kill by manslaughter. It may be doubted whether it is quite accurate on the facts of the case to go as far as saying that to tell the jury this would be necessary. But for myself I do not think that there is anything incorrect in the propositions that it has been conclusively established that they did not kill Mrs. Boulton by manslaughter and, further, that it has been established that they did not conspire with Prior and Mrs. Boulton to procure her miscarriage. (at p518)

4. Whilst there is not a great deal of authority upon the subject, it appears to me that there is nothing wrong in the view that there is an issue estoppel, if it appears by record of itself or as explained by proper evidence, that the same point was determined in favour of a prisoner in a previous criminal trial which is brought in issue on a second criminal trial of the same prisoner. That seems to be implied in the language used by Wright J. in R. v. Ollis (1900) 2 QB 758, at p 769 , which in effect I have adapted in the foregoing statement. Such a question must rarely arise because the conditions can seldom be fulfilled which are necessary before an issue estoppel in favour of a prisoner and against the Crown can occur. There must be a prior proceeding determined against the Crown

necessarily involving an issue which again arises in a subsequent proceeding by the Crown against the same prisoner. The allegation of the Crown in the subsequent proceeding must itself be inconsistent with the acquittal of the prisoner in the previous proceeding. But if such a condition of affairs arises I see no reason why the ordinary rules of issue estoppel should not apply. Such rules are not to be confused with those of res judicata, which in criminal proceedings are expressed in the pleas of autrefois acquit and autrefois convict. They are pleas which are concerned with the judicial determination of an alleged criminal liability and in the case of conviction with the substitution of a new liability. Issue estoppel is concerned with the judicial establishment of a proposition of law or fact between parties. It depends upon well-known doctrines which control the relitigation of issues which are settled by prior litigation. However, it is not necessary for us to determine any such question upon the present application. It is a question, as I have said, about which in criminal matters there is little authority. (at p519)

5. We are dealing only with an application to our discretion. To my mind it would be wrong to grant special leave with a view to enabling the Crown to have that particular point of law decided. For it is a point of law which, as it appears to me, is not necessarily implicit in the case itself. It arises only upon an observation made by the learned judges in giving a number of reasons for exercising their discretion to refuse a new trial on the third count quashing the conviction and independently of that particular reason I should myself have exercised the discretion in the same manner. For these reasons I think that it is not a proper case in which to grant special leave to appeal. (at p519)

McTIERNAN J. I agree that this application should be refused. For my part I think that Mr. Hannan is reading more into the reasons for judgment of the Full Court, to part of which he complains, than the learned judges intended to lay down. The learned judges were pointing out that if the Crown sought on a second trial on the third count to prove the allegations in the counts, that is counts one and two, upon which the jury acquitted the accused, the Crown would be faced with the fact that the jury had acquitted them on those two counts. It is clear that there would be almost insurmountable difficulties before the Crown in any endeavour it might make in a new trial of the third count to establish the conspiracy alleged in that count upon the basis of the allegations in the first and second counts; for that reason I think that the statement of which Mr. Hannan complains does not clearly raise the important general question of law which he says it does. But I am not to be taken as approving of the statement if, interpreted in the context of the judgment, it formulates the legal doctrine which Mr. Hannan says the court intended to lay down. For these reasons and the reasons which have been given by my brothers Rich and Dixon, I would refuse this application for special leave to appeal. (at p520)

ORDER

Application refused.

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