HIGH COURT OF AUSTRALIA

Mraz

Vs.

Queen

9Dixon C.J.(1), Williams(1), Webb(1), Fullagar(1) and Taylor(1) JJ.)

14 September 1956

CATCHWORDS

Criminal Law - Murder - Death consequent upon rape - Acquittal of murder - Conviction of manslaughter - Conviction set aside - Subsequent charge of rape on same facts - Plea of issue estoppel arising out of earlier acquittal - Nature of issue estoppel - Elements in verdict of not guilty - Right of Court to have regard to issues taken at trial - Crimes Act 1900-1951 (N.S.W.), s. 18 (1) (a).

HEARING

Sydney, 1956, August 16, 17; September 14. 14:9:1956APPLICATION for special leave to appeal from the Court of Criminal Appeal of New South Wales.

DECISION

September 14.THE COURT delivered the following written judgment: -

This application for special leave to appeal depends upon a question of Supreme Court dismissed an appeal by the applicant from a conviction of rape. He objects that his conviction of rape is inconsistent with the findings made, or which must be taken to have been made, on an indictment of murder upon which he had already been tried. The charge of murder had been based upon the death of a young woman on 27th September 1954. The case for the Crown had been that the applicant had ravished her and that he had caused her death during or immediately after the commission of this crime. (at p66)

2. The course taken at the trial of the indictment for murder was somewhat curious. The jury were told by the presiding judge that before they could convict the applicant of murder they must be satisfied not only that he committed rape and in the course of doing so had caused her death but also that the act was "malicious". If they considered that rape had been committed by the applicant and that death was caused in the course of the commission of the crime but that the act was not malicious they should acquit him of murder but they might convict him of manslaughter. The jury in the result found a verdict of not guilty of murder but guilty of manslaughter. (at p67)

3. On appeal from the Supreme Court sitting as a court of criminal appeal this Court set aside the verdict of guilty of manslaughter and directed that a verdict and judgment of acquittal of that crime be entered. The grounds upon which this order was based are set out in the judgments of the

members of the Court who formed the majority [1955] HCA 59; (1955) 93 CLR 493 For present purposes it is enough to say that it appears that in the opinion of the majority of the Court the direction of the presiding judge was wrong and could not be said to have occasioned, with respect to the conviction of manslaughter, no substantial miscarriage of justice, and that upon the evidence no such case of manslaughter arose as would make it proper to order a new trial on that charge. After this judgment, which was delivered on 10th November 1955, the applicant was indicted for rape in respect of the same set of facts. He filed a somewhat irregularly drawn plea to the indictment setting up the previous proceedings as an answer to the indictment. Upon this plea a verdict for the Crown was found. The applicant had been allowed also to plead not guilty to the indictment but upon the trial of the issues raised by this plea a verdict of guilty of rape was returned. He appealed to the Supreme Court from the conviction upon the ground that by reason of the proceedings on the former indictment he should have been discharged from the indictment and that the verdict for the Crown on his special plea was wrong. The appeal was dismissed and the present application is for special leave to appeal from the order so dismissing it. (at p67)

4. Under s. 18 of the Crimes Act 1901-1951 (N.S.W.) the crime of murder is committed if the act of the accused causing the death charged was done during or immediately after the commission by the accused of the crime of rape, that being a crime that was punishable by death or penal servitude for life. The acquittal of murder therefore necessarily negatived the proposition that the applicant caused the death of the young woman during or immediately after the commission by the accused of the crime of rape. It is of no importance for this purpose that the jury were or might have been led to negative the proposition by an erroneous direction by the presiding judge. On a subsequent indictment the Crown would be precluded upon any issue which could not be found consistently with the negative of the proposition. For the Crown is as much precluded by an estoppel by judgment in criminal proceedings as is a subject in civil proceedings: R. v. Wilkes [1948] HCA 22; (1948) 77 CLR 511, at pp 518, 519; Sambasivam v Public Prosecutor of Malaya (1950) AC 458, at p479 But the affirmative of the proposition involves three elements or things, viz. (1) that the applicant committed rape and (2) that during or immediately after the commission of the crime (3) an act of his caused the death of the young woman. Now to negative the proposition as a whole it is enough to find that any one of these three elements was lacking. But the jury's verdict included a finding that the applicant was guilty of manslaughter as well as a finding that he was not guilty of murder. Accordingly so far as the verdict of the jury is concerned it affirmed the last of these three elements, namely that an act of the applicant caused death. (at p68)

5. The verdict must, therefore, as a matter of law involve the proposition that either (1) the applicant did not commit rape, or (2) though his act caused death, he did not do it during or immediately after the commission of rape. (at p68)

6. This is an alternative proposition of a negative character, one arising on the face of the record from a consideration only of the indictment and the verdict understood as they must be by reference to the law of homicide. It is a negation in the alternative upon which, so long as the verdict stood in its entirety, the applicant was entitled to rely as creating an issue estoppel against the Crown. He was entitled so to rely upon it because when he pleaded not guilty to the indictment of murder the issues which were thereby joined between him and the Crown necessarily raised for determination the existence of the three elements we have mentioned and the verdict upon those issues must, for the reasons we have given, be taken to have affirmed the existence of the third and to have denied the existence of one or other of the other two elements. It is nothing to the point that the verdict may have been the result of a misdirection of the judge and that owing to the misdirection the jury may have found the verdict without understanding or intending what as a matter of law is its necessary

meaning or its legal consequences. The law which gives effect to issue estoppels is not concerned with the correctness or incorrectness of the finding which amounts to an estoppel, still less with the processes of reasoning by which the finding was reached in fact; it does not matter that the finding may be thought to be due to the jury having been put upon the wrong track by some direction of the presiding judge or to the jury having got on the wrong track unaided. It is enough that an issue or issues have been distinctly raised and found. Once that is done, then, so long as the finding stands, if there be any subsequent litigation between the same parties, no allegations legally inconsistent with the finding may be made by one of them against the other. Res judicata pro veritate accipitur. See per Higgins J. in Hoysted v. Federal Commissioner of Taxation [1921] HCA 56; (1921) 29 CLR 537, at pp 561, 563 and per Lord Shaw for the Privy Council (1926) AC 155, at pp 170, 171; [1925] HCA 51; (1925) 37 CLR 290, at pp 303, 304; Reg. v. Walker (1843) 2 M & Rob 446, at p 457 (174 ER 345, at p 348) and Reg. v. Hartington Middle Quarter (1855) 4 El & Bl 780, at pp 792, 793 [1855] EngR 264; (119 ER 288, at p 293) And, as has already been said, this applies in pleas of the Crown. (at p69)

7. In the present case, however, all that is disclosed by the record consisting of the indictment and the verdict is that either (1) the applicant was found not to have committed rape, or (2) that the young woman's death, though caused by his act, was not caused during or immediately after the commission by him of rape. Unless the applicant is able to make it appear that the verdict of not guilty of murder ought not to be treated as possibly depending on the second of these two elements his plea of issue estoppel must fail. For non constat that the verdict of not guilty conceded that the applicant had been or might have been guilty of rape and was to be referred only to a finding that, though so guilty, it was not during, or immediately after, the commission of the crime that he caused the death of the young woman. The fact is that there was neither contest nor doubt at the trial upon this latter issue. That an act of intercourse took place and that at the time, or shortly afterwards, the woman died was neither denied nor deniable. The issue at the trial was whether it was done against her will. Is it open to the applicant to rely on this fact in order to put out of consideration the merely logical possibility, arising as it does only on the state of the record, that the verdict may depend on the issue involved in the words "during or immediately after the commission . . . of a crime" occurring in s. 18 of the Crimes Act? (at p69)

8. Now in ascertaining what were the issues determined judicially it is proper to look beyond the record. See per Isaacs J. in Gray v. Dalgety & Co. Ltd. [1916] HCA 35; (1916) 21 CLR 509, at p 543 You cannot show that issues necessarily involved in the conclusion were not found. You cannot say that, though as a matter of law the conclusion could not be reached except by passing upon certain issues, yet one or more of them was not passed upon. You cannot do so unless it so appears upon the face of the record, or in the case of courts where there is no record, unless it so appears from the course of procedure by which in such a court the character of the claim and the answer is determined. It should be added, however, that the parties may definitely agree to suspend, defer or otherwise eliminate a necessary issue and then it is not covered by the determination. That is shown by Hoysted's Case, the report of which in the Privy Council (1926) AC 155; (1925) 37 CLR 290, should be read with the report of the decision in this Court [1921] HCA 56; (1921) 29 CLR 537 But there is no question of this having been done in the present case. What the applicant needs to do here is to exclude the possibility, a merely logical possibility, that the foundation of the verdict was the denial of an element that on the facts was not denied and could not be denied. Indeed it was in truth an element of an entirely notional character which factually could have no significance and accordingly passed unnoticed. It is quite consistent with the indictment and the verdict to exclude the possibility in question. There is no reason why, in order to ascertain the issue which in truth was found, matters of this kind should not be taken into consideration by the court when deciding the

validity of a plea of issue estoppel. It is by no means the same thing as going into evidence as to the course of the previous trial for the purpose of showing that what in point of law must be covered by the verdict or finding was in fact not considered at all. That is to run counter to the very principle of issue estoppel, which is to treat an issue of fact or law as settled once for all between the parties if it is distinctly raised and if the judgment pronounced implies its determination necessarily as a matter of law. All that the applicant need do here is to add to the record certain information which makes it possible to see what issue it was that the finding must necessarily cover. That information makes it clear enough that the finding must cover the issue which in fact is one of rape or no rape. To say that the jury never meant to negative rape is to overlook the essence of the error made on the previous trial. The jury were in effect told that it was not enough if there was a rape, it must be a rape done with malice. Doubtless it was a curious conception. But if it is assumed that they followed and acted upon the direction, what the jury may be supposed to have found is that there was not a rape done with malice. To speculate why a jury finds manslaughter on an indictment of murder is often fruitless, and in this case the direction may have had no further effect upon the result than to encourage the returning of a verdict of manslaughter. But let it be assumed that in fact it meant that there was no rape done with malice. That only meant that, having availed themselves of an erroneous reason supplied by the judge's charge, the jury found a verdict upon the very issue which under the plea of not guilty the indictment for murder, properly understood according to law, presented to them as an issue of rape or no rape. (at p71)

9. The foregoing reasoning shows that the verdict of not guilty of murder read with the verdict of guilty of manslaughter must be taken to cover the issue of rape and to negative the commission of that crime by the applicant. (at p71)

10. It remains to consider the effect of the order of the High Court vacating the finding of guilty of manslaughter. In form that order set aside the conviction of manslaughter and ordered that a verdict of acquittal of manslaughter should be entered. In the foregoing reasoning the fact that the jury convicted the applicant of manslaughter has been used to show that the verdict of not guilty of murder did not, indeed could not, mean that the applicant had not caused the death. Does the reversal of the conviction of manslaughter by the High Court remove the ground on which this step in the reasoning proceeds? It does not; and the reason why it does not do so is that the reversal of the conviction of manslaughter was done by the order of the Court and what "issue" or "question" that order determined is to be ascertained by considering the proceedings in the High Court and not simply the proceedings at the trial. The jury did not find a verdict of not guilty of manslaughter; it is the court's order that placed that verdict on the record. It was of course competent for the Court to do so on any relevant ground. It is difficult if not impossible to imagine any relevant ground which would involve the result that the jury's verdict of acquittal of murder should be treated as involving any wider, different or additional issue than an examination of the indictment, the verdict and the matters put in issue would disclose. But in fact the matters decided by the High Court as the ground of the order made are known: they appear clearly enough from the reasons and they do not in any way open any larger or other issue as the basis of the verdict of not guilty of murder. They do not do so either in reality or as a matter of logical possibility. In fact the grounds on which the decision of the majority is based mean that in the Court's opinion the conviction of manslaughter was vitiated by the judge's direction and that a new trial should not be ordered as to manslaughter because manslaughter was a conclusion not supported by the facts in evidence. (at p72)

11. From this it follows that the jury's verdict of not guilty of murder in the circumstances involves as a matter of law a finding that the applicant did not commit rape. An indictment for rape is therefore inconsistent with the verdict upon this issue. Accordingly the applicant's plea of issue

estoppel is made out. (at p72)

12. In our opinion special leave to appeal should be granted. The hearing of the application should be treated as the hearing of the appeal. The appeal should be allowed and the order of the Supreme Court discharged. In lieu thereof it should be ordered that the conviction for rape and the judgment thereon should be reversed and a verdict of not guilty should be entered. (at p72)

ORDER

Application for special leave to appeal granted. Hearing of the application to be treated as the hearing of the appeal. Appeal allowed. Order of the Supreme Court as the Court of Criminal Appeal discharged. In lieu thereof order that the conviction for rape and judgment thereon be quashed and a verdict and judgment of acquittal be entered.

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