[HIGH COURT OF AUSTRALIA.]

THE KING . . . . . APPLICANT;

AND

WILKES . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF SOUTH AUSTRALIA.

H. C. OF A. 1948.

ADELAIDE, *Sept.* 21.

Latham, C.J., Rich, Dixon and McTiernan JJ.

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.

An information against W. and his wife charged three offences: (1) manslaughter of B.; (2) conspiracy with B. and P. to procure the unlawful miscarriage of B.; and (3) conspiracy with P. to defeat the course of public justice. The case for the prosecution rested largely on the evidence of P., an alleged accomplice who had been pardoned, and who deposed that he had arranged with W. and his wife to procure the miscarriage of B., that B. had died whilst in W.'s house, and that, after removing B.'s body to another place, W. had told him to give to the police an untrue account of B.'s death. The jury found both accused not guilty on the first two counts, but guilty on the third count. On appeal, the Court of Criminal Appeal quashed the conviction on the ground of inconsistency between the verdicts.

Held, by *Rich*, *Dixon* and *McTiernan* JJ. (*Latham* C.J. dissenting,) that special leave to appeal to the High Court should be refused.

Per Dixon J. (and *semble per McTiernan* J.): Although the High Court has jurisdiction to grant special leave to appeal from judgments of acquittal, this is an exceptional power, to be carefully exercised in that it is not in accordance with the general principles of English law to allow such appeals.

Per Dixon J., issue estoppel in criminal trials discussed.

Decision of the Court of Criminal Appeal of South Australia, *Wilkes* v. *The King*, discussed.

H. C. OF A. 1948.

THE KING v. WILKES.

APPLICATION for special leave to appeal from the Court of Criminal Appeal of South Australia.

An information laid by the Attorney-General of South Australia in the Supreme Court of that State against H. J. Wilkes and D. M. Wilkes, his wife, charged three offences :—

First count : manslaughter in that the accused on or about 18th November 1947 unlawfully killed one Bessie Boulton.

Second count : conspiracy to procure abortion in that the accused in the month of November 1947 conspired with the said Bessie Boulton and one D. R. Prior to procure the unlawful miscarriage of Bessie Boulton.

Third count : conspiracy to defeat the course of public justice in that the accused on 18th November 1947 conspired together and with Prior to defeat the course of public justice.

The case for the prosecution depended almost entirely upon the evidence of Prior, the alleged accomplice, who had received a pardon. He deposed that he had been intimate with Bessie Boulton (a married woman living apart from her husband) who, in November 1947, found herself three months pregnant and told him that she wished to procure a miscarriage. He communicated with Wilkes and told him what he wanted. After a personal interview between Prior and Wilkes and several telephone conversations between Wilkes, Prior and Mrs. Boulton, it was arranged that Mrs. Boulton should go to Wilkes's premises at 8.30 p.m. on 17th November. Prior took Mrs. Boulton to the outside of the premises where they were met by a woman who, he thought but could not be certain, was Mrs. Wilkes. Mrs. Boulton accompanied the woman in the direction of the Wilkes's living room. At about 9.45 p.m., Prior returned and waited in the street for Mrs. Boulton. Then he telephoned Wilkes's premises and was told that she would be about an hour and would see him at 11 p.m. at a street corner near her residence. Prior went there at 11 p.m. and waited till midnight. He then rang Wilkes's premises again and a man's voice, which he thought was Wilkes's, said " I don't think Bet wants to see you to-night." Prior insisted that he would call and Wilkes said " I'll come and get you." Wilkes arrived in a utility truck and drove Prior to his premises saying " Did you know that girl had a weak heart, she's collapsed ? " In the premises he found Mrs. Boulton partially dressed and showing no sign of life. Wilkes then said that they would have to get an ambulance and that they would take Mrs. Boulton over to a suburb named Glanville, where Prior could ring for one. It was anticipated apparently that it would be a police ambulance, and Prior was told by Wilkes that, when the

police came, he was to say that he had been waiting for Mrs. Boulton and that he had seen a black and white taxi come along and that he had rushed towards it and as he turned the corner he had seen the taxi running away and Mrs. Boulton on the ground. He was not to mention Mr. and Mrs. Wilkes to the police and, if they were questioned, they would say that they didn't know Prior and that he had not been at their premises. Wilkes then left the office to bring the utility truck, and, while he was doing so, Mrs. Wilkes and Prior dressed Mrs. Boulton. Wilkes and Prior carried Mrs. Boulton to the truck, placed her in it and drove to Glanville where she was put down in the street. Wilkes drove away. Prior rang for an ambulance and was connected with the Police Department. He returned to Mrs. Boulton, and shortly afterwards the police arrived. Prior told them the story which Wilkes had instructed him to give. He was taken to a police station where, in an interview with Detective Bond, he first adhered to the story, but, after speaking with Mrs. Boulton's father, he admitted that the story was untrue and gave a written statement to Bond. Mrs. Boulton was taken to the City morgue, and medical evidence showed that she died in the course of an operation intended to procure her miscarriage. At the trial each accused made a short statement. Wilkes denied Prior's story. He said that on the evening of 17th November he and an employee had worked together on a machine in portion of his premises. He could see his wife and daughter in the kitchen during all that time and thought they could see him. Mrs. Wilkes also denied Prior's story. She said that she spent the evening with her step-daughter in the kitchen and that she could see her husband working in the factory until 11 p.m., when she went to bed. No further evidence was tendered on behalf of Wilkes, but Mrs. Wilkes called the employee and her step-daughter to confirm her story that from 8 p.m. till 11 p.m. she was in the kitchen and her husband working in the factory. She called another witness who said that Prior and Mrs. Boulton had been at this witness's home at about 8.45 p.m. on the 17th and that Mrs. Boulton had said that Prior was taking her to a nurse at Glanville.

The jury convicted the accused on the third count, but found both of them not guilty on the first and second counts. The accused appealed to the Court of Criminal Appeal which allowed the appeals, quashed the convictions and ordered that judgments and verdicts of acquittal be entered. The court, in the course of its judgment, said :—" In the light of the seeming inconsistency of the verdicts, the absence of corroboration of Prior, and the criticisms we have made of the learned judge's directions, we cannot feel satisfied

H. C. OF A. 1948.

THE KING v. WILKES.

that the verdicts have been reached upon proper grounds. We do not think that this is a case in which we should order a new trial. There was, of course, evidence upon which a jury properly directed could have found the appellants guilty on the third count, and in ordinary circumstances it would have been proper to order a new trial. The present case is, however, complicated by the verdict on the first and second counts. We have no power to set aside a judgment of acquittal following a verdict of not guilty, and, consequently, we cannot order a new trial on all three counts. If we had the power we would do so . . . On a new trial confined to the third count, Prior's story will have to be told again at length, in order to make it intelligible. In directing the jury afresh, the presiding judge must warn the jury against the danger of acting on his evidence. It will also be necessary to tell them 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. With these directions, doubt will immediately arise as to Prior's story, and the judge is likely to feel that he ought to advise the jury not to convict."

The Crown applied for special leave to appeal to the High Court.

Hannan K.C. (with him *Chamberlain* K.C. and *Kearnan*) for the applicant. A verdict of not guilty is not a final acquittal on all issues. Acquittal is no kind of estoppel (*R.* v. *Ollis* (1)). The Court of Criminal Appeal has, in effect, decided that acquittal on one ground excludes any other charge based on the same facts and has tried to introduce into the law a kind of " criminal estoppel." There is no such thing. There is only *autrefois acquit* or *autrefois convict*. An acquittal proves nothing and does not establish innocence (*Helton* v. *Allen* (2)). Prior's story was not rejected, and the Court of Criminal Appeal erred in failing to see that the verdicts of the jury were consistent. The killing might have been done by a fifth person, and on that, and other hypotheses, there was no inconsistency. That there is no " criminal estoppel " is shown by *R.* v. *Coventry* (3).

The following judgments were delivered :—

LATHAM C.J. I have the misfortune to differ in opinion, though not very strongly, from my colleagues as to whether we should exercise our discretion by granting special leave to appeal in this

(1) (1900) 2 Q.B. 758, at p. 764.
(2) (1940) 63 C.L.R. 691, at p. 710.
(3) (1938) 59 C.L.R. 633.

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.

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.

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

H. C. OF A. 1948.

THE KING v. WILKES.

Latham C.J.

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.

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.

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* (1), 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* (2), 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

(1) (1915) 20 C.L.R. 299.

(2) (1923) A.C. 603.

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.

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.

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

H. C. OF A. 1948.

THE KING v. WILKES.

Dixon J.

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.

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* (1), 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

(1) (1900) 2 Q.B. 758, at p. 769.

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.

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.

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

H. C. OF A. 1948.

THE KING v. WILKES.

McTiernan J.

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.

Application refused.

Solicitor for the applicant: *A. J. Hannan*, Crown Solicitor for South Australia.

C. C. B.