[HIGH COURT OF AUSTRALIA.]

MRAZ . . . . . APPLICANT;

AND

THE QUEEN . . . . . RESPONDENT.

[No. 2]

H. C. OF A. 1956.

SYDNEY, *Aug.* 16, 17; *Sept.* 14.

Dixon, C.J. Williams, Webb, Fullagar and Taylor JJ.

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*).

M. was indicted on a charge of murder of a woman, the Crown case being that the death of the woman had been caused during or immediately after the commission of an act of rape upon her by M. At the trial it was not disputed that there had been sexual intercourse between M. and the woman and that at the time, or shortly afterwards, the woman had died, but the real issue contested was whether or not such intercourse had taken place against the woman's will. The jury found M. not guilty of murder but guilty of manslaughter. The conviction for manslaughter was quashed on appeal by the High Court. M. was subsequently indicted for rape on the same facts and to such indictment, in addition to pleading not guilty, he entered a special plea of issue estoppel in reliance on the verdict in the earlier proceedings. Both pleas were found against M. His appeal to the Court of Criminal Appeal in relation to the special plea was dismissed, and he applied for special leave to appeal against such dismissal.

Held, (1) that a consideration of the indictment and the verdict of not guilty of murder but guilty of manslaughter understood by reference to the law of homicide established that the jury had found that an act of M. had caused the death of the woman but involved as a matter of law a finding either (a) that M. did not commit rape or (b) that though his act caused death it was not during or immediately after the commission of rape;

(2) that in order to exclude the possibility of alternative (b) being the ground of the verdict it was open to the appellant to rely on the fact that

there was no issue taken at the trial that sexual intercourse had not taken place between M. and the woman and at that time or shortly afterwards she had died;

(3) that, on that footing, the verdict must be taken to cover the issue of rape and to negative its commission by M.;

(4) that the order of the High Court vacating the finding of manslaughter did not prevent consideration of the jury's verdict upon the foregoing basis;

(5) that it followed that the verdict of the jury of not guilty of murder involved as a matter of law a finding that the appellant did not commit rape and a plea of issue estoppel was accordingly made out.

The nature and scope of issue estoppel considered.

Decision of the Court of Criminal Appeal of New South Wales: *Reg.* v. *Mraz* (1956) 73 W.N. (N.S.W.) 425, reversed.

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

Gyula Mraz was arraigned on 14th March 1955 in the Central Criminal Court of New South Wales before *Nield* J. and a jury of twelve on an indictment charging that he on 27th September 1954 at Woolamai in the State of New South Wales did feloniously and maliciously murder Isabella Joyce Wilson. He pleaded not guilty. The death of the said Isabella Joyce Wilson occurred during or immediately after sexual intercourse had occurred between her and the accused and the Crown case was that in the circumstances such sexual intercourse amounted to rape of the deceased by the accused.

The accused was found not guilty of murder but guilty of manslaughter which latter verdict was subsequently set aside by the High Court and a verdict and judgment of acquittal entered: *Mraz* v. *The Queen* (1).

Following upon the decision of the High Court Mraz was indicted on a charge of rape of the said Isabella Joyce Wilson at the same place and time as mentioned in the original indictment. To this indictment Mraz pleaded certain special pleas which were as follows:

"(i) On the fourteenth, fifteenth and sixteenth days of March one thousand nine hundred and fifty five he the said Gyula Mraz was tried in the Central Criminal Court at Sydney before the Honourable Mr. Justice *Nield* and a jury on a charge that he on the twenty-seventh day of September one thousand nine hundred and fifty four at Woolamai aforesaid did feloniously and maliciously murder Isabella Joyce Wilson.

(ii) He the said Gyula Mraz pleaded not guilty to the said charge of murder, and on the sixteenth day of March one thousand nine

(1) (1955) 93 C.L.R. 493.

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hundred and fifty five the jury returned a verdict that he was not guilty of murder but was guilty of manslaughter. He was thereupon sentenced to be imprisoned with hard labour for twelve years.

(iii) An appeal by him the said Gyula Mraz to the Court of Criminal Appeal of New South Wales against the said conviction was dismissed on the seventeenth day of June one thousand nine hundred and fifty five.

(iv) An appeal by the said Gyula Mraz against such judgment of the Court of Criminal Appeal was allowed by the High Court of Australia on the sixteenth day of November one thousand nine hundred and fifty five. The High Court set aside the order of the Court of Criminal Appeal, quashed the said conviction for manslaughter and directed that judgment and verdict of acquittal be entered.

(v) Having been acquitted of murder and manslaughter of the said Isabella Joyce Wilson, the said Gyula Mraz says: (a) that in law he must be deemed to have been acquitted of the rape of the said Isabella Joyce Wilson now alleged in the said indictment; (b) that the Queen is estopped from prosecuting the said indictment.

AND as to the offence of rape of which the said Gyula Mraz now stands indicted he says that he is not guilty."

The issues raised by the special pleas were determined against the accused, who on his trial on the indictment pleaded not guilty. He was convicted and sentenced to imprisonment with hard labour for six years.

Mraz then appealed to the Court of Criminal Appeal of New South Wales on the questions raised by the special pleas, which appeal was on 28th June 1956 dismissed (*Street* C.J. and *Herron* J., *Dovey* J. dissenting): *Reg.* v. *Mraz* (1).

From this decision Mraz, by notice of motion dated 6th July 1956, applied to the High Court for special leave to appeal.

J. J. Davoren, for the applicant. The substituted verdict of acquittal entered by this Court was an acquittal for all purposes and placed Mraz in the same position as if he had in the first instance been found not guilty both of murder and of manslaughter. [He referred to *Criminal Appeal Act of* 1912 (N.S.W.), s. 6 (2); *R.* v. *Barron* (2).] In this case it is proper to look at the record and the evidence submitted in support of the special pleas in order to decide what was the issue upon which the matter was decided and such an examination shows that the verdict really acquitted the applicant

(1) (1956) S.R. (N.S.W.) 431; 73 W.N. 425.

(2) (1914) 2 K.B. 570, at pp. 573, 574; (1914) 10 C.A.R. 81, at pp. 83, 87, 88.

of rape, that being the issue upon which the first trial was sought. [He referred to *Reg.* v. *Ollis* (1); *R.* v. *Wilkes* (2); *Sambasivam* v. *Public Prosecutor of Malaya* (3).] Because of the acquittals of murder and manslaughter the Crown was estopped from charging the applicant with rape, because such acquittals negatived any unlawful act of his causing death. [He referred to (1952) 65 *Harvard Law Review* 818, at pp. 874, 880—"*Developments in the law—Res Judicata*".] The judgment of this Court should be looked at to ascertain the reasons for the substitution of the verdict adjudgment of acquittal in respect of the finding of guilty of manslaughter. By its substituted verdict this Court specifically negatived rape, for it was not directed to the other question whether Mraz had caused the death of the woman. This latter question was inherent in the verdict of guilty of manslaughter. The applicant should be granted special leave to appeal.

H. A. Snelling Q.C., Solicitor-General for New South Wales (with him *J. Hall*), for the Crown. This Court by its judgment decided nothing as to the two issues of rape and causation, but decided merely that because of a wrong direction given to the jury the verdict should not stand. Then, too, the Court took the view that manslaughter was an inappropriate charge where the facts alleged are rape causing death. This Court's judgment does not operate as a finding of fact on both issues of rape and causation favourable to the applicant, and nothing in *R.* v. *Barron* (4) is contrary to this submission. [He referred to *Archbold's Pleading Evidence and Practice in Criminal Cases*, 33rd ed., (1954), p. 153.] The applicant cannot put his case as *res judicata* but must rely upon issue estoppel, and in doing so must find that some court has found an issue of fact in his favour, but not by an artificial process of trying to reason something from what the jury may have found in its wrong verdict combined with what this Court has done and thus constructing something entirely foreign to the real reason for the present result. There is no basis for an inference here that the jury by its verdict negatived rape; the jury in fact found that there was carnal knowledge without consent and that there was causation. If no regard is to be paid to these findings because of the misdirection and the fact that the verdict was set aside then there is no inference that the jury's verdict would have negatived rape. It would be unreal to look at the verdict divorced from the summing-up, and

(1) (1900) 2 Q.B. 758, at pp. 769, 770.
(2) (1948) 77 C.L.R. 511, at pp. 518, 519.
(3) (1950) A.C. 458, at p. 479.
(4) (1914) 2 K.B. 570; (1914) 10 C.A.R. 81.

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one is entitled to look at the summing-up to determine what the issues were : *Sealfon* v. *United States* (1). [He referred to *Clout* v. *Hutchinson* (2).] The jury's verdict of manslaughter here was meaningless and irrational from which no inference can be drawn that the jury found what would normally be necessary for a verdict of manslaughter. In all probability their verdict meant a conclusion of non-malicious rape. The verdict was quashed because it was meaningless. Then the jury always has a prerogative to return a verdict of manslaughter even where the case is one of murder or nothing and this shows the fallacy of attempting to draw out from a verdict the issues that must have been determined. It would be open to the jury, although satisfied both of rape and causation, to return a verdict of manslaughter. The decision of this Court did not purport to determine anything regarding an indictment of carnal knowledge without consent. [He referred to *Reg.* v. *Bird* (3).] This Court did not acquit on any ground of fact, but took the view that having regard to the direction it should not be allowed to stand. To find what the issue estoppel is arising from any judgment, the reasons of the Court as enunciated in its judgment should be looked at. So looked at, the reasons of this Court do not support the applicant's contentions. Special leave should not be granted.

Cur. adv. vult.

Sept. 14.

THE COURT delivered the following written judgment :—

This application for special leave to appeal depends upon a question of issue estoppel. By the order from which special leave to appeal is sought the 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.

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

(1) (1948) 332 U.S. 575, at pp. 576, 577, 580 [92 Law. Ed. 180, at pp. 183-185].
(2) (1950) 51 S.R. (N.S.W.) 32 ; 67 W.N. 203.
(3) (1851) 2 Den. 94, at pp. 131, 149, 150, 188, 198, 214, 215 [(1851) 169 E.R. 431, at pp. 446, 453, 467, 468, 471, 477, 478].

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.

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 (1). 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.

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

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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* (1); *Sambasivam* v. *Public Prosecutor of Malaya* (2). 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.

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.

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

(1) (1948) 77 C.L.R. 511, at pp. 518, 519.

(2) (1950) A.C. 458, at p. 479.

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* (1) and per Lord *Shaw* for the Privy Council (2); *Reg.* v. *Walker* (3) and *Reg.* v. *Hartington Middle Quarter* (4). And, as has already been said, this applies in pleas of the Crown.

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*?

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.* (5). You cannot show that issues necessarily involved in the conclusion were not found. You cannot say that,

(1) (1921) 29 C.L.R. 537, at pp. 561, 563.
(2) (1926) A.C. 155, at pp. 170, 171; (1925) 37 C.L.R. 290, at pp. 303, 304.
(3) (1843) 2 M. & Rob. 446, at p. 457 [174 E.R. 345, at p. 348].
(4) (1855) 4 El. & Bl. 780, at pp. 792, 793 [119 E.R. 288, at p. 293].
(5) (1916) 21 C.L.R. 509, at p. 543.

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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 (1), should be read with the report of the decision in this Court (2). 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

(1) (1926) A.C. 155; (1925) 37 C.L.R. 290.

(2) (1921) 29 C.L.R. 537.

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.

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.

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

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as to manslaughter because manslaughter was a conclusion not supported by the facts in evidence.

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.

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.

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.

Solicitor for the applicant, *J. D. Mahony.*

Solicitor for the Crown, *F. P. McRae,* Crown Solicitor for New South Wales.

R. A. H.