Supreme Court Notes

by Anita Del Medico

CRIMINAL LAW AND PROCEDURE - S339 Criminal Code - motion to quash indictment or stay proceedings - whether Supreme Court has inherent jurisdiction to stay proceedings where an abuse of process of the court or where procedural unfairness exists.

CRIMINAL LAW AND PROCEDURE - plea of autrefois acquit - S. 342 (2)(c) Criminal Code - scope of defence of previous acquittal - Division 5 Criminal code - meaning of "similar offence".

CRIMINAL LAW AND PROCEDURE - application of doctrine of issue estoppel in criminal proceedings - principle that accused should be given "the full benefit" of verdict of acquittal for murder - whether charges contained in fresh indictment amount to a "collateral attack" on the integrity of the verdict of acquittal for murder - principle of double jeopardy.

R -v- HOFSCHUSTER

1.11.93 Thomas J

In these proceedings, the accused appeared a second time before the Supreme Court to answer charges relating to the unlawful killing of S.V. on 24.12.91. The Crown case concerned an argument between the accused and S.V. during which the accused loaded a firearm and pointed it at the victim and attempted to shoot him. The gun jammed the victim fled to his residence. The accused lay in waiting outside his caravan and fatally shot S.V. when he was seen to return. The accused alleged the victim had returned carrying a knife in his uplifted hand. The victim, after being shot, staggered off and then collapsed. The accused later fired at persons who approached the scene; these persons were police officers.

By indictment dated 1.10.93 the accused was charged with attempting to unlawfully kill S.V. *(S165(a) Criminal Code)*, attempting to strike S.V. with a projectile, namely, a .303 calibre bullet, with intent to cause grievous harm *(S177(b) Criminal Code)* and in the alternative, with doing a dangerous act, aggravated by the fact that at the time this occurred, he was under the influence of alcohol *(S. 154 (1) and (4) Criminal Code)*. A second unsigned and undated indictment was also handed up, which the Crown indicated would be proceeded with at a later time. It contained a 4th count charging the accused with doing an act of such a nature as to be likely to endanger human life, with intent to unlawfully kill C.H., M.S. and M.M. *(S165 (b) Criminal Code)*.

Counsel for the accused sought to quash the indictment pursuant to *S339 (1) (a) of the Criminal Code*, and in the alternative, to stay the proceedings pursuant to S339 (1) (b). The motion for a stay was also put on the basis that under the inherent jurisdiction of the Supreme Court, the proceedings constituted an abuse of the process of the Court. It was further submitted that should these applications fail, the accused would be entering a plea of autrefois acquit on the basis that he had already been acquitted of a similar offence *(S342 (2) (c) Criminal Code)*.

By earlier indictment dated 4.11.92, the accused had been charged with having contravened *SS165 (a), 177 (b), 162 and 165 (b) of the Criminal Code*, and an application had then been made by the Defence to quash the indictment, or alternatively, to order a separate trial on the charge of murder (count 3), pursuant to *S341 of the Criminal Code*. On 12.11.92 Mildren J ordered that there be a separate trial on Count 3, "...because of the complexities involved in having to decide more than the murder charge in this case, and the risk of compromise verdicts... Obviously I expect the Crown to proceed with the murder charge first. If this does not occur, I would entertain a further notion under S339 of the Code." The trial proceeded on 1.12.92 before a jury and the accused pleaded not guilty to the charge of murder. He was acquitted on this charge, as well as on the alternative charges of manslaughter and dangerous act.

On this application, it was argued for the accused that at the first trial the Crown case relied on evidence "...as to all the continuum of events...", from the first failed attempt to shoot S.V., to the second shooting at police, to establish the intent to kill S.V. This gave rise to an issue estoppel, as the accused must be given the full benefit of the acquittal for the charge of murder: Sambasivan - v - Public Prosecutor, Federate of Malaya 1950 AC 458 and the accused, in this matter, must be taken to be innocent of the charge of murder: Kemp -v- R 83 CLR341.

Furthermore, following the reasoning of Barwick CJ in R -v- Storey 140 CLR 364 at 372, it was argued that full significance was to be accorded to the Jury's verdict acquitting the accused of murder, manslaughter and dangerous act.

HELD, per Thomas J, that the accused's plea of autrefois acquit for a similar offence, is a defence for all 3 charges on the indictment of 1.10.93; in relation to Count 4 on the second indictment, order that the indictment be quashed *(S339(1)(a))* on the ground that it is calculated to prejudice or embarrass the accused in his defence to the charge; alternately, pursuant to the inherent power of the court, order a permanent stay of the proceedings on the ground that the indictment creates an unfairness to the accused in that it infringes the principle of double jeopardy.

1. In Australia, issue estoppel is available in certain limited situations in criminal proceedings. The principle is not applicable in respect of this indictment. Applying the reasoning of Aickin J in R -v- Storey, (supra), at 416 that in the case of a jury acquittal, "...it will be seldom that decisions on separate issues involved as indispensable steps to the final conclusion can be ascertained. In most criminal charges the offence will involve more than one element which must be proved in order to establish guilt, but a verdict of not guilty will establish no more than that the jury was not satisfied that all elements had been proved..." In this case, it appears probable that by acquitting the accused on his trial, the

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jury did so on the basis that they could not be satisfied beyond reasonable doubt that the accused did not act in self-defence. However, there is also a possibility that the jury were not satisfied the accused intended to cause death or grievous harm to the deceased, per *S162 (1) (a) Criminal Code*. Nevertheless the jury had never been called upon to decide the issue of the intent of the accused at the time of attempting to fire the rifle in the caravan, and in respect of that incident, there was no evidence of self-defence.

R -v- Wilkes (1948) 77 CLR 511, referred to.

2. Were the 3 charges on the second indictment to proceed, the accused would not be deprived the benefit of the earlier acquittal for murder nor would this benefit be diminished - provided the trial judge gave a clear direction to the jury to the effect that the accused is entitled to the full benefit of the earlier acquittal and that it is not a matter for the jury on the second trial to enquire into the findings of the jury on the first trial. The fact that presenting the accused for trial presents some difficulties and will require care in respect of the jury directions to be given, is not a reason to quash the indictment nor stay the proceedings. No unfairness to the accused nor infringement of the principle of double jeopardy would arise from the accused being placed on trial for the offences on the indictment dated 1.10.93. Accordingly, the application to quash the indictment or stay proceedings pursuant to *S339 of the Criminal Code*, refused.

3. The Court possesses an inherent power to stay proceedings, but in relation to the indictment dated 1.10.93, there is no essential unfairness about the procedure adopted, nor does it amount to an abuse of court process.

Jago -v- District Court of NSW (1989) 168 CLR 23;
R -v- Haslett & Anor (1987) 50 NTR 17;
R -v- Siugzdinis & Mauri 32 NTR 1;
R -v- Mungaribi (1988) 55 NTR 12
Herron -v- McGregor (1986) 6 NSWLR 246, followed.

[Although there was no ruling made in relation to the S339 application at the time of its hearing, it was agreed that the accused enter pleas in relation to the 3 charges on indictment so that the ground of "autrefois acquit" *(S18 Criminal Code)* could be argued. This was done and he pleaded on Counts 1 & 2: "Already acquitted, similar offence" and on count 3: "Already acquitted, same offence and similar offence." It was argued by Defence Counsel that the accused's conduct relied upon in the first trial by the Crown, in order to establish the charge of murder, was the very same conduct now sought to be impugned by the fresh charges on the indictment of 1.10.93. This made it a "similar offence" within the meaning of *S.17 Criminal Code*.]

4. *Section 18 of the N.T. Criminal Code* has a broader meaning than its equivalent in the Criminal Codes of Queensland and Western Australia. As to the meaning of "similar offence" (S.17), the words "conduct" and "impugned" are not defined nor apparently judicially interpreted and should accordingly be given their plain and ordinary meaning.

On analysis, the use of the word "conduct" in the context of the remainder of the code shows that it does not always include reference to the mental element of a crime: SS. 7 (1) (b), 8, and 31. But see: SS 14 and 15. The definition of "similar offence" in S.17 is broader than the common law as expressed in Connelly -v- DPP 1964 AC 1280. Here, although in the earlier trial on the count of murder, the jury were not asked to consider the guilt or otherwise of the accused in respect of the incident in the caravan, it was raised by the Crown as relevant to the intent of the accused at the time of the fatal shooting of S.V. The first incident in the caravan (the failed attempt to fire the gun at S.V.) comes within the definition of "similar offence" because the charges on the fresh indictment include "...the conduct impugned in the offence to which it is said to be similar", i.e. the offence of murder, for which the accused has already been acquitted.

5. In relation to the third indictment (Count 4), the incident of firing at police occurred such a short time after the firing of the fatal shot (about 10 minutes later), and in such circumstances, that to place the accused on trial again for that offence, would diminish the benefit to the accused of the acquittal for murder. This is so despite the fact that the death of S.V. is not in issue on Count 4. This does not amount to issue estoppel. The full benefit of the acquittal could not be said to flow to the accused even if a direction were to be given to this effect by the trial judge in express terms: "...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...", per Mason J in R -v- Storey (supra), at 396. R -v- Humphrys 1977 AC at 40-41, per Lord Hailsham of St Marylebone (infringement of principle of double jeopardy), applied.

To place the accused on trial on Count 4, relying on the facts which would form part of the Crown Case, would amount to "a collateral attack on the integrity of the verdict of acquittal for murder".

R -v- Davis [1982] NZLR 584;
Ferris -v- Police [1985] 1 NZLR 314;
Bryant -v- Collector of Customs [1984] 1 NZLR 280, referred to.

The court has an inherent power "to see that no shadow of unfairness or injustice should taint these proceedings...", per Asche CJ in R -v- Haslett & Anor, (supra), at 34.

Application to quash indictment or stay criminal proceedings in the Supreme Court.

R. Wallace, Deputy Senior Crown Prosecutor, for DPP.
C McDonald instructed by R Coates of NTLAC, for the accused.

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