RES JUDICATA; ISSUE ESTOPPEL—THE QUEEN v. STOREY

An accused, once acquitted of an offence, can rely on that acquittal in any further criminal proceedings for the same offence, that much is certain. What is uncertain is in what other circumstances an accused can rely on that acquittal, in particular where the accused relies on the acquittal to invoke the doctrines of *res judicata* and issue estoppel. Both doctrines were considered by the High Court in its recent decision in *The Queen* v. *Storey*[1] Some difficulties with the first appear to have been resolved but the application of the doctrine of issue estoppel is now most uncertain. Issue estoppel appeared to apply to the criminal law in Australia[2] but the House of Lords decision in *DPP* v. *Humphreys*[3] raised doubts which have not been removed by *Storey's* case.

The appeal in *Storey* was by the Crown against an order of the Court of Criminal Appeal (Vic) setting aside a conviction for rape and ordering a new trial. The Crown case was that in October 1975 three men, including the respondent, forcibly took the prosecutrix from the Clifton Hill railway station to a nearby park where they raped her, each aiding and abetting the others.

The respondent was first presented on a charge under s.62 of the Crimes Act, 1958 (Vic.), as amended, of forcible aduction of the prosecutrix with intent to know her carnally, a charge of theft and two charges of rape and aiding and abetting rape. He was acquitted on the merits of the forcible abduction charge and, by direction, of the charge of theft. The jury was unable to agree on the charges relating to rape. The respondent was retried and convicted.

At the second trial the Crown adduced evidence that the prosecutrix was forcibly taken from the railway station, it being argued that the evidence was relevant to the prosecutrix's consent at the time of the alleged rape. The defence objeced to this evidence but the objection was overruled. The trial judge in his summing-up directed the jury to consider the whole of the evidence although they were relieved of deciding whether or not the respondent was guilty of the charge of abduction.[4]

On appeal the Court of Criminal Appeal (Vic) found that the doctrine of issue estoppel applied and held by a majority that the acquittal of the respondent on the charge of abduction estopped the prosecution from adducing evidence that the prosecutrix was taken against her will from the railway station. The High Court granted the Crown special leave to appeal limited to grounds which would raise two questions: (a) whether the doctrine of issue estoppel is applicable in criminal proceedings; and (b) what are the limitations on its use in such proceedings. In the final result the case was decided upon grounds of admissibility of evidence, the High Court deciding that the doctrine of issue estoppel had no application to the facts of the case before them.

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1. (1978) 52 A.L.J.R. 737.
2. See Campbell, "Issue Estoppel in Criminal Cases, With Special Reference to *Brown* v. *Robinson*", (1974) 48 *A.L.J.* 469; *R.* v. *O'Loughlin; Ex parte Ralph* (1971) 1 S.A.S.R. 219, 222 *per* Bray C.J.; 252 *per* Wells J.
3. [1976] 2 W.L.R. 857.
4. See the judgment of Jacobs J. where the summing-up is set out in full: (1978) 52 A.L.J.R. 737, 750-752.

It was held by Stephen, Mason, Jacobs and Aickin JJ., with Barwick C.J., Gibbs and Murphy JJ. dissenting, that the appeal should be dismissed. Stephen, Mason and Aickin JJ. held that the evidence in question was admissible but that the trial had miscarried because the trial judge had failed to give a sufficiently clear warning as to the effect of the acquittal of the charge of abduction. It was held by Jacobs J., the other member of the majority, that the evidence should have been excluded. Of the dissentients, Barwick C.J. and Gibbs J. thought the warning sufficient, while Murphy J. though it occasioned no miscarriage of justice. It is proposed, first, to look at the reasons for the decision in *Storey*, for they appear to amplify the principles discussed in the recent decision of *Garrett* v. *The Queen*[5] and, secondly, to discover whether the doctrine of issue estoppel will survive the decision.

Mason, Stephen and Aickin JJ. decided the case upon similar grounds. Mason J. found in the cases of *Sambasivam* v. *Public Prosecutor, Federation of Malaya*[6] and *Garrett* v. *The Queen*[7] a principle which he called *res judicata*. The principle was thus expressed:

> ". . . [it] will preclude the Crown from challenging the effect of a previous acquittal, not merely in proceedings for the same or substantially the same 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."[8]

The rationale of the principle His Honour found in the following notion:

> ". . . [that] once a person is acquitted of an offence the acquittal must be recognized fully and without qualification for all purposes in criminal proceedings."[9]

This principle, His Honour found, did not lead necessarily to the automatic exclusion of evidence relating to the acquittal and it could be satisfied by the admission of any relevant evidence ". . . accompanied by a precise instruction to the jury that the prior acquittal cannot be challenged and that the evidence for what it may be worth, is to be understood in this light."[10]

In some cases this evidence could be "edited" to reduce any prejudice to the accused, but in this case Mason J. found that to exclude any of it would be to render the rest so incomplete as to "provoke dangerous speculation on the part of the jury".[11] The direction of the trial judge was for the following reason inadequate:

> ". . . although His Honour instructed the jury that '. . . you are relieved of the task of considering whether the accused were, or were not guilty of forcible abduction, and you will confine your deliberations to the various counts of rape', he did not give sufficient emphasis to the fact that the jury were bound to accept the verdict

5. (1978) 52 A.L.J.R. 206.
6. [1950] A.C. 458.
7. (1978) 52 A.L.J.R. 206.
8. (1978) 52 A.L.J.R. 737, 748.
9. *Ibid.*
10. *Ibid.*
11. *Id.*, 749.

> of acquittal . . . as the only possible view of the evidence relating to those charges."[12]

The evidence, however, will only be admissible, even with a precise instruction, where it "works no injustice to the accused"[13] but His Honour found this was not such a case.

Aickin J., with whom Stephen J. concurred, agreed that the decision turned upon the proper application of *Garrett's* case and agreed with the view taken by Mason J. He also made the wry observation that it was reasonable to infer that if the prosecution had not led the evidence in question it would have been brought out by the defence as a means of discrediting the prosecutrix, but in spite of this artificiality, it was clear that the direction made by the judge fell short of what was required.[14]

A criticism of the above judgments is that neither judge considered whether, in spite of the misdirection, there had been any substantial miscarriage of justice. Barwick C.J. thought, "not without some residual misgivings",[15] that the accused had been given the full benefit of the acquittal, but added that if there had been a misdirection the case should have been remitted to the Court of Criminal Appeal to consider whether it was a proper case for the application of the proviso in the Crimes Act, 1958 (Vic.), s. 568(1).[16]

Gibbs J. thought there was no misdirection, even though it was "less emphatic than the canons of perfection might require".[17] The other member of the minority, Murphy J., agreed that the evidence was admissible. He saw no reason why evidence otherwise relevant and admissible should be excluded only because it had been led in relation to another charge for which the accused had been acquitted, as long as the accused is given the full benefit of the acquittal. In the case before him he found that the direction of the trial judge had occasioned no miscarriage of justice.[18]

The only member of the court to hold the evidence not admissible was Jacobs J. He found a rule, beyond the rule of *autrefois acquit*, based upon a principle forbidding double jeopardy "which makes an earlier acquittal conclusive in favour of the defendant in a later trial that he was not guilty of the offence upon which he had been acquitted".[19] His analysis of this rule was as follows:

> ". . . the essential basis of the rule against double jeopardy is that the jury in the trial for the second offence is not permitted to find against the defendant a fact, whether it be an element of the second offence or whether it be a fact relevant to the determination of the elements constituting that offence, which can be shown to have been an element of an offence in respect of which the defendant has been acquitted on an earlier trial and to have been certainly determined in his favour at that trial."[20]

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12. *Ibid.*
13. *Ibid.*
14. *Id.*, 759.
15. *Id.*, 740.
16. *Id.*, 741.
17. *Id.*, 746.
18. *Id.*, 755.
19. *Id.*, 752.
20. *Id.*, 753.

Pursuant to this principle it was not open to the prosecution to prove all the elements constituting the offence for which the accused had been acquitted. Nor was it possible to prove any element which had been conclusively determined in the accused's favour. Where it could not be said with certainty on which particular issue the accused had been acquitted "individual elements less than the whole"[21] can be accepted as proved.

In applying this principle to the case before him Jacobs J. found it was not possible for the prosecution to prove both that the prosecutrix left the station with the accused, the latter intending to have sexual intercourse with her, and that she was forcibly abducted by the accused. It was, though, theoretically possible to prove either one, because it was not possible to say on which particular element the accused had been acquitted.

From this two things followed. First, the existence of an intent to have sexual intercourse at a time when no constraint was placed upon the prosecutrix was irrevelant to what happened at a later time when constraint was placed upon her. Secondly, evidence of the abduction in the alleged rape carried an implication of intent at the time of the abduction to have sexual intercourse with the prosecutrix, and should have been excluded as a matter of discretion since it made it practically impossible, because of the nature of the abduction charge, for the accused to get the full benefit of the acquittal for that charge. Again, Jacobs J. found evidence of abduction without the suggestion of intent to have sexual intercourse to be irrelevant to the alleged rape. If evidence of the abduction were given it should have been made clear to the jury there was no suggestion of a concurrent intent to have sexual intercourse. As evidence of both elements of the abduction had been allowed, with no sufficient warning to the jury that they could not find both of the elements proved, His Honour dismissed the appeal.

Several criticisms may be made of Jacobs J.'s approach to the problem. First, it seems unnecessarily wide. His Honour found that a jury in a trial for an offence is not permitted to find against an accused any facts relevant to the determination of an element of that offence which can be shown to be conclusively determined in his favour at an earlier trial. But it is difficult to determine what elements have been conclusively determined in an accused's favour. To determine what facts relevant to those elements have been conclusively determined in his favour would be in most cases impossible.

Secondly, His Honour's approach has a degree of artificiality about it. Where an offence for which the accused has been acquitted has two or more elements, and it is not possible to find with certainty which one was found for the accused, it seems artificial to allow the prosecution to adduce evidence of one or two but not all. The jury may have found no element proved or, alternatively, have found for the accused that element upon which the prosecution elects to adduce evidence. Moreover, in the instant case, evidence of both elements of the charge of abduction appear relevant to whether the accused raped the prosecutrix.

It is submitted the approach of the other members of the court is preferable. Thus the principle of *res judicata* requires that evidence, which is relevant only if the accused is assumed to be guilty of an offence for which

21. *Ibid.*

he has been acquitted, will not be admissible because it directly challenges the earlier acquittal. But evidence which is otherwise relevant and admissible will not be excluded only because it has been led in relation to a charge for which the accused has been acquitted. When led, the principle of *res judicata* requires that it must, if possible, be so confined as to give an accused the full benefit of his acquittal. If it is not possible so to confine the evidence it may be admitted, but must be accompanied by a clear and precise warning by the trial judge that it is not open to the jury to accept a view of the facts inconsistent with the acquittal.

The distinction is a fine one and will, as Aickin J. pointed out,[22] depend on the circumstances of each case. The distinction can be seen by comparing *Storey's* case with *Garrett* v. *The Queen*.[23] In the latter case the accused had been tried for rape and the prosecutrix had given evidence that the accused had, on an earlier occasion, had intercourse with her without her consent, an act for which the accused had been charged with rape and acquitted. The Court held that the principle of *res judicata* required that the evidence should have been excluded as it was only relevant if the accused was assumed to be guilty of the rape for which he had been acquitted. If the evidence had been confined to the allegation by her of rape and the fact that she gave evidence against him it would not have offered the principle. In *Storey's* case the evidence that the prosecutrix was taken against her will from the railway station was relevant to the charge of rape whether or not the accused was guilty of abduction. Although the evidence did tend to challenge indirectly the earlier acquittal it could not be confined without making the evidence so incomplete as to "provoke dangerous speculation on the part of the jury".[24] In the circumstances the court found the principle satisfied by a sufficiently precise direction. When, even with such a direction, the accused would be prejudiced the trial judge has the discretion to exclude the evidence.

With *Storey* the application of the principle of *res judicata* to the admission of evidence is well entrenched. The same is not so with the doctrine of issue estoppel and its application in criminal proceedings. The doctrine of estoppel has a long history in civil proceedings and as Diplock L.J. pointed out in *Thoday* v. *Thoday*[25] is a feature of the adversary system of common law trials. One branch of the doctrine of estoppel is estoppel *per rem judicatam* which itself is divided into two species, cause of action estoppel and issue estoppel.[26]

While cause of action estoppel prevents a party to litigation challenging a former judgment, the doctrine of issue estoppel will prevent a party from relitigating any issue necessarily decided by the judgement. One of the earliest cases decided on grounds of issue estoppel is *Outram* v. *Morewood*[27], although the term was apparently first used by Higgins J. in *Hoystead* v. *Federal Commissioner of Taxation*[28] in a passage approved by the Privy Council.[29] The doctrine was described thus by Dixon J. in *Blair* v. *Curran*[30]:

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22. *Id.*, 759.
23. (1978) 52 A.L.J.R. 206.
24. (1978) 52 A.L.J.R. 737, 749.
25. [1964] P. 181, 197.
26. *Ibid.*
27. (1803) 3 East 346.
28. (1921) 29 C.L.R. 539, 561.
29. [1923] A.C. 155, 170-171.
30. (1939) 62 C.L.R. 464.

"A judicial determination directly involving an issue of fact or law disposes once for all the issue, so it cannot afterwards be raised between the same parties or their privies."[31]

The issue decided must be fundamental to the final legal conclusion expressed in the judgment, that is, where to raise the issue again would be to assert the former decision was erroneous. It is clear that issue estoppel applies only to material facts, and not to evidentiary facts. This distinction was made by Fullager J. in *Brewer* v. *Brewer*[32] where he said:

". . . issue estoppel applies only to issues. There is no estoppel as to evidentiary facts found in the course of determining the affirmative or negative of an issue. There is nothing to prevent a party from tendering in a later proceeding in relation to a particular issue facts negatived in an earlier proceeding when they are tendered in relation to a different issue."[33]

The distinction was affirmed by Lord Diplock in *Thoday* v. *Thoday*,[34] although Lord Reid in *Carl Zeiss Stiftung* v. *Raynor & Keeler Ltd. No. 2*[35] points out it was often difficult to distinguish issues from pure evidentiary facts.

While the application of the principle of *res judicata* in civil proceedings is fairly uncontroversial, the same is not so of its application in criminal proceedings. The principle as expressed in the criminal law has several aspects. Two are the special pleas of *autrefois acquit* and *autrefois convict*[36] which are based on the philosophy basic to the common law that no man should be twice placed in jeopardy for the same cause.[37] Since the times when Hale[38] and Hawkins[39] pondered the problem of when, in fact, a man is again placed in jeopardy for the same cause, the courts have faced constant difficulty in defining the limits of the pleas. In 1916 Maddern C.J. in *R.* v. *McNicol*[40] stated:

"Although this question has been constantly before the Courts, and has been the subject of frequent decision, yet it has been a matter for argument up to the present time."[41]

That this is still true today is evidenced by the recent decisions of the South Australian Supreme Court in *R.* v. *O'Loughlin: Ex parte Ralph*[42] and *Maple* v. *Kerrison.*[43]

While the limits of the pleas of *autrefois* are not yet clearly defined, their application in the criminal law is not disputed. When made out the pleas bar any further proceedings. They are procedural in nature and must be distinguished from the evidentiary aspect of *res judicata* first postulated by

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31. *Id.*, 531.
32. (1953) 88 C.L.R. 1.
33. *Id.*, 15.
34. [1964] P. 181, 198.
35. [1967] 1 A.C. 853, 916-917.
36. (1948) 77 C.L.R. 511, 519 *per* Dixon J.
37. *Connelly* v. *DPP* [1964] A.C. 1254, 1306 *per* Lord Morris.
38. Hale, *Pleas of the Crown* (7th ed., 1778), Vol. 2, 240.
39. Hawkins, *Pleas of the Crown* (8th ed., 1824), Vol. 2, chs. 35, 36.
40. [1916] V.L.R. 350.
41. *Id.*, 352.
42. (1971) 1 S.A.S.R. 219.
43. (1978) 19 S.A.S.R. 513.

the Privy Council in *Sambasivam's* case[44] and discussed earlier in this comment. While the evidentiary aspect of *res judicata* may require evidence to be excluded it does not prevent the prosecution from proving an offence by adducing other admissible evidence. Again, the application of this aspect *res judicata* in criminal proceedings is now beyond dispute. A further aspect may be the criminal doctrine of issue estoppel, but its existence is most uncertain. The possible existence of the doctrine in the criminal law was discussed by Sir Owen Dixon in *R.* v. *Wilkes*[45]:

> ". . . it appears to me that there is nothing wrong in the view that there is issue estoppel, if it appears by the 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."[46]

The only High Court decision to be decided on grounds of issue estoppel was *Mraz* v. *The Queen No. 2*.[47] The accused had been charged under s. 18 of the Crimes Act, 1901-1951 (N.S.W.), with having caused the death of the victim during or immediately after raping her. It was not disputed that intercourse took place or that the victim had died during or shortly afterwards. The only issue was whether there had been consent by the victim to intercourse. The accused was acquitted of murder but convicted of manslaughter. This conviction was quashed on the ground of misdirection.[48] The accused was then charged with the rape of the victim and convicted. On appeal to the High Court the conviction was set aside. After analysing the course of the first trial, the direction and the verdict, the Court found the jury must have reached their verdict of guilty of manslaughter only because they had found the accused had not raped the victim. Thus the issue had been conclusively determined in the accused's favour and it was not open to the prosection again to attempt to prove it.

The doctrine is accepted in the United States, where it is known as collateral estoppel,[49] and in Canada where it is called *res judicata.*[50]. The Canadian case of *R.* v. *Gill*[51] provides a simple example of the operation of the doctrine. The accused had been cleaning his shotgun when it discharged killing his wife and son. He was charged with killing his wife by criminal negligence and acquitted. He was then charged with the same offence in relation to his son and convicted. The Quebec Court of Appeal quashed his conviction on the ground that the issue of the accused's negligence had been conclusively determined in his favour at the first trial.

The doctrine is, like the pleas of *autrefois*, procedural in nature. Where an accused is acquitted of an offence because an issue, or more precisely, a material fact was found in his favour, it will bar prosecution for any offence which requires proof of the same material fact. It is best explained as an extension of the plea of *autrefois acquit*.[52] While *autrefois convict* is analogous to merger, *autrefois acquit* is best explained as being analogous to

44. [1950] A.C. 458.
45. (1948) 77 C.L.R. 511.
46. *Id.*, 518.
47. (1956) 96 C.L.R. 62.
48. (1955) 93 C.L.R. 493.
49. *Sealfon* v. *U.S.* 332 U.S. 575 (1948); *Asche* v. *Sevenson* 397 U.S. 436 (1970).
50. *Wright, McDermott and Freeley* v. *The Queen (1963) 3 C.C.C. 201; R.* v. *Dooley* (1978) 43 C.C.C. 2d 288.
51. (1962) 38 C.R. 122.
52. Howard, "Res judicata in the Criminal Law," (1961) 3 *M.U.L.R.* 101.

estoppel. The prosecution is estopped from alleging an offence found by a prior judgement not to exist. So, too, with issue estoppel. The prosecution is estopped from alleging a material fact found by a prior judgement not to exist. It is submitted much of the controversy surrounding the doctrine of issue estoppel is due to the failure to distinguish between material facts and evidentiary facts. This failure has led to the confusion of issue estoppel with the evidentiary aspect of *res judicata*. Issue estoppel applies only to material facts: *res judicata* is concerned only with the admissibility of evidentiary facts.

As stated earlier the doctrine of issue estoppel appeared to form part of the criminal law in Australia. A re-examination of the doctrine became inevitable after the House of Lords decision in *D.P.P.* v. *Humphrys*[53] when it was authoritatively held that the doctrine formed no part of the criminal law of England. Their Lordships were divided upon whether the doctrine applied in Australia, some accepting that it did, others preferring to distinguish the Australian cases as having been decided on other grounds. *Storey's* case appeared to present the High Court with the opportunity to make an authoritative determination. In fact it did not, and the discussion was *obiter*, although each judge did take the opportunity to look at the doctrine in depth.

Barwick C.J. found himself compelled, after reading the earlier decisions, to accept as correct the position and reasons taken by Lord Dilhorne in *Humphry's* case.[54] These were essentially that no case had been decided by applying issue estoppel and that to do so would be to import into the criminal law a new doctrine which would be "very undesirable".[55] His Lordship, however, had treated the doctrine as one of evidence[56] and the Chief Justice was of the same opinion. He found support for this in the cases of *Kemp* v. *R.*[57] and *G. (An Infant)* v. *Coltart*[58] but thought that these cases could be better explained by the principle that evidence cannot be led which calls an earlier acquittal into question. This appears to be correct. In both cases the Crown attempted to prove the accused had committed offence B by leading evidence that the accused had committed offence A, an offence for which the accused had been acquitted. In neither case was the prosecution trying to prove a material fact which had been found before in the accused's favour. They must be contrasted with *Mraz No. 2*[59] where the prosecution twice attempted to prove the same material fact, *viz.*, that on the occasion in question the accused had raped the victim. Barwick C.J., however, found that *Mraz No. 2*[60] could be explained as a case of evidence challenging a prior acquittal. Clearly this is true, as evidence led in a case where issue estoppel is applicable will necessarily challenge the earlier acquittal, but the doctrine goes further than estopping the Crown from leading evidence: it estops the Crown from proving that material fact by using any evidence. In both *Kemp* v. *R.*[61] and *G. (An Infant)* v. *Coltart*[62] it was still open to the

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53. [1976] 2 W.L.R. 857.
54. (1978) 52 A.L.J.R. 737, 739.
55. [1976] 2 W.L.R. 857, 866.
56. *Ibid.*
57. (1951) 83 C.L.R. 341.
58. [1967] 2 W.L.R. 333.
59. (1956) 96 C.L.R. 62.
60. *Ibid.*
61. (1951) 83 C.L.R. 341.
62. [1967] 2 W.L.R. 333.

Crown to prove the offence, but without using the inadmissible evidence. Clearly in *Mraz No. 2*[63] this was not open.

Gibbs J. was not so emphatic in his rejection of the doctrine, but he saw three main problems with its application. First, in a criminal trial the issues are not defined; specific findings are not made; the jury merely brings a general verdict of not guilty. These problems, however, were not seen as insuperable. It might still be open to adopt the following approach:

> ". . . to determine from an examination of the proceedings at the trial, or from an examination of other material, what issues were necessarily determined by that verdict."[64]

Secondly, as the Chief Justice had pointed out, the doctrine in civil proceedings is of its nature mutual and by analogy it should in criminal cases apply against the accused as well as the Crown. Gibbs J. thought this would be "most unfortunate"[65] but again, this was not an insuperable problem:

> ". . . the law not being strictly logical may apply the doctrine against the Crown but not against the accused."[66]

He accordingly found that *R.* v. *Hogan*[67] insofar as it accepted mutuality, was wrong.

The third objection, which he found compelling, was that the doctrine was artificial:

> "A jury may find in favour of an accused person on a particular issue simply because a reasonable doubt has been raised and it would not seem just that in those circumstances the issue should thereafter be treated as conclusively established in favour of the accused."[68]

His Honour surveyed the authorities and found that only *Mraz No. 2*[69] was clear authority for the doctrine in criminal proceedings. It may have been the subtle reasoning behind the decision in this case which led Gibbs J. into the opinion that the doctrine was artificial and may require a judgement to be given contrary to overwhelming evidence.

The same argument can be put in relation to the plea of *autrefois acquit*. However, where this plea is open, new evidence will not allow the Crown to charge a person with a crime of which he has been acquitted, even if the new evidence amounts to a confession.[70] But if issue estoppel is seen as an extension of the plea *autrefois acquite*, there seems no reason why the principle forbidding double jeopardy should be outweighed by the possibility of acquittal in the face of new evidence tending to show the accused guilty, if only an element of an offence and not the offence itself is taken to be decided conclusively in the accused's favour.

A different approach was taken by Mason J. While approving the statement by Lord Hailsham in *D.P.P.* v. *Humphrys*[71] that the ". . . doctrine

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63. (1956) 96 C.L.R. 62.
64. (1978) 52 A.L.J.R. 737, 762.
65. *Ibid.*
66. *Ibid.*
67. [1974] 2 W.L.R. 357.
68. (1978) 52 A.L.J.R. 737, 742.
69. (1956) 96 C.L.R. 62.
70. *Advocate (H.M.)* v. *Cairns*, [1967] J.C. 37; [1967] S.L.T. 165.
71. [1976] 2 W.L.R. 857.

of issue estoppel as it has been developed in civil proceedings is not applicable to criminal proceedings",[72] he thought there was an analogous doctrine of *res judicata* which had sometimes been called issue estoppel. He was of the opinion that it drew its effect from the binding nature of a previous decision. In this respect the doctrine had a common base with those rules governing evidence. Necessarily, it was a very narrow doctrine:

> ". . . [it called for] no investigation of the precise issues of fact or law decided by a verdict except such as may be discerned from the verdict."[73]

His Honour regarded *Mraz No. 2*[74] as an example of this effect of *res judicata,* although from the judgement of the court it is clear that it did look behind the verdict to the record to arrive at a decision.

Yet another approach was taken by Jacobs J. While he too wished to avoid the term issue estoppel, he preferred to explain the conclusiveness of a prior acquittal in terms of double jeopardy. Double jeopardy occurred in the following situations:

> ". . . when the commission of the second offence can be shown to have been an essential element of the first."[75]

or

> ". . . when the commission of the first offence can be shown to be an essential element of the second offence charged."[76]

This was so whether or not the plea of *autrefois acquit* was open. His Honour explained *Kemp* v. *R.*[77] as an example of the operation of this principle.

With respect, this is not so. The previous acquittal in that case was relevant only as evidence and was not an element to be proved in the second. His Honour also held that it does not matter ". . . whether the rule is classified as a rule of evidence or a substantial rule of law governing the course of the latter trial."[78] But with respect, it makes a great deal of difference. As has been pointed out, in the case of a rule of evidence it is still open to the Crown to prove the offence, but issue estoppel, once made out, means the accused must be acquitted.[79]

In a brief but very lucid examination of the doctrine, Murphy J. recognized this distinction and found there was a place for the doctrine in criminal law. During the course of his judgement he stated:

> "If a distinct issue of fact or mixed fact and law has been found in favour of the accused against the Crown (for example by special finding), it is conclusive in any later proceedings between the Crown and the accused. If the same issue arises as an element (to be proved or disproved by the Crown) in the second trial, application of this

72. *Id.*, 884.
73. (1978) 52 A.L.J.R. 737, 750.
74. (1956) 96 C.L.R. 62.
75. (1978) 52 A.L.J.R. 737, 753.
76. *Ibid.*
77. (1951) 83 C.L.R. 341.
78. (1978) 52 A.L.J.R. 737, 752.
79. *R.* v. *Flood* [1956] Tas. S.R. 95; *O'Mara* v. *Liftin; ex parte O'Mara* [1972] Q.W.N. 73; *R.* v. *Dooley* (1978) 43C.C.C. 2d 288.

> principle would *require* acquittal on the second trial. In this sense estoppel has a place in the criminal law."[80] (emphasis supplied).

His Honour also found that the doctrine should not be mutual for the compelling reason that a government should be presumed not to be ignorant of the law while an accused may through ignorance or oversight prefer not to fight an issue or even to concede it and it should not be held agains him.[81]

Aickin J. similarly found a place for the doctrine, though it must have only a limited operation:

> ". . . it will be seldom that decisions on separate issues involved as indispensable steps to a final conclusion can be ascertained."[82]

But that this was not often possible was not a reason for not applying the doctrine. There was in *R.* v. *Wilkes*,[83] and in particular *Mraz No. 2*[84] clear authority for the doctrine. Accordingly he felt unable to agree with the views taken of these cases by their Lordships in *DPP* v. *Humphrys*.[85]

It is interesting, however, that Aickin J. appears to suggest that the doctrine did not apply in the instant case only because it was not possible to discern from the acquittal of the accused of abduction that the jury had conclusively determined any issues. He implies, therefore, that if it could have been discerned that a distinct issue had been decided in favour of the accused the Crown would have been prevented from proving that issue at the later trial for rape.[86] However, this would give the doctrine a wider application than desirable. Accordingly it is thus qualified:

> ". . . it must always be borne in mind that issue estoppel applies to issues. There is no estoppel as to evidentiary facts found in the course of determining an issue. There is nothing to prevent a party in a later proceeding, in relation to a particular issue of fact negatived in the earlier proceeding, tendering evidence of those same facts to a different issue."[87]

It is submitted that the doctrine of issue estoppel has a place in criminal proceedings in Australia, and that the views of Stephen, Murphy and Aickin JJ. as to its application and limitations are correct. The doctrine of issue estoppel as used in civil proceedings does not accurately reflect the operation of the doctrine in the criminal law. Because of the nature of criminal proceedings it must have only limited application, and should be available only to the accused. If the doctrine is considered as an extension of the plea of *autrefois acquit* this should cause no problems as this plea is, by definition, only available to an accused.

The term "material fact estoppel", although cumbersome, may resolve some confusion. Further, if thought of in terms of "material fact estoppel" it will be seen that *DPP* v. *Humphrys*,[88] is, on its facts, no authority against the doctrine. The accused had been charged with driving a motor vehicle on July 18, 1972, while disqualified. The only issue at the trial was whether

80. (1978) 52 A.L.J.R. 737, 755.
81. *Ibid.*
82. *Id.*, 756.
83. (1948) 77 C.L.R. 511.
84. (1956) 96 C.L.R. 62.
85. [1976] 2 W.L.R. 857.
86. (1978) 52 A.L.J.R. 737, 759.
87. *Ibid.*
88. [1976] 2 W.L.R. 857.

a police officer was correct in identifying the accused. The accused, in his evidence, stated that he had not driven a vehicle during 1972. He was acquitted. The police then collected evidence which showed that he had driven during 1972 and he was charged with perjury. The police officer who gave evidence at the previous trial was again called to identify the accused. Neighbours also gave evidence that on days other than July 18, they had seen him driving.

The defence argued that the issue of identity had been conclusively determined in the accused's favour. The judge, rejecting the plea of issue estoppel, allowed the police officer's evidence and the accused was convicted. The accused appealed successfully against his conviction to the Court of Appeal. From that decision, the Crown appealed to the House of Lords. Their Lordships found that the doctrine of issue estoppel formed no part of the law of England and allowed the appeal.

The application of the doctrine of issue estoppel, however, should never have arisen on the facts. There was no material fact common to the proof of the offence of driving without a licence and the offence of perjury. While the issue of identity of the person in control of the motor vehicle on July 18, 1972, was a material fact in the first charge, it was merely evidence relevant to proving the charge that Humphrys had wilfully made a statement which he knew to be false, *viz.*, that he did not drive any motor vehicle during 1972.

Equally, it is submitted that the case was a proper one for the application of the evidentiary aspect of the principle of *res judicata*, and further that the police officer's evidence should have been excluded. It was only relevant if the accused was assumed to be guilty of the charge for which he had been acquitted, as was the evidence under consideration in *Garrett's* case. The exclusion of the evidence would not have prevented the prosecution from proving the charge of perjury since it did not depend on proving the accused had been driving on July 18, 1972. In any event, the decision appears to have authoritatively determined that the doctrine of issue estoppel will not be applied in England. The position in Australia, after *Storey's* case is unclear, as the varying approaches of the members of the High Court in that case show. The position will presumably remain uncertain until a case comes before the High Court where the doctrine is clearly applicable.

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