IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: SAMATTA, C.J., MAKAME, J.A., And RAMADHANI, J.A.)

CRIMINAL APPEAL NO. 54 OF 1996

BETWEEN

ISSA ATHUMANI TOJO. . . . . APPELLANT

AND

THE REPUBLIC. . . . . RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Kyando, J.)

dated the 4th April, 1994

in

Economic Crime Case No. 17 of 1990

JUDGMENT OF THE COURT

SAMATTA, C.J.:

This is an appeal by Issa Athumani Tojo from a judgment of the High Court (Kyando, J.) dismissing his appeal and upholding his conviction on a charge of unlawful possession of a firearm and three rounds of ammunition, contrary to section 13 (1) of the Arms and Ammunition Ordinance as read together with sections 21 and 59 (2) of the Economic and Organised Crime Control Act, 1984, and the Written Laws Miscellaneous Amendments Act, 1989, and also upholding a sentence of seven years' imprisonment. One of the appellant's co-accused, Yahya Abdallah, who was also found guilty, did not appeal against his conviction.

A novel point of law, namely, whether the doctrine or principle of issue estoppel is applicable in criminal cases in this country arises in this appeal, but we shall first cull out of the record the essential facts of the case which have given rise to that issue. Happily, those

.../2

facts are not complex. Most of them were, in fact, not in dispute. They may, we think, be narrated as follows: in April, 1990, one Hakem Jetha, a resident of Morogoro, was robbed of his rifle and some other property by a group of persons. On December 22, 1990, the firearm was recovered by a team of policemen who, following a tip their leader had received from an informer to the effect that some men were planning to perpetrate a robbery, pounced upon six men, including the appellant and Yahya Abdallah, who were in a house, owned by the appellant, situated within Morogoro town. The six men were arrested in various parts of the premises. The appellant's arrest was effected by one D/Sgt. Gabriel, in the presence of Corporal Ramadhani. When the room from which, according to the testimony of D/Sgt. Gabriel, the appellant had emerged immediately before his arrest, was searched by the police, Hakem Jetha's stolen rifle was found therein, lying on the floor underneath a bed. Being in possession of this evidence, the police charged the six men before the District Court of Morogoro with robbing Hakem Jetha of his rifle. The appellant and his co-accused protested their innocence. The learned trial magistrate acquitted all the six accused of the charge, but convicted the appellant and Yahya Abdallah of the offence of receiving stolen property, contrary to section 311 of the Penal Code, and sentenced each of them to three years' imprisonment. Aggrieved by that decision, the appellant appealed against it to the High Court. Mkude, J., allowed the appeal, quashed the conviction and set aside the sentence imposed thereon. Exercising revisional powers, he quashed Yahya Abdallah's conviction and set aside the sentence imposed thereon. The learned Judge held that the evidence laid in the scale against the appellant and Yahya Abdallah was insufficient to constitute a basis for making a finding that the two men were found in possession of Jetha's rifle. In the course of his judgment, he said:

.../3

"It seems to me that before a person can be convicted of the offence under section 311 of the Penal Code it must be shown that he "received" the property which was feloniously or unlawfully obtained and he did so with knowledge, actual or constructive that the property was feloniously or unlawfully obtained. It is not enough, as it happened in the present case, that a person owns the house in which the stolen property is found by the police. In that case the element of "receiving" has not been shown, let alone the knowledge that the property had been feloniously or unlawfully obtained. The rule in MWANGI NJOROGE vR /1963/ E.A. 624 is that where there is no direct proof of theft or of receiving goods knowing them to have been stolen, the ordinary rule of circumstantial evidence must be applied, namely, that the circumstances must be such as to convince any reasonable person that no other conclusion was reasonably possible. As it happened in this case the gun was found in a room in which several other people were found and so no such irresistible inference can be drawn."

The police were undaunted by Mkude, J.'s decision. On March 18, 1991, they preferred a charge of unlawful possession of the rifle and three rounds of ammunition, before the District Court, against the appellant and his five co-accused. The basis of this new charge was still the alleged possession by the accused of Jetha's rifle. The appellant and his co-accused unsuccessfully raised a plea of autrefois acquit under section 280 (1) (a) of the Criminal Procedure Act, 1985. As already pointed out, at the end of the trial, the District Court

.../4

convicted the appellant and Yahya Abdallah as charged and sentenced each of them to seven years' imprisonment. The appellant was of the view that his plea of autrefois acquit ought to have been sustained. He appealed against the District Court's decision to the High Court on the ground, inter alia, that the learned trial magistrate had strayed into an error in law in rejecting his plea. Like the learned trial magistrate, Kyando,J. found no merit in the plea. In the course of his judgment, he said:

> "... I fully agree myself that the appellant was acquitted in a case charging him with robbery and not in one charging him with /offence/ in this case. His plea of autrefois acquit therefore has no substance or merit and the trial court rightly rejected it. I hereby reject it too."

Before us the primary contention of the appellant who was, as was the position in the two courts below, unrepresented, is that his plea of autrefois acquit was sustainable. His grievance is that Kyando, J., misdirected himself in law in holding, as he did, that the District Court had directed itself correctly on that plea. Since we were inclined to be of the opinion that the plea of autrefois acquit was not available to the appellant in this case, in the interests of justice, we invited Mrs. Mkwizu, Senior State Attorney, to address us on the question whether the doctrine of issue estoppel applies to criminal trials in this country and, if it does, whether it is applicable in the instant case. The crux of the statement of that doctrine may be stated in the words of Lawson, J., in Regina v Hogan, /1974/ 1 Q.B. 398, at p. 401:

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> "Issue estoppel can be said to exist when there is a judicial establishment of a proposition of law or fact between parties to earlier litigation and when the same question arises in later litigation between the same parties. In the later litigation the established proposition is treated as conclusive between those same parties. It can also be described as a situation when, between the same parties to current litigation, there has been an issue or issues distinctly raised and found in earlier litigation between the same parties."

In order to invoke the doctrine of issue estoppel the parties in the two trials must be the same and the fact-in-issue proved or not in the earlier trial must be identical with what is sought to be reagitated in the subsequent trial: see Ravinder Singh v State of Haryana, A.I.R. [1975] S.C. 856. The principle differs from the autrefois principle, embodied in sections 137 and 280 (1) (a) of the Criminal Procedure Act. The difference is described by Lord Devlin in Connelly v Director of Public Prosecutions [1964] 2 All E.R. 401, at p. 436 as follows:

> "... The difference between issue estoppel and the autrefois principle is that while the latter prevents the prosecution from impugning the validity of the verdict as a whole, the former prevents it from raising again any of the separate issues of fact which the jury have decided, or are presumed to have decided, in reaching their verdict in the accused's favour."

There is no provision in the Criminal Procedure Act or the Evidence Act, 1967, which embodies the principle of issue estoppel. What is embodied in section 137 and 280 of the former Act is, as already pointed out, the

.../6

autrefois principle, and what is embodied in s. 123 of the latter Act (the Evidence Act) is estoppel by declaration, act or omission.

Can the principle of issue estoppel be invoked in a criminal case? Placing reliance on an observation made by S.K. Sarkar and Ejaz Ahmed in their book LAW OF EVIDENCE, 4th ed., Mrs.Mkwizu invited us to answer that question in the negative. The observation, at p. 1223, reads:

> "Rule of estoppel is not applicable to criminal cases."

With great respect, we are unable to accept the learned Senior State Attorney's invitation. The statement relied upon by Mrs. Mkwizu, namely, that the rule of estoppel is not applicable to criminal cases, to support her argument, is clearly made in reference to estoppel by declaration, act or omission as embodied in section 115 of the Indian Evidence Act, 1872, which is in pari materia with section 123 of our Evidence Act. The view that the observation relied on by the learned Senior State Attorney has no relevance to the principle of issue estoppel is re-inforced by the learned authors' observation at p. 1315 of their book, which is almost a repetition of a passage in the judgment of the Supreme Court of India in Masud Khan v State of Uttar Pradesh [1974] 1 S.C.R. 793:

> "Principle of issue estoppel is simply this where an issue of fact has been tried by a competent court on a former occasion and a finding has been reached in favour of an accused, such a finding would constitute an estoppel or res judicata against the prosecution not as a bar to the trial and conviction of the accused for a different and distinct

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> offence but as precluding the reception of evidence to disturb that finding of fact when the accused is tried subsequently even for a different offence which might be permitted by law."

In our opinion, this passage leaves no doubt that in India issue estoppel is applicable to criminal cases. There is a stream of authority from that country plainly demonstrating that, contrary to Mrs. Mkwizu's submission, issue estoppel is applicable in criminal cases. Those cases include Gopal Prasad Sinha v The State of Bihar 1971 S.C. 458; Masud Khan (supra); and Ravinder Singh v State of Haryana(supra). In Masudi Khan's case, the Supreme Court, speaking through Alagiriswami, J., said, at p.795:

> "The principle of estoppel issue is simply this: that where an issue of fact has been tried by a competent court on a former occasion and a finding has been reached in favour of an accused such a finding would constitute an estoppel or res judicata against the prosecution not as a bar to the trial and conviction of the accused for a different or distinct offence but as precluding the reception of evidence to disturb that finding of fact when the accused is tried subsequently even for a different offence which might be permitted by law."

The Supreme Court, having quoted a passage from the opinion of the Privy Council in Sambasivam v Public Prosecutor, Federation of Malaya [1950] A.C. 458, proceeded, a little later, to quote the following passage from the judgment of Dixon, J. (sitting in the High Court of Australia) in The King v Wilkes (1948) 77 C.L.R. 511, the report of which, unfortunately, is not available to us:

.../8

"... 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 .... There must be a prior proceeding determined against the Crown necessarily involving an issue which again arises in subsequent proceeding by the 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. Issue estoppel is concerned with the judicial establishment of a proposition of law or fact between the parties. It depends upon well-known doctrines which control the relitigation of issues which are settled by prior litigation."

This passage was also quoted with approval by Lawson, J., in Hogan's case supra. The Supreme Court also cited with approval the following passage from the judgment of the High Court of Australia in Marz v The Queen, 96 C.L.R. 62:

"The Crown is as much precluded by an estoppel by judgment in criminal proceedings as is a subject in civil proceedings .... The law which gives effect to issue estoppel is not concerned with the correctness or incorrectness of the finding which amounts to an estoppel, still less with the process of reasoning by which that finding was reached in fact .... It is enough that an

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> issue or issues have been distinctly raised or 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."

In our opinion, it is not of little significance to observe, as we do, that in Canada, too, the principle of issue estoppel has been applied to criminal cases: see footnote 22 at p. 1037 of PHIPSON ON EVIDENCE. In U.S.A., too, the principle may afford protection to an accused person: see the references to Sealfon v United States (1948) 332 U.S. 575 made in both Connelly and Hogan's cases supra.

Does issue estoppel avail an accused person in England? To this question we now turn our attention. Until when the appeal in Director of Public Prosecutions v Humphrys, [1977] A.C.1 was determined, it seemed settled that under the English law an accused could invoke the principle of issue estoppel against the prosecution. In Hogan's case supra, Lawson, J., entertained no doubt that issue estoppel applied to criminal proceedings. He held that the plea applied with mutuality as between the Crown and the defendant in such proceedings and could operate when the relevant issues were determinable with precision and certainty by reference to the earlier record and what occurred in relation to them in the course of the previous proceedings. In Connelly's case supra, three of their Lordships, Lord Morris of Borth-y-Gest, Lord Hodson and Lord Pearce were of the view that the principle applied to criminal proceedings. Lord Devlin, however, specifically dissented from that view. In the course of his judgment, Lord Hodson said, at p. 430:

.../10

> "Thus, so far as aurefois acquit is concerned the appellant must fail unless he can persuade your lordships to make a further extension of the principle which justice requires. This he has sought to do by reliance on issue estoppel, which has been referred to of recent years more often in other countries than our own, but is an aspect of the law which, I think, lies behind the application of the principle autrefois acquit. It was recognised pro tanto in the Sambasivam case [(1950) A.C. 458] and the appellant is entitled if he can... bring himself within it."

Thirteen years later, however, the House of Lords, in Humphrys' case (supra), departed from the views expressed by the majority in the Connelly case and held that issue estoppel, in the form in which it operates in civil cases, has no role to play in criminal trials. The facts of that case are accurately summarised in the headnote, which reads:

> "The respondent was charged with driving a motor vehicle on July 18, 1972, while disqualified. The only issue at the trial was whether a police officer was correct in identifying the respondent as the driver of a motor bicycle on that day. In evidence, in answer to a question, the respondent denied driving any motor vehicle during 1972. He was acquitted. Later he was charged with perjury, the allegation being that at the first trial he had willfully made a statement which he knew to be false, viz., that he did not drive any motor vehicle during 1972. The same police

.../11

> officer was a prosecution witness, with others, at the second trial. The judge, rejecting a plea of issue estoppel raised by the defence, allowed the police officer to give evidence again identifying the respondent as the driver of the motor bicycle which he had stopped on July 18, 1972. The respondent was convicted."

The Court of Appeal allowed Humphry's appeal against conviction, holding that the doctrine of issue estoppel applied. The House of Lords reversed that decision. As already pointed out, their Lordships departed from the views of the majority in Connelly's case (supra) and held that issue estoppel, in the form in which it operates in civil cases, has no application in criminal cases. The difficulty of identifying issues in a criminal trial (conducted in England), because of the absence of pleadings, and the fact that verdicts given by the jury in those cases are of general character, appear to have weighed fairly heavily on their Lordships' minds in arriving at their decision. In the course of his judgment, Lord Salmon said, at p. 43 D - E:

> "The doctrine of issue estoppel is complex and highly technical, even where applied to civil proceedings alone. In this field, however, it is firmly entrenched and performs a useful function. It brings finality to litigation. The whole procedure relating to pleadings in the civil courts is appropriate for defining with precision the issues between the parties. Once these issues have been ascertained and fought out and then finally adjudicated upon in the courts, it would be unjust and absurd if the disappointed party, save in certain exceptional circumstances which I need not

.../12

recite, were allowed to reopen the issues and start litigating them all over again. It is in the public interest that litigation should have and end."

His Lordship went on to say:

"In the criminal field, however, besides being complex and technical, the doctrine of issue estoppel would, in my view, also be inappropriate, artificial, unnecessary and unfair. It would be inappropriate because there are no pleadings defining the issues and no judgments explaining how the issues (even if identifiable) were decided. Sometimes, as in the present case, it would be possible to identify the issues. But it would rarely be possible to do so. Since juries give general verdicts "guilty" or "not guilty" it would often be difficult, if not impossible, to do more than guess how they had decided any issue capable of identification."

Lord Edmund-Davies also alluded to the difficulties pointed out by Lord Salmon. He said, at p. 49:

"It is not surprising that, at an early stage in the expression of his doubts, Lord Devlin said [in Connelly's case], at p. 1344:

"The main difficult about its application to criminal trials is that as a rule there is no determination by the jury of separate issues; and so their conclusion on any issue can be reached only by an analysis of the general verdict."

.../13

> The verdict is, in the vast majority of cases, simply one of "guilty" or "not guilty". Connelly v Director of Public Prosecutions is itself an example of how frustrating the effort to analyse the issues can be, while the Australian decision in Mraz v The Queen (No. 2), 96 C.L.R. 62 illustrates how subtle such an analysis may be. Unlike on the civil side, there are no formal pleadings and, if more than one issue is involved, it can indeed be diffifult to ascertain upon which particular issue or issues the jury found for or against the accused. And the difficult may be enormously increased in relation to decisions in the magistrates' courts, unless they state the reasons for their decisions, which they are not generally obliged to do."

A little later, his Lordship said:

> "But, even if the decisive issue can be isolated, as in the present case, Mr. David Lanham has powerfully demonstrated ("Issue Estoppel in the English Criminal Law" [1970] Crim. L.R. 428, 440) that:
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> > "The difficulty is that once the principle of issue estoppel is recognised in cases where the issue is easy to discern... there is a danger that it will be applied in cases where it is inappropriate."
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> Sambasivam v Public Prosecutor, Federation of Malaya [1950] A.C. 458, to my way of thinking illustrates the difficulty."

.../14

Courts in this country are empowered by section 2 (2) of the Judicature and Application of Laws Ordinance to apply the common law as it existed in England on the twenty-second day of July, 1920. Authorities, including Hogan's case supra and the Connelly case supra appear to us to demonstrate that prior to 1977, when the House of Lords, in Humphrys' case (supra), reversed the earlier decisions, the common law recognized the application of the doctrine of issue estoppel in criminal cases. We are not persuaded that the difficulties of applying the doctrine in criminal cases, alluded to by their Lordships in Humphrys's case, exist in our country. It is true, of course, that no pleadings are framed in criminal cases in this country. But bearing in mind the mandatory provisions of section 192 of the Criminal Procedure Act, which require a trial court, before the trial commences, to identify issues which are not in dispute, and taking into consideration the provisions of sections 312 (1) of the Act and 32 (2) of the Primary Courts Criminal Procedure Code, which enact that judgments must contain points for determination, the decision thereon and the reasons for such decisions, we are of the settled opinion that the primary considerations which moved their Lordships in Humphrys' case (supra) to depart from what the majority of their Lordships in the Connelly case had held to be the law on application of the doctrine of issue estoppel in criminal cases have no weight in our country, where the jury system does not apply.

As regards the danger of the doctrine being applied in cases where it is inappropriate, we are content to observe that the doctrine should not be given universal applicability. If its application in certain situations is likely to give rise to injustice, the solution is not to exclude its application entirely, but to limit it to cases in which it would promote fairness. As was rightly observed by Lawton, J., in one of

.../15

his interventions in the course of argument of counsel for the Crown in Connelly's case in the Court of Criminal Appeal (see [1964] A.C. 1254), "it would be deplorable that a defence available in civil cases would not be available in identical circumstances in a criminal matter."

The judgments delivered in Hogan and Connelly's cases do not, however, show that before July 22, 1920, the common law recognised the application of the doctrine of issue estoppel in criminal cases. We find the reasoning in the judgment of Lawson, J., in Hogan's case and that of the majority in the Connelly case so persuasive that, assuming that before the reception date the common law did not recognise the application of the doctrine in criminal law, we are prepared to invoke the proviso to section 2 (2) of the Judicature and Application of Laws Ordinance, modify the common law, and hold, as we do, that in this country the doctrine applies in criminal cases.

Keeping in view of what we have said, we pass to consider the facts of the instant case. One of the issues in the appellant's second trial was the same as that in the first trial, to wit, whether the appellant and his co-accused had been in possession of Jetha's rifle. Mkude, J., as will be recalled, answered that issue in the negative. We entertain no doubt that, for reasons we have endeavoured to give, the prosecution was bound to accept the correctness of that finding and was precluded from taking any step to challenge it at the subsequent trial. In other words, the prosecution was estopped in the second trial from seeking to prove that,contrary to Mkude, J.'s finding, the appellant and his co-accused were found in possession of Jetha's rifle. The mounting of the prosecution against the appellant and his co-accused in the second trial was inconsistent with what is right. Kyando, J., should have allowed the appeal before him.

.../16

For the reasons we have given, we allow the appeal, quash the appellant's conviction and set aside the sentence imposed thereon. Exercising revisional powers conferred upon this Court by section 4 (2) of the Appellate Jurisdiction Act, 1979 as amended by the Appellate Jurisdiction (Amendment) Act, 1993, we quash Yahya Abdallah's conviction and the sentence imposed thereon. As the two men are, as far as this case is concerned, out of prison, we make no order for their release. Though the appellant and his co-accused will derive no practical advantage from our decision, they are entitled to have their convictions expunged from records.

DATED at DAR ES SALAAM this 28th day of June, 2001.

B.A. SAMATTA
CHIEF JUSTICE

L.M. MAKAME
JUSTICE OF APPEAL

A.S.L.RAMADHANI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(F.L.K. WAMBALI)
DEPUTY REGISTRAR