

TANZANIA / JUDGMENT

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, t IN THE COU1T OF APPEAL CF TANZANIA AT fIAP ES SALaJd (: CS.II'INAL ;PEAL NO 51+ OF 1996 BECi1EN ISSA ATThUNANI 'IOJO. ..eAPiELLANT AiD Ti{t ANJUBLIC. • RPOIDENT (Appeal :rcm the decision of the high Court of Tanzania at Dar es Salaari) (arido) dated the Lfth April, 1994 in Ec onom ic Cr ime Case No. 10 JUJXhENT OF TNO COURT ACJ.: This is an appeal by Issa Athunani 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 fireann and three rounds of ammunition, contrary to section 13 (1) of the Arms and- Asaunition Ordinance as read together with sectionc 21 and 59 (2) of the Economic and Organised Crise Control Act, 1984, and the Written Laws Miscellaneous Amendnents act, 1989, and also upholding a sentence of seven years' imprisonment. One of the appellant's coaccused, Yahya Abdallah, who was also found guilty, did not appeal agaist his conviction. A novel point of law, namely, whether the doctrine or principle of issue_e3tc1 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

- *12 I L - -\$ 2 - facts are not coiplex. Moat 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 Norogoro, was robbed of his rifle and some other property by a group of persons. On December 22, 1990, the fireaie was recovered by a team of policemen who, following a tip their leader had received from an inforier to the effect that some men were planning to perpetrate a robbery, pounced uDon six nen, including the ap'elarit and Yahya Abdallah, who were in a house, owned by the appellLant, 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 testinony Gabriel, the appeilant had emerged themediately before his arrest, was searched by tho plic, Hakem Jetha's stolen rifle was found therein, lying on the LLoor underneath a bed. Being in possession of this evidence, the polico 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. I4kude, J., allowed the appeal, quashed the conviction and set aside the sentence imposed thereon. 1lxercising 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 Yakiya 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: I -. . • e..13 -- 1 - It seems to me that before a person can be convicted of the offence under section 311 of the Penn-i-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 lJroperty was feloniously or unlawfully obtained. It is not enough, as it happened in the present case 1 that a person owns the house in which the stojen rroperty is found by the :)olice. 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 MWiPCI NJOPOCf v1 76 E.A. 624 is that where there is no direct proof of theft or ct receiving goods knowing then to have been stclen. the ordinary rule ef cii cums:antial evidence must be applied, namiy, that the circumstances must be such as to convince an:' reasonable person that nc other coaclusion was reasonably posiblo. As it happened in this case the gun 'as found in a room in which several other people were found and so no such irresistible isference can be drawn.t The police were usdauntad by Mkude, Js deciSion. On March 18, 1991, they preferred c charge of unlawful possesaion of the rifle and three rounds of aomni-t ion, before the District Court, against the appellant and his Ldve co-accused. The basis of this now charge wha still the allegedd possession by the accused of Jethas rifle. The appellant ani 11liS co..accused unsuccessfully raised a plea of antrefois git unr section 280 (1) (a) of the Criminal Procedure Act, 1 985. As airadY pointed out, at the end of the trial, the District Court .../k
- LF - convicted the appellant and Yahya Abd.allah as charged and sentenced each of them to seven years inpyisonment. The appellant was of the view that his pica of autrefois acquit ought to have been sustained. He appealed against the District Court's decision to the High Court on the ground 1 inter alia, that the learned trial magistrate had strayed into an error in law is rejecting his plea. Like the learned trial magistrate, Kyando,J. found, no merit in the plea. In bhe course of his judgment, he said: ... I fubly agree myself that the appellant was acquitted in a case charging his with robbery and not in one charging his with /fencej in this case. His plea of autr:fois accuit therefore has no substance or merit and the trial court riht.ly rejected it. I hereby reject it too.' Before us the prinary contention of the appellant who was, as was the two courts be16, unrepresented, is that his plea of autrefoISaqt 'ias 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 aut refo isuit 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 91 Lawson, 3., in *Re Lina v Ji* 197/ I Q. 398, at p. 01: -C

- "... 1' -5- '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 parties.
- parties. It can 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 re-litigated in the subsequent trial see *Javed Si v State of Hayana*, A.I.R. 1997 S.C. 356. 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* [1967] 2 All 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 Criminal Procedure Act is, as already pointed out, the *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*, 11th ed., Mrs. Mkwizu invited us to answer that question in the negative. The observation, at p. 1223 reads: - "The rule of estoppel is not applicable to criminal cases. With great respect, we are unable to accept the learned Senior State Attorneys 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 no way material 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 reinforced by the learned authors observation at p. 1315 of their book, which is a) not a repetition of a passage in the judgment of the Supreme Court of India in *Masud Khan v State of Uttar Pradesh* [1977] 1 S.O. 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 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 *Prasad Sinha v The State of Bihar* 1971 S.C. 458; *Masud Khan* (supra); and *Ravinder Singh v State of Orissa*. In the *Hasan Ali Khan* case, the Supreme Court speaking through Mr. Justice Agiriswami, J., said, -at p. 795: The principle of issue estoppel 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 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 *Prosecutor v. Hale* 21 Q.B. 48, -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. Wainman* (1958) 7 C.L.R. 511 the report of which, unfortunately, is not available to : I

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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 Hy*, p19777 A.C.I was determined, it seemed settled that under the English law an accused could invoke the principle of issue estoppel against the prosecution. In *Eamias case*, 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 *Donnelly* case three of their Lordships, Lord Morris of Borth-yest, 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:

- OL officer was a prosecution witness, with others, at the second trial. The judge, rejecting a pica 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 Hurnphry's appeal against conviction, holding that the iioctrinc of issueesoapplied. The House of Lords reversed that decision. As already pointed out, their Lordships departed from the views of the majority in Connell case () and held that issue Ct- estoppel, in the form in which it operates in civil cases, has no application in crininal 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 Lordahipa' minds in arriving at their decision. In the course of his jut Ird Salncn said, at p. 43 D - 'The doctrine of issue ostoppel is complex d d highly technical, even where applied to civil proceedings alone. In this field, however, it is firmly entrenched and performs a use ful 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 4

- 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 an end. Lord Diplock 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 Devlin said in Connelly's case, at p. 132-2: The main difficulty 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.
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- 1+ - Courts in this country are empowered by section 2 (2) of the Judicature and Application of Laws Ordinance to apply the common law as on the twenty-second day of July, 1920. Authorities, nG1Udi2g Hman. case pa and th4 Connelli case 2upra appear to us to demonstrate that prior to 1977, when the house of Lords, in Oaa0 reversed the earlier decisions, the common law recognised the the fact-in effect step in criminal cases • We are not persuaded that the difficulties of applying the doctrine in original cases, alluded to by their Lordships in Humbers' case, exist in our country. It is true, of course, that rip pleadings are framed in criminal cases vobis ± thus. obviously. But bearing in mind the mandatory provisions of section 2 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 contain point for determination, the decision thereon and the reasons for such decisions, we are of the settled opinion that the primary consideration 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 application of the doctrine of issue in similar cases is that 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 the

- 15 - interventions in the course of argument of counsel for the Crown in case in the *Curtis* Criminal Appeal (see [1967] 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 *Hoen* 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 Lawton, J., in *Hogan's* case and that of the majority in the *Connelly* case 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 apply 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, 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. Mkudo, J., as will be recalled, answered this issue in the first trial. 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 Mkudo, 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. I allow the appeal. For the reasons we have given, we allow the appeal, quash the appellant's conviction and impose thereon the sentence imposed by the Appellate Jurisdiction (Appeal) Act, 1993, we quash Yahya Abdallah's conviction and impose the sentence imposed thereon. As the two defendants 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 a practical advantage from our decision, they are entitled to have their convictions expunged from the records. *DAI b bi LkAi t's* 28th day of June, 2001, 3 A. 3AP1XITA c:I:uF JUSTICE L.I.I. MAKAME JUS TICE OF APPEAL
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