ROGERS v THE QUEEN*

ISSUE ESTOPPEL AND ABUSE OF PROCESS IN CRIMINAL LAW

The High Court's decision in *Rogers* appears to resolve uncertainty as to whether the principle of issue estoppel is applicable to criminal proceedings in Australian law. In addition, the Court's judgment marks an important development in the evolution of the concept of abuse of process.

In 1989 the appellant, Rogers, was tried before Phelan DCJ and a jury in the District Court of New South Wales on four counts of armed robbery. During the proceedings, his Honour conducted a *voir dire* examination to determine the admissibility of certain confessional statements made by the appellant that the Crown sought to adduce as evidence. Rogers had been arrested and interviewed by the police in August 1988, at which time he confessed to various armed robberies, including those that were the subject of the indictment before Phelan DCJ. His statements were recorded in a series of four written and signed records of interview. The contents of the first two records dealt only with counts 1 and 2 in the indictment, whilst the fourth record in the series was, in part, relevant to both of the remaining counts. In the *voir dire*, the appellant gave evidence to the effect that he had made the confessions in response to threats by police officers. Though sceptical of the appellant's allegations, Phelan DCJ was not satisfied that the admissions contained in the records of interview had been given voluntarily. Accordingly, his Honour ruled that they were inadmissible and the trial proceeded with the prosecution's case relying on other evidence. The jury acquitted the appellant of the first two counts in the indictment, but convicted him on the third and fourth counts.[1]

The appellant was indicted in 1992 before Kinchington DCJ of the District Court on eight further counts of armed robbery. In support of seven of the charges, the Crown proposed to rely on confessions made in the third and fourth records of interview. Kinchington DCJ refused the appellant's application for a permanent stay of the proceedings, whereupon Rogers appealed to the Court of Criminal Appeal, pursuant to s 5F of the Criminal Appeal Act 1912 (NSW). The appellant's case was argued on two bases. First, it was contended that the Crown was, by an issue estoppel, precluded from challenging the finding of Phelan DCJ that the records of interview had not been made voluntarily and were, for that reason, inadmissible. Secondly, it was submitted as an alternative argument that a permanent stay of the proceedings should be ordered, as the tender of the records of interview amounted to an abuse of the process of the Court.[2]

Chief Justice Gleason, with whom Sully and Ireland JJ concurred, held that even if the doctrine of issue estoppel were available in criminal proceedings, the Crown

* (1994) 181 CLR 251. High Court, Mason CJ, Brennan, Deane, Gaudron and McHugh JJ, 28 September 1994 ('*Rogers*').

1 *R v Rogers [No 2]* (1992) 29 NSWLR 179, 180-2.

2 Ibid 182.

in the present case was not estopped from seeking to have the records of interview admitted as evidence.[3] Furthermore, the tender of the records of interview was not a collateral attack on the ruling of Phelan DCJ that they were inadmissible, and thus did not constitute an abuse of process.[4] The appeal was dismissed. Rogers appealed to the High Court, where he presented the same arguments that had been rejected by the Court of Criminal Appeal.

The High Court, by a majority, upheld the appeal on the basis that the tender of the records of interview amounted to an abuse of process.[5] Consequently, it was declared that, in the absence of further evidence, the appellant should be acquitted on those counts in respect of which the records of interview were the sole evidence available against him.

Issue Estoppel in Criminal Proceedings

Issue estoppel, which is unquestionably available in civil cases, was authoritatively defined by Dixon J in *Blair v Curran*.[6] In essence, the principle is that once an issue of fact or law has been subject to a judicial determination, it may not be litigated afresh in subsequent proceedings between the same parties or their privies.[7] One qualification, which was significant in *Rogers*, is that estoppel arises only in relation to 'ultimate' issues, namely those matters the determination of which forms a necessary and indispensable step in the justification of the conclusion reached in the former proceedings.[8] In particular, findings of fact that are subsidiary (in that they, themselves, do not comprise elements in the cause of action alleged at the previous trial) do not raise an estoppel.[9]

Although it was favoured by Dixon J in *R v Wilkes*,[10] and the High Court purportedly applied issue estoppel in *Mraz v R [No 2]*,[11] the availability of the doctrine in criminal proceedings has been seriously questioned. In *R v Storey*,[12] several members of the Court, influenced by the judgment of the House of Lords in *Director of Public Prosecutions v Humphrys*,[13] concluded that issue estoppel ought not to be imported into the criminal law.[14] However, since the principle actually

3 Ibid 182-3.
4 Ibid 186.
5 *Rogers* (1994) 181 CLR 251.
6 (1939) 62 CLR 464, 531-3.
7 Ibid 531, quoted in *Jackson v Goldsmith* (1950) 81 CLR 446, 466-7 (Fullagar J); *Brewer v Brewer* (1953) 88 CLR 1, 14-15 (Fullagar J).
8 *Blair v Curran* (1939) 62 CLR 464, 531-2 (Dixon J); *Brewer v Brewer* (1953) 88 CLR 1, 14-15 (Fullagar J); *Queensland Trustees Ltd v Commissioner of Stamp Duties (Qld)* (1956) 96 CLR 131, 152 (Kitto and Taylor JJ).
9 *Blair v Curran* (1939) 62 CLR 464, 532 (Dixon J); *Jackson v Goldsmith* (1950) 81 CLR 446, 467 (Fullagar J); *Brewer v Brewer* (1953) 88 CLR 1, 15-16 (Fullagar J).
10 (1948) 77 CLR 511, 518-19, considered in *Kemp v R* (1951) 83 CLR 341, 342 (Dixon J).
11 (1956) 96 CLR 62 ('*Mraz [No 2]*'). The question whether this is a true case of issue estoppel has been disputed and will be discussed below.
12 (1978) 140 CLR 364 ('*Storey*').
13 [1977] AC 1. For a critique of *Humphrys*, see Peter Mirfield, 'Shedding a Tear for Issue Estoppel' [1980] *Criminal Law Review* 336.
14 *Storey* (1978) 140 CLR 364, 371 (Barwick CJ), 388 (Gibbs J), 400-1 (Mason J), 407 (Jacobs J). But see 413 (Murphy J), 423 (Aickin J, with whom Stephen J agreed).

applied in *Storey* was not issue estoppel, but *res judicata*,[15] the Court's observations on the applicability of the former doctrine should be regarded as *obiter dicta*. The effect of the judgments in *Storey*, then, was to leave undecided, though doubtful, the question of whether issue estoppel had any role in the criminal law.[16]

The Majority Decision

A majority of the Court in *Rogers* expressed the clear opinion that issue estoppel, as enunciated in civil cases, was a principle that ought not to be deemed part of the criminal law. Chief Justice Mason, in stating this conclusion, adopted as his reasons the considerations of policy that had persuaded Barwick CJ, Gibbs J and himself in *Storey* to conclude that the application of issue estoppel would be inappropriate to criminal proceedings.[17] Moreover, his Honour considered that the availability of other measures, including *res judicata*, abuse of process and the rule against double jeopardy, rendered issue estoppel unnecessary to the criminal law.[18] He expressed agreement with the reasons of Deane and Gaudron JJ for concluding that the tender of the records of interview was an abuse of process.[19]

Justices Deane and Gaudron, who together with Mason CJ comprised the majority, differed from the Chief Justice in their reasons for refusing to recognise issue estoppel in criminal proceedings. The point of departure for their Honours' analysis was the nature of the difference between *res judicata* and issue estoppel. The principle of *res judicata* asserts that in a subsequent trial, neither party can seek to relitigate a cause of action that has already been determined, and has thus passed into judgment.[20] For example, an attempt by the Crown in a criminal case to prove the accused guilty of an offence of which he or she had already been acquitted would be an attempt to relitigate a cause of action on which judgment had previously been obtained, and would for that reason invoke application of the principle of *res judicata*.[21] As was discussed above, issue estoppel is a rule that prevents findings of fact or law from being contested in a later trial. Hence, whereas *res judicata* is concerned with verdicts or causes of action as such, issue estoppel is aimed specifically at the issues decided by a prior judgment.[22]

As Deane and Gaudron JJ pointed out,[23] having thus identified the distinction, both principles can be envisaged as emanating from the same fundamental public policy considerations. That policy, as explained by Fullagar J in connection with *res*

[15] Ibid 372 (Barwick CJ), 389-90 (Gibbs J), 396-7 (Mason J), 423-4 (Aickin J).

[16] Cf J Forbes, 'Criminal Issue Estoppel — an Ambiguous Epitaph' (1980) 11 *University of Queensland Law Journal* 168.

[17] *Rogers* (1994) 181 CLR 251, 254-5.

[18] Ibid 255.

[19] Ibid.

[20] *Jackson v Goldsmith* (1950) 81 CLR 446, 466 (Fullagar J).

[21] *Garrett v R* (1977) 139 CLR 437, 445.

[22] *Blair v Curran* (1939) 62 CLR 464, 532 (Dixon J); *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589, 596-7 (Gibbs CJ, Mason and Aickin JJ); *Chamberlain v Deputy Commissioner of Taxation* (1988) 164 CLR 502, 507-8 (Deane, Toohey and Gaudron JJ).

[23] *Rogers* (1994) 181 CLR 251, 274.

judicata,[24] is to prevent relitigation of matters that have already been adjudicated, both as a means of ensuring the conclusiveness of judicial decisions, and to avoid the hardship and injustice to the individual that would otherwise result.[25] Justices Deane and Gaudron considered the principle that judicial determinations must be treated in subsequent proceedings as incontrovertibly correct to be justified by the importance of preventing inconsistent decisions being made in respect of the same matters upon the same evidence.[26] Such inconsistency would assuredly bring the judicial system into disrepute. Their Honours accordingly recognised that the policy on which *res judicata* and issue estoppel are likewise based was to be upheld in all cases, whether they be civil or criminal. Though their Honours were conscious of the need to prevent relitigation so as to avoid 'the scandal of conflicting decisions',[27] they took the view that the best means of attaining that objective did not consist in the unqualified introduction of issue estoppel into the criminal law.[28] Instead, they preferred to recognise that the fundamental considerations of policy manifested by that doctrine could have an independent operation in the criminal law, extending beyond the established pleas of *autrefois convict* and *autrefois acquit*, but divested of the special rules and restriction that qualify issue estoppel in civil proceedings.[29] Those special rules include the mutuality of the doctrine,[30] its confinement to ultimate issues, and the limitation that an estoppel can only arise in respect of an issue if it is strictly the same question that was decided in the prior proceedings.[31] In their Honours' view, issue estoppel, since its precise rules had emerged in the context of civil cases, was unsuited to the distinctive nature of criminal proceedings; its application therein would only be detrimental to the development of more coherent and appropriate principles.[32]

It will be argued below that such a conclusion is vindicated by the judgments of Brennan and McHugh JJ in *Rogers*. Justices Deane and Gaudron proceeded to hold that the tender of the records of interview was a challenge to the decision of Phelan DCJ that they had not been made voluntarily,[33] and invited 'the scandal of conflicting decisions'.[34] Accordingly, it constituted an abuse of process.[35]

24 *Jackson v Goldsmith* (1950) 81 CLR 446, 466.
25 *Rogers* (1994) 181 CLR 251, 273.
26 Ibid.
27 George Spencer Bower and Sir Alexander Turner, *The Doctrine of Res Judicata* (2nd ed, 1969) 411, quoted in *Rogers* (1994) 181 CLR 251, 273.
28 *Rogers* (1994) 181 CLR 251, 278.
29 Ibid.
30 Mutuality was specifically criticised as a requirement peculiar to issue estoppel that ought not to be incorporated into the criminal law: ibid 280.
31 See below n 57 and accompanying text.
32 *Rogers* (1994) 181 CLR 251, 278.
33 On this point it should be noted that the Crown had conceded that, for the purpose of the question of voluntariness, all four records could be taken as having been made in the same circumstances: ibid 272.
34 Ibid 280, quoting Spencer Bower and Turner, above n 27.
35 Ibid.

The Minority Judgments

Like Deane and Gaudron JJ, Brennan J recognised that it was a fundamental and necessary objective of the criminal law to prevent relitigation of issues.[36] However, his Honour differed from the majority in thinking that this policy justified the recognition of issue estoppel.[37] Justice Brennan was explicitly opposed to the view expressed in *Storey* that the use of issue estoppel in criminal cases was inadequately supported by authority.[38] Specifically, his Honour objected to the claim that *Mraz [No 2]* exemplified *res judicata* rather than issue estoppel.[39]

Mraz had been charged with murder in reliance on the provisions of s 18 of the Crimes Act 1901 (NSW) which, in effect, established that a person who caused the death of another in the course of or immediately after committing rape upon that person was guilty of murder. On appeal to the High Court, the jury's verdict of manslaughter was set aside, owing to a misdirection by the presiding judge.[40] The accused was then tried and convicted of rape on the same facts. The High Court reasoned that, in returning a verdict of manslaughter, the jury at the original trial had necessarily concluded that an act of the accused was the cause of the deceased's death.[41] However, in acquitting Mraz of murder, the jury must have entertained reasonable doubt either as to whether rape had occurred, or as to whether the fatal act had been done during or immediately after the commission of that crime.[42] Yet it had not been disputed at the trial that intercourse had taken place and that the deceased had died shortly thereafter. From this, the High Court concluded that the jury's decision to return a verdict of manslaughter rather than murder manifested a finding that Mraz was not guilty of rape.[43] The Court held that the Crown was therefore estopped from contesting that finding in the later proceedings and ordered that the accused's conviction of rape be quashed.

As Brennan J observed in *Rogers*, the Court's analysis in *Mraz [No 2]* was not confined to the verdict returned by the jury at the first trial.[44] In order to exclude the possibility that Mraz had committed rape but caused the death of the victim on a different occasion, the Court had to look beyond the formal record of the proceedings[45] and take into account the actual questions of fact that were at issue. In so doing, it clearly applied a principle that extended beyond *res judicata*,[46] which is limited to the verdict, and thus to a consideration of the formal record.[47] Since it

36 Ibid 264-5.
37 Ibid.
38 *Storey* (1978) 140 CLR 364, 373-4 (Barwick CJ), 388-9 (Gibbs J), 400-1 (Mason J).
39 *Rogers* (1994) 181 CLR 251, 263, referring to *Storey* (1978) 140 CLR 364, 374 (Barwick CJ), 400-1 (Mason J).
40 *Mraz v R* (1955) 93 CLR 493.
41 *Mraz [No 2]* (1956) 96 CLR 62, 68.
42 Ibid.
43 Ibid 69.
44 *Rogers* (1994) 181 CLR 251, 263
45 *Mraz [No 2]* (1956) 96 CLR 62, 69.
46 *Rogers* (1994) 181 CLR 251, 263.
47 Ibid. See also *Mraz [No 2]* (1956) 96 CLR 62, 69; *Jackson v Goldsmith* (1950) 81 CLR 446, 467 (Fullagar J).

involved the isolation of specific issues, the decision in *Mraz [No 2]* can thus be understood as an application of issue estoppel.[48] However, as the decision did not rely on questions of mutuality, identity of issues or other special rules characteristic of issue estoppel, it is equally compatible with the approach advocated by Deane and Gaudron JJ in *Rogers*.[49] Nevertheless, Brennan J, with whom McHugh J agreed in this respect,[50] was firmly of the opinion that issue estoppel, together with its qualifying principles as developed in civil cases, should be imported directly into the criminal law.[51] The only modification that ought to be made to the doctrine was that mutuality should not be required, so that issue estoppel would apply only in favour of the accused.[52] Though Brennan and McHugh JJ agreed in recognising issue estoppel in the criminal law, their Honours differed fundamentally in their application of it to the instant case.

As McHugh J emphasised, the issue of whether Rogers' confessions were admissible, let alone the antecedent question of whether they had been made voluntarily, could not be regarded as ultimate issues in the proceedings before Phelan DCJ. At that trial, the ultimate issues were whether Rogers had, on specified occasions, engaged in such conduct as to satisfy the elements of the offence of armed robbery. Even if one were to decide that all four records of interview should have been admitted, the jury's verdict would not necessarily have been different, since it could still have been concluded that, despite the admissions contained in the first two records of interview, there was insufficient evidence to sustain a conviction.[53] Correspondingly, the confessions in the fourth record of interview would merely have confirmed the jury's finding that Rogers was guilty of the third and fourth charges in the indictment. Thus, the ruling that the confessional statements were inadmissible was not so integral to the jury's determination that, without it, the verdict must be regarded as necessarily wrong.[54]

Accordingly, the question of voluntariness was not a matter on which the guilt or innocence of the accused depended, and therefore did not constitute an ultimate issue at the trial. However, it was an ultimate issue with respect to the admissibility ruling made on the *voir dire*. Indeed, the voluntariness of the confessions was the only issue of fact on which admissibility depended. It was on this footing that Brennan J held there to be an issue estoppel.[55] In doing so, however, his Honour raised the status of a ruling made on a *voir dire* by treating it as a final and binding judgment in itself, independent of the trial of which it was a part. This approach overlooks the provisional character of such a ruling, which is not *res judicata* once made, and can be reconsidered in the course of the trial. Even if it were accepted that a *voir dire* examination was akin to a trial in itself, and that the resultant ruling was not merged into the judgment in the main proceedings when the jury returned

[48] *Rogers* (1994) 181 CLR 251, 263-4.
[49] Ibid 277-8.
[50] Ibid 284.
[51] Ibid 266.
[52] Ibid 267-8.
[53] Ibid 285.
[54] Ibid 286.
[55] Ibid 269.

its verdict, issue estoppel would still not apply to the facts in *Rogers*. The ruling of Phelan DCJ did not apply strictly to the third record of interview, or to the part of the fourth record that was in question in the 1992 proceedings.[56] Thus, since it involved different parts of the evidence, the admissibility issue arising from the 1992 proceedings was not precisely the same as that which had been decided earlier by Phelan DCJ; therefore, no estoppel could be established without departing from the requirement, emphasised in civil cases, that the two corresponding issues must be absolutely identical.[57] Justice McHugh correctly recognised that, when properly applied, issue estoppel did not preclude the Crown from tendering the third and fourth records of interview.[58]

The attempt by Brennan J to bring the present case within the requirements of issue estoppel illustrates the complications that can arise in applying the doctrine to criminal proceedings. Indeed, the principle that his Honour actually implemented differed from issue estoppel in important respects: mutuality was discarded, and the rule requiring identity of issues between the two trials was loosely interpreted. Furthermore, his Honour could only establish that the question of voluntariness was an ultimate issue by treating the *voir dire* examination, independently of the trial, as the proceedings with respect to which 'ultimateness' was to be judged.[59] In so doing, Brennan J fundamentally modified the relationship between such a ruling and the trial itself. Whether the doctrine on which Brennan J based his judgment, which differed markedly from its civil counterpart, could properly be called issue estoppel is a question of classification and semantics.[60] Of much greater importance is that it was only after substantial modification that the rules of issue estoppel could apply (even then somewhat artificially) to prevent relitigation of the voluntariness of the confessions. This result corroborates the view that the circumstances in which issue estoppel is available in civil cases are not similar in kind to those in the criminal law in which the need to prevent relitigation of issues is paramount.[61] The preferable approach, that of the majority in *Rogers*, is to recognise the importance of the policy that underlies issue estoppel, but allow it to be manifest in quite distinct rules under the rubric of abuse of process, which take into account the special character of criminal proceedings.[62]

Abuse of Process and Public Policy

Justice Brennan was by no means alone in holding that the ruling of Phelan DCJ on the admissibility of evidence constituted a final determination. The majority was also of the opinion that, upon the return of the jury's verdict and subject to any right of appeal, such an evidentiary ruling should be taken as conclusive for the purposes

56 Ibid 280.
57 See *Storey* (1978) 140 CLR 364, 380-2 (Gibbs J) and the authorities there cited.
58 *Rogers* (1994) 181 CLR 251, 286.
59 This approach is further discussed in *Duhamel v R* (1984) 14 DLR (4th) 92, 96-7.
60 Cf *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, 540 ('*Hunter*').
61 *Rogers* (1994) 181 CLR 251, 276 (Deane and Gaudron JJ).
62 Accordingly, the term 'issue estoppel' would be restricted to civil cases. See *Storey* (1978) 140 CLR 364, 407 (Jacobs J); *Hunter* [1982] AC 529, 540-1.

of subsequent proceedings.[63] However, if issue estoppel were to be applied, such rulings would have to be taken as incontestably final in order to maintain the relationship between issue estoppel and *res judicata*, and to satisfy the requirement that a finding made for the purposes of an evidentiary ruling must be an ultimate issue. The approach of the majority in *Rogers* is potentially more flexible. Thus it would not be inconsistent with the policy against double jeopardy and the need to prevent conflicting decisions to hold that, in certain cases, countervailing considerations of public interest were sufficient to allow the Crown, or even more importantly the accused, to challenge an adverse ruling made on a *voir dire* at a previous trial. Moreover, it would be inconsistent with the purpose of the law of abuse of process, which is to prevent parties to litigation from suffering vexation or oppression and to maintain public confidence in the judicial system,[64] to hold that evidentiary rulings are necessarily binding on subsequent trials.

The availability of fresh evidence,[65] proof that the previous ruling was obtained fraudulently,[66] or an indication that the evidentiary question was not fully contested and argued[67] are all grounds on which it would be proper to hold that there would be no abuse of process if the matter were relitigated. There are also circumstances in which a party against whom a possibly erroneous evidentiary finding has been made would not be in a position to mount an appeal against that decision. In such cases, it would be undesirable to maintain that the suspect determination was axiomatically immune from challenge in a later trial.[68] In *Rogers* itself, none of the foregoing policy factors militated against concluding that the tender of the records of interview, which would be both oppressive to the accused and create the possibility of 'scandalous conflicting decisions', was an abuse of the process of the Court. However, in future cases, further considerations of policy will arise, such as those mentioned above, which should be taken carefully into consideration before concluding that a challenge to a finding made in the course of a trial amounts to an abuse of process. Indeed, the High Court has recognised that, in deciding what constitutes an abuse of process, the public interest must be taken into account, including the interest in convicting those who have committed serious offences.[69]

A further issue raised by the High Court's adoption of the abuse of process doctrine in preference to issue estoppel, is whether *Mraz [No 2]* should continue to be followed. In reaching its decision in that case, the Court expressly dismissed as irrelevant the substantial possibility that the return of a verdict of manslaughter was attributable to a misdirection of the jury, rather than to the

63 *Rogers* (1994) 181 CLR 251, 256-7 (Mason CJ), 279 (Deane and Gaudron JJ). Cf *Hunter* [1982] AC 529, 542, followed in *Bryant v Collector of Customs* [1984] 1 NZLR 280, 283-4.

64 *Rogers* (1994) 181 CLR 251, 255-6, affirming *Williams v Spautz* (1992) 174 CLR 509, 520-1; *Walton v Gardiner* (1993) 177 CLR 378, 392-4. See also *Bryant v Collector of Customs* [1984] 1 NZLR 280, 284.

65 *Rogers* (1994) 181 CLR 251, 280 (Deane and Gaudron JJ); *Hunter* [1982] AC 529, 545.

66 *Rogers* (1994) 181 CLR 251, 280 (Deane and Gaudron JJ).

67 See ibid 292-3 (McHugh J).

68 Ibid; *Duhamel v R* (1984) 14 DLR (4th) 92, 99. But see *Rogers* (1994) 181 CLR 251, 266 (Brennan J).

69 *Rogers* (1994) 181 CLR 251, 256 (Mason CJ), applying *Walton v Gardiner* (1993) 177 CLR 378, 395-6.

jury's doubts that the accused was guilty of rape. In their Honours' opinion, an issue estoppel arose even in circumstances where it appeared likely that the jury's finding resulted from a misdirection, and thus did not necessarily involve a conclusive determination of the rape issue.[70] Justices Gibbs and Murphy have expressed dissatisfaction with the artificiality of such an approach.[71] Such reasoning inflexibly applies the doctrine of issue estoppel to the former trial, and fails to consider the underlying policy question of whether the public interest in attaining a conviction should outweigh the need to ensure that the accused is not convicted of a crime of which the jury at the previous trial has implicitly acquitted him. It is arguable that the doctrine of abuse of process, which is more sensitive to considerations of public policy, may lead the courts to a reappraisal of *Mraz [No 2]* and, ultimately, to the development of a more sophisticated approach that takes into account the conflicting imperatives of public interest and fairness to the accused that need to be reconciled in such cases.

In *Rogers*, the Court has demonstrated that abuse of process is an evolving concept not restricted to pre-defined categories of circumstances.[72] It is to be hoped that as this area of the criminal law matures, courts will develop these rules so as to take due account of both the interests of the public and those of the accused.

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[70] *Mraz [No 2]* (1956) 96 CLR 62, 68-9.

[71] *Storey* (1978) 140 CLR 364, 388-9 (Gibbs J), 413 (Murphy J). See also David Lanham, 'Issue Estoppel in the English Criminal Law' [1970] *Criminal Law Review* 428, 440.

[72] *Rogers* (1994) 181 CLR 251, 255 (Mason CJ), 286 (McHugh J). But see 270 (Brennan J).

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