



HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA

ADELAIDE REGISTRY

BETWEEN:

DIRECTOR OF PUBLIC PROSECUTIONS (CTH)

Appellant

and

ALFRED KOLA

Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE APPELLANT

10 PART I INTERNET PUBLICATION

This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

1. In a prosecution for the offence of conspiracy under s 11.5(1) to commit the offence of importing a commercial quantity of a border controlled drug under s 307.1, the statutory text and legislative history makes plain that the Crown need not prove that the accused knew or intended that the agreement to import a border controlled drug would result in a quantity being imported that satisfied the commercial quantity standard: **AS [11]-[16]; Reply [4]-[5]**.
- *Criminal Code* (Cth) ss 11.5, 307.1. The role of s 11.5(7A) is critical. It is an express statutory modification of the default fault element of intention under the *Code* and the former common law.
 - The Court of Appeal appears to have overlooked that s 11.5(7A) applies, *on its own terms*, to the *whole* of the conspiracy offence created by s 11.5(1), as well as, by s 11.5(2A) applying *specifically* to the epexegetical provisions of s 11.5(2): see **CAB 69 [42], 73-75 [54]-[58], 77 [65]**.
 - The relevant history is as follows: Review of Commonwealth Criminal Law, Interim Report, *Principles of Criminal Responsibility and Other Matters* (July 1990) at (**JBA Vol 5, Tab 26**); Explanatory Memorandum, Criminal Code Bill 1994 (Cth) at 39-42 (**JBA Vol 5, Tab 27**); Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999 (Cth) (Sched 1, Item 16 inserting s 600.1) (**JBA Vol 5, Tab 28**); Explanatory Memorandum, Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999 (Cth) (**JBA Vol 5, Tab 29**); Revised Explanatory

Memorandum, Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999 (Cth) (**JBA Vol 5, Tab 31**); Commonwealth, *Parliamentary Debates*, House of Representatives, 11 October 2000 (**Vol 5, Tab 30**).

2. *Standen* and *Le* illustrate two acceptable and compatible means by which juries can be directed about the matters for the prosecution to prove. See **AS [17]-[29]; Reply [3]-[5]**.

- *Standen No 1* (2011) 218 A Crim R 28 (**JBA Vol 4, Tab 22**); *Standen No 2* (2015) 298 FLR 35 (**JBA Vol 4, Tab 23**); *Le* (2016) 308 FLR 486 (**JBA Vol 4, Tab 19**).

3. *R v LK* does not support the Court of Appeal's reasoning or conclusion.

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- *R v LK, obiter*, explained the role of s 11.5(7A) as an express statutory modification of the common law position. But the point at issue in *R v LK* was a different one: could the prosecution import the fault element of recklessness *from* the primary offence *into* the conspiracy offence? Answer: No, because there was no provision equivalent to s 11.5(7A) expressly modifying the common law for recklessness fault elements as opposed to strict liability elements. Nothing in that answer impugns the trial judge's direction here.

- *R v LK* (2010) 2411 CLR 177 at [75], [105], [107], [117]-[119], [141] (**JBA Vol 3, Tab 13**)

4. There is no error in the trial judge's summing up when read as a whole: See **AS [30]-[35]; Reply [6]-[9]**. In particular, the summing up, correctly:

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- Directed on the burden of proof and standard of proof.
- Directed on the elements of the offence, broken down in 5 easy to understand ways.
- Directed on the methods of proof (direct and circumstantial).
- Directed on the sources of evidence led by the prosecution.
- Directed (twice) on the use of evidence admitted under the co-conspirators rule.
- Directed on corroboration of the rollover witness (James).
- Directed on the accused's right to silence.
- Summarised the prosecution and defence cases.

- Taken together, in no way was the jury invited to engage in the form of reasoning that concerned the Court of Appeal at **CAB 67 [36], 70 [45], 78 [69]**. There was no risk of the jury considering events in Panama unmoored from the alleged agreement, or from the full range of permissible sources of evidence of the making of the agreement, the accused's participation in it and the accused's mental state (where required).

10 5. The Court of Appeal identifies at **CAB 78 [71]** the evidence which, it says, was improperly left to the jury by reason of the trial judge's directions on the elements. There is no problem with **CAB 78 [71]**. See **AS [10], [47]-[48]; Reply [14]**. The underlined material which is said to be offensive consists of:

- Direct evidence against the accused (plan to use a boat big enough to make the trip and to pay the courier James \$250,000).
- Evidence of (minor) matters about which later clear directions on the co-conspirators rule were given (boat needed repair and a captain).
- Evidence of an objective fact permissible under s 11.5(7A) (street value of drug).
- An exhortation to apply common sense reasoning to the facts as found.

20 6. The Court of Appeal's reasoning is otherwise erroneous: **CAB 67 [36], 69-70 [43]-[45], 76 [61]-[63], 77-78 [67]-[69]**. The reasoning:

- Misunderstands the *Criminal Code* (Cth), particularly as to s 11.5(7A).
- Ignores or marginalises the co-conspirator's rule. See *Ahern v The Queen* (1988) 165 CLR 87 (**JBA Vol 3, Tab 11**).
- Creates a more general problem, beyond s 11.5(7A), in that proof of all elements of the conspiracy is erroneously limited by a requirement that the accused must have known or believed in the matters before evidence of them may be left to the jury. See **AS [37]-[42], [44]-[66]; Reply [10]-[22]**.

Dated: 15 February 2024



Justin Gleeson SC