HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA

ADELAIDE REGISTRY

BETWEEN: **DIRECTOR OF PUBLIC PROSECUTIONS (CTH)**

Appellant

and

ALFRED KOLA

Respondent

SUBMISSIONS OF THE APPELLANT

PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the internet.

PART II CONCISE STATEMENT OF ISSUES

2. This appeal is about the offence of conspiracy under s 11.5(1) of the *Criminal Code* (Cth) where absolute liability attaches to a physical element of the offence which is the object of the conspiracy. At a level of generality, the issues in this appeal concern what the prosecution must prove, and how a jury may be directed, as to the nature and scope of the agreement which is the nub of the offence of conspiracy.

3. The specific issues in this appeal arise in the specific circumstances of an alleged conspiracy to import a commercial quantity of a border controlled drug, where absolute liability attaches to the circumstance that the drug is in a "commercial quantity". The issues more concretely are: may a judge direct the jury that they must be satisfied that the accused was party to an agreement to import a border controlled drug into Australia and direct them subsequently and separately that the substance to be imported pursuant to the agreement was to be a commercial quantity of that drug? Further, is proof of what in fact occurred after the agreement has allegedly been made irrelevant unless the evidence is of acts or events known to the accused when they entered into the agreement?

PART III SECTION 78B NOTICE

4. No notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

PART IV DECISIONS BELOW

5. The Court of Appeal's judgment has the medium neutral citation [2023] SASCA 50.

PART V RELEVANT FACTS

6. The respondent was charged with conspiring to import a commercial quantity of a border controlled drug contrary to ss 11.5(1) and 307.1(1) of the *Criminal Code* (Cth).

7. The particulars of the charge alleged that, between about 2 April 2014 and 18 July 2014, in the State of South Australia and elsewhere, the respondent conspired with Juan Daniel Londono-Gomez, James (a pseudonym), Ibrahim Halil Yavuz and unknown others, to commit an offence, namely importing a substance, the substance being a border controlled drug, namely cocaine, and the quantity being a commercial quantity, via boat from Panama to Australia.

10 8. The prosecution case was that the respondent agreed with the others to conduct being engaged in, which if successful, would result in a commercial quantity of cocaine being imported from Panama to Australia via boat. The prosecution's evidence consisted of lawfully intercepted communications between the conspirators, oral evidence from James and other evidence providing circumstantial support for the agreement.

9. There was, as is regularly the case, no direct evidence of the quantity of cocaine they had allegedly agreed to import. The prosecution case was that the amount of cocaine to be imported pursuant to the alleged agreement was 2kg or more, and thus a commercial quantity. The main facts and inferences supporting proof of this were as follows.[1]

9.1. The respondent and other conspirators agreed to engage in conduct by which a boat
20 would be sailed from Panama to Australia with cocaine on board. The boat was bound to be big enough to carry much more than 2kg of cocaine.

9.2. One kilogram of cocaine was worth $180,000 to $220,000. A range of expenses would be incurred to execute the agreed conspiracy. These included James being paid $250,000 for his role. To cover the importation expenses and make a profit for all participants involved, the quantity of cocaine to be imported had to be a substantial amount.

9.3. Given the method of importation and the effort, risks and expenses involved, there was no reasonable possibility that the agreement to import cocaine would have been to import less than 2kg of cocaine.

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[1] See generally Summing Up at p 6 (**CAB 12**).

10. The matters underlined in [9] were said by the Court of Appeal to be irrelevant and beyond what should have been left to the jury: see **CAB 78 [71]**.

PART VI ARGUMENT

A. CONSPIRACY TO COMMIT AN OFFENCE UNER SECTION 307.1(1)

11. Section 307.1 of the *Criminal Code* (Cth) relevantly creates the offence of importing a commercial quantity of a border controlled drug. It provides:

> **307.1 Importing and exporting commercial quantities of border controlled drugs or border controlled plants**
>
> (1) A person commits an offence if:
>
> (a) the person imports or exports a substance; and
>
> (b) the substance is a border controlled drug or border controlled plant; and
>
> (c) the quantity imported or exported is a commercial quantity.
>
> Penalty: Imprisonment for life or 7,500 penalty units, or both.
>
> (2) The fault element for paragraph (1)(b) is recklessness.
>
> (3) Absolute liability applies to paragraph (1)(c).

12. Focusing for convenience only on that part of the offence provision that concerns the importation of a border controlled drug, the fault and physical elements of the offence are as follows:

1. The accused imports a substance (**conduct**).
2. The accused intends to import a substance (*Criminal Code* (Cth) s 5.6(1)).
3. The substance is a border controlled drug (**circumstance**).
4. The accused is reckless as to the circumstance that the substance is a border controlled drug (*Criminal Code* (Cth) s 307.1(2)).
5. The quantity imported is a commercial quantity (**circumstance; absolute liability**).

13. Section 11.5(1) of the *Criminal Code* (Cth) creates the offence of conspiracy to commit an offence punishable by imprisonment for more than 12 months, which includes an offence contrary to s 307.1 of the *Criminal Code* (Cth). Section 11.5 relevantly provides:

> **11.5 Conspiracy**
>
> **(1) A person who conspires with another person to commit an offence punishable by imprisonment for more than 12 months, or by a fine of 200 penalty units or more, commits the offence of conspiracy to commit that offence and is punishable as if the offence to which the conspiracy relates had been committed.**

Note: Penalty units are defined in section 4AA of the *Crimes Act 1914*.

(2) For the person to be guilty:

(a) the person must have entered into an agreement with one or more other persons; and

(b) the person and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement; and

(c) the person or at least one other party to the agreement must have committed an overt act pursuant to the agreement.

(2A) Subsection (2) has effect subject to subsection (7A).

…

(7A) Any special liability provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.

14. The Dictionary defines "special liability provision" to include "a provision that provides that absolute liability applies to one or more (but not all) of the physical elements of an offence". Accordingly, s 307.1(3) of the *Criminal Code* (Cth) is an example of a "special liability provision".

15. Authority of this Court establishes that s 11.5 has the following five features.

15.1. *First*, the offence of conspiracy is created by s 11.5(1).[2]

15.2. *Second*, the offence of conspiracy has a single physical element of conduct, namely that the accused conspired with another person to commit a relevant offence,[3] and a corresponding fault element of intention, that is the accused meant to conspire with another person to commit the offence particularised as the object of the conspiracy.[4]

15.3. *Third*, s 11.5(2)(a)-(b) in particular explain what it means in s 11.5(1) to conspire.[5] "In charging a jury as to the meaning of 'conspiring' with another person, it is

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2 *R v LK* (2010) 241 CLR 17 at [75] (French CJ), [141] (Gummow, Hayne, Crennan, Kiefel and Bell JJ; Heydon J agreeing); *Ansari v The Queen* (2010) 241 CLR 299 at [23] (French CJ).

3 *R v LK* (2010) 241 CLR 17 at [141] (Gummow, Hayne, Crennan, Kiefel and Bell JJ; Heydon J agreeing). See also *Ansari v The Queen* (2010) 241 CLR 299 at [58] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

4 *R v LK* (2010) 241 CLR 17 at [78(2)] (French CJ), [135]-[136], [141] (Gummow, Hayne, Crennan, Kiefel and Bell JJ; Heydon J agreeing).

5 *R v LK* (2010) 241 CLR 17 at [133] (Gummow, Hayne, Crennan, Kiefel and Bell JJ; Heydon J agreeing); *Agius v The Queen* (2013) 248 CLR 601 at [34] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

necessary to direct that the prosecution must establish that the accused entered into an agreement with one or more other persons and that he or she and at least one other party to the agreement intended that the offence particularised as the object of the conspiracy be committed pursuant to the agreement".[6]

15.4. *Fourth*, the matters in s 11.5(2) are conditions of guilt which the prosecution must establish beyond reasonable doubt rather than elements of the offence.[7]

15.5. *Fifth*, the fault element in s 11.5(1), as explicated by s 11.5(2)(b), is "[s]ubject to one reservation",[8] namely s 11.5(7A) to which s 11.5(2) is expressly made subject by reason of s 11.5(2A). "Proof of the intention to commit an offence does not require proof of knowledge of, or belief in, a matter that is the subject of a special liability provision".[9]

16. Piecing that together, where a person is charged with the offence of conspiracy to commit an offence of importing a commercial quantity of a border controlled drug under s 307.1(1) contrary to s 11.5(1), the prosecution must prove the following.

16.1. *First*, the accused must have participated in or been a party to an agreement to import a commercial quantity of a border controlled drug.

16.2. *Second*, the accused must have intended to (i.e., meant to) participate in or be a party to such an agreement.

16.3. *Third*, the accused and another person must have intended that a border controlled drug would be imported pursuant to the agreement but need not be proved to have intended the amount to have been a commercial quantity. That reservation follows from the operation of s 11.5(7A) together with s 307.1(3).

16.4. *Fourth*, the accused or another participant in the conspiracy must have committed an overt act.

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6 *R v LK* (2010) 241 CLR 17 at [141] (Gummow, Hayne, Crennan, Kiefel and Bell JJ; Heydon J agreeing).

7 *R v LK* (2010) 241 CLR 17 at [57] (French CJ), [134], [137]-[138], [140]-[141] (Gummow, Hayne, Crennan, Kiefel and Bell JJ; Heydon J agreeing). See also *Agius v The Queen* (2013) 248 CLR 601 at [36] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

8 *R v LK* (2010) 241 CLR 17 at [117] (Gummow, Hayne, Crennan, Kiefel and Bell JJ; Heydon J agreeing).

9 *R v LK* (2010) 241 CLR 17 at [117] (Gummow, Hayne, Crennan, Kiefel and Bell JJ; Heydon J agreeing).

B. NEW SOUTH WALES AND VICTORIAN APPROACHES

17. What the prosecution must prove in a prosecution of an offence of conspiracy to commit an offence where absolute liability attaches to a physical element of that offence has been the subject of a number of intermediate appellate court decisions.

B.1 New South Wales

18. The leading authority in New South Wales is *Standen v Director of Public Prosecutions (Cth)*,[10] which has been affirmed on one subsequent occasion[11] and endorsed without argument on two further occasions.[12]

19. *Standen* involved a conspiracy to commit an offence contrary to s 307.11(1) of the *Criminal Code* (Cth). At the time, s 307.11(1) provided:

> **307.11 Importing and exporting commercial quantities of border controlled precursors**
>
> (1) A person commits an offence if:
>
> (a) the person imports or exports a substance; and
>
> (b) either or both of the following apply:
>
> (i) the person intends to use any of the substance to manufacture a controlled drug;
>
> (ii) the person believes that another person intends to use any of the substance to manufacture a controlled drug; and
>
> (c) the substance is a border controlled precursor; and
>
> (d) the quantity imported or exported is a commercial quantity.
>
> Penalty: Imprisonment for 25 years or 5,000 penalty units, or both.
>
> (2) The fault element for paragraph (1)(c) is recklessness.
>
> (3) Absolute liability applies to paragraph (1)(d).

20. Hodgson JA (Adams and Hall JJ agreeing) held that the "elements" (more accurately, the matters to be proved) were as follows:[13]

> 1. That the accused entered into an agreement with one or more other persons (including at least Jalalaty): s 11.5(2)(a).
>
> 2. That the accused or at least one other party to the agreement (Jalalaty) intended that an offence would be committed pursuant to the

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10 (2011) 218 A Crim R 28.

11 *Standen v The Queen* (2015) 298 FLR 35 at [419]-[420] (Bathurst CJ, Hoeben CJ at CL and McCallum JA).

12 *Cranney v R* (2017) 269 A Crim R 449; *McGlone v R* [2019] NSWCCA 252.

13 (2011) 218 A Crim R 28 at [21].

agreement (s 11.5(2)(b)), namely, in this case, an offence under s 307.11 (*the offence*) involving the following elements:

(1) A person *imports* a substance: s 307.11(1)(a).

(2) The substance is a border control precursor, namely, pseudoephedrine: ss 307.11(1)(c); 300.2; 314.6.

(3) A person(s) committing *the offence* either intend(s) to use any of the substance to manufacture a controlled drug or believes that another person intends to use any of the substance to manufacture a controlled drug: s 307.12(1)(b)(i) and (ii).

3. The substance would be a commercial quantity: ss 307.11(1)(d); (2); 11.5(7)(a).

4. That the accused, or at least one other party to the agreement committed an overt act pursuant to the agreement: s 11.5(2)(c).

21. This analysis was proffered in the context of an appeal refusing a stay and is simply a starting point for trial judges to use as a guide to appropriate directions in a case. There is some compression in the statement of the first matter to be proved. Rather than clearly identifying that the accused must have intended to enter into the agreement (which is likely to be helpful to a jury to make explicit), that has been left implicit in the statement that the accused entered into an agreement. Entry into an agreement "necessarily includes" an intention to do so, as McHugh J explained in *Peters v The Queen*.[14] An example of how *Standen* can be adapted for directions to a jury by teasing out what *Standen* left implicit is the present appeal: see [30] below.

22. What is pertinent for present purposes is to notice the separation of the third matter to be proved (commercial quantity) from the earlier matters of proof (which pertain to the conspiratorial agreement and what the accused and another must intend). It is that separation which is in issue in this appeal.

23. The appellant submits that the advantage of this separation is that it guards against a jury thinking (wrongly) that the accused must have known or believed that the substance to be imported was in a "commercial quantity" before a guilty verdict could be returned. Directing the jury that the accused must have intentionally entered into an agreement that involved importation of a "commercial quantity" would carry such a risk (and require additional directions to guard against it) because the jury may wonder how a person could

[14] (1998) 192 CLR 493 at [55].

intend to be a party to such an agreement without knowing or believing the substance to be in a "commercial quantity".

24. The *Standen* formulation avoids this issue, which is a virtue. And it does so without introducing the different risk that the jury might think (wrongly) that the accused could be found guilty based on an agreement to import something other than a "commercial quantity" of the relevant substance. In context, the third matter to be proved clearly hangs off the agreement referred to in the matters before it. That does not direct attention to "commercial quantity" untethered to any agreement.

25. Accordingly, separating out the third matter to be proved from the first and second matters is faithful to the fact that absolute liability attached to the circumstance that the substance be in a "commercial quantity", and is thus faithful to the continued application of special liability provisions when prosecuting a conspiracy under s 11.5 of the *Criminal Code* (Cth). It is an appropriate way to structure jury directions. Certainly it is not erroneous, even if a different structure could be employed in a particular case.

B.2 Victoria

26. The Court of Appeal of the Supreme Court of Victoria found no error in a structurally different formulation in *Le v The Queen*.[15] As in the present case, that case involved a conspiracy to import a commercial quantity of a border controlled drug contrary to ss 11.5(1) and 307.1(1) of the *Criminal Code* (Cth). Weinberg AP and Redlich JA found no error in directions formulated as follows:

> (1) the accused made an agreement with at least one other person to commit the offence of importation of a commercial amount of a border controlled drug;
>
> (2) at the time the agreement was made the accused meant to enter into the agreement;
>
> (3) when the parties made the agreement they intended that the offence of importation of a border controlled drug would be committed: this does not require proof of intention of the quantity;
>
> (4) the accused or one other party committed an overt act pursuant to the agreement.

In this formulation, the commercial quantity is expressed as a component of the conspiratorial agreement in the first matter to be proved rather than being separated out

[15] (2016) 308 FLR 486.

into a separate matter to be proved as in *Standen*; albeit it is further explicated in the final phrase of the third element, as discussed below.

27. This formulation involves no error. But the risk in this formulation is that the jury might think, from the combination of the first and second matters to be proved, that the accused must have known that a commercial quantity was to be imported. How else could it be said, a jury might wonder, that the accused meant to enter into the agreement understood as an agreement to import a commercial quantity of a border controlled drug?

28. A jury should not be left to think that such knowledge is necessary for the prosecution to prove. When special liability provisions were inserted into Part 2.4 of the *Criminal Code* (Cth) by the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* (Cth), it was abundantly clear that the purpose of these provisions was to ensure that the prosecution did not need to prove, in the context of ancillary offences, knowledge of certain matters where knowledge of those matters did not need to be proved to establish the substantive offence.[16] Because knowledge that the border controlled drug was in a "commercial quantity" is not needed to prove an offence under s 307.1(1), no direction to the jury about the agreement which the accused must have entered into should even hint that such knowledge might be required.

29. The qualification in the final phrase of the third matter is then imperative to guard against that risk. But the fact that such a qualification is imperative tends to make the point that *Le* is not obviously superior to *Standen*. They convey in substance the same matters to be proved, but *Standen* does so in a way that introduces the smallest risk of error.

C. THE DIRECTIONS IN THIS CASE

C.1 The trial judge's directions

30. The trial judge's directions in this case were a variation on *Standen*. In her Honour's summing up, the trial judge directed the jury that the elements of the offence that must be proved beyond reasonable doubt were (emphasis added):[17]

> 1. The accused was party to an agreement with at least one other person to commit an offence, namely, to import a border controlled drug into Australia.

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16 See Revised Explanatory Memorandum, Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 2000 (Cth) at [14]-[15]. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 11 October 2000 at 21,334.

17 Summing Up at pp 2-4 (**CAB 8-10**).

2. The accused intended to agree, that is, he meant to be a party to the agreement with at least one other person.

3. The accused and at least one other party to the agreement intended to commit the offence; that is, they intended to import a border controlled drug pursuant to the agreement.

4. The substance to be imported pursuant to the agreement was to be a commercial quantity of that border controlled drug. The prosecution did not need to prove the accused or any party to the agreement intended to import a commercial quantity, it was sufficient for the prosecution to prove that the quantity of border controlled drug to be imported pursuant to the agreement was to be a commercial quantity. As a matter of law a commercial quantity of cocaine was 2 kg or more.

5. The accused or at least one other party to the agreement committed an overt act pursuant to the agreement.

31. The trial judge also set out the elements in an aide-memoire provided to the jury. There were very minor differences between the above oral directions and those in the aide-memoire. Elements 2 and 4 in the aide-memoire were (emphasis added):

> Element 2: The accused intended to agree, that is, he meant to be a party to the agreement with that other person or persons.
>
> Element 4: The substance to be imported pursuant to the agreement was a commercial quantity of that border controlled drug.

32. The trial judge gave further directions to the jury in relation to the fourth matter to be proved while giving directions about circumstantial evidence. Her directions were (emphasis added):[18]

> The prosecution, for example, seeks to prove the further element by way of circumstantial evidence. That is that the substance to be imported pursuant to the agreement was a commercial quantity of the border controlled drug.
>
> The prosecution asks you to consider various pieces of evidence, put them altogether and draw inferences to infer beyond reasonable doubt that that was the case. That evidence includes evidence that the plan was to bring cocaine in via a boat to Australia. Added onto that is that the boat was big enough to make that trip. In addition, that the boat needed repair and needed a captain. The prosecution says it is common sense that you would not bring back less than 2 kg in such an enterprise.
>
> In addition, you have the evidence from James about what he was to be paid. Add to that the evidence of Detective Murray about the value of a kilo of cocaine being $180 to 220,000. The prosecution says that this would not have been done in order to give James half the money, especially after all the expenses they had paid out. So the prosecution asks you to draw from those circumstances certain

[18] Summing Up at p 6 (**CAB 12**).

inferences if you find those circumstances proved to establish that fourth element.

33. When summarising the prosecution's closing address, the trial judge also said "[s]o, members of the jury, the prosecution says that you can be satisfied that there was an agreement, that the accused was party to it and that it was to do with a commercial quantity of cocaine to be imported to Australia" (emphasis added).[19]

C.2 The trial judge's directions were free from error

34. There is no dispute that the appellant had to prove that the conspiratorial agreement in this case was to import a "commercial quantity" of border controlled drug. That inheres in the requirement that the criminalised agreement be an agreement to commit an offence.[20] The fourth matter explained by the trial judge, together with the first matter, directed the jury to this very effect. This follows from the ordinary and natural meaning of the words "pursuant to the agreement". Those words tie the quantity of substance to the conspiratorial agreement in a manner which is entirely consistent with the *Criminal Code* (Cth). It is noteworthy that s 11.5(2)(b) and (c) of the *Criminal Code* (Cth) itself uses the words "pursuant to". Any doubt about it (and there could be none) is dispelled by other parts of the summing up, as identified in [33]-[34] above. The trial judge repeatedly used the words "pursuant to".

35. By separating the fourth matter to be proved from the rest, there is no possible confusion as to the states of mind that must be proved. The second and third matters to be proved stated positively what intention must be shown. The respondent had to intend to be a party to the agreement and intend to import a border controlled drug. But consistently with the special liability provision, there was no necessity to prove that he knew or believed anything as to it being in a commercial quantity. The directions do not therefore trouble the jury about that subject at all. The trial judge's directions were not erroneous.

C.3 The Court of Appeal's misplaced concerns

36. It is convenient now to deal with five of the Court of Appeal's concerns with the trial judge's directions (and implicitly or explicitly, with *Standen*) before dealing with a final concern separately below: see Part D.

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19 Summing Up at p 25 (**CAB 31**).

20 See *Ansari v The Queen* (2010) 241 CLR 299 at [58] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

37. *First*, the Court of Appeal worried that, on these directions, the respondent could have been convicted even if importation of a commercial quantity was not the subject of the agreement he entered into (**CAB 56 [3]**). That is not a well-founded concern when reading the directions fairly. The fourth matter to be proved, as explained by the trial judge, was clearly tethered to the conspiratorial agreement ("pursuant to").

38. The artificiality of the Court of Appeal's reasoning can be illustrated in this way. Suppose the trial judge had combined the relevant parts of the first and fourth matters to be proved by directing the jury as follows:

> 1. The accused was party to an agreement with at least one other person to commit an offence, namely, to import a border controlled drug into Australia where the substance to be imported pursuant to the agreement was to be a commercial quantity of that border controlled drug.

It is doubtful that the Court of Appeal would have found error in this direction. Yet the trial judge's direction, in splitting up the first and fourth matters, cannot be understood in substance to have been to any different effect.

39. *Second*, the Court of Appeal acknowledged at **CAB 67 [36]** that the words "pursuant to" might tie commercial quantity to the conspiratorial agreement, but considered that it was insufficiently explicit in this regard. That criticism is misconceived. There is no confusion in the language of "pursuant to", which is no doubt why the *Criminal Code* (Cth) uses that as the relevant connector in s 11.5(2)(b) and (c). The criticism also fails to give any weight to other aspects of the summing up, as set out in [33]-[34] above.

40. *Third*, the Court of Appeal was critical of both the trial judge and *Standen* in treating the subject matter of the special liability provision as "if it stands independently" of the previous matters: **CAB 76 [61], 77 [65]**. The Court of Appeal misunderstood the directions in so saying. The fourth matter to be proved in the trial judge's directions was not independent of the agreement referred to in the first matter to be proved merely because the directions dealt with it separately. Plainly, the fourth matter built or was cumulative upon what went before.

41. *Fourth*, part of the Court of Appeal's worry at **CAB 70 [45]** was that the trial judge's directions might permit the accused to be convicted of participating in an agreement which was something other than to import a "commercial quantity" (another part reflects their Honours' final concern addressed in Part D below). Again, that is not a realistic

concern having regard to the terms of the first and fourth matters to be proved in the directions.

42. *Fifth* and for completeness, it is possible that **CAB 78 [70]** is to be understood as a criticism. Their Honours said: "In that respect it will be observed that no part of the aide memoir or the summing up directed the jury that the prosecution had to prove that the accused intended to import a commercial quantity of the border controlled drug" (emphasis added). If it is a criticism then it is plainly misdirected. Section 11.5(2A) and (7A), when read with s 307.1(3), has the consequence that the prosecution did **not** need to prove that the accused intended to import a commercial quantity. This is so clear that it may be that this is not how the Court of Appeal should be understood, but the point their Honours were making is then entirely obscure.

43. It follows from the above that there is no error in the *Standen* approach, contrary to what the Court of Appeal said in **CAB 77 [65]-[67]**, and no error in the trial judge's directions of the kinds identified by the Court of Appeal. Grounds 1(a) and (b) of the notice of appeal are established.

D. PROOF OF A CONSPIRATORIAL AGREEMENT

D.1 The Court of Appeal's final concern

44. The Court of Appeal had a final criticism of the trial judge's directions. It is apparent from reading the Court of Appeal's reasons as a whole that their Honours considered that the trial judge should have directed the jury not to use evidence of events that occurred after the agreement is alleged to have been made to prove the agreement or the respondent's participation in it, unless the prosecution could prove that those events were known to the respondent and intended by him as components of the agreement at the time the agreement was made. The trial judge did not do so, and it appears that the Court of Appeal blamed the separation of the first and the fourth matters to be proved for this inadequacy.

45. The starting point to understand how the Court of Appeal reasoned is **CAB 77 [67]**, where the Court of Appeal said that the trial judge ought to have directed as follows (emphasis added):

> The conduct to be performed in accordance with the agreement proved in element 1, in the circumstances known, or believed, by the conspirators to exist, would have resulted in the importation of a shipment of cocaine which weighed

> 2 kg or more, but the accused need not have intended to import a shipment of that weight.

46. The Court of Appeal begins to explain why this direction should have been given at **CAB 78 [69]**:

> The use of the passive voice in element 4 of the directions given by the Judge in this case is problematic because it fails to direct the jury on the evidential material from which that inference as to a hypothetical future fact is to be drawn. On the authorities, to which I have referred, and as a matter of principle, that material must be confined to the conduct in which the accused agreed to engage and the circumstances in which the accused believed and intended that conduct to be carried out. …

47. Next, at **CAB 78 [71]**, the Court of Appeal underlined evidence which their Honours considered was inadmissible against the accused. The reason why it was inadmissible is then set out in **CAB 78 [72]**:

> Much of the evidence to which the Judge referred was known to Mr Kola when he entered into, or affirmed, his commitment to the agreement. However, there is a fundamental difference between the question whether Mr Kola had made an agreement, with knowledge that if it were executed, it would result in the importation of a shipment of cocaine which would be a commercial quantity and the question whether the conduct engaged in by his co-conspirators in Central America would produce that result. The process of reasoning required to answer the first question must focus on Mr Kola's state of mind. The process of reasoning called for by the second question must focus on objective probabilities.

48. What the Court of Appeal seems to be saying here is that evidence of things done (on the Crown case in order to give effect to the agreement) are only admissible against the accused to prove the charge if those things can be proved to have been known to the accused at the time he is said to have entered into the agreement. That emphasis is consistent with what the Court of Appeal said elsewhere: see **CAB 70 [45], 78 [71]**.

49. That then leaves **CAB 69 [44]**, where the Court of Appeal said this:

> … There may be cases in which the agreement is to be inferred from the overt acts. Careful directions on the extent to which that conduct allows inferences to be drawn as to what was agreed or is to be treated as no more than unilateral conduct will be required. Proof of what in fact occurred is irrelevant. If what did occur fell within the scope of what was agreed, it is unnecessary. If it fell outside what was agreed, it cannot be, by definition, evidence of the agreement which was reached.

50. The Court of Appeal seems to be saying that evidence of acts is admissible to prove an agreement if there is a separate basis (independent of that evidence) upon which the jury

could conclude that those acts are overt acts in furtherance of the agreement. But because that independent basis must be available to make evidence of subsequent acts relevant, such evidence is unnecessary because (on this reasoning) the agreement will have already been proved through other evidence.

D.2 Error in the Court of Appeal's final concern

51. The Court of Appeal's final criticism is misconceived.

52. *First*, the Court of Appeal's approach is not consistent with established principles about how conspiracies are proved.

53. Evidence of what occurred in allegedly implementing the agreement is rationally capable of proving, together with other evidence, the scope and content of that agreement. The canonical explanation of this is to be found in this Court's judgment in *Ahern v The Queen*:[21]

> In conspiracy cases a clear distinction is to be made between the existence of a conspiracy and the participation of each of the alleged conspirators in it. Conspiracy is the agreement of two or more persons to do an unlawful act or to do a lawful act by unlawful means and it is the fact of the agreement, or combination, to engage in a common enterprise which is the nub of the offence. This fact can seldom be proved by direct evidence of the making of an agreement and must in almost all cases be proved as a matter of inference from other facts, that is to say, by circumstantial evidence. For this purpose, evidence may be led which includes the acts or declarations of one alleged conspirator made outside the presence of the others provided such evidence is not led to prove against the others the truth of any assertion or implied assertion made by the actor or the maker of the statement. It may take the form of evidence of separate acts or utterances from which the fact of combination might be inferred. Led in that way, it is not hearsay and is not dependent upon some circumstance to take it outside the hearsay rule, such as an implied authority making the acts and words of one the acts and words of the other.

54. Peter Gillies explained the position as follows in *The Law of Criminal Conspiracy*:[22]

> The formation of this agreement may be provided either by evidence that the parties actually met together and concluded it, and/or indirectly, usually by proof of the overt acts done in the transaction of the agreement, where these acts are sufficient when taken with any relevant surrounding circumstances to justify the inference that their commission was the product of concert between the alleged parties. Most conspiracies which come to be indicted have been consummated in part or in whole, so that the prosecution usually relies upon the latter mode of proof. This is often a necessity and not merely convenience, in that direct

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21 (1988) 165 CLR 87 at 93 (Mason CJ, Wilson, Deane, Dawson and Toohey JJ).

22 P Gillies, *The Law of Criminal Conspiracy* (2nd ed, 1990) at pp 16-17.

> evidence of the actual acts whereby agreement has been signified will typically not be forthcoming. The result is that the actus reus of the crime most usually will not be proven in concrete detail. Thus, its precise form will usually be irrelevant, provided that the fact of agreement in the terms alleged is able to be inferred. …

55. So take the example in *Ahern v The Queen*: a conspiracy to commit armed robbery may be inferred "from the fact that one accused wearing a disguise was present in a bank at the same time as another accused, similarly disguised, was waiting outside the bank in a motor vehicle with the motor running".[23] That such evidence is admissible for this purpose is well established.[24] There is no suggestion in the authorities that such actions can only be proved and relied upon for this purpose if they were agreed or known to the accused. In fact, a similar contention was rejected by Whealy J in the often-cited decision of *R v Baladjam [No 19]*.[25]

56. Further, evidence of things said or done outside the presence of the alleged co-conspirator can be admissible against the accused including to prove their participation in the conspiracy under the co-conspirators' rule where there is "reasonable evidence" of that participation aside from (i.e. independent of) the evidence sought to be admitted on this basis.[26] It is frequently the case that evidence of conversations or events at which an alleged conspirator is *not* present are relied upon to prove participation of that conspirator in the alleged conspiracy. This was, in fact, the subject of unchallenged and impeccable directions by the trial judge in this case.[27] Again, there is no suggestion in the authorities that such actions can only be proved and relied upon if they were agreed or known to the accused.

57. *Second*, there is no basis in s 11.5 to justify the Court of Appeal's departure from established principles. Except to the extent modified by the statutory text, common law concepts inform s 11.5 of the *Criminal Code*.[28] Nothing in the text of the *Criminal Code*

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23 *Ahern v The Queen* (1988) 165 CLR 87 at 93-94 (Mason CJ, Wilson, Deane, Dawson and Toohey JJ).

24 See, eg, *Tripodi v The Queen* (1961) 104 CLR 1; *R v Baladjam [No 19]* [2008] NSWSC 1441.

25 [2008] NSWSC 1441 at [40].

26 *Ahern v The Queen* (1988) 165 CLR 87 at 100 (Mason CJ, Wilson, Deane, Dawson and Toohey JJ).

27 See Summing Up at 14, 19 (**CAB 20, 25**).

28 *R v LK* (2010) 241 CLR 177 at [59], [72] (French CJ), [93], [107] (Gummow, Hayne, Crennan, Kiefel and Bell JJ; Heydon J agreeing); *Ansari v The Queen* (2010) 241 CLR 299 at [21] (French CJ), [58] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Agius v The Queen* (2013) 248 CLR 601 at [32] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), [54] (Gageler J); *Namoa v The Queen* (2021) 271 CLR 442 at [12], [16] (Gleeson J; Kiefel CJ, Gageler, Keane, Gordon, Edelman and Steward JJ agreeing).

(Cth) provides that, contrary to the position at common law, evidence of events is only relevant in proof of the charge if the accused can be shown (through some other independent body of evidence) to have agreed to or known of those events forming part of the agreement.

58. *Third*, the Court of Appeal implicitly or inevitably required the accused to be shown to have **known** that the agreement would involve a commercial quantity being imported, despite s 11.5(7A) of the *Criminal Code*. That misunderstanding of the matters to be proved to establish the offence of conspiracy appears to have been the main driver of the Court of Criminal Appeal seeking to confine the evidence that could be relied upon by the prosecution and its criticism of *Standen*. There is this connection between the errors in the two grounds of appeal.

59. *Fourth*, while it would be particularly incongruous to employ this form of knowledge filter in the context of proof of a matter the subject of a special liability provision, there is no logical reason why the Court of Appeal's analysis should not apply to proof of every feature of the agreement criminalised in s 11.5(1). This case focused on the "commercial quantity" component, but if the Court of Appeal were right then it follows that proof that the agreement involved an "importation" of a "border controlled drug" should also be confined in the manner propounded by the Court of Appeal. That is inconsistent with principle as summarised above, and the heresy could not be confined to or justified by the special liability provision regime in the *Criminal Code* (Cth).

60. *Fifth*, the Court of Appeal evidently considered its approach to be consistent with the *Le*[29] formulation: see **CAB 77 [67]**. It is not. The *Le* formulation on its face says nothing like what the Court of Appeal has proposed, and what the Court of Appeal saw as the operation of these underlined words is <u>not</u> to be found in *Le*.

61. *Sixth*, what the Court of Appeal considered itself to be doing, in the context of directions on matters to be proved, was providing the jury appropriate guidance on the manner of proof (i.e., the way in which evidence may be used). That should raise immediate concerns about the Court of Appeal's entire project. The elements and matters to be proved are separate from what evidence can rationally bear on proof, and it is doubtful that directions on elements/matters of proof are the appropriate place to deal with a concern about how a jury may use evidence. The latter should be dealt with through

[29] (2016) 308 FLR 486 at [9].

directions on the use of evidence. That is what the High Court contemplated in *Ahern v The Queen*.[30] That is what the trial judge did here, in directions[31] that were not complained about at the time and have not been the subject of criticism since.

62. *Seventh*, the Court of Appeal appears to proceed as if the jury will reason sequentially. Their Honours appeared to contemplate that the jury *would* first decide whether there is an agreement without recourse to evidence of events occurring after the agreement is alleged to have been formed, and only then bring to bear that excluded body of evidence if satisfied there was such an agreement. This appears to be driven by a perception that the jury *should* reason in this way, because evidence of post-agreement events cannot rationally bear on proof of the fact of agreement unless an agreement has already been proved so as to be able to conclude in a very sequential process of reasoning that those events are within the scope of the agreement. This analytical approach does not reflect an accurate understanding of how agreements are proved in a circumstantial case. It imputes to juries a two-step approach to their assessment of the evidence which is not consistent with the High Court's explanation for why the existence of reasonable evidence to engage the co-conspirators' rule should be left to the trial judge rather than the jury.[32]

63. *Eighth*, the circumstances of this case show that the Court of Appeal's approach (whatever its precise parameters) leads to bizarre and absurd outcomes which tell against its correctness.

64. In this case, a rollover witness given the pseudonym James gave evidence that, in Australia, the respondent and another met him and agreed to pay him $250,000 to sail back from South America on a sailing boat. So there was evidence which it was open to the jury to accept which would, if accepted, support an inference that things done in South America were comprehended by the respondent when the agreement began to be made.

65. Further, it was no part of the defence case to suggest that what occurred in Panama and the eventual importation that occurred was in any way beyond the scope of any agreement entered into by the respondent when "James" was in Australia with him, if the prosecution were to persuade the jury beyond reasonable doubt that such an agreement had been entered into. That suggestion was in no way part of the real issues at trial.

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30 (1988) 165 CLR 87 at 104-105 (Mason CJ, Wilson, Deane, Dawson and Toohey JJ).

31 See Summing Up at pp 14, 19 (**CAB 20, 25**).

32 (1988) 165 CLR 87 at 100-105 (Mason CJ, Wilson, Deane, Dawson and Toohey JJ).

66. Just how then it could be said that evidence of events occurring in Panama could not be used by the jury to draw inferences about the nature and scope of any agreement and the accused's participation in that agreement is unclear. If that were not possible given the above, then whatever principle compels that conclusion simply cannot be correct.

67. Ground two of the notice of appeal is established.

PART VII ORDERS SOUGHT

68. The appellant seeks the orders in the notice of appeal.

PART VIII ESTIMATE OF TIME FOR ORAL ARGUMENT

69. The appellant will require 1 ¼ hours, which includes time for reply.

10 Dated: 15 December 2023

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IN THE HIGH COURT OF AUSTRALIA

ADELAIDE REGISTRY

BETWEEN: **DIRECTOR OF PUBLIC PROSECUTIONS (CTH)**

Appellant

and

ALFRED KOLA

Respondent

ANNEXURE TO THE APPELLANT'S SUBMISSIONS

10 Pursuant to paragraph 3 of *Practice Direction No 1 of 2019*, the appellant sets out below a list of the particular statutes and Conventions referred to in these submissions.

No	Description	Version	Provision(s)
1.	*Criminal Code Act 1995* (Cth)	As at 2 January 2014	ss 11.5, 301.1, 307.1, 307.11, Dictionary ("special liability provision")
2.	*Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* (Cth)	As enacted	