HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S188/2020

BETWEEN: **ALO-BRIDGET NAMOA**
Appellant

AND: **THE QUEEN**
Respondent

APPELLANT'S WRITTEN SUBMISSIONS

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Dated: 1 December 2020

Part I: Internet certification

1. This document is in a form suitable for publication on the internet.

Part II: Statement of issues

2. The question raised by this appeal is whether two married persons alone may commit the offence of "conspiracy" under s.11.5 of the *Criminal Code* (Cth). The appellant ("Namoa") says that they cannot and that the decision of this Court in *R v LK* (2010) 241 CLR 177 makes that clear.

3. The two principal subsidiary issues which are likely to arise on the appeal are whether there is an established common law rule that spouses alone cannot conspire and whether that rule has been expressly ousted by the Code. The appellant ("Namoa") submits that it is clear that this was an established common law rule and that the Code clearly does not expressly oust that rule.

Part III: Section 78B certification

4. It is certified that there are no constitutional issues in this case.

Part IV: Case citations

5. The decision of Fagan J at first instance is reported at (2018) 274 A Crim R 1. The decision of the CCA is reported at (2020) 351 FLR 266.

Part V: Statement of facts

6. The Crown on 23 July 2018 filed an indictment charging Namoa and her husband (Mr Bayda) in these terms:

> "That between 8 December and 25 January 2016 at Sydney in the State of New South Wales and elsewhere [they] did conspire with each other to do acts in preparation for or planning a terrorist act or acts."

7. The indictment relied on ss.11.5 and 101 of the *Criminal Code*. On 31 August 2018 both accused applied for an order permanently staying the charge of conspiracy on the ground that they were married to each other at the time of the alleged conspiracy and that under s.11.5 of the *Criminal Code* the crime of conspiracy could not be committed by husband and wife alone: Fagan J at [1].

8. After hearing argument on 28-31 August 2018, Fagan J on 10 September 2018 rejected the application for a stay.

9. On 5 October 2018 Namoa was convicted of one count of conspiring to do acts in preparation for a terrorist act (or acts) contrary to ss.11.5 and 101.6(1) of the Code: CCA [1]. She then brought an appeal to the CCA (heard on 21 February 2020) arguing (*inter alia*) that the offence charged under the indictment was bad in law because s.11.5 did not apply to a conspiracy between husband and wife alone. The

CCA rejected that argument and dismissed her appeal in a judgment delivered on 6 April 2020.

Part VI: Appellant's argument

10. The principal submission made by Namoa is that the CCA erred in its construction of s.11.5(1) by failing to apply *LK* and, in particular, [107] and [131] of that decision. Those paragraphs make it clear that the words "conspires" and "conspiracy" in s.11.5(1) import the established common law rule that spouses alone cannot conspire. The relevant passages of *LK* are set out at [69]-[71] below, the principal submissions by the appellant at [72]-[80] and the alleged errors by the CCA at [81]-[92]. However, those submissions must first be put in context by a discussion of the common law rule.

(i) Early history of the common law rule

11. There is "no doubt that, at common law, no indictment for the crime of conspiracy would lie in any case where the only parties to the conspiracy alleged are husband and wife" (*Midland Bank v Green [No 3]* [1979] Ch 496, at page 510C per Oliver J). His Lordship later adds that this "was and is" the position at common law: 520C. His Lordship's views were endorsed by the CA: see [23] and [50]-[52] below. That appears to have been the position at common law from the time of the Year Books. In the words of Taschereau J (Kerwin, Estey and Cartwright JJ concurring) in *Kowbel v R* [1954] SCR 498 at 501, since the 14th century "it has generally been recognised that a husband and wife were legally incapable of conspiracy".

12. In 1345, there is reference in the Year Books (RS, ed Pike, 19 Edward III Mich 24) to an argument by way of objection to a writ of conspiracy. It noted that exception was taken to the writ on the ground that:

> "if this writ were good, for the same reason one would be good if it were brought against a husband and wife alone, and it could not be understood that a wife, who is at the will of her husband, could conspire with him, because the whole would be accounted the act of the husband."[1]

13. In 1364, YB 38 Edward III Hil 3a also involved a writ of conspiracy. In that case it is suggested that an allegation of a conspiracy between husband and wife and a third person could not lie "where the wife could not conspire with her husband, nor the husband with his wife".[2] It is not clear whether this is a ground of decision or a mere record of argument: see G. L. Williams, *The Legal Unity of Husband and Wife* (1947) 10 MLR 16, at 20 (footnote 16). However, as noted by Taschereau J in *Kowbel v R* [1954] SCR 498 (at 500) even if it does not amount to a ground of decision "this case is most useful to show what was the state of the law at that time, and how it was understood by the lawyers of England over six hundred years ago".

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[1] Translation accessed from https://www.bu.edu/phpbin/lawyearbooks/display.php?id=10904
[2] Translation accessed from https://www.bu.edu/phpbin/lawyearbooks/display.php?id=13259

14. In 1367, in YB 41 Edward III Mich 30 it is stated that "the writ was brought against the husband and his wife, in which case the wife could not conspire with her husband; judgment of the writ."[3]

15. G. L. Williams (ibid, footnote 16 at p.21) notes that the earliest textbook formulation of the rule appears to be in FNB 116L (quoting the 1364 Year Book case).

16. Williams' reference to FNB is a reference to Fitzherbert's work *Natura Brevium* (1534). In that work at p.279 (1652 ed) Fitzherbert notes that a writ of conspiracy will not lie against husband and wife. He then adds that "against husband and wife and a third person [the writ] well lyeth".[4]

17. In Stanford *Les Plees Del Corone* (1607 ed) at p.174 (utilising the translation of Oliver J at [1979] Ch at 514A) the following appears:

> "And note that the writ of conspiracy does not lie against one alone any more than it lies against two when they represent a single person, as husband and wife are, for a writ of conspiracy is not maintainable against them alone…"

18. Hawkins in his *Pleas of the Crown* (8th ed, 1824 at pp.448-9) writes (in 1716) of a prosecution for conspiracy that:

> "it hath been holden, that no such prosecution is maintainable against a husband and wife only, because they are esteemed but one person in law, and are presumed to have but one will."

(ii) The common law rule in the principal common law jurisdictions

19. The common law rule has been held to be good law in all the major common law jurisdictions.

20. *United Kingdom*. In the UK, the early cases and texts are set out at [11]-[18] above. In *Mawji v R* [1957] AC 126, the Privy Council referred to the "rule of English criminal law" that "the accused being husband and wife could not be guilty of conspiracy" (p.133). Their Lordships went on to hold that "the rule in England" was "part of the criminal law of Tanganyika" (at 135). That "rule" was held to be "incorporated into the provisions" (at 134) of section 110 of the Penal Code which provided that "[a]ny person commits a misdemeanour who *conspires* with any person [etc]" (emphasis added). The Board noted as follows (at 134-135):

> "The words 'conspires' and 'conspiracy' in English criminal law are not applicable to husband and wife alone; the words 'other person' in section 110(a), if English criminal law is applied to their 'interpretation' or 'meaning', cannot in this context include a spouse."

21. The Board concluded (at 136):

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[3] Translation accessed from https://www.bu.edu/phpbin/lawyearbooks/display.php?id=13611
[4] Quoted by Oliver J at [1979] Ch at 513H

> "The rule *plainly* applies here [i.e. in the UK] at least to marriages recognized as fully valid, and it should therefore apply in Tanganyika to marriages recognized as fully valid there." (emphasis added)

22. *Midland Bank v Green [No 3]* [1979] Ch 496 contains a thorough examination of the history, rationale and authorities for the rule. At p.510C Oliver J held as follows:

> "There can, I think, be *no doubt* that, at common law, no indictment for the crime of conspiracy would lie in any case where the only parties to the conspiracy alleged were husband and wife." (emphasis added)

23. Similar statements are to be found at pp.511A, 511G and 520D. At p.521C the judge referred to "the continued existence of the rule, in relation to the crime of conspiracy". In the Court of Appeal, Fox LJ and Sir George Baker expressly endorsed the reasoning of Oliver J: *Midland Bank v Green [No 3]* [1982] 1 Ch 529, at 542E, 542-543.

24. In *DPP v Blady* [1912] 2 KB 89, Lush J at p.92 states that "Husband and wife being one person could not be indicted or convicted of conspiracy one with the other". In *R v Peel* (The Times, 8.3.22) Darling J said that the common law rule still obtained: "Of course, it takes at least two people to conspire, and the husband and wife being one person in law the situation is that they cannot conspire" (quoted in *Kowbel v R* [1954] SCR 498, at 503).

25. Textbooks in the UK also refer to the existence of the common law rule. For example:

- W.O. Russell, *A Treatise on Crimes and Misdemeanours* (6th ed 1896) at 152: "[a] prosecution for conspiracy is not maintainable against a husband and wife only".
- *Russell on Crime*, 11th (1958) and 12th (1964) editions: "[i]t is established that husband and wife cannot be convicted of conspiring with one another".
- J.W. Bryan *The Development of the English Law of Conspiracy* (1909) at 24: "[h]usband and wife … were … incapable of conspiracy with one another."
- Cross & Jones, *An Introduction to Criminal Law* 11th ed (1988): a "husband and wife who are the only parties to an agreement cannot be guilty of conspiracy".
- P.H. Winfield, *The Present Law of Abuse of Legal Procedure* at p.159 refers to "this rule" and notes that "it is repeated in contemporary books of practice applying to the modern crime of conspiracy".
- Wright, *Criminal Conspiracies* (1887) at p.59 notes that "the ancient writ of conspiracy appears not to have lain against husband and wife alone" (quoted in *Kowbel* at p.509).
- D. Harrison, *Conspiracy as a Crime and as a Tort in English Law* (1924) at p.76 notes that it "is generally stated … that husband and wife cannot by themselves be convicted of conspiracy".

- Stephen, *Commentaries on the Laws of England* (21st ed) states at vol 2, p.491 of a husband and wife that "nor can any agreements to which they alone are parties amount to a criminal conspiracy". At vol 4 p.165 Stephen adds "[h]usband and wife are for this purpose regarded as one person and cannot be indicted for conspiracy with one another".

- Kenny, *Outlines of Criminal Law* (16th ed at p.340) states of husband and wife that "an unlawful combination by him and her alone does not amount to a conspiracy"; this statement also occurs in the 15th ed (1936) at 336 and the 5th ed (1911) at 288.

- *Phipson on Evidence* (9th ed) p.99 states that at common law husband and wife "cannot alone commit a crime of conspiracy".

- *Roscoe's Criminal Evidence* (16th ed) at 749 states that a "married couple cannot be guilty of conspiracy (only) with each other". See also the 14th edition at p.520.

- Archbold, *Criminal Pleading, Evidence & Practice* (32nd ed) at p.21 states that "husband and wife cannot alone be found guilty of conspiracy". See also the 26th (1922) edition at [1417].

- Halsbury's Laws of England (1st ed) (vol 9) at p.264 states that "[h]usband and wife cannot alone commit the crime of conspiracy". This view is repeated in the 2nd (vol 9 at p.48) and 3rd (vol 10 at p.314) editions. The 4th edition of Halsbury at volume 11(1) [72] states that a "person is not guilty at common law where the only parties to the agreement are husband and wife".

- *The English and Empire Digest* (1924) vol 14 at [835]-[836] refers to the rule.

- Lush in his *The Law of Husband and Wife* (3rd ed 1910) at p.17 (and 4th ed at 597) also refers to the existence of the rule.

- Smith & Hogan, *Criminal Law* 12th ed (2008) at 432 states that s.2(2)(a) of the *Criminal Law Act* 1977 (UK) "almost certainly states the rule of the common law".

- H. Warburton and C. H. Grundy, *A Selection of Leading Cases in the Criminal Law* (5th ed, 1921) at 167 state that "a man and his wife cannot be indicted for conspiring together".

26. In 1976 the UK Law Commission determined that the common law rule existed and was supported by public policy: Report on Conspiracy and Criminal Law Reform (1976) (Law Com No 76). Subsequently the rule was specifically affirmed by statute: section 2(2)(a) of the *Criminal Law Act* 1977 (UK).

27. *Canada.* In Canada, the leading authority is the decision of the Supreme Court in *Kowbel v R* [1954] SCR 498. Section 573 of the *Criminal Code* was to the effect that every one is guilty of an indictable offence who conspires with any person to commit any indictable offence (p.499). Taschereau, Kerwin, Estey and Cartwright JJ held that "it is well settled that since many centuries, it has been the law of England that a husband and wife cannot alone conspire to commit an indictable offence" (at 503). This had "always been considered as the existing law" (at 503). Accordingly, the words "every one" in s.573 did not apply to husbands and wives alone because of their common law "incapacity to conspire" (at 500). Notably, the four judges held

that the terms of the section were neither inconsistent with the common law rule (pp.499, 500) nor expressly contrary to the common law rule (pp.505 and 506).

28. *New Zealand.* In New Zealand the Court of Appeal held in 1925 that at common law a husband and wife alone could not conspire and that the provisions of the Criminal Code did not alter the common law: *R v McKechie* [1926] NZLR 1. The relevant section (s.219 of the *Crimes Act*) stated that "[e]very one … who conspires with any other person [etc]". It was held that the common law was "too well established" (p.11) and that there was "no intention manifested in the section to alter the common law" (p.13): "[t]he statute does not in terms alter the common law, nor is it inconsistent with it" (at 12). Earlier authorities (*R v Annie Brown* (1896) 15 NZLR 18, 32 and *R v Howard* unreported) were said to have adopted the "same view of the law" (at 11-12).

29. *Hong Kong.* In Hong Kong the "old common law rule" was applied in *R v Cheung Ka-Fai* [1995] 2 HKCLR 184 (at 194, 195). The Court stated "it is the law". See also *HKSAR v Kong* [2015] HKCA 21 at [54] referring to *Cheung Ka-Fai* and *Mawji* as having "accepted … the rule that a husband and wife cannot conspire together". When s.159B was inserted into the *Crimes Ordinance* it took effect from 2 August 1996 but preserved the common law of conspiracy for offences before that date: *Chan Pun Chung v HKSAR* (2000) 3 HKCFAR 392. Section 159B(2)(a) re-enacts the common law position that spouses cannot be guilty of conspiracy if the only other party is the other spouse. *Archbold Hong Kong* [2007] [36-25] states that s.159B "reflects the common law" citing *Mawji v R* [1957] AC 126 and *R v Cheung Ka Fai.*

30. Pausing there, it is clear that the common law rule is accepted and established in every major common law jurisdiction outside Australia.

(iii) The common law rule in Australia

31. The common law rule is also well established in Australia. It was accepted by the QCA in *Byast v R* [1999] 2 Qd R 384. At p.385 the QCA (Davies and Pincus JJA with de Jersey J) stated: "It is true that a husband and wife cannot at common law be found guilty of conspiracy together" (citing *Mawji v R* [1957] AC 126 and the Canadian Supreme Court in *Kowbel v R* [1954] SCR 498). The common law rule was also accepted by the District Court of South Australia in *R v Won* [2012] SADC 117: "[a]t common law it is an essential ingredient of the offence of conspiracy that the criminal agreement is between an accused and someone other than their spouse": [42].

32. In Australia, works of reference on the criminal law support the view that the common law rule is well established in this country. See for example:

- Peter Gillies, *The Law of Criminal Conspiracy* (2nd ed: 1990), p.63: "At common law a husband and wife cannot be convicted of a conspiracy … where it is proven that they alone were parties to the criminal agreement."
- Sir Harry Gibbs, *Review of Commonwealth Criminal Law* (1990) at [39.3]: "At common law there can be no criminal conspiracy if the only two parties to the agreement are husband and wife."
- D. Lanham, M. Weinberg et al, *Criminal Fraud* (1987) at p.443: "At common law an agreement between husband and wife is not a conspiracy."

- *Halsbury's Laws of Australia*, Vol 9, at [130-7420]: "At common law … a husband and wife cannot be guilty of a conspiracy between themselves alone."

- *Laws of Australia* (Westlaw) at [9.2.1420]: "a husband and wife are not criminally responsible for conspiracy between themselves alone, at common law".

- *Ross on Crime*, 7th ed (2016) states at [3.6625]: "At common law husband and wife cannot conspire together". The same words appear in the 8th edition at [3.6625]

- Simon Bronitt, Bernadette McSherry, *Principles of Criminal Law*, 3rd ed (2010) at [8.110]: "At common law … a husband and wife cannot be criminally responsible for a conspiracy between themselves alone." The same point is made in their second edition (2005) at p.420.

- Samuel Griffith *Draft of a Code of Criminal law* (1897) incorporates at p.17 a provision (s.35) that "[a] husband and wife are not criminally responsible for a conspiracy between themselves alone" having noted (at p.xiii) that the provision is in a Part which contains statements which "are accurate statements of the existing law of Queensland".

- Peter Gillies, *Criminal Law* (3rd ed) (1993) at p.718: "An old common law rule holds that a husband and wife cannot be convicted of a conspiracy where it is proven that they alone were parties to criminal agreement."

- Peter Gillies, *Criminal Law* (4th ed) (1997) at p.195: "A husband and wife cannot be convicted upon an indictment alleging that they alone have conspired together." At p.732 the author continues: "An old common law rule holds that a husband and wife cannot be convicted of a conspiracy where it is proven that they alone were parties to criminal agreement."

- Colin Howard, *Criminal Law* (4th ed) (1982), at p.281: "There is an outmoded rule that husband and wife cannot be convicted for conspiring with each other alone."

- Peter Gillies, *The Law of Criminal Complicity* (1980) at p.151: "A husband and wife cannot be convicted upon an indictment alleging that they alone have conspired together."

- NSWLRC *Report on Complicity* No 129 (2010) p.181 [6.57] "The position, at common law, is that a husband and wife cannot be guilty of conspiring with each other".

33. Thus it is clear that informed professional and academic opinion in both the UK and Australia accepted the common law rule. Professional tradition (it is submitted) may fairly be regarded "as a distinct source of law in its own right": Baker, *The Law's Two Bodies: Some Evidential Problems in English Legal History* (2001) at 66-67.

34. In NSW before 1999, the common law rule applied. In R Watson and H. Purnell *Criminal Law in NSW* (1971) it is noted at [1152] that "husband and wife cannot alone commit the crime of conspiracy". The same conclusion is reached in the 4th and 6th editions (1940 and 1956) of Hamilton and Addison *Criminal Law and Procedure NSW* at pp.344 and 364 respectively. Similarly, the NSW Criminal Trials Courts Bench Book at [5.220] Note 8 refers to "[t]he common law rule that a husband and wife cannot be found guilty of conspiring together". However, the rule was abolished

by s.580D of the *Crimes Act 1900* which was inserted by Act No 149 of 1998, s.3 (operative 8 February 1999).

35. In Victoria, the common law rule has been retained except for treason and murder: s.339 of the *Crimes Act* 1958.

36. In Tasmania, the common law rule was specifically retained by s.297(2) of the *Criminal Code*.

37. In SA the common law applies. The common law rule was held to be part of Australian common law by the District Court of SA in *R v Won* [2012] SADC 117.

38. In Queensland, the common law rule was given statutory force by s.33 of the *Criminal Code* until it was abolished by the repeal of s.33 in 1997. It is clear from pp.xiii and 17 of his *Draft of a Code of Criminal Law* that Sir Samuel Griffith regarded the rule as part of the common law (which he attempted to replicate in the provision which became s.33).

39. In WA the Code deals with conspiracy in ss.558 and 560 but does not deal specifically with spouses. In the ACT *Criminal Code* s.48 a similar position obtains. In the Northern Territory s.291 of the *Criminal Code* specifically abolishes the common law rule.

40. This review of Australian law demonstrates that the common law rule has long been established in Australia. It has been specifically affirmed or abolished in most jurisdictions.

41. Five further points concerning the status in Australia of the UK authorities and texts discussed at [11]-[26] above provide further support for Namoa's submission that the common law rule is an established rule in Australia. First, the common law rule was adopted by the Privy Council in *Mawji v R* [1957] AC 126: Australian courts have long treated pre-1986 Privy Council decisions as authoritative (particularly in the absence of High Court authority): see *Cook v Cook* (1986) 162 CLR 376 at 389-390; *Barclay v Penberthy* (2012) 246 CLR 258, at [103]. Secondly, the common law rule was accepted by the UKCA in *Midland Bank*: Australian courts at least until 1986 treated decisions of the UKCA as authoritative in the absence of controlling authority: *Cook v Cook* at 390. Thirdly, for a long time the High Court took the view that Australian courts should conform to English decisions on the common law in order to avoid diversity in the development of legal principle: see for example *Wright v Wright* (1948) 77 CLR 191, at 210; but cf *Parker v R* (1963) 111 CLR 610, at 632. Fourthly, until 1988 s.80 of the *Judiciary Act* 1903 (Cth) made "the common law of England" applicable in all courts exercising federal jurisdiction. Fifthly, prior to about 1980 the Australian legal profession was heavily reliant on English textbooks for statements of the common law given the dearth of quality Australian works of reference: these English texts supported the rule: see [16]-[18] and [25] above.

(iv) The common law rule and Commonwealth criminal legislation

42. The *Crimes Act* 1914 (Cth) originally contained s.86(1) which provided as follows:

> (1) A person who conspires with another person:

(a) to commit an offence against a law of the Commonwealth;

(b) to prevent or defeat the execution or enforcement of a law of the Commonwealth;

(c) to effect a purpose that is unlawful under the law of the Commonwealth;

(d) to effect a lawful purpose by means that are unlawful under a law of the Commonwealth;

shall be guilty of an indictable offence.

43. Importantly, s.4 of the Act provided that "[t]he principles of the common law with respect to criminal liability shall, subject to this Act, apply in relation to offences against this Act".

44. In R. Watson and A. Watson *Australian Criminal Law Federal Offences* (loose leaf) at [746] it was noted in relation to s.86 that "husband and wife cannot alone commit the crime of conspiracy".

45. Although there seems to be no reported case on point, it may confidently be asserted that "conspires" in s.86 would have been interpreted so as not to include spouses alone as conspirators (see [75]-[76] below) and that the words "person … with another person" would not have been interpreted as displacing the common law rule that spouses alone cannot be conspirators (see [77] and [90] below).

46. In addition to the *Crimes Act* conspiracy offences, *R v Kidman* (1915) 20 CLR 425 discusses a common law conspiracy offence applicable in the Commonwealth sphere.

47. When the Commonwealth Code was enacted in 1995 it provided for an offence of conspiracy in s.11.5, which provides as follows:

> 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, is guilty of the offence of conspiracy to commit that offence and is punishable as if the offence to which the conspiracy relates had been committed.

48. Also significant is s.11.5(3) which discusses parties and provides as follows:

(3) A person may be found guilty of conspiracy to commit an offence even if:

(a) committing the offence is impossible; or

(b) the only other party to the agreement is a body corporate; or

(c) each other party to the agreement is at least one of the following:

(i) a person who is not criminally responsible;

(ii) a person for whose benefit or protection the offence exists; or

(d) subject to paragraph (4)(a), all other parties to the agreement have been acquitted of the conspiracy.

(v) Rationale of the common law rule

49. In *Midland Bank* at p.521 Oliver J concluded as follows:

> "I infer therefore, that the continued existence of the rule, in relation to the crime of conspiracy rests, as the more modern cases suggest, not upon a supposed inability to agree as a result of some fictional unity, but upon a public policy which for the preservation of the sanctity of marriage, accords an immunity from prosecution to spouses who have done no more than agree between themselves in circumstances which would lay them open, if unmarried, to a charge of conspiracy."

50. In the Court of Appeal, both Fox LJ and Sir George Baker agreed with all of the reasoning of Oliver J: pp.542E, 542-543. Fox LJ was more explicit at p.541C, stating that:

> "I agree entirely with the conclusion of the judge that the continued existence of the rule in relation to conspiracy as a crime rests not upon the supposed inability of the spouses to agree as a result of the doctrine of physical unity, but upon public policy concerning the marriage relationship."

51. At p.542C Fox LJ referred to:

> "considerations of public policy, based upon the marriage relationship, which justify giving protection to a husband and wife because the existence of the marriage may expose one or other of them to the risk of criminal liability from a mere agreement which the closeness of the marriage relationship might, in practice, make it very difficult for him or her to resist."

52. For LJ added that the Law Commission had pointed out:

> "that to change the criminal law might offer scope for improper pressure to be applied to a spouse; for example, a husband who refuses to confess to the commission of a crime might be open to the threat that his wife will be charged with conspiracy."

53. In its 1975 report (*Criminal Liability of Married Persons (Special Rules) Report No 3* [1975] Vic LRC 3), the Victorian Law Reform Commission identified a number of public policy rationales for the rule which gave it ongoing vitality: pp.27-28. The Commission determined that the rule helped maintain the public interest in the stability of marriages because, absent the rule, marital confidences would be discouraged, thereby "impairing the quality of marital relationships". They added that "if agreements between spouses were capable of constituting the crime of conspiracy,

this might offer excessive scope for improper pressure on a husband or wife". Accordingly, the Commission recommended against abolishing the rule: p.28.

54. Similarly, the UK Law Commission referred to various public policy rationales for the rule in recommending that the rule be maintained (Report No 76 *Conspiracy and Criminal Law Reform* (1976)) at [1.47]-[1.48]:

> (a) making a husband and wife liable would represent a factor tending to undermine the stability of the marriage;
>
> (b) a change in the law might offer excessive scope for improper pressure to be applied to spouses in particular cases;
>
> (c) public trials on charges of conspiracy in respect of communications between spouses only might be likely to have a significant effect in discouraging marital confidences;
>
> (d) faced with an apparent conflict between their duty to each other and their duty to society the making of an agreement between spouses might be much less reprehensible than one between persons owing no duties to each other;
>
> (e) the agreement of one spouse to the project of the other is less likely to bring in additional resources or make the agreement a formidable one than the agreement of a stranger would be.

55. At [1.48] the Law Commission elaborated on the notion of "improper pressure" and noted that a "change in the law to permit a spouse to be charged with conspiracy with his or her spouse might offer excessive scope for improper pressure to be applied to spouses in particular cases; where, for example, a husband refuses to confess to the commission of a crime, he would be open to the threat that his wife will be charged with conspiracy with him".

56. These and similar arguments of public policy have been relied upon by the courts in other contexts.

57. For example, in the context of a condition in a will, Windeyer J in *Church Property Trustees, Diocese of Newcastle v Ebbeck* (1960) 104 CLR 394, at 415 stated:

> "In my view the policy of the law is not merely that marriages should not break up by divorce or separation. It is rather that the consortium of matrimony and all that that means, should not be interfered with, hampered or embarrassed."

58. And in *Argyll v Argyll* [1967] 1 Ch 302 Ungoed-Thomas J noted (at 324) that the case law had "recognised the importance in the eyes of the law of preserving confidential communications between husband and wife inviolate". The judge added that "the preservation of those communications inviolate is an objective of public policy" (at 324) and that "it is the policy of the law … to preserve the close confidence and mutual trust between husband and wife" (at 332).

59. Simply by reason of the intimate life which they share as marriage partners, spouses may easily garner knowledge and do things which would arguably expose them to the risk of a charge of conspiracy, even where at least one spouse is not truly privy to any criminality. That risk appears very clearly from the various evidential principles and practices which enable the "prosecutor's darling" (*R v Saik* [2007] 1 AC 18 at 62 [123]) to be proved (or at least get to the jury) by very indirect (and often exiguous) proofs. These principles include not only the co-conspirators' rule but also other matters which assist in establishing (by inference or circumstantial means) a *prima facie* case that "community of purpose", "preconcert" or a "common design" exists and that a person is privy thereto. To quote Isaacs J in *R and Attorney-General (Cth) v Associated Northern Collieries* (1911) 14 CLR 387, at 400:

> "Community of purpose may be proved by independent facts but it need not be. If the other defendant is shown to be committing other acts, tending to the same end, then though primarily each set of acts is attributable to the person whose acts they are, and to him alone, there may be such a concurrence of time, character, direction and result as naturally to lead to the inference that these separate acts were the outcome of preconcert, or some mutual contemporaneous engagement, or that they were themselves the manifestations of mutual consent to carry out a common purpose, thus forming as well as evidencing a combination to effect the one object towards which the separate acts are found to converge."

60. In the words of Dennis Shapiro (Note: UCLA Law Rev vol 12 (1965) at 1467-1468):

> "When applied to married persons, however, the loose evidentiary requirements sufficient to establish and delineate the scope of the corrupt agreement present opportunity for manifest injustice. For example, most conspiracy convictions are based upon such factors as a close relationship between two parties, knowledge of criminal acts committed by an alleged co-conspirator, or a sharing in the proceeds of criminal activity. However reliable these indicia may be when the participants are unmarried, their application to the spousal conspiracy is unwise. Married persons are by definition intimately related, and are under legal obligation to contribute to each other's support. Application of the traditional notions of conspiracy might result in convictions supported only by knowledge of a spouse's criminal activity and an entirely equivocal demonstration of relationship and benefit."

61. It is for such reasons of public policy that the rule has been preserved in those jurisdictions (e.g. the UK, Victoria and Tasmania) which have endorsed it by statute. Similarly, it may be inferred that the South Australian Parliament has not changed the common law rule by legislation for public policy reasons.

62. It is submitted that these various public policy factors justify the common law rule. Those factors are buttressed by the principle that as a matter of policy the courts will not create new offences or extend the criminal law, this being a matter for the legislature: *R v Rogerson* (1992) 174 CLR 268, at 304; *Midland* at 517C-D. Multiple new offences would be created (or existing offences extended) if the established

common law rule were abrogated because most offences can be the subject of a conspiracy charge.

63. As noted above, some of the authorities mention as an alternative basis for the common law rule the notion of spousal unity, that is, that spouses are one person and have one will. The notion that husband and wife are of one flesh is reflected in passages of both the Old Testament and New Testament: Genesis 2.24; Matthew 9.5-6; Mark 10.8.

64. However, the notion of spousal unity has been "eroded by exceptions" (*Midland* at 520F) and is "a very imperfect representation of the common law, which in many important respects, recognised a wife as being a separate person and, certainly in criminal matters, capable of acting both independently of and in concert with her husband" (*Midland* at 520E). See also McCardie J in *Gottliffe v Edelston* [1930] 2 KB 378, at 384 (quoted in *Midland* at 518B-C).

65. In truth, the common law rule is not based upon the biblical notion of unity, although ascribed to that notion in some cases (particularly early cases). In the words of Dixon CJ, Williams, Webb and Fullagar JJ in *Tooth & Co Ltd v Tillyer* (1956) 95 CLR 605, at 615-616 (cited by Oliver J in *Midland* at p.519):

> "To say that the common law rule is based upon the conception of the unity of husband and wife is probably to invert the order of historical development. One may suppose that the conception of the unity of husband and wife was but an *ex post facto* explanation and not a source of the state of early English law upon the subject. What *Bracton* actually said in reference to "vir et uxor" was "qui sunt quasi unica persona, quia una et sanguinis unus": Bracton De Legibus fo.429b (Woodbine's ed, vol 4, p.335) It is worth recalling the comment of Maitland, writing of the twelfth and thirteenth centuries: "If we look for any one thought which governs the whole of this province of law, we shall hardly find it. In particular we must be on our guard against the common belief that the ruling principle is that which sees an "unity of person" between husband and wife. This is a principle which suggests itself from time to time; it has the warrant of holy writ; it will serve to round a paragraph, and may now and again lead us out of or into a difficulty; but a consistently operative principle it cannot be": Pollock & Maitland, *History of English Law*, 2nd ed (1923), Vol II, pp.405, 406."

66. Although this statement was made in the context of a discussion of a different rule,[5] it is just as apposite in relation to the common law rule presently under discussion. To similar effect are the observations of G. L. Williams (in (1947) 10 MLR 16, at p.31) that the notion of spousal unity may "be used only to bolster up a decision arrived at on other grounds"; he added that it may be imported as a factor "to mould other rules of law in accordance with public policy" but "is not in itself a satisfactory basis of decision". The ancient ascription by medieval lawyers of the common law rule to the notion of unity is an "ex post facto explanation" probably due to the fact that "the

[5] Namely, the vicarious liability of a husband's employer for injury sustained by the wife as a result of the husband's negligence.

medieval lawyers and writers were clerics" (*Midland* CA at 542F) or otherwise steeped in holy writ.

67. The upshot is that the present understanding of the common law rule as a rule based on the policy of the law differentiates it from the ancient understanding of the basis for the rule: *Barclay v Penberthy* (2012) 246 CLR 258, at [40]. Public policy is now and probably always was the basis for the common law rule. And the public policy justifications for the rule abide.

(vi) The decision in *R v LK*

68. *R v LK* (2010) 241 CLR 177 is the leading authority on the construction of s.11.5. There are three important principles which emerge from *LK* which are of present relevance.

69. The first is that it is stated at [107] that the words "conspires" and "conspiracy" in s.11.5(1) are to be understood as fixed by the common law: these words "had an established meaning within the criminal law at the time the Code was enacted" (i.e. 1995) and the words were "intended to be understood by reference to that legal meaning".

70. Secondly, at [107] there is one rider on that proposition: the common law meaning of "conspires" and "conspiracy" is capable of alteration by the Code provided that there is "*express* statutory modification" (emphasis added).

71. Thirdly, at [131] the following passage appears:

> "It is by the adoption of the word "conspires", with its established legal meaning, that the drafters of the Code chose to deal with questions that are not otherwise addressed in s.11.5. *These may be taken to include the parties to the conspiracy* and the sufficiency of their dealings to constitute the agreement. Section 11.5(1) is the specification of a physical element of the offence, namely, conspiring with another person to commit a non-trivial offence. *Central to the concept of conspiring is the agreement of the conspirators*." (emphasis added)

(vi) Appellant's central submission

72. The appellant submits that the following propositions (derived from *LK*) demonstrate that under s.11.5 there can be no conspiracy between a husband and wife alone.

73. First, the words "conspires" and "conspiracy" in s.11.5(1) are to be understood as fixed by the common law, "had an established meaning within the criminal law at the time the Code was enacted" and were "intended to be understood by reference to that legal meaning": *LK* at [107].

74. Secondly, *LK* at [107] contains one qualification to that proposition which is that the common law meaning of "conspires" and "conspiracy" is subject to "express statutory modification" in the Code.

75. Thirdly and importantly, in *LK* at [131] the plurality refer to the word "conspires" in s.11.5(1) and note that its "established legal meaning" "may be taken to include the

parties to the conspiracy". The plurality then add that "central to the concept of conspiring is the agreement of the conspirators". In the light of *LK* at [107], the plurality are thus saying that the question of who are parties to a conspiracy under the Code is to be determined by reference to the established common law (subject only to *express* statutory modification in the Code).

76. Fourthly, from well before 1995 it was very well established at common law that spouses alone could not be parties to a conspiracy, that is, could not be conspirators. That is clear from multiple authorities in multiple jurisdictions (including Australia): see [11]-[41] above; and numerous texts: see [25] and [32] above. Thus the QCA (Davies and Pincus JJA and de Jersey J) in *Byast* (relying on such authorities) stated at 385 that "[i]t is true that a husband and wife cannot at common law be found guilty of conspiring together". Likewise, Oliver J (whose reasoning was expressly accepted by a majority of the UKCA) in *Midland Bank* at 510C (having reviewed caselaw and texts dating back to the 14th century) said that there was "no doubt" about the common law position. And at 520C his Lordship stated that the rule "has been too often stated now to be in doubt". See also Fox LJ in *Midland* at 540 ("has long been the law"). Similarly in *R v McKechie* at p.11 the plurality in the NZCA said that "the law is too well established in this respect to be challenged". Likewise, the HKCA in *Cheung* at pp.194 and 195 referred to the "old common law rule" that "a husband and wife are legally incapable of conspiring together" adding that "it is the law". In *Kowbel v R* at 503 Taschereau J (Kerwin, Estey and Cartwright JJ concurring) summed up the views of the Canadian Supreme Court plurality as follows:

> "I think it is well settled that since many centuries, it has been the law of England that a husband and wife cannot alone conspire to commit an indictable offence. These views have been expressed during over six centuries and I would be slow to believe that the hesitations of a few modern writers could justify us to brush aside what has always been considered as the existing law .... It may very well be amended by legislative intervention, but as long as it is not, it must be applied."

77. Fifthly, the words of the Code do not expressly oust the established common law position. As Soulio DCJ noted in *R v Won* at [39] "[t]he Code does not contain clear and unambiguous provisions abrogating the rule at common law". The CCA did not so find. Nor did the CCA address the test of "express statutory modification". And the Privy Council, Canadian Supreme Court and NZCA have rejected this argument based on the words "person ... other person" in very similar statutory provisions: *Mawji* at 133-135; *Kowbel* at 499, 500, 505, 506; *McKechie* at 12, 13.

78. Accordingly, it is submitted that the reasoning of this court in *LK* coupled with the established common law rule mandates the conclusion that under s.11.5 there can be no conspiracy between husband and wife.

79. To this reasoning one further matter may be added. Subsection 11.5(3) (quoted at [48] above) deals in detail with the issue of parties to conspiracy. It states that a person may be found guilty of conspiracy even where the other party is a company, has been acquitted, is not criminally responsible or the offence exists for that party's protection. Thus the statutory context shows that when the legislature wished to include persons as parties whose status as parties has given rise to debate in the cases

and textbooks, it dealt with the issue explicitly in this subsection. And yet the subsection does not mention spouses at all (when it could easily have done so).

80. For these reasons it is submitted that the CCA was obliged to find that there can be no conspiracy under s.11.5(1) between spouses (the conclusion reached by Soulio DCJ in *R v Won* [2012] SADC 117).

(vii) Difficulties with CCA reasoning

81. The CCA's reasoning on the issues the subject of this appeal is to be found in its judgment at [54]-[86]. In short, Namoa submits that the CCA should have adopted the reasoning set out at [72]-[80] above. In addition, it is respectfully submitted that there are some more particular difficulties with the CCA's reasoning.

82. First, at CCA [56] it is suggested that ("if it were necessary to decide the issue") "at the time immediately prior to the introduction of the Code in 1995 the common law of Australia did not recognise an immunity from prosecution for conspiracy for a husband and wife, even where the husband and wife were the only alleged conspirators". For the reasons set out at [11]-[41] above this is not correct. In particular, the CCA should have held that it was bound by the decisions of the QCA in *Byast* and the Privy Council in *Mawji* to hold otherwise: see [88] below.

83. Secondly, at CCA [70]-[72] it is stated that the UK Court of Appeal did not support the public policy rationale for the common law rule accepted by Oliver J in *Midland Bank* (see [49] above). This is not correct: see the passages from the CA judgment referred to at [50]-[52] above. Moreover, for the reasons noted at [49]-[67] above the policy of the law clearly supports the common law rule.

84. Thirdly, at CCA [76] it is suggested that ("[if] it were necessary to decide the issue") the common law rule that spouses alone cannot conspire should no longer be maintained. The CCA's reasoning is as follows: (i) the common law rule that spouses cannot conspire is based on another common law rule that spouses are one person; (ii) the common law rule that spouses are one person was removed by s.119 of the *Family Law Act* (which provides that "[e]ither party to a marriage may bring proceedings in contract or tort against the other party"); (iii) because the basis for the common law rule that spouses cannot conspire has been removed by statute, it follows that that rule can no longer be maintained.

85. It is respectfully submitted that there are difficulties with all three steps in that reasoning.

86. As to (i): the common law conspiracy rule is not based solely (or even predominantly) on the notion that spouses are one person: see [49]-[67] above. That common law rule is based on public policy considerations: see [49]-[62] above.

87. As to (ii) and (iii): even if the common law conspiracy rule were solely based on the common law notion that spouses were one person, that common law notion was not extirpated by s.119 of the *Family Law Act*. Section 119 removes two aspects of the common law which may be connected with the notion of spousal unity (viz no contracts between spouses and inter-spousal tort immunity) but leaves standing all of the other aspects of the notion of spousal unity – including (if spousal unity is its

basis) the common law conspiracy rule. The Privy Council put the matter neatly in *Mawji* at 135: (proceeding on the assumption that the common law rule was an example of the fiction of spousal unity) the Board stated that: "Some of the consequences of the fiction have been removed by statute. This has not."

88. More generally, it was not for the CCA to determine (even provisionally) that the common law rule should no longer be maintained: the CCA was bound to follow the Privy Council's pre-1986 contrary view in *Mawji*: *Barclay v Pemberthy* (2012) 246 CLR 258 at [103] (citing *Cook v Cook* (1986) 162 CLR 376 at 389-390). And the CCA was also bound to follow the QCA's contrary view in *Byast* unless the CCA determined that the QCA was plainly wrong (which the CCA did not do): *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [135].

89. Fourthly, at [77], [81]-[82] and [85] the CCA holds that, assuming that the common law immunity for conspiracy between spouses was established as at 1995, that common law immunity was "inconsistent" (at [77]) with the language of the Code, the "clear language" (at [85]) of which abrogated the immunity. The "clear" words relied upon were the words "[a] person who conspires with another person" in s.11.5(1) (together with the broad definition of "person" in the Dictionary to the Code) on the basis that these words must include a husband and wife.

90. There are multiple difficulties with this reasoning. One is that *LK* at [131] clearly states that the words "conspires" and "conspiracy" in s.11.5(1) incorporate the common law principles as to who may be parties to a conspiracy and at common law spouses cannot be conspirators; thus, even if the word "person" in the phrase "person who conspires with another person" is given the widest conceivable meaning the subsection still requires that there be a "conspiracy" and that notion is limited by the common law of conspiracy (which excludes spouses). Further, *LK* states at [107] that the common law position can only be altered by *express* statutory modification: mere "inconsistency" is not express statutory modification. Nor is the language of the Code relevantly "clear". The words "person who conspires with another person" in s.11.5(1) do not amount to *express* statutory modification. Nor does the CCA apply that test. Indeed, the Privy Council, the Canadian Supreme Court and the NZCA have held that the words "person … another person" do not amount to an express (or even implied) statutory ouster of the common law rule (see [77] above).

91. Fifthly, at [83]-[84] the CCA says that "person … person" in s.11.2(1) must include two spouses and that therefore a "coherent reading" of ss.11.2(1) and 11.5(1) requires that "person … person" in s.11.5(1) include two spouses.

92. Again the CCA fails to consider *LK* at [131] which states that the words "conspires" and "conspiracy" in s.11.5(1) incorporate the common law principles as to who may be parties to a conspiracy. The common law conspiracy rule is thus incorporated even if "person … person" in s.11.5(1) is given its widest possible meaning. In short, spouses alone cannot "conspire" at common law.

(viii) Conclusion

93. For the above reasons, it is respectfully submitted that the CCA decision is wrong. Section 11.5(1) of the Code does not apply to spouses alone.

Part VII: Orders sought

94. The appellant seeks the following orders:

(1) Appeal allowed.

(2) Set aside order 2 made by the CCA on 6 April 2020 and, in its place, order that:

(a) the appeal be allowed; and

(b) the appellant's conviction be quashed and a judgment of acquittal be entered in its place.

Part VIII: Time estimate

95. Namoa estimates approximately 2 hours for the presentation of her argument.

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Dated: 1 December 2020

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S188/2020

BETWEEN: **ALO-BRIDGET NAMOA**
Appellant

AND: **THE QUEEN**
Respondent

ANNEXURE

A LIST OF STATUTES AND PROVISIONS REFERRED TO IN THE APPELLANT'S SUBMISSIONS

Criminal Code Act 1995 (Cth), ss 11.5 and 101 (Compilation No 102, as in force from 1 December 2015).