IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S28 of 2013

BETWEEN:

ROBERT AGIUS
Appellant

and

THE QUEEN
Respondent

APPELLANT'S REPLY

Part I:

1. We certify that these submissions are in a form suitable for publication on the internet.

Part II:

General

2. No matter how this case is approached, one is confronted by an indictment in conventional language which clearly and unambiguously alleges two conspiracies, each being separate and distinct from the other and each the subject of a separate count. They required each of the accused to plead to each of the two counts and to give an opening and closing address in respect of two counts. They required the prosecutor to open and close on two counts and the trial judge to sum up in respect of two counts. Verdicts were necessarily returned on each count.

3. But having quite plainly charged two conspiracies, the Director of Public Prosecutions then said, in effect, he alleged only one conspiracy, so the allegation of the two conspiracies could be ignored. The Crown particulars tell us:

> "The conspiracy alleged is represented by two counts in order to reflect a change made to the name and wording of the sections under which the first count was drafted which came into effect at about the commencement date of the second count." **AB6.10**

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4. As the respondent has acknowledged, such an indictment is without precedent. It is supported by no authority. At application book p.107 (filed 13.11.12) the respondent's earlier submission is restated:

> "However, none of the cases on the offence of conspiracy at common law or under statute address, even tangentially, the issue now raised with respect of count 2."

5. The *Criminal Code Act* 1995 (the Code) introduced a new set of laws applicable to conspiracies to defraud. Entry into each agreement must be by a process which complies with the Code.

In response to Part II of the respondent's concise statement of issues

6. As to the respondent's submissions (RS) [2], the respondent would delete "to have entered into" from the appellant's further amended submissions (AFAS) Part II [2(a)]. The respondent thereby asserts the question to be whether, on or after 24 May 2001, a conspiracy contrary to the Code s.135.4(5) can be proved without the statutory requirement of proof of entry required by s.135.4(9). It is difficult to see how a conspiracy said to be contrary to the Code can be proved if it was not entered into conformably with the requirements of the statute. As to deleting "retrospectively" from AFAS [2(c)] the question as drafted necessarily assumes retrospectivity. The questions should stay as drafted.

In response to Part VI of the respondent's statement of argument

Need for agreement (Notice of Appeal Ground 1)

7. As to RS [6] and further to the AFAS [21], the parties are in agreement that the Crown case was that there was one conspiratorial agreement. The respondent agrees there is no evidence, nor an allegation, of a second agreement to support Count 2. Remaining unexplained is how that could be, when the indictment pleads two conspiracies.

8. If, as the respondent says at RS [8], it is not necessary for the parties to the antecedent agreement to enter into a new agreement in order to be guilty of the Code offence on the basis propounded, why does the indictment allege precisely that, as it is does in

Count 2? Whilst averring only one conspiracy, the respondent frequently speaks of an antecedent agreement and then of the Code offence as if there were in fact two conspiracies, for example RS [7], [8], [14] and [30].

9. As to RS [7] to [10], to prove conspiracy contrary to s.135.4(5) the law requires proof of the matters stipulated by s.135.4(5) and (9), which points to the need for active conduct on the part of an alleged conspirator . *R v LK and RK* (2010) 241 CLR 177 says nothing different.

10. What the respondent's case concerning Count 2 comes down to is an allegation of a second conspiracy which did not exist, and justification for the allegation upon the premise that the continuation of the Count 1 *Crimes Act* 1914 (*Crimes Act*) conspiracy somehow filled the gap and gave validity to Count 2. Broadly speaking, the case overlooks three problems:

    (a) It denies the necessity for proof of an agreement criminalised under the Code s.135.4(5) and proof of the obligations required by s.135.4 (9) but purports to rely upon participation in an agreement formed in 1997 and made criminal by virtue of *Crimes Act* ss.29D and 86 (1) (both now repealed);

    (b) It pays no regard to the time at which the alleged agreement was entered;

    (c) It requires the Code s.135.4 to be read retrospectively.

11. As to RS [11]-[14], s.135.4(9)(a) (b) and (c) all govern proof of the offence created by s.135.4(5). They specify particular requirements of a finding of guilt and are therefore express statutory modifications of the common law. Each of those conditions has to have been met. None can be satisfied by evidence of events before s.135.4(5) commenced. The reference to an agreement in s.135.4(9)(a) is reference to an agreement criminalised by s.135.4(5) and not by the previous *Crimes Act* or the common law. To satisfy the requirements of the Code requires adherence to its provisions, including the need for proof of entry into an agreement.

12. As to RS [15], this Court thought the matter of timing sufficiently important to include in its analysis of *R v LK and RK* as one if the indicia of a conspiracy. The courts below merely observed that the prosecution is not obliged to prove a precise starting time.

13. As to RS [16] to [24], the difficulty that the respondent has with cases such as *R v Simmonds* (1969) 1 QB 685 and *R v Doot* [1973] AC 807 is that they were cases at common law uncomplicated by significant changes wrought by legislation such as the *Crimes Act* (Cth) ss. 86(1) and 29D and their repeal and the introduction of the Code s.135.4. *Doot* and *Simmonds* were common law cases involving no statutes. Neither case is apt in the present statutory context. As to RS [17] and [18], the conclusion in the asserted hypothesis is illogical. Obviously the fourth person would be guilty if, in joining the conspiracy he or she fell within s. 135.4(5) and (9). The counter parties would be the other conspirators. But in any event the Crown case here is that all accused were parties to the conspiracy during the continuance of *Crimes Act* ss. 29D and 86(1).

Retrospectivity and legislative history

14. As to RS [25] - [27], Item 418 of the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences)* Act 2000 became law for the very reason that it preserved the criminality of conduct before 24 May 2001, which would have included engaging in conspiracies.

15. As to RS [30] and [31] in the debate in the interlocutory application (relevant to the issue of retrospectivity) the respondent asserted that the use of the past tense in s.135.4(9)(a) supports the claim that an agreement pre-dating the introduction of Chapter 7 was sufficient to establish the necessary agreement. Simpson J pointed out that such a construction would mean an offence wholly committed prior to 24 May 2001 could be prosecuted under s 135.4. That, she said, is plainly not the case (Judgment [49] – [51]). The respondent maintained the argument before the Court of Criminal Appeal. It was again rejected (Judgment [90]-[91]). **AB34-35** **AB83**

16. As to RS [32], the appellant does not contend that conspiracy at common law, under the *Crimes Act* or the Code is not a continuing offence. But the respondent's reliance on *Doot* ignores the statutes which have modified the common law. The *Crimes Act*

conspiracy has come and gone. As to the Code, a conspiracy formed contrary to s.135.4(5) will endure, but it can only begin to exist if the requirements of s.135.4(5) and (9) have been met. It can only be proved by evidence of active conduct to bring it within the Code.

State of Affairs (Notice of Appeal Ground 2(b))

17. As to RS [33] to [38] the appellant joins issue with the respondent. There seems to be no authority for the proposition that in the circumstances a state of affairs can be other than a passive circumstance (such as being in possession of something or being a vagrant). It is difficult to see how s.4.1(2) can be interpreted so as to exclude conduct as being an act, particularly having regard to s.135.4(5).

18. In the circumstances of this case the physical element cannot be a state of affairs s.4.1 (2) but must be conduct. In *R v LK and RK* French CJ at [42] observed that the concept of engaging in conduct which is a state of affairs remains unexplained. Simpson J held that "there is no escaping the conclusion that a 'state of affairs' includes the existence (continuing) of a conspiracy to defraud the Commonwealth" (Judgment [39]). The structure of the Code provisions makes the conclusion difficult. Put briefly: AB32

(a) There is one physical element in conspiracy encapsulated in the words "conspires with another person…";

(b) The physical element may be conduct a result of conduct or a circumstance: s.4.1;

(c) Conduct means an act, omission, or state of affairs: s.4.1(2);

(d) Engaging in conduct means:

(i) do an act;

(ii) omit to perform an act: s.4.1(2)(a) and (b)

all of which seems to mean that one can engage in a passive state of affairs by doing an act or omitting to perform an act, which would seem to require action on the part of the person so engaging.

Dated: 26 April 2013

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