



HIGH COURT OF AUSTRALIA

17 April 2024

DIRECTOR OF PUBLIC PROSECUTIONS (CTH) v KOLA
[2024] HCA 14

Today, the High Court unanimously allowed an appeal from the Court of Appeal of the Supreme Court of South Australia. The principal issues for determination were whether the Court of Appeal erred in concluding that the trial judge's directions failed to properly direct the jury on: (1) the elements of the offence of conspiring to import a commercial quantity of a border controlled drug, namely cocaine, contrary to ss 11.5(1) and 307.1(1) of the *Criminal Code* (Cth) ("the conspiracy offence"); and (2) the evidential material they could rely on to prove such an offence.

The respondent was found guilty in the District Court of South Australia of the conspiracy offence. At trial, it was alleged that the respondent and several co-conspirators had entered into an agreement to import a shipment of cocaine from Panama to Australia ("the agreement"). There was no evidence that the cocaine was actually imported into Australia. The trial judge directed the jury that one of the elements of the conspiracy offence was that "the substance to be imported pursuant to the agreement was to be a commercial quantity" but that the prosecution did not need to prove that the respondent intended to import a commercial quantity. The trial judge also directed the jury that statements made by the respondent's co-conspirators in his absence could be used to "prove the existence of the conspiracy and the extent of the [respondent's] participation in it". However, the trial judge warned the jury to exercise caution before acting upon such statements.

The Court of Appeal upheld the respondent's appeal on the basis that there were two failures in the trial judge's directions. First, that the trial judge's description of the elements of the offence meant that the conspiracy charge might have been established merely by proving that the conduct in which one or more conspirators did engage, or might have engaged, would result in the importation of a commercial quantity of cocaine. Accordingly, the trial judge did not explicitly direct the jury that they had to be satisfied that the conduct in which the conspirators agreed to engage would result in the importation of a commercial quantity. Second, the trial judge's direction wrongly permitted the jury to have regard to evidence of acts and statements of the respondent's co-conspirators undertaken outside his presence to determine whether the quantity of drug to be imported pursuant to the agreement would have been a commercial quantity.

The High Court held that there was no error in the trial judge's directions. The Court held that the directions had the advantage of not introducing potential confusion that the requisite intention to enter into the agreement extended to an intention to import a commercial quantity of cocaine, or the respondent otherwise knowing or believing that would occur. The directions made it clear that the scope of the agreement had to be such that, if executed, a commercial quantity of cocaine would have been imported. The Court also found that it was permissible for the trial judge to direct the jury that the acts and statements of the respondent's co-conspirators undertaken outside his presence could be used as evidence of the existence and scope of the agreement as well as evidence of the fact, nature and extent of the respondent's participation in the agreement.

This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.