HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

Matter No S287/2009

HAJAMAIDEEN MOHAMED ANSARI APPELLANT

AND

THE QUEEN RESPONDENT

Matter No S288/2009

ABDUL AZEES MOHAMED ANSARI APPELLANT

AND

THE QUEEN RESPONDENT

Ansari v The Queen
Ansari v The Queen
[2010] HCA 18
26 May 2010
S287/2009 & S288/2009

ORDER

In each matter, the appeal is dismissed.

On appeal from the Supreme Court of New South Wales

Representation

S J Odgers SC with W P Lowe for the appellant in each matter (instructed by Ford Criminal Lawyers)

P W Neil SC for the respondent in each matter (instructed by Commonwealth Director of Public Prosecutions)

CATCHWORDS

Ansari v The Queen
Ansari v The Queen

Criminal law – Conspiracy – Fault element – Recklessness – Where appellants charged with conspiracy to deal with money where risk existed money would be used as instrument of crime – Whether charges bad in law because of inherent inconsistency in proving conspiracy where fault element of offence the object of conspiracy is recklessness – *R v LK* [2010] HCA 17.

Words and phrases – "conspiracy to commit an offence", "instrument of crime".

Criminal Code (Cth), ss 5.4, 11.5, 400.3(2).

FRENCH CJ.

Introduction

1 On 15 March 2006 the appellants and their brother, Abdul Jaleel Mohamed Ansari, were arraigned upon a joint indictment in the District Court of New South Wales on two counts of conspiracy under s 11.5 of the *Criminal Code* (Cth) ("the Code") to commit an offence against Commonwealth law known broadly as money laundering. The three men pleaded not guilty. The appellants were found guilty on each count. The jury were unable to reach a verdict in relation to their brother.

2 The appellants appealed against their convictions to the Court of Criminal Appeal of New South Wales. They did so on the ground that the offences of which they had been convicted were not known to the law. They contended that the charges against them were bad because they alleged a mental state involving an intention which contemplated future reckless behaviour. On 14 August 2007, the Court of Criminal Appeal dismissed their appeals[1]. They applied for special leave to appeal to this Court on 12 September 2007. Their applications lapsed, but were later reinstated. On 2 October 2009 special leave was granted. The appeals were heard immediately after *R v LK*[2]. These reasons should be read with those in *LK* so far as they relate to the elements of conspiracy under the Code.

3 For the reasons that follow the appeals must be dismissed.

The indictment

4 The first count of the joint indictment alleged against the appellants and their brother that:

> "Between about 1 September 2003 and about 14 October 2003 at Sydney in the State of New South Wales and elsewhere [they] did conspire with each other and with [Z] and divers other persons to deal with money to the value of $1,000,000 or more where there was a risk that the money would become an instrument of crime and where the said Abdul Jaleel Mohamed Ansari, Abdul Azees Mohamed Ansari and Hajamaideen Ansari were reckless as to the fact that there was a risk that the money would become

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1 *R v Ansari* (2007) 70 NSWLR 89.

2 [2010] HCA 17.

an an [sic] instrument of crime contrary to section 11.5(1) and subsection 400.3(2) of [the Code]."[3]

The second count was in identical terms save that it covered a later period.

5 As is clear from the indictment, the Crown alleged that a risk existed that the money would become an instrument of crime. It provided particulars of the offences in the commission or facilitation of which the money was allegedly to be used. In respect of each count they were:

(a) an offence under s 31(1) of the *Financial Transactions Reports Act* 1988 (Cth) ("the FTR Act"); or

(b) an indictable offence under Commonwealth law which potentially could be committed by deliberately evading the reporting of taxable income from a cash source.

Statutory framework

6 The relevant provisions of the Code, including those provisions dealing with the general principles of criminal responsibility and the elements of offences and s 11.5, which creates the offence of conspiracy, are set out in *LK*[4]. The other offence-creating provisions of the Code and the FTR Act which are central to these appeals are referred to below.

7 Section 400.3(2) of the Code, which appears in Div 400 under the general heading "Money laundering", relevantly provides as follows:

"**400.3 Dealing in proceeds of crime etc – money or property worth $1,000,000 or more**

…

(2) A person is guilty of an offence if:

(a) the person deals with money or other property; and

(b) either:

(i) the money or property is proceeds of crime; or

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3 Z, an Israeli national, was alleged to have been a co-offender of the appellants and their brother.

4 [2010] HCA 17 at [41]-[47].

(ii) there is a risk that the money or property will become an instrument of crime; and

(c) the person is reckless as to the fact that the money or property is proceeds of crime or the fact that there is a risk that it will become an instrument of crime (as the case requires); and

(d) at the time of the dealing, the value of the money and other property is $1,000,000 or more.

Penalty: Imprisonment for 12 years, or 720 penalty units, or both.

…

(4) Absolute liability applies to paragraph[] … (2)(d)".

The term "instrument of crime" is defined in s 400.1(1):

> "***instrument of crime***: money or other property is an instrument of crime if it is used in the commission of, or used to facilitate the commission of, an offence that may be dealt with as an indictable offence (even if it may, in some circumstances, be dealt with as a summary offence)."

Critical to the disposition of the present appeals is s 5.4(4) of the Code, which provides that, where recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

8 Section 31(1) of the FTR Act makes it an offence for a person to be a party to two or more "non-reportable cash transactions" where it would be reasonable to conclude that the person conducted the transactions in a particular manner or form for the sole or dominant purpose of ensuring, or attempting to ensure, that the currency involved in the transactions was transferred in a manner or form that would not give rise to a "significant cash transaction", within the meaning of the FTR Act. That purpose is assessed by reference to enumerated factors[5]. This kind of offence is commonly referred to as a "structuring offence".

The factual background

9 It is common ground that the Court of Criminal Appeal dealt with the case on the factual basis that follows.

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5 FTR Act, s 31(1)(b).

10 The appellants were directors of a company called Exchange Point Pty Ltd, through which they conducted a money exchange business in Sydney. In mid-2003, Z was recruited by a relative and other associates from Romania to travel to Australia and collect more than $2,000,000 in cash from the back of a floor safe located in an apartment at Bondi. He did so, and over a ten-day period delivered instalments of the money to the appellants at the Exchange Point premises.

11 The appellants were said to have arranged for an associate to come to Exchange Point and take various portions of the money which they had received from Z and deposit them into a number of different bank accounts. The associate deposited a total of $1,952,107 on behalf of the appellants between 16 October 2003 and 13 May 2004. The sums were deposited in amounts of less than $10,000. The second count arose out of another visit to Sydney by Z in June 2004.

12 The Crown case in relation to the first count was that when the appellants received cash exceeding $2,000,000 in October 2003:

(a) there were risks that at least some of the money which they had received might be used in structuring offences and that at least some of it would be dealt with in a way that facilitated deliberate tax evasion;

(b) the risk that the money would become an instrument of crime was one in respect of which the appellants were reckless "in the sense of being aware of and going ahead".

13 In respect of the second count the Crown case was that the appellants agreed with Z in June 2004 to receive between $2,000,000 and $3,000,000 in cash and:

(a) they intended that they would receive from Z well over $1,000,000 in cash;

(b) a risk existed that the money would become an instrument of a structuring offence or an indictable offence under Commonwealth law which potentially could be committed by deliberately evading the reporting of taxable income from a cash source;

(c) the appellants were aware of the existence of the risks referred to in (b).

14 The Crown case against the appellants did not ultimately rely upon them being reckless about the risk of the money becoming an instrument of crime. Their receipt and their contemplated receipt of the money, intending to "launder" it by deposits of less than $10,000, was said to have created the relevant risk.

The charge was framed in terms of recklessness because the Crown was concerned that it would not be able to prove that Jaleel Ansari (about whom the jury ultimately were unable to reach any verdict) had any knowledge or intention that the money would be the subject of structured cash transactions.

15 It was contended for the appellants that the Court of Criminal Appeal misunderstood the way in which the Crown case was put to the jury. At the hearing of the appeals to this Court, the appellants applied for special leave to appeal to raise that additional contention, which was refused. The disposition of these appeals turns not upon how the Crown put its case to the jury, but upon whether the charges against the appellants were bad in law. Special leave was also refused to add an additional ground of appeal. That ground was that the appellants could not be convicted of the offence charged because neither money the subject of a structuring offence nor money the subject of an offence of failing to report taxable income, could be regarded as an instrument of the commission of those offences. Leave was refused because the point, which may be of importance to the administration of the criminal law, had not been taken at trial or in the Court of Criminal Appeal. This Court did not therefore have the assistance of those Courts in relation to it.

The reasoning of the Court of Criminal Appeal

16 The single ground of appeal before the Court of Criminal Appeal in the case of each appellant was:

> "That a miscarriage of justice was occasioned in that the Appellant was tried and convicted of an offence not otherwise known to law."

17 Howie J, with whose reasons Simpson and Hislop JJ agreed[6], identified as the only issue to be resolved by the Court of Criminal Appeal whether there is a limit upon the applicability of the law of conspiracy for federal offences in addition to that specified in s 11.5(1)[7]. The argument advanced for the appellants in the Court of Criminal Appeal was that s 11.5(2)(b) of the Code indicated that Parliament intended to adopt the common law requirement that a person could not enter into a conspiracy recklessly. Howie J observed correctly that a conspiracy entered into recklessly was not known to the common law and is not

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6 (2007) 70 NSWLR 89 at 91 [1] per Simpson J, 124 [150] per Hislop J. Simpson J concurred with Howie J but delivered further reasons of her own.

7 (2007) 70 NSWLR 89 at 103 [58].

an offence under s 11.5[8]. But as he said, that conclusion did not resolve the real question in the appeals[9].

18 As formulated by Howie J, the question posed by the offences with which the appellants were charged was whether a person could conspire to commit an offence the mental element of which was recklessness[10]. After referring to authority, including *Giorgianni v The Queen*[11], his Honour held that there seemed to be no good reason at common law why a person could not conspire to commit an offence of which the mental element was recklessness[12]. He considered that the position was the same under the Code[13]. It was the intention of what became the Model Criminal Code Officers Committee and the legislature which adopted its recommendations that the mental element of the offence of conspiracy under the Code was to reflect the position at common law[14]. That conclusion was correct for the reasons given in *LK*[15]. His Honour went on to reject the submission that the conspiracy alleged in each of the charges was bad at law. He gave two reasons for reaching that conclusion[16]:

1. It may be that the agreement constituting the conspiracy contemplates a third party carrying out the relevant conduct.

2. By the operation of s 5.4(4), recklessness under the Code can be proven by intention or knowledge.

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8 (2007) 70 NSWLR 89 at 106 [67].

9 (2007) 70 NSWLR 89 at 106 [67].

10 (2007) 70 NSWLR 89 at 106 [68].

11 (1985) 156 CLR 473; [1985] HCA 29.

12 (2007) 70 NSWLR 89 at 108 [76].

13 (2007) 70 NSWLR 89 at 108 [77].

14 Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapter 2: General Principles of Criminal Responsibility*, Final Report, (1992) at 99. For a description of the background to the formation of the Model Criminal Code Officers Committee, see *LK* [2010] HCA 17 at [51], [53].

15 [2010] HCA 17 at [51]-[57].

16 (2007) 70 NSWLR 89 at 110 [87]-[88].

His Honour said[17]:

> "It is the second reason that applies in the present case. Provided that the Crown was intending to prove as against the appellants that they knew that there was a risk that the money they dealt with would become an instrument of crime, that is that they knew of all the facts that made their dealing with the money criminal conduct, there was no impediment to the prosecution proving the offences charged."

It was that proposition that applied to the appeals before the Court of Criminal Appeal and ultimately supported their dismissal.

19 Simpson J agreed with the conclusions and reasons of Howie J but added her own reasons. Her Honour held that the conceptual difficulty of an intentional agreement to commit an offence of which recklessness is a fault element fades when regard is had to the extended definition of recklessness in s 5.4(4) of the Code[18]. Her Honour described what the Crown had to establish in the following terms[19]:

> "[T]he Crown had to prove that the appellants intentionally agreed that each would deal with money in the future, and that, at that future time each appellant would be aware that there then would be a substantial risk that there was a risk that the money would become an instrument of crime (that is, would be used in, or to facilitate, the commission of an indictable offence), and (by subpar (b)) that, having regard to the circumstances known to him, it was unjustifiable to take that risk. That is conceptually unacceptable. But it emerges only from the unextended meaning of 'recklessness'. To prove recklessness, by reason of s 5.4(4) the Crown could also prove either that the appellants intended or knew that the money would become an instrument of crime. That is, in fact, what the Crown here set out to do."

The grounds of appeal

20 The grounds of appeal to this Court, which were the subject of the grants of special leave to appeal on 2 October 2009, were:

- "That the Court of Criminal Appeal of New South Wales erred in holding that it was not bad in law for the Crown under [the Code]

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17 (2007) 70 NSWLR 89 at 111 [89].

18 (2007) 70 NSWLR 89 at 95 [21].

19 (2007) 70 NSWLR 89 at 96 [23].

to charge a conspiracy to commit an offence the fault element of which is recklessness."

- "That the Court of Criminal Appeal of New South Wales erred in its characterization of the physical and fault elements of the offence of conspiracy under [the Code]."

The disposition of the appeals

21 Consideration of these appeals directs attention primarily to the first ground of appeal. The second ground was based upon a submission that the elements of the offence of conspiracy are defined by s 11.5(1) and (2) and not by the common law. On that submission, the element of conspiracy found in s 11.5(1) is that the offence which is the subject of the conspiracy must be punishable by imprisonment for more than 12 months or by a substantial fine. The other elements were said to be found in the other parts of s 11.5, particularly s 11.5(2) read subject to s 11.5(7A). Howie J was said to have erred by holding in effect that the term "conspires … to commit an offence" in s 11.5(1) imports the common law concept of conspiracy at least so far as the mental element is concerned. For the reasons which I gave in *LK*[20], his Honour was correct in that conclusion, and the second ground of appeal cannot succeed. Even if it could have succeeded, the connection between the second ground and the fundamental question whether the charges were bad in law for alleging agreement to commit an offence of which recklessness is an element was not explained with any clarity in the written submissions or in the course of oral argument.

22 The appellants submitted, in support of the first ground of appeal, that:

1. It is conceptually unacceptable in a charge of conspiracy to allege an intention that a risk exist at some future time and that at that time someone will be reckless as to the existence of the risk. That is to say, a person cannot both intend that a circumstance will exist and intend to be reckless about the existence of that circumstance.

2. In a case of conspiracy to commit an offence of which recklessness is an element, the conspirator would have to intend that the relevant physical circumstance exist, that he or she would be aware of the risk of its existence and that it be unjustifiable to take that risk. A concept of intention as to a lack of justifiability is incoherent.

3. The conceptual difficulty is exacerbated when the "crime", of which the money the subject of the conspiracy might have been an instrument, is the

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20 [2010] HCA 17 at [51]-[57].

structuring offence under the FTR Act or the deliberate evasion of the reporting of taxable income from a cash source.

The appellants disputed the application of s 5.4(4), which allows the Crown to prove recklessness by proving intention or knowledge. They referred to the observation by Simpson J that the Crown could charge a conspiracy to commit a crime of recklessness because s 5.4(4) permits recklessness to be proven by establishing intention or knowledge[21]. Their response to that proposition was to refer to the use which the trial judge made of s 5.4(4). But whatever criticism might have been made of the trial judge's direction, misdirection was not a ground of appeal in the Court of Criminal Appeal or in this Court.

23 The appellants went further and said that, in any event, s 5.4(4) could not be applied. It could be utilised only where recklessness was "a fault element for a physical element of an offence" and it was necessary to satisfy that fault element. The offence was conspiracy under s 11.5. That offence carries no fault element of recklessness. There is a fault element of intention in s 11.5(2)(b), not a fault element of recklessness. Accordingly, it was said, s 5.4(4) has no operation. To the extent that the preceding submission rests upon the premise that the elements of conspiracy are found in ss 11.5(1) and 11.5(2), it cannot succeed.

24 It is not necessary, having regard to the grounds of appeal, to consider how the Crown presented its case and whether the Court of Criminal Appeal correctly characterised that presentation. The question is whether the charges set out in the indictment disclosed an offence known to the law. The objection was that they did not because there is a logical incoherence in applying the intention that an offence be committed, which is necessary to make out a conspiracy, to an offence of which recklessness is an element – in this case, an offence against s 400.3(2) of the Code. In so confining the question for determination, I do not dissent from the reasons given in the joint judgment in relation to the presentation of the case at trial by the Crown and the consideration by the Court of Criminal Appeal of the way in which it was presented.

25 The offences charged on the indictment, on their face, involved the following allegations:

1. The appellants entered into an agreement with each other and others to commit an offence punishable by imprisonment for more than 12 months or by a fine of 200 penalty units or more[22].

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21 (2007) 70 NSWLR 89 at 98 [33].

22 Code, s 11.5(1) and (2)(a).

2. The appellants entered into their agreement intentionally[23].

3. Each of the appellants intended that the offence would be committed pursuant to the agreement[24].

4. The offence which each appellant intended would be committed pursuant to the agreement was an offence against s 400.3(2) of the Code.

5. The elements of an offence against s 400.3(2), as appears from that provision, comprise the following:

   (i) a person deals with money[25];

   (ii) there is a risk that the money will become an instrument of crime[26];

   (iii) the person is reckless as to the fact that there is a risk that the money will become an instrument of crime[27];

   (iv) at the time of dealing the value of the money is $1,000,000 or more[28].

26 The requisite intention on the part of the conspirators that the offence against s 400.3(2) be committed extends to an intention that the person committing it will be reckless as to the fact that there is a risk that the money

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23 Code, ss 11.5(1) and 5.6(1), attaching the fault element of intention to the physical element of agreement, which perhaps illustrates the awkwardness at common law mentioned by McHugh J in *Peters v The Queen* (1998) 192 CLR 493 at 516 [55]; [1998] HCA 7 of treating agreement as actus reus and intention as mens rea. See *LK* [2010] HCA 17 at [57], [64].

24 Code, s 11.5(2)(b). For either appellant to have been found guilty of the offence of conspiracy, it was necessary for that appellant and at least one other party to the agreement to have intended that an offence would be committed pursuant to the agreement. That other party could have been the other appellant or the appellants' brother or some other person.

25 Code, s 400.3(2)(a).

26 Code, s 400.3(2)(b)(ii).

27 Code, s 400.3(2)(c).

28 Code, s 400.3(2)(d).

dealt with will become an instrument of crime. Such an intention may exist where the contemplated repository of the reckless state of mind is a third party[29]. But if it be the alleged conspirator who is said to intend to carry out the offence, that person may intend to deal with the money with knowledge of the risk that it will become an instrument of crime. Alternatively, such a person may intend to deal with the money intending that there will be a risk that it will become an instrument of crime. These states of mind are logically consistent and reflect the application of the extended meaning of recklessness under s 5.4(4) of the Code. Once that is accepted, no incoherence is introduced by reason of the particular offences of structured transactions and tax evasion relied upon to support the characterisation of the possible use of the money as an instrument of crime. That is not to say that a charge of this kind does not create a significant challenge for the trial judge in directing the jury in a way that is clear and comprehensible. But that practical difficulty does not go to the question whether the charges laid against the appellants were bad at law.

27 For the preceding reasons the charges laid in the indictment against the appellants did disclose offences and the first ground of appeal therefore fails. The second ground of appeal fails for the reasons given in *LK*[30].

Conclusion

28 The appeals should be dismissed.

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29 As Howie J observed, "[p]rovided that the conspirators know of all the facts that would make the conduct of the third party criminal, it would not matter that the person carrying out the conduct was committing an offence by acting recklessly": (2007) 70 NSWLR 89 at 110 [87].

30 [2010] HCA 17 at [51]-[57], [75]-[78].

GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ.

Introduction

29 The appellants were convicted, following a trial in the District Court of New South Wales, of two counts of conspiring to commit a money laundering offence. Part 10.2 of Ch 10 of the *Criminal Code* (Cth) ("the Code")[31] creates a number of offences involving this activity. The offence particularised as being the object of these conspiracies involves dealing with money being reckless as to the risk that the money will be used as an instrument of crime.

30 The appellants appealed against their conviction to the New South Wales Court of Criminal Appeal upon a single ground, which contended that they had been "tried and convicted of an offence not otherwise known to law"[32]. Under the Code it is an offence to conspire with another person to commit an offence punishable by more than 12 months imprisonment or a fine of 200 penalty units or more[33] ("a non-trivial offence"). The appellants' case before the Court of Criminal Appeal was that it is not open under the Code to charge a conspiracy to commit an offence that has recklessness as its fault element. The Court of Criminal Appeal rejected this contention and dismissed the appeals.

31 The appellants applied for special leave to appeal from the orders of the Court of Criminal Appeal. Their applications lapsed. They were reinstated following the grant of special leave to appeal in *R v LK* ("*LK*")[34]. That case raised an issue concerning proof of a conspiracy to commit the offence of dealing with money being reckless to the circumstance that the money is proceeds of crime[35]. It also raised an issue concerning the elements of the offence of conspiracy under s 11.5 of the Code. On 2 October 2009 the present appellants were granted special leave to appeal. The two grounds of appeal upon which special leave was given raise issues in common with those raised in *LK*. These

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31 *Criminal Code Act* 1995 (Cth), s 3.

32 *R v Ansari* (2007) 70 NSWLR 89 at 91 [4] per Simpson J ("*Ansari*").

33 Code, s 11.5(1).

34 [2010] HCA 17.

35 Code, s 400.3(2)(b)(i).

appeals were heard immediately following the hearing in *LK*. These reasons are to be read with the joint reasons in *LK*.

32 One of the appellants' grounds contends that the Court of Criminal Appeal erred in its characterisation of the physical and fault elements of the offence of conspiracy under the Code. For the reasons given in the joint judgment in *LK*, the Court's analysis was correct and this ground must be dismissed. This conclusion has no bearing on the determination of the appellants' remaining ground, which is that the Court of Criminal Appeal erred in holding that a charge of conspiracy to commit an offence of recklessness under the Code is not "bad in law".

33 The fault element of the offence of conspiracy is intention[36]. The foundation for the appellants' contention, that the charges are bad in law, is a suggested inconsistency inherent in proving that an accused conspirator intended that a circumstance will exist (a physical element of the offence that is the object of the conspiracy) and intended that, at that time, he or she would be reckless as to the existence of that circumstance. As will appear, the suggested inconsistency does not arise and it follows that each appeal must be dismissed.

The indictment

34 The appellants are brothers. They and a third brother, Abdul Jaleel Mohamed Ansari, were jointly charged in the first count of the indictment as follows:

> "Between about 1 September 2003 and about 14 October 2003 at Sydney in the State of New South Wales and elsewhere [they] did conspire with each other and with [Z] and divers other persons to deal with money to the value of $1,000,000 or more where there was a risk that the money would become an instrument of crime and where the said Abdul Jaleel Mohamed Ansari, Abdul Azees Mohamed Ansari and Hajamaideen Ansari were reckless as to the fact that there was a risk that the money would become an an [sic] instrument of crime contrary to section 11.5(1) and subsection 400.3(2) of [the Code]."

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36 *LK* [2010] HCA 17 at [117].

35 The second count in the indictment was in the same terms, save that the offence was particularised as occurring between about 22 March 2004 and about 29 July 2004.

36 The jury were unable to agree upon their verdict with respect to Abdul Jaleel Mohamed Ansari.

The Court of Criminal Appeal

37 The principal judgment in the Court of Criminal Appeal was delivered by Howie J (Hislop J concurring). Simpson J agreed with Howie J's reasons and gave additional reasons for dismissing the appeals against conviction. The Court held that the indictment did not charge offences that were "bad at law"[37]. Howie J characterised the issue raised by the appellants' ground of appeal as being whether there is a limitation on the application of the law of conspiracy to federal offences in addition to those limitations that are stated in s 11.5(1)[38]. His Honour concluded that there is nothing in the Code to suggest that a person cannot conspire to commit an offence of recklessness and thus no occasion for the Court to impose such a restriction[39]. His Honour gave two reasons to support that primary conclusion. First, the conspirators' agreement may provide for a third person to carry out the conduct that constitutes the offence. In such a case, provided that the accused conspirators know all of the facts that make the conduct criminal, it would not matter that the third person was acting recklessly[40]. Second, s 5.4(4) provides that recklessness, where specified as a fault element for an offence, may be satisfied by proof of intention or knowledge[41]. Provided that the accused conspirators intend that the conduct upon which they have agreed will be carried out and that they know all the facts that make that conduct criminal, it does not matter that the offence is one for which the fault element is recklessness[42].

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37 *Ansari* (2007) 70 NSWLR 89 at 110 [87].

38 *Ansari* (2007) 70 NSWLR 89 at 103 [58].

39 *Ansari* (2007) 70 NSWLR 89 at 110 [87].

40 *Ansari* (2007) 70 NSWLR 89 at 110 [87].

41 *Ansari* (2007) 70 NSWLR 89 at 110-111 [88].

42 *Ansari* (2007) 70 NSWLR 89 at 110-111 [88].

38 The conclusion that the Code does not preclude charging a conspiracy to commit an offence of recklessness, for any one of the reasons that the Court gave, was sufficient to dispose of the appeals on the sole ground of challenge. However, the Court went on to consider the appellants' challenge on a wider basis. Howie J observed[43]:

> "Generally speaking the issue that is raised in respect of conspiracy to commit an offence to which recklessness applies is one of proof of the guilty knowledge of the conspirator rather than the validity of the charge. A charge is not bad at common law on its face just because it alleges a conspiracy to commit a strict or absolute liability offence or an offence that could be committed recklessly. It would be rare for the statement of the offence to show on its face that the allegation was one that relied upon the accused's being reckless as to a fact that was an element of the offence to which the conspiracy related. It should become apparent if particulars were required to be given indicating how it was alleged by the prosecution that the accused had agreed to commit the offence that is the subject of the conspiracy. Unless the prosecution was alleging that the accused had sufficient knowledge of the facts making the conduct agreed upon a criminal offence, it could not succeed on the charge of conspiracy."

39 Consistently with these observations, his Honour turned to the conduct of the trial to determine whether it had been the prosecution case that the appellants had knowledge of the facts that made the conduct, upon which they had agreed, an offence. It is not necessary to set out the whole of the factual background, which his Honour detailed[44]. It is sufficient to take from the judgments the following summary of the evidence and the way the prosecution case was presented.

40 The appellants were the directors of a money exchange business in Sydney known as Exchange Point Pty Ltd ("Exchange Point"). In 2003, Z, an Israeli national, flew to Australia and took possession of more than $2 million in cash. He delivered this money in batches to the appellants at Exchange Point. The appellants arranged for the money to be collected by an associate and

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43 *Ansari* (2007) 70 NSWLR 89 at 110 [85].

44 *Ansari* (2007) 70 NSWLR 89 at 100 [42]-[48].

deposited by him on their behalf in various bank accounts. Each deposit was for an amount less than $10,000 in cash. Over a period of seven months the associate banked an amount of a little less than $2 million on the appellants' behalf. The appellants' agreement to deal with this money constituted the factual basis of the first count.

41 The second count arose out of a further trip to Australia by Z in June 2004. It was the prosecution case that the appellants and Z agreed to deal with between $2 million and $3 million cash in the same fashion on this occasion but that the police arrested them before Z took possession of the money.

42 Under the *Financial Transaction Reports Act* 1988 (Cth) ("the FTR Act") obligations are imposed on banks and other financial institutions to report cash transactions involving amounts of $10,000 or more (a "significant cash transaction")[45] to the Director of the Australian Transaction Reports and Analysis Centre[46]. Transactions involving amounts of less than $10,000 are "non-reportable cash transactions" under the FTR Act[47]. It is an offence under the FTR Act for a person to be a party to two or more non-reportable cash transactions if, having regard to the manner or form in which the transactions were conducted (including any explanation made by the person in this respect), it would be reasonable to conclude that the person conducted the transactions in that manner or form for the sole or dominant purpose of ensuring, or attempting to ensure, that the currency involved in the transactions was transferred in a manner or form that would not give rise to "a significant cash transaction" (or would give rise to "exempt cash transactions")[48] (a "structuring offence").

43 The prosecution case against the appellants was that, at the time they received the money (the first count), there existed a risk that the money would become an instrument of crime in that it might be used in a "structuring offence". During the course of the trial the prosecution particularised, as an alternative, the risk of tax evasion. It is neither necessary nor appropriate to consider in these reasons the difficulties that appear to lie in using the expression "tax evasion" as

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45 FTR Act, s 3.

46 FTR Act, s 7.

47 FTR Act, s 3.

48 FTR Act, s 31(1).

a description of the offence which it is alleged money or other property was or would be "used in the commission of, or used to facilitate the commission of"[49].

44 The prosecution case on the second count was that the appellants intended to deal with money to be received from Z in the same way as they had dealt with the money received from Z on the earlier occasion. The same risks of criminal use were relied upon in respect of the second count.

45 Howie J found that it was clear from the prosecutor's opening and closing addresses that its case was that the appellants were reckless as to the risk of the money being used as an instrument of crime because it was their intention that it would be used in this way[50]. The offence particularised as the object of each conspiracy is created by s 400.3(2) of the Code. Section 400.3(1) creates an offence of dealing with money intending that it will become an instrument of crime. This is a more serious offence than the offence under sub-s (2). Howie J observed that it may be that the agreement was to do acts constituting the more serious offence, but that this did not affect the appellants' liability for the offence with which they were charged[51]. His Honour commented that one reason for particularising the lesser offence as the object of the conspiracy was the perceived difficulty in proving that Abdul Jaleel Mohamed Ansari had the requisite knowledge of, or intention with respect to, the use to which the money would be put[52].

46 Howie J concluded that the prosecution case had been conducted upon the basis that the appellants had entered into an agreement intending to commit an unlawful act of the type prescribed[53]. His Honour had earlier noted s 5.4(4), observing that, provided the prosecution was intending to prove that the appellants knew all of the facts that made their dealing with the money criminal conduct, there was no impediment to proof of the charges in the indictment[54].

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49 Code, s 400.1 ("instrument of crime").

50 *Ansari* (2007) 70 NSWLR 89 at 113 [92]-[93].

51 *Ansari* (2007) 70 NSWLR 89 at 115 [101].

52 *Ansari* (2007) 70 NSWLR 89 at 113 [92].

53 *Ansari* (2007) 70 NSWLR 89 at 115 [99]-[101].

54 *Ansari* (2007) 70 NSWLR 89 at 110-111 [88]-[89].

47 Simpson J found that the appellants' argument failed to take into account the extended definition of recklessness contained in s 5.4(4). Her Honour considered that the case which the prosecution had set out to prove was one based on knowledge and intention[55].

48 Before turning to the appellants' challenge to these conclusions it is convenient to refer to the relevant statutory provisions.

The statutory framework

49 Section 400.3 relevantly provides:

"(2) A person is guilty of an offence if:

(a) the person deals with money …; and

(b) either:

…

(ii) there is a risk that the money … will become an instrument of crime; and

(c) the person is reckless as to the fact … that there is a risk that [the money] will become an instrument of crime …; and

(d) at the time of the dealing, the value of the money … is $1,000,000 or more.

…

(4) Absolute liability applies to paragraphs … (2)(d) and …"

50 It will be noted that the offence under s 400.3(2) has three physical elements: dealing with money (an element of conduct); the existence of a risk that the money will become an instrument of crime (an element of circumstance); and the value of the money is $1,000,000 or more (an element of circumstance).

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55 *Ansari* (2007) 70 NSWLR 89 at 98 [33].

51 The fault element for the physical element of circumstance set out in par (b)(ii), that there exists a risk that the money will become an instrument of crime, is recklessness. Section 5.4 of the Code defines recklessness, relevantly, as follows:

> "(1) A person is reckless with respect to a circumstance if:
>
> (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
>
> (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
>
> …
>
> (4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element."

52 Section 400.1(1) defines a number of terms for the purposes of Pt 10.2. "Instrument of crime" includes money if it is used in the commission of, or to facilitate the commission of, an offence that may be dealt with as an indictable offence (even if it may, in some circumstances, be dealt with as a summary offence).

The appellants' submissions

53 The appellants accept that the first of the two reasons given by the Court of Criminal Appeal for rejecting their primary contention, that the acts may be done by a third person, is correct. However, they say that this is not the case that was particularised against them in the indictment. They maintain that each charge as framed, that *they* were reckless as to the fact that there existed a risk that the money would become an instrument of crime, is "bad in law" because it is "conceptually unacceptable" to intend to be reckless as to a circumstance.

54 In their written submissions the appellants challenge the Court of Criminal Appeal's second reason for rejecting their contention. They submit that the Court's recourse to s 5.4(4) to resolve the claimed conceptual difficulty involved error. This is because s 5.4(4) operates to allow the fault elements of intention and knowledge to satisfy the fault element of recklessness for an offence. Since

the fault element of the offence of conspiracy is intention there was no occasion, so the argument runs, to have recourse to s 5.4(4).

The claimed conceptual difficulties

55 The appellants identify suggested conceptual difficulties attending proof of each offence charged in the indictment. They submit that it was necessary for the prosecution to prove the following intentions in order to establish that they intended that the offence particularised in the indictment would be committed pursuant to their agreement:

> "(a) an intention that a person would deal with money;
>
> (b) an intention that that person would intend to deal with the money;
>
> (c) an intention that, at the time the person intentionally deals with the money, a risk exist that the money will be used in the commission of, or used to facilitate the commission of, an offence that may be dealt with as an indictable offence; and
>
> (d) an intention that, at the time the person intentionally deals with the money, the person will be reckless as to the fact that there is a risk that the money will be used in the commission of, or used to facilitate the commission of, an offence that may be dealt with as an indictable offence".

56 Proof of the intention in (d) is subject to a further layer of suggested conceptual difficulty arising from the definition of recklessness in the Code. The appellants submit that the prosecution was required to establish an intention that, at the time of the proposed dealing, the appellants would not only be aware of a substantial risk that the money would be used as an instrument of crime, but that they intended, at that time, to be of the opinion that such a risk would be objectively unjustifiable. The appellants characterise this requirement of proof as conceptually incoherent.

57 The premise for the appellants' argument is that proof that a person intends to commit an offence requires proof that the person intends that each physical element of the offence will come into existence and that the fault element specified for that physical element will also come into existence at that time. It is a proposition which, if correct, would lead to directions of considerable complexity in summing-up to a jury with respect to a conspiracy to

commit an offence of recklessness. However, it would not follow from this that the charge is "bad in law". The proposition is, in any event, incorrect.

58 Section 11.5(1) makes it an offence to conspire with another person to *commit an offence*. In the appellants' submission, the emphasised words are to be understood by reference to s 3.1(1), which provides that "[a]n offence consists of physical elements and fault elements". The legislative intent, it is said, is to require proof of each of the constituent elements of the subsidiary offence in order to establish guilt of the conspiracy. As explained in *LK*, the words "conspires" and "conspiracy" as used in s 11.5 are to be understood by reference to the common law subject to express modification under s 11.5[56]. One such modification is that the offence is confined to agreements to *commit an offence* (being a non-trivial offence). Liability for conspiracy under the common law covers a wider field[57]. This is the legislative intent to be discerned in the use of the words "to commit an offence" in s 11.5(1).

59 Proof of intention to commit an offence requires proof of the accused's knowledge of, or belief in, the facts that make the proposed conduct an offence[58]. Fault elements are specified with respect to physical elements of an offence[59]. They are defined in Div 5 of Pt 2.2 in a descending order of culpability: intention, knowledge, recklessness and negligence. The most blameworthy fault element is intention and the least blameworthy is negligence. To intend that a fact, circumstance or state of affairs will exist includes a lesser mental state with respect to the existence of that fact, circumstance or state of affairs[60].

60 A person may be criminally responsible for an offence even if he or she is mistaken about, or ignorant of, the existence or content of an Act that directly or indirectly creates the offence[61]. This rule of criminal responsibility provides a

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56 *LK* [2010] HCA 17 at [96]-[107].

57 *LK* [2010] HCA 17 at [134]; *Mulcahy v The Queen* (1868) LR 3 HL 306.

58 *LK* [2010] 17 at [117].

59 Code, ss 3.1(2), 3.2.

60 This is reflected in the Code, s 5.4(4).

61 Code, s 9.3(1).

further reason for rejecting the contention that s 11.5 is to be interpreted as requiring proof that an accused conspirator intended that a specified fault element (being a fault element of lesser culpability than the fault element of intention) accompany a particular physical element of an offence as distinct from proof that the accused intended that an act or acts be performed which, if carried out in accordance with the agreement, would amount to the commission of an offence.

61 The appellants' submission, that under s 11.5 a person does not intend that an offence will be committed unless he or she intends that any fault element specified for that offence will exist at the time the physical element for the fault element comes into existence, is unsustainable.

62 Certain of the appellants' submissions proceed upon a view that, because the Code provides the offence of dealing with money intending that it will be used as an instrument of crime in s 400.3(1), it is not competent to particularise the lesser offence in s 400.3(2) as being the object of the conspiracy and prove it by establishing that the accused intended that the money would be used as an instrument of crime. It is an argument that, as the Court of Criminal Appeal correctly found, overlooks s 5.4(4). To deal with money, believing that there is or will be a risk that it will be used as an instrument of crime, is an offence contrary to s 400.3(2) as much as dealing with money, being reckless as to that risk, is an offence contrary to that provision.

63 The Court of Criminal Appeal was right to reject the challenge that the indictment charged the appellants with offences that were not known to the law.

64 In the written submissions filed on the appellants' behalf, it was foreshadowed that special leave would be sought to argue two further grounds of appeal. In oral submissions it was suggested that the Court of Criminal Appeal proceeded under a misapprehension as to the way in which the prosecution case had been put to the jury. It was not said that the judgments contained any error in the statement of the evidence or the way in which the prosecution case was presented. The complaint was as to the adequacy of the trial judge's directions to the jury concerning the elements of the offence. Senior counsel submitted that it was appropriate to grant special leave in order to correct a miscarriage of justice. The challenge to the sufficiency of the directions was sought to be advanced for the first time in this Court. It would appear that the suggested deficiency in the directions was not raised at the trial, where, if the point was good, it might have been addressed. The appellants would have required the leave of the Court of

Criminal Appeal in order to rely on the proposed ground in that Court[62]. Nothing in the appellants' submissions gave colour to senior counsel's assertion that their convictions are a miscarriage of justice. Special leave was refused. Special leave was also refused to rely on a ground concerning the meaning of "instrument of crime" as defined in s 400.1. Again, the issue had not been raised below and this Court did not have the benefit of consideration by the Court of Criminal Appeal on the question.

Orders

65 The appeals should be dismissed.

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62 Criminal Appeal Rules (NSW), r 4.