

HIGH COURT OF AUSTRALIA

GAGELER CJ,
STEWART, GLEESON, JAGOT AND BEECH-JONES JJ

DIRECTOR OF PUBLIC PROSECUTIONS (CTH)

APPELLANT

AND

ALFRED KOLA

RESPONDENT

Director of Public Prosecutions (Cth) v Kola
[2024] HCA 14

Date of Hearing: 15 February 2024

Date of Judgment: 17 April 2024

A21/2023

ORDER

- 1. Appeal allowed.*
- 2. Set aside the orders of the Court of Appeal of the Supreme Court of South Australia made on 19 May 2023 and, in their place, order that the appeal to that Court be dismissed.*

On appeal from the Supreme Court of South Australia

Representation

J T Gleeson SC with C J Tran and R D Thampapillai for the appellant
(instructed by Commonwealth Director of Public Prosecutions)

T A Game SC with A J Culshaw for the respondent (instructed by Dadds
Jandy Lawyers)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Director of Public Prosecutions (Cth) v Kola

Criminal practice – Trial – Directions to jury – Conspiracy – Where respondent found guilty of conspiracy to import commercial quantity of border controlled drug contrary to ss 11.5(1) and 307.1(1) of *Criminal Code* (Cth) – Where s 11.5(7A) provided that any special liability provisions that apply to an offence apply also to offence of conspiracy to commit that offence – Where s 307.1(3) provided absolute liability applies to physical element of offence of importing border controlled drug – Where Court of Appeal of Supreme Court of South Australia found element of conspiracy charged was that conduct in which conspirators agreed to engage would have resulted in importation of a commercial quantity had agreement been successfully executed – Where Court of Appeal found evidential material concerning what would have been imported confined to conduct in which respondent agreed to engage and circumstances in which respondent believed and intended conduct to be carried out – Whether trial judge failed to properly direct jury on element of offence regarding quantity – Whether trial judge's directions wrongly permitted jury to have regard to conduct of co-conspirators engaged in outside of respondent's presence in determining scope of conspiratorial agreement.

Words and phrases – "absolute liability", "agreement to import a commercial quantity of a border controlled drug", "conspiracy", "co-conspirators rule", "elements of the offence", "intention", "pursuant to the agreement", "scope of the conspiracy", "special liability provision".

Criminal Code (Cth), ss 11.5(1), 11.5(2), 11.5(2A), 11.5(7A), 307.1(1).

1 GAGELER CJ, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ. The respondent, Alfred Kola, was tried and convicted in the District Court of South Australia of conspiracy 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 Code").

2 The Court of Appeal of the Supreme Court of South Australia (Kourakis CJ, Nicholson and Stein A-JJA agreeing) allowed an appeal against the respondent's conviction, set the conviction aside and ordered a re-trial.¹ The appellant, the Commonwealth Director of Public Prosecutions, was granted special leave to appeal from that decision.

3 The Court of Appeal held that the trial judge's summing up failed to properly direct the jury that it was an element of the offence of the conspiracy charged that the respondent entered into an agreement with others to import a quantity of cocaine which, if it were executed, would have been a commercial quantity.²

4 In this Court, it was common ground that the Court of Appeal was correct in concluding that, to establish the conspiracy charged, the appellant had to prove that the weight of the border controlled drug to be imported would have been a commercial quantity if the agreement to which the respondent was a party had been successfully executed.³ However, the parties were in dispute as to whether the Court of Appeal erred in concluding that the trial judge's directions were deficient in conveying that requirement to the jury. The appellant also contended that the Court of Appeal erred in concluding that the trial judge's directions wrongly permitted the jury to have regard to the conduct of the respondent's alleged co-conspirators engaged in outside of his presence in determining whether the weight of the border controlled drug to be imported pursuant to their agreement would have been a commercial quantity.⁴

5 For the reasons that follow, the Court of Appeal was wrong to conclude that the trial judge's directions to the jury were erroneous. The Court of Appeal was

1 *Kola v The King* (2023) 377 FLR 253 ("*Kola*") at 274 [77].

2 *Kola* (2023) 377 FLR 253 at 254 [2]-[3].

3 *Kola* (2023) 377 FLR 253 at 264 [42].

4 *Kola* (2023) 377 FLR 253 at 272 [69].

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also wrong to conclude that the conduct of the respondent's co-conspirators engaged in outside of his presence could not be used by the jury to determine whether the scope of the agreement to which the respondent was a party was such that, if it were executed, a commercial quantity of cocaine would have been imported into Australia. The appeal should be allowed, the orders of the Court of Appeal set aside, and the respondent's conviction restored.

The prosecution and defence cases

6 At the trial, the appellant alleged that the respondent and one of his alleged co-conspirators, Ibrahim Yavuz, recruited an acquaintance of Mr Yavuz ("James") to travel to Panama to accompany a shipment of cocaine to Australia.

7 The evidence adduced at the trial was capable of demonstrating that, from March to May 2014, the respondent arranged with Mr Yavuz to financially assist another alleged co-conspirator, Juan Londono-Gomez, to return to Colombia to see his father who was ill and that in return Mr Londono-Gomez would assist with the importation of cocaine. The respondent also spoke with a male in Colombia who the appellant contended was the overseas contact for the supplier of the cocaine.

8 James testified that the respondent and Mr Yavuz agreed to pay him \$250,000 to travel to Central America and return on the boat with the cocaine. The three of them attended a travel agency to book and pay for James' flight to Panama City. James left for Panama City on 19 May 2014. James said that Mr Londono-Gomez introduced him to the captain of the boat. James said he waited in Panama for a shipment of cocaine to be loaded onto the boat, which he would also board to travel to Australia, and for the boat to be repaired. The boat departed but, according to James, the journey to Australia was abandoned after the captain learnt that James had told other persons on the boat that he was "doing a job" with the captain. James then flew back to Australia from Panama City. James did not testify that he saw cocaine on the boat or any containers which might contain cocaine being loaded onto the boat. No cocaine was imported into Australia on the boat.

9 The respondent did not give evidence. The trial judge summarised the respondent's defence case as being that James' evidence was unreliable, the other evidence adduced by the appellant did not prove its case to the requisite standard and the jury could not be satisfied that the respondent was a party to an agreement, "let alone [a] party to an agreement to import a drug as opposed to something else ... [or] to import a drug into Australia as opposed to somewhere else".

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The trial judge's directions

10 In summing up, the trial judge provided the jury with an aide-mémoire specifying five "elements" of the offence (ie, five matters to be proved beyond reasonable doubt). The trial judge explained the elements to the jury in the following terms, of which only the fourth element is in dispute on this appeal. The first element was that the accused was a "party to an agreement with at least one other person to commit an offence, namely to import a border controlled drug into Australia". The second element was that the accused "intended to agree, that is, he meant to be a party to the agreement with at least one other person". The third element was that the accused and at least one other party to the agreement "intended to commit the offence, that is, they intended to import a border controlled drug pursuant to the agreement". The fifth element was that the accused, or at least one other party to the agreement, "committed an overt act pursuant to the agreement".⁵

11 In relation to the fourth element, the trial judge directed the jury as follows:

"The fourth element that the prosecution must prove is that the substance to be imported *pursuant to the agreement* was to be a commercial quantity of that border controlled drug.

The prosecution does not need to prove the accused or any party to the agreement intended to import a commercial quantity, it is sufficient for the prosecution to prove that the quantity of border controlled drug to be imported pursuant to the agreement was to be a commercial quantity. I direct you as a matter of law that in 2014 a commercial quantity of cocaine was 2 kg or more." (emphasis added)

12 In relation to this fourth element, the aide-mémoire given to the jury stated that the "substance to be imported pursuant to the agreement *was* a commercial quantity of that border-controlled drug" (emphasis added).

13 The trial judge also addressed the matters relied on by the appellant to establish the fourth element, namely various aspects of the proposed importation which bore upon its scale and scope. These matters included that the cocaine was to be imported by a boat "big enough" to make the trip from Panama to Australia, the fact the boat also needed repairs and a captain, and the substantial amount of

5 Criminal Code (Cth), s 11.5(2)(c).

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money James said he was to be paid for his involvement in the proposed importation compared to the price of one kilogram of cocaine.

14 The trial judge directed the jury twice as to the effect of the "co-conspirators rule", namely that the "general rule" is that, if the accused was not present when statements were made by others, those statements cannot be used against the accused but there is an exception in the case of a conspiracy charge to the effect that such statements of others may be used to "prove the existence of the conspiracy and the extent of the accused's participation in it". The trial judge warned the jury to "exercise ... caution before acting upon ... phone calls where [the respondent was] not present".⁶

15 There was no complaint or request for a redirection about any of the above aspects of the summing up. There was no specific issue raised at the trial regarding whether the respondent's alleged co-conspirators may have embarked upon a drug importation that was larger in scope and scale than that in which the appellant contended the respondent had agreed to participate.

The Court of Appeal's reasoning

16 The Court of Appeal identified two related failures on the part of the trial judge's summing up. First, the Court found that the trial judge's description of the elements of the offence meant that the conspiracy charged 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 and, as such, did not "explicitly direct the jury that they must be satisfied that the conduct in which the conspirators agreed to engage would result in the importation of a commercial quantity".⁷ This finding is the subject of ground 1 of the appeal in this Court.

17 Second, the Court of Appeal held that the trial judge's direction on the fourth element failed to direct the jury on the evidential material from which the "inference as to [the] hypothetical future fact" concerning what was agreed to be imported might be drawn.⁸ The Court held that "as a matter of principle, that material must be confined to the conduct in which the accused agreed to engage

6 See *R v Chai* (1992) 27 NSWLR 153 at 190.

7 *Kola* (2023) 377 FLR 253 at 263 [36].

8 *Kola* (2023) 377 FLR 253 at 272 [69].

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and the circumstances in which the accused believed and intended that conduct to be carried out", whereas the trial judge's direction wrongly "permitted the jury to have regard to evidence as to what occurred on the ground in Panama City".⁹ This finding is the subject of ground 2 of the appeal in this Court.

18 These two errors were said to be exemplified by the passage in the summing up referred to above which identified the aspects of the proposed importation relied on by the appellant to establish the fourth element. The Court of Appeal held that this passage did not "link" back and "limit" those matters to the agreement into which the respondent had entered.¹⁰ According to the Court, this failure meant there was an elision of the "fundamental difference" between the questions of "whether [the respondent] had made an agreement, with knowledge that if it were executed, it would result in the importation of a shipment of cocaine which would be a commercial quantity" and "whether the conduct engaged in by [the respondent's] co-conspirators in Central America would produce that result".¹¹

Conspiracies and absolute liability under the Code

19 Chapter 2 of the Code codifies the general principles of criminal responsibility under laws of the Commonwealth.¹² An offence consists of its physical elements and its fault elements.¹³ Different fault elements may apply to different physical elements.¹⁴ A physical element of an offence may be either conduct, a result of conduct or a circumstance in which conduct, or a result of conduct, occurs.¹⁵ A fault element for a particular physical element of an offence may be intention, knowledge, recklessness or negligence,¹⁶ although other fault

9 *Kola* (2023) 377 FLR 253 at 272 [69].

10 *Kola* (2023) 377 FLR 253 at 272 [71].

11 *Kola* (2023) 377 FLR 253 at 273 [72].

12 *Criminal Code* (Cth), s 2.1.

13 *Criminal Code* (Cth), s 3.1(1).

14 *Criminal Code* (Cth), s 3.1(3).

15 *Criminal Code* (Cth), s 4.1(1).

16 *Criminal Code* (Cth), s 5.1(1).

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elements may be specified by a law that creates a particular offence.¹⁷ A person has intention with respect to "conduct" if he or she means to engage in that conduct.¹⁸ A person has intention with respect to a "circumstance" if he or she believes that the circumstance exists or will exist.¹⁹ However, if a law that creates an offence provides that "absolute liability" applies to a particular physical element of the offence, then there are no fault elements for that physical element and no defence of mistake of fact is available in relation to that physical element.²⁰ A provision that attaches absolute liability to a physical element of an offence is a "special liability provision".²¹

20 Conspiracy is defined by s 11.5 of the Code, which relevantly provided:

"11.5 Conspiracy

- (1) **A person who conspires with another person to commit an offence punishable by imprisonment for more than 12 months, or by a fine of 200 penalty units or more, 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.**

...

- (2) For the person to be guilty:
- (a) the person must have entered into an agreement with one or more other persons; and
 - (b) the person and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement; and

17 *Criminal Code* (Cth), s 5.1(2).

18 *Criminal Code* (Cth), s 5.2(1).

19 *Criminal Code* (Cth), s 5.2(2)

20 *Criminal Code* (Cth), s 6.2(2).

21 *Criminal Code* (Cth), Dictionary.

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

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

...

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

21 In *R v LK*, this Court observed that, subject to any express statutory modification, the common law informs the content of the words "conspiracy" and "conspires" in s 11.5(1) of the Code.²² The Court held that the offence of conspiracy is created by s 11.5(1).²³ The offence has a single physical element, being that the accused conspired with another person to commit a non-trivial offence.²⁴ As no fault element is expressly specified for this physical element, which consists of "conduct", the default element is intention,²⁵ that is, the accused meant to enter into an agreement to commit the relevant offence the subject of the conspiracy²⁶ (or meant to "adhere" to such an agreement²⁷). Section 11.5(2)(a) and (b) explain what it means to "conspire" as referred to in s 11.5(1). However, neither para (a), nor (b), nor (c) of s 11.5(2) is an element of the conspiracy offence created by s 11.5(1).²⁸

22 The respondents in *LK* were charged with conspiracy to commit an offence under s 400.3(2) of the Code. That section relevantly provided that a person is guilty of an offence under s 400.3(2) if: the person "deals with money"; the money is the proceeds of crime; the person is "reckless as to the fact that the money ... is

22 *R v LK* (2010) 241 CLR 177 ("*LK*") at 206 [59], 224 [107].

23 *LK* (2010) 241 CLR 177 at 212 [75], 234 [141].

24 *LK* (2010) 241 CLR 177 at 234 [141].

25 *Criminal Code* (Cth), s 5.6(1).

26 *LK* (2010) 241 CLR 177 at 233 [136], 235 [141]; see also at 213 [78(2)].

27 *Agius v The Queen* (2013) 248 CLR 601 at 613 [43].

28 See *LK* (2010) 241 CLR 177 at 205-206 [57], 232 [133], 234 [137].

[the] proceeds of crime"; and "at the time of the dealing, the value of the money ... is \$1,000,000 or more".²⁹ Dealing with money is a physical element which is "conduct", and the corresponding fault element is intention.³⁰ Money that is the proceeds of crime is a physical element which is a "circumstance", and the specified fault element is recklessness.³¹ However, the fault element for a conspiracy to commit an offence under s 400.3(2) is an intention to enter into an agreement to commit that offence. In *LK*, this Court held that a person does not agree to commit an offence "without knowledge of, or belief in, the existence of the facts that make the conduct that is the subject of the agreement an offence".³² Thus, the parties to such a conspiracy had to intend to deal with money that they knew was, or would be, the proceeds of crime even though recklessness is a sufficient fault element for the equivalent physical element of the predicate crime.³³

- 23 The plurality in *LK* expressed "one reservation"³⁴ to the conclusion that proof of intention to commit an offence requires proof of knowledge of, or belief in, facts that make the conduct the subject of an agreement an offence, namely any matter that is the subject of a special liability provision. In *LK*, the physical element of an offence under s 400.3(2) requiring that the value of the money dealt with was \$1,000,000 or more attracted absolute liability (ie, it was a special liability provision). It followed that it was not necessary to prove that the alleged co-conspirators knew or believed that the money they proposed to deal with had a value of \$1,000,000 or more.³⁵ This reservation arises because s 11.5(2)(b) is subject to s 11.5(7A).³⁶

29 *LK* (2010) 241 CLR 177 at 228-229 [118].

30 *Criminal Code* (Cth), s 5.6(1).

31 *Criminal Code* (Cth), s 400.3(2)(c).

32 *LK* (2010) 241 CLR 177 at 228 [117].

33 *LK* (2010) 241 CLR 177 at 229 [122].

34 *LK* (2010) 241 CLR 177 at 228 [117].

35 *LK* (2010) 241 CLR 177 at 229 [119].

36 *LK* (2010) 241 CLR 177 at 228 [117]; *Criminal Code* (Cth), s 11.5(2A).

24 In this case, the elements of the offence the subject of the alleged conspiracy are defined by s 307.1 of the Code. The first physical element of this offence is that the accused imports (or exports) a substance, which is "conduct".³⁷ As no fault element is expressly specified for that physical element, it follows that intention is the corresponding fault element.³⁸ The second physical element is that the substance imported (or exported) is a border controlled drug or border controlled plant, which is a "circumstance".³⁹ The fault element expressly specified for that physical element is recklessness.⁴⁰ Cocaine is a border controlled drug.⁴¹ The third physical element is that the quantity of the substance that is imported (or exported) is a commercial quantity.⁴² Section 307.1(3) expressly provides that absolute liability applies to that physical element. The commercial quantity of cocaine is not less than 2 kg.⁴³

25 It follows from *LK* that, even though for an offence under s 307.1 the corresponding fault element for the physical element that the substance imported is a border controlled drug is recklessness, intention is the necessary fault element for the single physical element of the offence of conspiring to commit that offence. This means that to establish the offence of conspiring to import a commercial quantity of a border controlled drug, the prosecution must prove, inter alia: that the accused participated in or was a party to an agreement to import a commercial quantity of a border controlled drug; that the accused intended to participate in or be a party to such an agreement; and that the accused and another person intended that a border controlled drug would be imported pursuant to the agreement, that is,

37 *Criminal Code* (Cth), s 307.1(1)(a).

38 *Criminal Code* (Cth), ss 5.6(1), 5.2(1).

39 *Criminal Code* (Cth), s 307.1(1)(b).

40 *Criminal Code* (Cth), ss 307.1(2), 5.4(1).

41 *Criminal Code* (Cth), s 301.4(a); *Criminal Code Regulations 2002* (Cth), s 5D(1) and Sch 4, item 41; *Criminal Code Regulations 2019* (Cth), s 14(a) and Sch 2, cl 1, item 43.

42 *Criminal Code* (Cth), s 307.1(1)(c).

43 *Criminal Code* (Cth), s 301.10; *Criminal Code Regulations 2002* (Cth), s 5D(2) and Sch 4, item 41; *Criminal Code Regulations 2019* (Cth), s 14(b) and Sch 2, cl 1, item 43.

they knew or believed that a border controlled drug would be imported pursuant to the agreement.

26 However, as explained in *LK*, this statement of what must be proved is subject to the operation of s 11.5(2A) and (7A) such that proving intention does not extend to having to prove that the accused and another intended to import a border controlled drug knowing or believing that the amount to be imported pursuant to their agreement would be a commercial quantity.⁴⁴

27 There is an obvious tension between the prosecution being required to prove that the accused was a party to an agreement to import a commercial quantity of a border controlled drug but not being required to prove that the accused knew or believed that the amount to be imported pursuant to the agreement would be a commercial quantity. In the ordinary course proof of an intention to enter into an agreement will carry with it proof of an intention that the agreement be performed in accordance with its terms. Nothing in the secondary materials accompanying the enactment of s 11.5(2A) and (7A) on 24 May 2001⁴⁵ assists in resolving this tension.⁴⁶ The resolution follows from recognising the difference between the intended scope of the agreement to which the accused was a party and any subjective belief or knowledge of the accused as to what the anticipated performance of that agreement would entail.

28 In this Court, both parties embraced the Court of Appeal's approach of "recognising that the attendant resulting circumstance of the weight of the importation is established by proof that the weight of the border controlled drug [that would have been imported] if the agreement to commit the offence was successfully executed" is, or would be, the commercial quantity.⁴⁷ This consensus should be accepted as the correct understanding of what must be demonstrated to prove a conspiracy offence under the Code where absolute liability applies to a

44 See *LK* (2010) 241 CLR 177 at 228-229 [117]-[119].

45 *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* (Cth), Sch 1, items 8E, 8F.

46 Australia, House of Representatives, *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999*, Explanatory Memorandum; Australia, House of Representatives, *Parliamentary Debates* (Hansard), 24 November 1999 at 12463-12465.

47 *Kola* (2023) 377 FLR 253 at 264 [42].

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physical element of the predicate (or underlying) offence. It directs attention to the scope of the conspiratorial agreement between the parties without requiring proof that each party intended, by performance of the agreement, to import a particular weight of a border controlled drug or knew or believed that would occur.

29 The application of this approach in the present context can be illustrated by an example that arose in argument. If two passengers on a commercial aircraft agree to import cocaine by secreting the drug in one of their (small) pockets, then the weight of the drug that would be imported pursuant to that agreement would not be a commercial quantity. If one of the passengers, without recourse to the other, places 3 kg of cocaine in their suitcase, then the other passenger is not culpable for conspiracy to import a commercial quantity of the drug as the placement of cocaine in the suitcase was not undertaken pursuant to their agreement. The scope of their agreement did not extend that far. However, if the two passengers agree to import as much cocaine as will fit into a particular suitcase and that amount is not less than 2 kg, then they will each be culpable, even if it is not proved that they knew that the amount that was, or could be, placed in the suitcase was, or would be, not less than 2 kg. In that case, the scope of their agreement is such that the weight of the border controlled drug that would have been imported if the agreement to commit the offence was successfully executed is a commercial quantity. Moreover, the passenger will still be culpable even if they mistakenly but reasonably believed that the amount that was, or would be, placed in the suitcase would not be, or could not be, 2 kg or more. Such a belief is irrelevant in relation to a physical element that attracts absolute liability.⁴⁸

Flawed direction?

30 As noted, the Court of Appeal found that the trial judge's description of the fourth element of the conspiracy offence was flawed in that it did not "explicitly direct the jury that they must be satisfied that the conduct in which the conspirators agreed to engage would result in the importation of a commercial quantity".⁴⁹ The Court considered that this failing followed from the trial judge's reliance on a formulation of the elements of the offence derived from *Standen v Director of Public Prosecutions (Cth)*.⁵⁰ The Court considered that the "preferable course" was

48 *Criminal Code* (Cth), ss 6.2(2)(b), 9.2(1).

49 *Kola* (2023) 377 FLR 253 at 263 [36].

50 (2011) 218 A Crim R 28 at 38-39 [21], approved in *Standen v The Queen* (2015) 253 A Crim R 301 at 367 [420]; *Kola* (2023) 377 FLR 253 at 271-272 [65].

to specify the elements in the manner approved by the Court of Appeal of the Supreme Court of Victoria in *Le v The Queen*.⁵¹

31 *Standen* was an unsuccessful application for leave to appeal from a dismissed application seeking to stay a count on an indictment that charged the applicant with knowingly taking part in the supply of pseudoephedrine. It was contended that the criminality of that count was captured by another count on the indictment, which charged the applicant with conspiracy to import a commercial quantity of a border controlled precursor, intending to use or believing that another person would use that precursor to manufacture a controlled drug contrary to ss 11.5 and 307.11(1) of the Code.⁵² Absolute liability attaches to the physical element of an offence under s 307.11(1) which requires that the quantity imported is a commercial quantity.⁵³

32 In dismissing the application for leave, Hodgson JA (with whom Adams and Hall JJ agreed) set out the elements of the conspiracy offence in that case to the following effect:⁵⁴

1. That the accused had entered into an agreement with one or more other persons.
2. That the accused or at least one other party to the agreement intended that an offence would be committed pursuant to the agreement, namely, in that case, an offence under s 307.11 of the Code involving the following elements:
 - (a) a person imports a substance;
 - (b) the substance is a border controlled precursor; and
 - (c) a person committing the offence intends to use any of the substance to manufacture a controlled drug or believes that

51 (2016) 308 FLR 486 at 490 [9]; *Kola* (2023) 377 FLR 253 at 272 [67].

52 *Standen v Director of Public Prosecutions (Cth)* (2011) 218 A Crim R 28 at 36-37 [15].

53 *Criminal Code* (Cth), s 307.11(3).

54 *Standen v Director of Public Prosecutions (Cth)* (2011) 218 A Crim R 28 at 38-39 [21].

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another person intends to use the substance to manufacture a controlled drug.

3. *The substance would be a commercial quantity.*
4. That the accused, or at least one other party to the agreement, committed an overt act pursuant to the agreement.

33 The applicant in *Standen* was convicted at trial. The trial judge provided the jury with written directions that reformulated the third of the above directions to the effect that the prosecution had to prove that the agreement entered into by the accused "related to a commercial quantity".⁵⁵ In the summing up of that element, the trial judge told the jury that the prosecution had to prove that "the object of the agreement was to import a commercial quantity of pseudoephedrine".

34 On appeal from that conviction, no issue was taken with either the trial judge's directions or Hodgson JA's formulation of the elements,⁵⁶ although the extremely large size and scale of the importations meant that satisfaction of this element was barely in issue.⁵⁷

35 Considered in isolation, the third element formulated by Hodgson JA in *Standen* does not expressly relate the commercial quantity that would be imported to the agreement referred to in the first two elements. It can be accepted that, if directions considered as a whole do not require such a connection, then there is a risk that the jury will act on the basis that the conspiracy offence is proved simply by establishing that the accused was a party to an agreement to import a border controlled drug and the alleged co-conspirators set about importing a commercial quantity without reference to the accused. However, that risk did not arise when directions were given by the trial judge in *Standen*, which focussed the jury's attention on whether the object (or scope) of the agreement to which the accused was a party was to import a commercial quantity of the border controlled precursor. By separating out the reference to commercial quantity from the first and second elements, the form of the elements of the offence identified by Hodgson JA in *Standen* minimises the risk of the jury wrongly believing that the intention referred

55 See *Standen v The Queen* (2015) 253 A Crim R 301 at 361 [394(5)].

56 *Standen v The Queen* (2015) 253 A Crim R 301 at 362 [397], 366 [419].

57 *Standen v The Queen* (2015) 253 A Crim R 301 at 305-306 [6]-[13].

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to in the first and second elements extends to the weight of the border controlled precursor.

36 In *Le*, the Court of Appeal of the Supreme Court of Victoria (Weinberg AP and Redlich JA) dismissed an application for leave to appeal a conviction for conspiring to import a commercial quantity of a border controlled drug contrary to ss 11.5(1) and 307.1 of the Code. Consistent with *LK*, their Honours upheld the trial judge's ruling that it was not necessary for the prosecution to prove any fault element, including intention, concerning the quantity of the drug to be imported.⁵⁸ Their Honours noted that, consistent with that ruling, the trial judge directed the jury that they had to be satisfied beyond reasonable doubt of the following elements:⁵⁹

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

37 Other than raising a ground of appeal that the required intention extended to the weight of the drug to be imported (which was rightly rejected by the Court of Appeal), no issue was taken with these directions before the Court of Appeal in *Le* and there was no occasion for that Court to consider them in detail.⁶⁰ A potential risk with these directions is that they do not expose the difference between the first and third "elements" as exemplified by the example of the two passengers on a commercial aircraft given above. However, if in giving the *Le* directions to a jury a trial judge also exposes the significance of the difference between the first and

⁵⁸ *Le v The Queen* (2016) 308 FLR 486 ("*Le*") at 493 [21].

⁵⁹ *Le* (2016) 308 FLR 486 at 490 [9].

⁶⁰ *Le* (2016) 308 FLR 486 at 490 [11].

third "elements" in the context of the facts of the particular case, that risk can be ameliorated, just as further explanation in the context of the facts of the particular case can ameliorate the different risk identified above to which the *Standen* directions can give rise. Trial judges applying either the approach in *Le* or *Standen* can be expected to explain the law to the jury in a manner that relates it to the facts of the particular case and the issues to be decided.⁶¹

38 This appeal is not an occasion for this Court to anoint the directions set out in either *Standen* or *Le* as the preferred, much less mandated, version. Either approach may suffice. However, in all cases, the directions given to the jury should be calibrated to the issues that arise in that particular trial. The use of either approach without further explanation could give rise to a risk of the jury not being properly instructed about the necessity for the prosecution to prove that the scope of the agreement to which the accused was a party was to import a commercial quantity of a border controlled drug and that the prosecution need not prove that the accused intended to import a commercial quantity of that drug (and the distinction between those two matters).

39 That said, the present issue is whether the particular directions that were given by the trial judge in this case involved a wrong decision on any question of law or a miscarriage of justice.⁶² The respondent submitted that, by framing the first element as only requiring an agreement to import a border controlled drug and not referring to a commercial quantity until stating the fourth element, the trial judge misdirected the jury as to the scope of the agreement. The respondent contended that this misdirection was not corrected by the inclusion of the phrase "pursuant to the agreement" in the trial judge's oral and written directions concerning the fourth element. The respondent contended that there "remained a significant risk that the jury would understand the words 'the agreement' ... as an agreement to import cocaine without necessarily importing reference to any quantity thereof".

40 This submission should be rejected. The content and structure of the trial judge's directions had the advantage of not introducing any potential confusion on the part of the jury that the requisite intention to enter into the agreement extended to an intention to import a commercial quantity or knowledge or belief that would occur. The directions otherwise made it clear to the jury that the scope of the

61 *Alford v Magee* (1952) 85 CLR 437 at 466, cited in *R v Chai* (2002) 76 ALJR 628 at 632 [18]; 187 ALR 436 at 441.

62 *Criminal Procedure Act 1921* (SA), s 158(1)(b)-(c).

agreement between the respondent and his alleged co-conspirators had to be such that, "pursuant to [that] agreement", the quantity to be imported was to be a commercial quantity. The difference between the aide-mémoire ("was a commercial quantity") and the oral direction ("was to be a commercial quantity") was immaterial.

41 As noted, in explaining the fourth element, the trial judge properly drew the jury's attention to various aspects of the alleged agreement between the respondent and his alleged co-conspirators to import a border controlled drug that were relevant to whether the scope of their agreement was such that, if executed, a commercial quantity would have been imported. Leaving aside the Court of Appeal's concern about the means of proving the scope of their agreement, which is addressed next, there was no error in the trial judge's directions.

Proving the scope of a conspiracy

42 The second and related difficulty that the Court of Appeal identified with the trial judge's directions on the fourth element was that they supposedly failed to direct the jury that the evidential material concerning what would have been imported, had the agreement been executed, was confined to the conduct in which the accused agreed to engage and the circumstances in which the accused believed and intended that conduct to be carried out.⁶³ According to the Court of Appeal, this meant that the jury could not have regard to evidence as to what occurred in Panama City.⁶⁴

43 This reasoning elides the means of proving the existence and scope of a conspiracy with the elements of the offence of conspiracy. In this case, evidence of what occurred in Panama City was evidence of what the respondent believed and intended would occur in Panama City pursuant to his alleged agreement with his alleged co-conspirators.

44 At common law, on a charge of conspiracy, evidence of the acts and declarations of each of the co-conspirators, even if engaged in each other's absence, is admissible to prove, by inference, the existence of the conspiratorial

63 See *Kola* (2023) 377 FLR 253 at 272 [69].

64 *Kola* (2023) 377 FLR 253 at 265 [44], 272 [69].

agreement,⁶⁵ including its nature and scope.⁶⁶ Under the *Evidence Act 1995* (Cth), evidence of any such declaration is not excluded by the hearsay rule as it is not adduced to prove the truth of any fact asserted;⁶⁷ ie, it is admissible for a non-hearsay purpose.⁶⁸ However, "evidence in the form of acts done or words uttered outside [an accused's] presence by a person alleged to be a co-conspirator will only be admissible to prove the participation of the accused in the conspiracy where it is established that there was a combination of the type alleged, that the acts were done or the words uttered by a participant in furtherance of its common purpose and there is reasonable evidence, apart from the [alleged co-conspirator's] acts or words, that the accused was also a participant".⁶⁹ The question of whether there is such reasonable evidence is for the trial judge to determine.⁷⁰ Once that threshold is overcome, then the acts done or words uttered by the alleged co-conspirators outside the presence of the accused are evidence of the nature and extent of the accused's participation in the conspiracy.⁷¹

45 It is not clear whether the trial judge formally ruled on whether there was "reasonable evidence" of the respondent's participation in the alleged conspiratorial agreement independent of the conduct of his alleged co-conspirators undertaken outside his presence. However, such a ruling was not essential as the threshold was clearly met.⁷² Thus, the evidence of the acts and declarations of the

65 *Tripodi v The Queen* (1961) 104 CLR 1 at 6; *Ahern v The Queen* (1988) 165 CLR 87 ("Ahern") at 93; see also *Tsang v The Queen* (2011) 35 VR 240 ("Tsang") at 250 [37].

66 *R v Masters* (1992) 26 NSWLR 450 ("Masters") at 464; *R v Bilick* (1984) 36 SASR 321 at 331-332; *Caratti v The Queen* (2000) 22 WAR 527 at 552 [153]; *Dinh* (2000) 120 A Crim R 42 at 50-51 [51]-[52].

67 cf *Evidence Act 1995* (Cth), s 59(1); see *Tsang* (2011) 35 VR 240 at 250 [37].

68 *Evidence Act*, s 60(1).

69 *Ahern* (1988) 165 CLR 87 at 100; *Evidence Act*, ss 87(1)(c), 57(2); *R v Dolding* (2018) 100 NSWLR 314 at 322 [38].

70 *Ahern* (1988) 165 CLR 87 at 103; *Evidence Act*, ss 87(1)(c), 57(2).

71 *Ahern* (1988) 165 CLR 87 at 95.

72 *Masters* (1992) 26 NSWLR 450 at 465-466, cited in *Lewis v The Queen* (1998) 20 WAR 1 at 40.

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respondent's alleged co-conspirators in Panama City was evidence of the existence and scope of the conspiratorial agreement and also evidence of the fact, nature and extent of the respondent's participation in that agreement. In those circumstances, it would have been inconsistent with principle for the trial judge to direct the jury that they should not use evidence of what occurred in Panama City as evidence of whether the respondent was a party to an agreement pursuant to which a commercial quantity of a border controlled drug was to be imported into Australia.

46 It may be that, in a particular case, an issue might arise as to whether the acts and declarations of an accused's alleged co-conspirators undertaken in the accused's absence depart from what the evidence otherwise suggests was the scope of the agreement into which the accused entered. This may raise issues about whether the evidence of those acts or declarations is inadmissible, at least for some purposes, because it is not evidence of acts undertaken or declarations made in furtherance of the common purpose,⁷³ whether that evidence should be rejected or its use limited as a matter of discretion,⁷⁴ or whether some particular direction should be given by the trial judge to the jury about the need for caution in using the acts and declarations of alleged co-conspirators to ascertain the participation of the accused in the charged conspiracy or the scope of the conspiracy in which the accused joined.⁷⁵ However, there were no such issues in this case. There was nothing to suggest that the respondent's alleged co-conspirators who travelled to Panama were not putting into effect what was agreed upon with the respondent. In those circumstances, the general warning given by the trial judge about the operation of the co-conspirators rule was sufficient.

Conclusion

47 Neither of the Court of Appeal's criticisms of the trial judge's summing up were justified. Both grounds of appeal should be upheld.

73 *Ahern* (1988) 165 CLR 87 at 100.

74 *Smith* (1990) 50 A Crim R 434 at 441-443; *Masters* (1992) 26 NSWLR 450 at 466; *Evidence Act*, ss 135-137.

75 *Ahern* (1988) 165 CLR 87 at 104-105, quoted in *Smith* (1990) 50 A Crim R 434 at 443; *R v Dellapatrona* (1993) 31 NSWLR 123 at 156; see also *Tsang* (2011) 35 VR 240 at 261-262 [87]-[91].

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The following orders should be made:

1. Appeal allowed.
2. Set aside the orders of the Court of Appeal of the Supreme Court of South Australia made on 19 May 2023 and, in their place, order that the appeal to that Court be dismissed.