HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY
BETWEEN: **DIRECTOR OF PUBLIC PROSECUTIONS (CTH)**
Appellant

and

ALFRED KOLA
Respondent

REPLY SUBMISSIONS

PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the internet.

PART II REPLY

Ground one

2. The disagreement between the parties is very narrow, but very important. If the respondent and the Court of Appeal below are right, then the New South Wales position reflected in *Standen* is wrong: see **AS [18]**. While the respondent invites this Court not to wade into the competing Victorian and New South Wales approaches (see **RS [20]**), it cannot avoid doing so, as is evident from the criticisms of *Standen* in **RS [25], [39]**. Indeed, for the respondent to succeed, eminent and highly experienced judges in New South Wales have wholly misunderstood the law for over a decade.

3. It is common ground that the object of the conspiratorial agreement under s 11.5 of the *Criminal Code* (Cth) must be to commit the offence particularised by the Crown: **AS [15]-[16], [34]; RS [11]-[13]**. Accordingly, in this prosecution, the respondent and another must have entered into an agreement pursuant to which a commercial quantity of a border controlled drug would be imported into Australia.

4. The appellant's submission is that a trial judge can direct the jury to that effect by splitting up the object of the agreement. Thus, a trial judge can direct that:

   4.1. the accused was party to an agreement with at least one other person to commit an offence, namely, to import a border controlled drug into Australia (because the substance of this direction is that the accused was party to an agreement pursuant to which a border controlled drug would be imported into Australia); and

   4.2. the border controlled drug to be imported pursuant to the agreement was to be in a commercial quantity (because the substance of this direction is that the accused was

party to an agreement pursuant to which the border controlled drug to be imported into Australia was to be in a commercial quantity).

5. Splitting up the object of the agreement into its two components is then a convenient way to enable the balance of the directions to comply with the *Criminal Code* (Cth). The first matter in [4.1] will be the subject of the direction that the accused must have intended this to occur; whereas the second in [4.2] will not require any intention to be proved in respect of it. Bifurcation is not the only possible way of complying with the (difficult) situation created by the *Criminal Code* (Cth), but it is a logical and convenient way to do so.

6. The above is what the trial judge did here and there was no realistic risk of the jury understanding the directions to mean anything different, for the reasons the appellant has laid out fully in written submissions in chief. While the respondent disagrees, subject to the one matter addressed below, he essentially repeats the Court of Appeal's reasoning without attempting to answer the criticisms of it developed by the appellant in writing.

7. The respondent goes further in one respect. He points out that, on several occasions, the trial judge referred to the alleged conspiratorial agreement as an agreement to import a border controlled drug, without reference to a commercial quantity: see **RS [27]-[31]**. He contends that this would leave the jury to consider that the object of the alleged agreement never had to travel further than the importation of a border controlled drug into Australia.

8. That possibility is not realistic upon a fair reading of the summing up. Importation of a commercial quantity could not be said to be "pursuant to" the agreement without the agreement being to import a commercial quantity. No other interpretation of the ordinary English words "pursuant to" is available. The *Criminal Code* (Cth) proceeds on this very basis by explaining the fault element in terms that rely upon the connector "pursuant to". Section 11.5(2)(b) provides that "the person and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement".

9. Ultimately, her Honour's direction about commercial quantity left no room for the respondent to be convicted on a misunderstanding of the offence. Especially is that so when the real issues in dispute are recalled: see **AS [65]**. Further, it is noteworthy that the possibility now pointed to by the respondent was not raised by trial counsel at the time. This fortifies the conclusion that the summing up could not realistically have led the jury to misunderstand the matters the prosecution had to prove.

Ground two

10. **RS [45]** misstates the appellant's argument as reflected in both the notice of appeal and in **AS [44], [48], [50], [55], [58]-[59], [62]**. The appellant's complaint is not that the Court of Appeal erroneously went so far as to require the jury to be directed that "what in fact occurred was irrelevant to the existence of the alleged agreement". Rather the complaint is a more precise one that the Court erroneously required a direction that the jury could consider what in fact occurred as proof of the alleged agreement only in so far as those events were known or believed by the accused to exist. The criticisms in **RS [51], [53], [57] and [61]** are thus misdirected, for they attack an interpretation of the Court of Appeal's (undoubtedly difficult) reasons which the appellant has not advanced.

11. An example of this is **RS [50]-[51] and [53]**, where the respondent seizes upon **CAB 69-70 [44]** and the statement that "[t]here may be cases in which the agreement is to be inferred from the overt acts" as alleged proof that the Court did not wholly discount the relevance of what in fact occurred in every case. But what the appellant drew attention to in **AS [49]-[50]** was the question when the Court contemplated that an overt act will be relevant in proof of the agreement. It was said that an overt act will be relevant to prove the offence against an accused when the overt act was "within the scope of what was agreed", and irrelevant when it was not within the scope of what was agreed. That is to say, an overt act will be relevant only when known and intended by the respondent.

12. It is this knowledge-based distinction which the appellant calls out in **AS [44]**, by reference to the paragraphs of the Court of Appeal's reasons worked through in **AS [45]-[50]**, and which the appellant criticises at **AS [51]-[66]**.

13. The erroneous distinction is particularly apparent in **CAB 77 [67]** where the Court required the *Standen*-based direction to be supplemented to prevent the jury considering overt acts unless they occurred "in the circumstances known, or believed, by the conspirators to exist". The respondent embraces that reasoning, in its defence of Ground 1 at **RS 20.3,** without grappling with the point being made by the appellant.

14. It is seen again in **CAB 78 [69]** where the Court required the jury to be directed that they could not consider evidence unless it proved conduct in which the accused agreed to engage "and the circumstances in which the accused believed and intended that conduct to be carried out". It is seen yet again in the underlined portions in **CAB 78 [71]** which, in the context of what is said in **CAB 78 [72]**, are plainly to be understood as the matters

which the Court considered could not be admitted against the respondent because it had not been independently proved that he knew of those matters: cf **RS [58]-[59]**.

15. Indeed, **CAB 78 [72]** illustrates how Grounds 1 and 2 fit together. The Court has, erroneously, required a direction that the accused "made an agreement, with knowledge that if it were executed, it would result in the importation of a shipment of cocaine that would be a commercial quantity…". By this route, the very thing that the *Criminal Code* (Cth) does not require (namely proof of intent as to commercial quantity) has been made essential to the offence.

16. More generally, the respondent asserts that it is "obvious" that evidence of what occurred is only admissible against an accused if he or she is proved to have known of those events: **RS [47]**. Far from being obvious, the proposition is wrong. Because the Court of Appeal did not bifurcate their analysis in terms of proof of the conspiratorial agreement and proof of the accused's participation in it, apparently applying this knowledge-based restriction to both, it is important to explain why this restriction is wrongly applied to each.

17. In relation to proof of the existence of an agreement to import a commercial quantity of a border controlled drug, whether an accused person knew of a particular act does not determine whether that act can be relied upon as one circumstance among many from which to infer the existence of such an agreement. Proof of a conspiracy "may well consist in evidence of the separate acts of the individuals charged which, although separate acts, yet point to a common design and when considered in combination justify the conclusion that there must have been a combination such as that alleged in the indictment".[1] Such evidence is direct evidence of the conspiracy, and "does not depend in any way upon any acknowledgment or acceptance of the truth by" an accused of what occurred.[2]

18. In relation to proof of participation in the agreement, whether the jury considers that the accused knew that that act occurred or was to occur may bear upon the weight the jury gives to that evidence. But evidence of things said or done can be led to prove an accused's participation in a conspiracy and to prove the nature and extent of that participation without proving that the things said or done were known to the accused at the time of making the agreement.

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1 *Ahern v The Queen* (1988) 165 CLR 87 at 93, quoting *Tripodi v The Queen* (1961) 104 CLR 1 at 6.

2 *R v Masters* (1992) 26 NSWLR 450 at 461. See also at 463D-F (discussion of the admissibility of the first and second conversations); *Standen v The Queen* (2015) 253 A Crim R 301 at [71], [214], [345]-[346], [350], [354]-[360].

19. Participation by an accused can be inferred from acts undertaken or things said in the accused's absence where, for example, those acts or statements expressly or impliedly assert that the accused was a participant pursuant to the co-conspirator's rule: see **AS [56]**. No formulation of that rule has ever qualified it by requiring the Crown to prove as a condition of admissibility that the accused knew of those acts or statements,[3] nor should the rule be so qualified. The relevant qualification is that there be reasonable evidence of participation apart from those acts or statements.[4]

20. The evidence of the rollover witness James about a conversation[5] with the respondent and another about James being paid $250,000, and about the use of a sailing boat from South America, supplied that reasonable evidence independently of the evidence of what occurred in South America. The use of a boat for a long trip and the payment of a substantial sum to James for his role in the importation supports the inference that the respondent was a participant in a conspiracy to import a commercial quantity of cocaine. Why take such a long trip by precarious means, and why pay a participant so much, if the quantity to be imported was not of a quantity to make the game worth the candle?

21. This was reasonable evidence even though James' evidence was contested: **RS [7]**. A rollover witness' evidence is often challenged, and it is not for a trial judge to exclude evidence sought to be admitted under the co-conspirator's rule based on the trial judge's assessment of reliability or credit.[6]

22. In sum, Ground 2 is an aspect of the error reflected in Ground 1. The Court's (misplaced) concern about how evidence may be used drove the conclusion that *Standen* was erroneous: **AS [58]**. The respondent overlooks or understates the significance of the knowledge-based restriction to the Court's conclusion that the trial judge had misdirected the jury: **RS [46], [61]**. The appeal should be allowed on both grounds.

Dated: 31 January 2024

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3 See, eg, *Ahern v The Queen* (1988) 165 CLR 87 at 93. See also *R v Masters* (1992) 26 NSWLR 450 at 459F-G, 464 (discussion of the admissibility of the "third conversation").
4 See *Ahern v The Queen* (1988) 165 CLR 87 at 100.
5 This evidence was admitted as direct evidence of the agreement and of his participation in it.
6 See *R v Masters* (1992) 26 NSWLR 450 at 465.