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

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification for publication

1. This submission is in a form suitable for publication on the internet.

Part II: Outline of the propositions to be advanced in oral argument

Ground 1

2. The physical element of the offence of conspiracy to import a commercial quantity of a controlled drug, contrary to ss 11.5 and 307.1 of the *Criminal Code* (**JBA1 10-12**) is the making of the agreement to import a commercial quantity of the controlled drug: AS [16] and RS [11]-[12]; see *R v LK* (2010) 241 CLR 177 at [132] and [141] (**JBA3 147-150**).

3. For the offence of importing a commercial quantity of a controlled drug, absolute liability attaches to the physical element of quantity imported: s 307.1(c) and 307.1(3). That special liability provision applies to the offence of conspiracy: s 11.5(7A) of the Code.

4. The special liability provision should not be allowed to undercut the requirement that the prosecution must prove that the object of the conspiracy in which an accused person engages (physical element) is the importation of a commercial quantity of a controlled drug: thus the importance of directing a jury explicitly as to the nature and object of the alleged agreement.

5. If the special liability provision is allowed to creep into the physical element of the offence (s 11.5(1) of the Code) then this undermines the need for proof of the object of conspiracy in manner set out by Kourakis CJ at [45] (**CAB 70**).

6. Any potential for confusion in the minds of the jury can be overcome by identifying for it the agreement to which an accused is said to be a party with some specificity (e.g. that the

agreement was to import a particular container or shipment: see Kourakis CJ at [44], [62]-[63] and [68] **CAB 69-70 and 76-78**). Separately, (when it is in issue) the jury can be directed it is not necessary to establish that an accused intended to import more than the relevant quantity of the border-controlled drug.

7. The directions given in this case did not achieve this because they identified the agreement as being one to import a border-controlled drug (orally **CAB 9**, *aide memoire* **RFM 4**). The jury was later directed as a separate element that the quantity of the drug to be imported was to be a commercial quantity (**CAB 10**), without ever being directed that the prosecution was required to prove that the respondent himself was a party to an agreement to import a commercial quantity of a border-controlled drug.

8. This was exacerbated by the very next direction which was that the prosecution did not need to prove intention in relation to quantity (**CAB 10**). Although that direction was itself correct, its combination with and proximity to the direction relating to the quantity of the border-controlled drug to be imported "pursuant to" the agreement had the effect that it was merely necessary to establish that the accused made himself party to an agreement to import a border controlled drug but separately from that that the prosecution had to prove the amount to be imported was in fact a commercial quantity.

9. The approach promoted by the appellant, following *Standen v Director of Public Prosecutions* (2011) 254 FLR 467 (**JBA4 262**) is "bifurcation" (Reply [5]) of the physical element into a bare agreement and quantity. This does not accord with the terms of the statute, as construed in *LK*. It carries the real risk that an accused person may wrongly be held liable for conduct graver than that to which they had made themselves a party.

10. If directions are given that bifurcate the physical element in this way then the jury must still be adequately directed (1) that in order to find an accused guilty, it must be satisfied to the requisite standard that the agreement the accused entered was to import a commercial quantity of a border controlled drug; and (2) against reaching that state of satisfaction by acting upon the unilateral conduct of other participants in the conspiracy. A direction such as the one suggested by Kourakis CJ at [67] (**CAB 77**) would be sufficient.

11. The directions given in *Le v The Queen* (2016) 308 FLR 486 at 490 (**JBA4 194**, extracted by Kourakis CJ at [64] **CAB 76-77**) correctly state the position. Applied to the facts of this case, the directions stated by Hodgson JA in *Standen* at [21] (**JBA4 271**) do not. The directions actually given in the *Standen* trial (*Standen v The Queen* (2015) 298 FLR 35 at

[394] (**JBA4 335**)) were in different terms and the question at issue in *Standen* was quite different to the one arising in this case.

12. In this case, the trial judge never made clear to the jury that in order to find the respondent guilty, it needed to be satisfied beyond reasonable doubt that he was a party to an agreement to import a commercial quantity of a border-controlled drug. The words "pursuant to", even if drawn from the Code, abstracted the issue: Kourakis CJ at [36] (**CAB 67**). That is, they conveyed that it was merely necessary that the drugs in fact to be imported exceeded 2kg.

Ground 2

13. This ground is academic. The appeal does not turn on it. In any event, the reasoning of the Court of Appeal does not enliven the principles of admissibility arising from cases such as *Ahern v The Queen* (1988) 165 CLR 87 (**JBA3 51**) and *Tripodi v The Queen* (1961) 104 CLR 1 (**JBA3 152**).

14. When read in full, the passage at [44]-[45] (**CAB 69-70**) is an articulation of the proposition that the unilateral conduct of others does not form part of an agreement entered into by an accused.

15. The reasoning of Kourakis CJ expressly recognizes and proceeds on the basis that a conspiracy can be established by the conduct of others. The point of [44]-[45], which feeds into the conclusion at [72] (**CAB 78**) is to urge careful consideration of whether the acts of other co-conspirators do in fact form part of what was agreed by a particular accused, or whether those acts are unilateral.

16. The effect of the reasons is to make clear that a jury should be given careful directions to ensure that its focus is on identifying with precision the agreement to which an accused made themselves a party.

Dated: 15 February 2024

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