HIGH COURT OF AUSTRALIA

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File Number:	A21/2023
File Title:	Director of Public Prosecutions (Cth) v. Kola
Registry:	Adelaide
Document filed:	Form 27D - Respondent's submissions
Filing party:	Respondent
Date filed:	22 Jan 2024

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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 SUBMISSIONS

Part I: CERTIFICATION OF SUITABILITY FOR PUBLICATION

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

Part II: STATEMENT OF ISSUES

2. The issue presented by this appeal is whether the Court of Appeal (Kourakis CJ, with whom Nicholson and Stein AJJA agreed) misunderstood the trial judge's directions to the jury in relation to the elements of the offence of conspiracy to import a commercial quantity of a border controlled drug.[1] In circumstances where the trial judge directed the jury to the effect that entry into an agreement to import a border controlled drug was a separate and distinct element of the offence to the quantity of the border controlled drug that was the subject of the conspiracy, the question to be determined is whether the trial judge adequately directed the jury that it was necessary that the accused enter an agreement to import a commercial quantity of a border controlled drug, as opposed to an agreement to import the border controlled drug *simpliciter*. The respondent submits the directions given were inadequate and erroneous, and that the analysis of Kourakis CJ in the Court of Appeal was correct.

3. The second ground of appeal raises an issue as to whether the Court of Appeal's reasons, properly understood, assert that acts done in furtherance of a conspiracy were irrelevant to establishment of the existence of the agreement the subject of the charge. The respondent submits that this ground involves a misreading of Kourakis CJ's reasons, and

[1] Contrary to sections 11.5(1) and 307.1(1) of the *Criminal Code* (Cth) ("**the Code**").

that even if the complaint is made good, it would not undermine the basis upon which the Court of Appeal allowed the appeal and should not affect the outcome of this appeal.

Part III: SECTION 78B NOTICE

4. No notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

Part IV: CONTESTED FACTS

5. The facts set out at paragraphs 6-8 of the appellant's submissions are not in dispute. Further, paragraph 9 of the appellant's submissions accurately sets out the prosecution case on the issue of the quantity of cocaine said to be the subject of the conspiracy.

6. As to paragraph 9.2 of the appellant's submissions, the evidence of "James" was in dispute generally.[2] Insofar as James' evidence is relevant to the issues on this appeal, he said that he was initially offered $200,000 for his role in the enterprise but that he negotiated that figure to $250,000.[3] It was put to James (and denied) that the conversation where he was offered either $200,000 or $250,000 did not occur.[4]

7. James also accepted that he had made a prior inconsistent statement that he was to be paid $200,000.[5] In itself the difference between $200,000 and $250,000 mattered little in the context of the case if James' evidence on the topic was accepted. The significance of the inconsistency went to the question of **whether** James' evidence on the topic should be accepted. If the conversation occurred, the quantum of the payment would have been important to James at the time. It is unlikely that he would be mistaken about it, whether in a statement to police or in his evidence. The inconsistency was capable of causing doubt that the conversation ever happened at all.

8. As is elaborated upon at paragraphs 47 to 61 below, the respondent does not agree with the construction of the Court of Appeal's reasons contained in paragraph 10 of the appellant's submissions.

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[2] See generally the summing up at pages 20-22 and 25; **CAB 26-28 and 31**.
[3] Summing up page 17; **CAB 23**. There her Honour misspoke and said $20,000 instead of $200,000, which was corrected at summing up page 29; **CAB 35**.
[4] Respondent's Book of Further Material at page 84; trial transcript page 145 ("**RFM 84 T145**").
[5] **RFM 63 T124**.

9. In addition to the appellant's summary of the facts, the geographical location of the various co-conspirators at relevant times is important to the issues on appeal. On the prosecution case:[6]

   9.1. the conspiracy was agreed as between (at least) the respondent, Juan Londono-Gomez and Ibrahim Yavuz in Adelaide in March and April of 2014;

   9.2. at all relevant times, the respondent remained in Adelaide;

10 9.3. in early May 2014, Mr Londono-Gomez travelled to Colombia. Thereafter, the respondent continued to advance the conspiracy by telephone with Londono-Gomez and a further co-conspirator, "Julio";

   9.4. by mid-May 2014, James had been recruited and travelled to Panama. He met with Mr Londono-Gomez and was introduced to the boat's captain, "Marco";

   9.5. the boat that was intended to sail to Australia had to be repaired and was eventually travelled through the Panama Canal, before an argument broke out between James and Marco and the conspiracy was frustrated.

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10. At all times that the conspiracy was being put into effect in Panama the respondent remained in Australia. The evidence of his ongoing involvement and knowledge came from telephone intercepts. There was no direct evidence from any witness or from the telephone intercepts that the respondent had talked about, or been present for any conversation about, the quantity of cocaine to be imported. On the prosecution case, the respondent's knowledge and agreement as to that issue was a matter of inference.

Part V: STATEMENT OF ARGUMENT

30 **GROUND ONE**

A. APPROPRIATE DIRECTIONS ON THE ELEMENTS OF THE OFFENCE

11. The respondent agrees with the analysis of the relevant provisions of the Code that is contained in paragraphs 11 to 16 of the appellant's submissions.

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[6] **CAB 57-58 [6]-[12]**.

12. The appellant correctly identifies (at paragraph 16.1 of the submissions) the physical element of the offence as the entry into an agreement to import a commercial quantity of a border controlled drug. Of significance in resolution of this appeal is the accepted position of both parties that it is necessary for the prosecution to prove that the accused participated in or was a party to an agreement to import a commercial quantity of a controlled drug. That conclusion is consistent with the text of the Code, principle and authority.[7]

13. Accordingly, in order to establish the commission of the relevant offence, the object of the conspiracy must be the importation of a commercial quantity of a controlled drug. That conclusion is unaffected by the special liability provision contained in s 307.1(3) of the Code, which is given effect in the offence of conspiracy by s 11.5(7A) of the Code.

14. On this analysis the special liability provision takes effect when considering the fault element of the offence, as "explicated"[8] by s 11.5(2)(b) of the Code. The work done by the special liability provision is that it need not be established that the accused intended that the quantity of a border controlled drug to be imported be a commercial quantity.

15. If it is not made clear to the jury that it is necessary for the prosecution to prove a conspiracy with the importation of a commercial quantity of a controlled drug as its object then the risk identified by Kourakis CJ at **CAB 70 [45]** becomes manifest. That is, the same agreement could found liability for conspiracy to commit any of the hierarchy of importation offences, depending on what in fact occurs (even unilaterally, in the absence of any agreement of a particular accused) after the agreement is entered into.

16. The challenge facing a trial judge in directing a jury in relation to the offence lies in the tension between the necessary direction that the physical element (and hence object) of the conspiracy must be the importation of a commercial quantity of a border controlled drug on the one hand, whilst instructing as to the correct application of ss 11.5(7A) and

[7] To the appellant's reference to *R v LK* (2010) 241 CLR 177 may be added *Churchill v Walton* [1967] 2 AC 224 at 233 and in respect of the closely related principles of aiding and abetting, *Johnson v Youden* [1950] 1 KB 544 at 546. See also *Rohan (a pseudonym) v The King* [2022] VSCA 215.
[8] Paragraph 15.5 of the appellant's submissions.

307.1(3) of the Code as it applies to the fault element of the offence informed by s 11.5(2)(b).

17. Section 307.1(3) of the Code provides, in relation to the substantive offence of importing a commercial quantity of a border controlled drug, that absolute liability applies to the physical element of the offence that the quantity imported is a commercial quantity. This is a special liability provision as defined in the Dictionary to the Code. Section 11.5(7A) of the Code provides that any special liability provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.

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18. The careful analysis of this question by Kourakis CJ identifies the correct approach to be taken in properly addressing this apparent tension. In particular, framing as the first step the physical element as an agreement to engage in conduct which, if executed, would have the result of the importation of a commercial quantity of a border controlled drug, resolves any apparent incongruence between the physical element of the offence and the special liability provision. It also has the virtue of simplifying what may otherwise be confusing and apparently inconsistent concepts to the jury.

19. In particular, the example[9] given by Kourakis CJ of an agreement to import of a particular
20 parcel or container, where the precise weight of the contents is unknown, gives a practical example of the type of situation where the special liability would have work to do on a correct analysis of the Code.

20. It is not necessary in resolution of the issue raised in this case to descend into a detailed comparison of the formulations of the elements of the offence set out in the intermediate appellate decisions of *Standen v Commonwealth Director of Public Prosecutions*[10] and *Le v The Queen*.[11] It suffices to make the following observations:

    20.1. a close comparison of paragraphs 16 and 26 of the appellant's submissions
30 demonstrate the *Le* formulation of the elements to be closely aligned to a correct formulation of the elements of the offence which the appellant accepts;

[9] At **CAB 69 [44]** and repeated at **CAB 77 [68]**.
[10] (2011) 218 A Crim R 28.
[11] (2016) 308 FLR 386.

20.2. the *Le* formulation has the distinct benefit that it makes unambiguously clear that the object of the conspiracy must be the importation of a commercial quantity of border controlled drugs; and

20.3. Kourakis CJ was correct to observe that if the *Standen* formulation is to be utilised by separating agreement to import and quantity into two distinct elements, it will be necessary for a trial judge to give directions as to quantity in terms such as the ones set out at **CAB 77 [67]**:

> *The conduct to be performed in accordance with the agreement proved in element 1, in the circumstances known, or believed, by the conspirators to exist, would have resulted in the importation of a shipment of cocaine which weighed 2 kg or more, but the accused need not have intended to import a shipment of that weight.*

To direct otherwise would be to risk the jury reasoning that once an agreement to import any of a border controlled drug is established, the conduct of one or more of an accused's co-conspirators, falling outside of the agreement in fact entered into by the accused, gives rise to a pathway to conviction for conspiracy to import a commercial quantity of a border controlled drug even where a particular accused did not agree to the importation of such a quantity.

B. THE DIRECTIONS IN THIS CASE

21. After giving preliminary directions about fundamental matters such as the roles of judge and jury, and the concept of reasonable doubt, the trial judge directed the jury as to the elements of the offence. Before giving any specific directions, her Honour provided the jury with an *aide memoire* setting out the elements.[12]

22. Although it is ultimately the oral directions of the trial judge that the jury must follow,[13] where there is the potential for misunderstanding in the oral directions, that risk may be limited or exacerbated by any written document provided by judge to jury.

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[12] **RFM 4**. The text of the *aide memoire* was set out in full by the Court of Appeal at **CAB 67 [35]**.
[13] Her Honour made this point: Summing up page 2; **CAB 8** in the first paragraph after the *aide memoire* was provided to the jury.

23. The *aide memoire* set out five elements. Relevant to this appeal are elements one and four:

> *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.*
>
> ...
>
> *4. The substance to be imported pursuant to the agreement was a commercial quantity of that border-controlled drug.*

24. The first element as stated, is, on its face, incorrect. As is conceded by the appellant, the object of the conspiracy must be the importation of a commercial quantity of a border controlled drug.

25. This formulation is closely analogous to that identified in the interlocutory appeal in *Standen*, and it ran the risk inherent in that formulation identified at paragraph 20.3 above. Accordingly it was even more important that the oral directions made clear to the jury that, for the prosecution to prove its case, it must prove beyond reasonable doubt that the respondent himself had entered into an agreement to import a commercial quantity of cocaine. It was not sufficient if he entered into an agreement to import cocaine (*simpliciter*) and that other parties to the agreement determined that the importation was to be of a quantity of the drug which was in fact a commercial quantity. That had to be made clear to the jury.

26. The oral direction that corresponded with the first element on the *aide memoire* was as follows:[14]

> *The first element of the offence is that 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.*

27. It is against the background of that direction that further reference to "the agreement" in the summing up must be understood. It is plain from the direction given, particularly when read in combination with the subsequent references to "the agreement" prior to any

[14] **CAB 8**.

mention of the quantity of the border controlled drug, that "the agreement" on which the jury was being directed was an agreement to import cocaine, untethered to any quantity. In other words, the object of the conspiracy was wrongly stated to be the importation of a border controlled drug, rather than a commercial quantity of a border controlled drug.

28. It was only after six such references to "the agreement"[15] that the jury was first instructed on the element of the charged offence relating to the quantity of the border controlled drug the subject of the agreement.

29. Given the introduction of the concept of "the agreement" during the directions on the first element of the offence, and the frequent repetition of that phrase prior to any directions on the element of the offence relating to the quantity of the border controlled drug that was the subject of the conspiracy, a fair reading of the summing up suggests that "the agreement" was to be understood by the jury as the alleged agreement to import cocaine at all, rather than any alleged agreement to import (at least) a particular identifiable subject consignment or importation which was of a commercial quantity.

30. Obviously enough the jury did not have the benefit of a careful reading of the directions. Whatever the intention of the trial judge or whatever can be drawn out from a nuanced reading of the words spoken, there remained a significant risk that the jury would understand the words "the agreement", when used by the trial judge, as an agreement to import cocaine without necessarily importing reference to any quantity thereof.

31. Having been wrongly directed as to the object of the conspiracy that was required to establish guilt, the jury was then not given any direction that remedied the misdirection.

32. The trial judge directed the jury as to the requisite quantity of a border controlled drug as the fourth element in the following terms:[16]

> *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.*

[15] **CAB 9**.
[16] **CAB 10.**

> *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]

33. Whether that direction was sufficient to remedy the identification of the object of the conspiracy as the importation of a border controlled drug (of any quantity) rests on the question whether or not the trial judge's reference to the quantity "to be imported pursuant to the agreement" can be equated with the element of the offence that the respondent entered into an agreement to import that quantity of a border controlled drug.

34. The Court of Appeal answered that question in the negative.[17] It was correct to do so. It is straightforward to see how from a juror's perspective, conduct might occur "pursuant to an agreement" without it in fact being the object of the agreement.

35. The closest the trial judge came to giving a correct direction was in saying the *"prosecution says that you can be satisfied that that there was an agreement, that the accused was party to it and that it was to do with a commercial quantity of cocaine to be imported into Australia."*[18] However this did not form any part of the legal directions to the jury, and was said in a different part of the summing up where the judge was summarizing the addresses of counsel. A summary of the prosecution argument cannot supplant defective directions which expressly purport to explain the elements of an offence to a jury.

36. The jury was not correctly directed on the elements of the offence. The Court of Appeal was correct to allow the appeal on that basis.

C. THE COURT OF APPEAL'S REASONS

37. The ground of appeal below which is presently in issue was considered by Kourakis CJ at **CAB 67-78 [35]-[72]**.

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[17] **CAB 67 [36]**.
[18] **CAB 31**.

38. The determinative aspect of those reasons is found at **CAB 67 [36]**. Kourakis CJ (with whom Nicholson and Stein AJJA agreed) observed in relation to the *aide memoire*, but in a passage that applied with equal force to the oral directions:

> *It will be observed that the passive voice 'to be imported pursuant to the agreement' is used in the fourth element. In her Honour's charge, element 4 was modified slightly such that the jury was directed that the substance to be imported pursuant to the agreement was* ***to be*** *a commercial quantity. I acknowledge that the adverbal phrase 'pursuant to the agreement' might be understood to mean something like if the agreement were successfully executed but it might also mean imported by the conduct in which one or more conspirators, did engage, or might have engaged. <u>It follows that the elements so framed do 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.</u>* [bold emphasis in original, underlined emphasis added]

39. The ambiguity in the phrase "pursuant to the agreement" exposed the vice in the *Standen* formulation when applied to facts such as arose in this case. In particular, the fact that the respondent in this case was geographically removed from any attempt to execute the conspiracy left open the possibility that the jury might consider that the conduct of other co-conspirators proved that the quantity of cocaine to be imported was a commercial quantity and accordingly find the respondent guilty, without finding established that the respondent had himself joined an agreement to import such a quantity of a border controlled drug.

40. It is not strictly necessary to go further. This appeal turns on whether the direction given by the trial judge on the distinct element of quantity adequately conveyed to the jury that it was a necessary element of guilt that the respondent agreed to import a commercial quantity of a border controlled drug. The Court of Appeal's reasoning on this issue was correct.

41. The importance of directions expressly stating that an accused must agree to import a commercial quantity in order to avoid the risk of the jury misunderstanding the necessary object of the conspiracy, was adverted to at various points in the judgment below:

41.1. At **CAB 70 [44]**, Kourakis CJ observed that in a case (such as this) where no shipment is located and the scope of the agreement is to be inferred from the overt acts, *"Careful directions on the extent to which that conduct allows inferences to be drawn as to what was agreed or is to be treated as no more than unilateral conduct will be required"*.

41.2. At **CAB 70 [45]**, the point was made that it was necessary for the prosecution to prove that the conspirators agreed to engage in conduct that would result in the importation of a commercial quantity of a border controlled drug. If it were otherwise, there would be no material distinction between the agreements for the various offences in the hierarchy of importation offences. Rather, the offence committed could be determined by such circumstances as happened to occur after the agreement was made.

41.3. At **CAB 73 [52]**, Kourakis CJ noted the weight placed on the Gibbs Committee Report in *LK*, and the focus in that Report on the accused's agreement, intent and knowledge (or ignorance) of surrounding circumstances.

41.4. Finally, at **CAB 78 [72]**, the analysis concluded with the correct observation that there *"is a fundamental difference between the question whether Mr Kola 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 the question whether the conduct engaged in by his co-conspirators in Central America would produce that result."*

42. The reasoning of Kourakis CJ was orthodox, consistent with principle and correct.

43. The failure to direct the jury in clear terms that in order to find the respondent guilty, it had to be satisfied beyond reasonable doubt that he made an agreement to import a commercial quantity of cocaine was an error. The Court of Appeal was right to allow the appeal and order a re-trial.

44. Ground 1 should be rejected.

GROUND TWO

45. The appellant's complaint on this ground is that the Court of Appeal erred by concluding that the jury should have been directed that what in fact occurred was irrelevant to the existence of the alleged agreement. That ground of appeal misunderstands the reasoning below. The Court of Appeal did not so conclude.

46. In any event, the asserted error did not form an essential part of the Court of Appeal's reasoning on the ground that succeeded below.[19] Thus even if the appellant's complaint is made good, it would not provide a basis upon which to allow this appeal.

47. Nowhere in the judgment below does the Court of Appeal say that evidence of events that occurred in alleged furtherance of the criminal conspiracy should not be admitted. The theme of Kourakis CJ's reasoning was that it was necessary for a jury to be reminded that evidence of actual events can only be used as evidence of his agreement to the extent that it is accepted that he knew about or contemplated those actual events. Respectfully, that point is obvious.

48. Paragraph 47 of the appellant's submissions asserts that at **CAB 78 [71]** the Court of Appeal underlined evidence which their Honours considered was inadmissible against the respondent. That is not what the judgment says.

49. Paragraph 71 of the Court of Appeal's reasons has to be read in the context of the paragraphs that surround it, as well as **CAB 69-70 [44]**, from which it draws.

50. At paragraph 44, after giving examples of different types of conspiracy to import and how the special liability provision would be appropriately directed upon, Kourakis CJ stated *"There may be cases in which the agreement is to be inferred from the overt acts"*.

51. It cannjot be said, then, that the Court of Appeal was purporting to hold that actual events that occur in furtherance of an alleged conspiracy are irrelevant and inadmissible.

52. His Honour proceeded to make the point that was picked up later at **CAB 78 [71]**: *Careful directions on the extent to which that conduct allows inferences to be drawn as to what was agreed or is to be treated as no more than unilateral conduct will be required.* That

[19] Ground 1: see the Amended Grounds at **CAB 53**.

statement is also correct. In summary: evidence of the acts actually engaged in is relevant and admissible, but directions are necessary to ensure that a jury carefully considers whether those acts are truly attributable to an agreement entered into by a particular accused, or whether they represent co-conspirators going beyond an agreement entered into by a particular accused.

53. The appellant relies on the next passage: *"Proof of what in fact occurred is irrelevant."* The use of the word "Proof", rather than the word "Evidence" may be significant. On the plain words used, the Court of Appeal did not suggest that evidence of the overt acts committed in furtherance of an alleged conspiracy are irrelevant and, by extension, inadmissible. Further, when read against the paragraph as a whole, and particularly the observation that there may be cases in which the agreement is to be inferred from the overt acts, it is clear enough that the word "irrelevant" was intended to mean "neither necessary nor sufficient to prove the existence of the conspiracy".

54. At **CAB 78 [69]**, Kourakis CJ applied that reasoning. His Honour made the point that one difficulty with the directions on the discrete element relating to the quantity of cocaine that was the subject of the conspiracy was the absence of direction to the jury as to the evidential material upon which the inference was to be drawn as against Mr Kola. His Honour stated, correctly:

> *…that material must be 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. However, the passive voice permitted the jury to have regard to evidence as to what occurred on the ground in Panama City.*

55. It is clear from the context of the paragraph that the last sentence is to be understood as being referable to unilateral conduct – engaged in by co-conspirators on the other side of the world – that was not within the scope of the respondent's agreement.

56. It is the conduct that occurred in Panama that was described as "that conduct" at **CAB 78 [71]**. In that paragraph, Kourakis CJ observed the *"Judge's summary referred to that conduct in the context of element 4 without linking it back, and limiting it to, the agreement and Mr Kola's understanding of the circumstances in Panama City."*

57. There is no available reading of that paragraph that suggests the Court of Appeal has advanced a rule of inadmissibility as to actual events that post-date the alleged agreement.

58. The underlined portions of paragraph 71 of the Court of Appeal's reasons do not represent evidence that their Honours considered to be inadmissible against the respondent. Rather, they represent the trial judge's summary of the pieces of circumstantial evidence relied upon by the prosecution to prove the quantity of cocaine said to be the object of the conspiracy. In summary, those pieces of evidence were first, that the importation was to occur by boat and second, the combination of evidence as to what James was to be paid for his role in the enterprise and evidence as to the value of cocaine.

59. Kourakis CJ did not say any of that evidence was inadmissible against the respondent. To the contrary, his Honour immediately observed **CAB 78 [72]** that *"Much of the evidence to which the Judge referred was known to Mr Kola when he entered into, or affirmed, his commitment to the agreement."*

60. The next sentence correctly identified the vice in the directions. It identified the risk of the respondent being wrongly convicted of conspiracy to import a commercial quantity of a border controlled drug on the basis of the unilateral conduct of his co-conspirators caused by a combination of:

    60.1. the separation of the elements of agreement and quantity; and

    60.2. reference to events and circumstances in Panama as evidence of Mr Kola's agreement as to quantity; and

    60.3. the absence of any direction that such events and circumstances could only evidence Mr Kola's agreement as to quantity if he knew about them.

61. On a full and fair reading, those paragraphs do not carry the meaning ascribed to them by the appellant. Even if they do, they do not undermine the reasoning of the Court of Appeal that led to the appeal being allowed on ground 1 below.

62. Ground 2 should be rejected.

CONCLUSION

63. The appeal should be dismissed.

Part VI: CROSS-APPEAL/NOTICE OF CONTENTION – N/A

Part VII: ESTIMATE OF TIME

64. The respondent estimates requiring one hour for oral submissions.

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Dated 22 January 2024

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

BETWEEN: DIRECTOR OF PUBLIC PROSECUTIONS (CTH)
Appellant

and

10 ALFRED KOLA
Respondent

ANNEXURE TO THE RESPONDENT'S SUBMISSIONS: LIST OF STATUTES REFERRED TO

1. *Criminal Code Act 1995* (Cth), ss. 11.5, 307.1 and the Dictionary ("special liability provision") as at 27 March 2014 to 23 June 2014.

   Note: the amendments that took effect on 24 June 2014 are immaterial.