

AGIUS v THE QUEEN (S28/2013)

Court appealed from: New South Wales Court of Criminal Appeal
[2011] NSWCCA 119

Date of judgment: 24 May 2011

Special leave granted: 15 February 2013

The Appellant (and others) faced trial before Justice Simpson on an indictment containing two counts of conspiracy, described in the following terms:

- "1. *Between about 1 January 1997 and about 23 May 2001 at Sydney, New South Wales and elsewhere did conspire with each other and with Owen Trevor DANIEL to defraud the Commonwealth. Contrary to section 86(1) and section 29D of the Crimes Act 1914 (Cth). (Law Part Code 11102).*
2. *Between about 24 May 2001 and about 10 April 2008 at Sydney, New South Wales and elsewhere did conspire with each other and with Owen Trevor DANIEL to dishonestly cause a loss, or to dishonestly cause a risk of loss, to a third person, namely the Commonwealth, knowing or believing that the loss would occur or that there was a substantial risk of the loss occurring. Contrary to section 135.4(5) of the Criminal Code. (Law Part Code 41506)."*

Notwithstanding that the indictment alleged two counts of conspiracy, the Commonwealth Director of Public Prosecutions alleged that only a single conspiracy or course of conduct occurred. That conduct allegedly began with an initial agreement in early 1997, through its progressive implementation, until its finalisation in April 2008. That two separate counts were called for arose because the conduct in question was criminalised by two different legislative regimes.

On 27 April 2011 the Appellant (and his co-accused) filed notices of motion seeking a permanent stay of the second count. It was submitted that the Appellant (and the others) should not have been charged with two separate offences because the allegations against each of them involved a *single* conspiracy spanning the periods of operation of two legislative regimes. On 4 May 2011 the applications for a permanent stay of the second count were refused.

On 24 May 2011 the Court of Criminal Appeal (Tobias AJA, Johnson and Hall JJ) dismissed the Appellant's (and the others') appeals. Their Honours held that the second count was not doomed to fail so as to warrant it being permanently stayed. On 15 June 2011 this Court (comprised by Justices Gummow and Bell) refused the Appellant (along with his co-accused) special leave to appeal against the Court of Criminal Appeal's judgment.

On 31 July 2012 a jury convicted the Appellant (and one of his co-accused) of the two counts in the indictment. On 23 August 2012 the Appellant was sentenced to 8 years, 11 months imprisonment, with a non-parole period of 6 years and 8 months. As at the time of writing, no appeal against that conviction has been determined by the Court of Criminal Appeal. A fresh application for special leave to appeal (against the Court of Criminal Appeal's judgment dated 24 May 2011) was however successful before Justices Heydon and Bell on 15 February 2013.

The grounds of appeal include:

- The Court of Criminal Appeal erred in finding that proof of the conspiracy alleged in Count 2 of the indictment did not require evidence of an agreement entered into on or after 24 May 2001.