HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No S188/2020**

BETWEEN: **ALO-BRIDGET NAMOA**
Appellant

AND: **THE QUEEN**
Respondent

APPELLANT'S OUTLINE OF SUBMISSIONS

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Dated: 11 March 2021

PART I: CERTIFICATION

1. This document may be placed on the internet.

PART II: OUTLINE OF ARGUMENT

2. The principal issue for determination is whether two spouses alone can commit the offence of conspiracy under s.11.5 of the Code. Namoa says they cannot and submits that this is clear from the text of s.11.5, from the decision in *LK* (esp at [107] and [131]) and from the established common law position.

3. Section 11.5(1) refers to "conspires" and "conspiracy". Section 11.5(3) deals specifically with issues relating to parties but makes no mention of the spousal conspiracy rule ("SCR").

4. *LK* [107] states that the words "conspire" and "conspiracy" had an established meaning at common law when the Code was enacted and are used in s 11.5 in accordance with that meaning (subject to express statutory modification – not suggested here). At common law spouses alone cannot "conspire" or be "conspirators": Reply footnote 1; AS [11]-[41]; *Mawji* p.134 ("The words 'conspire' and 'conspiracy' in English criminal law are not applicable to husband and wife alone"); *Midland* 511A. *LK* [131] also makes it clear that s.11.5(1) imports the SCR: the drafters in using "conspires" "may be taken to include the parties to the conspiracy".

5. The Crown says at RS [15] that *LK* [131] refers to parties *in fact* but not *in law*. That is not a sustainable interpretation. In any event (see [4] above), *LK* [107] shows that the SCR is incorporated into s 11.5(1): *LK* [131] is simply a footnote to [107].

6. The Crown also says that although the proposition in *LK* [107] that "conspires" has its established meaning was ratio it is not *binding* ratio, because that proposition was merely assumed without argument in *LK*. However, it was not assumed: the plurality in *LK* determined the correctness of the proposition and lent their authority to it. Indeed *Agius* accepted that *LK* [107] is binding ratio and adopted it: *Agius* [32] ("held"), [54] ("holding"). See also *Agius* at [58]. And this proposition was argued in *LK*: *LK* [95].

7. The Crown says that the statements in *LK* [131] (in relation to parties) are only dicta. However, the notion of parties is within the general principle stated in *LK* [107] and that is made clear by the caselaw (Reply footnote 1 and *Mawji* p.134). *LK* [131] simply acts as a footnote to [107] explaining what is already clear from *LK* [107].

8. The Crown says that *LK* [107] is wrong and should be overruled. However, *LK* [107] was endorsed in *Agius* [32]-[33], [54]-[55] and *Ansari v R* (2010) 241 CLR 299 at

[58]. Nor has any basis for doubting its correctness been established, let alone any basis for overruling it: Reply at [6]-[7].

9. The SCR is well established in all common law jurisdictions: AS [11]-[41]; Reply footnote 1. However, the Crown submits that the SCR was not an established rule "within the criminal law at the time the Code was enacted" (LK [107]) because it had ceased to exist at some time before 1995 (relying on a cessante ratione argument).

10. In support of that submission the Crown relies on *PGA* [30] and says: (i) at common law the SCR came into existence long ago; (ii) there is another common law rule, namely, the unity rule; (iii) "the reason or foundation" of the SCR is the unity rule; (iv) by reason of various statutory provisions the unity rule has ceased to exist; (v) therefore the SCR has ceased to exist (having become a legal fiction).

11. As to [10](ii): the so-called unity "rule" is not a rule of law, but a mere "notion" (GL Williams MLR at 16), "maxim" (*Midland* at 516D, 516F, 525C and GLW at 16, 17), "figurative expression" (GLW at 17), "concept" (*PGA* [45]), "a mere figure of speech" (*Phillips v Barnet* 440) or "conception" (*Tooth* at 615-616) and subject to exceptions and qualifications: AS [64]; *Midland* 520F; *PGA* [45]. Unity is not a "ruling principle" nor a "consistently operating principle": *Tooth* at 615-616. The position is that spouses were treated as if ("quasi") they were one for some purposes only: GLW at 17; *Tooth* 615-616 quoting Bracton.

12. As to [10](iv): the relevant statutory provisions have not caused the unity "rule" to cease to exist. At most, the statutory provisions have abolished some rules which (the Crown asserts) depend (to some extent) on the unity rule and left other rules untouched (e.g. the SCR): AS [87] citing *Mawji* at 135. The intent of the legislatures is to abolish some rules and leave the others. And the Crown must establish that all the rules abolished by statute have as their reason or foundation the unity rule: this Court has stated that the rule relating to non-liability of spouses inter se in tort is not based on unity: *Tooth* 615.

13. As to [10](iii): the Crown cannot show that "*the* reason or foundation" of the SCR is the unity "rule": *Tooth v Tillyer*: AS [65]; *Midland Bank*.

14. Although early authorities refer to unity that is in a context where the SCR was not disputed, there was no full jurisprudential analysis of the SCR's basis and no need to decide that question. When the issue of the basis of the SCR was finally looked at closely last century the courts (and FW Maitland) rejected unity as the basis: *Tooth v Tillyer* at 615-616; *Midland Bank* (Oliver J); *Midland Bank* (CA).

15. Having noted that the SCR related only to a situation of mere agreement (CA: 542C), the judges in *Midland* emphasised various policy factors: the preservation of the sanctity and stability of marriage: 512C; CA: 541C, 542E, 542H-543A; AS [54](a), [57], [53]; that the closeness of the marriage relationship in the context of lenient rules for proof of conspiracy works unfairly against spouses: CA: 542C, 542-543; AS [59]-[60]; that there is a risk of improper pressure by the police: CA: 542D, 542-543; AS [53], [54](b), [55]. And marital confidence has also been mentioned: AS [53], [54](c), [58]: *US v Dege* at 58 (twice) per Warren CJ.

16. The Crown also argues that the common law rule has been impliedly ousted by the terms of s.11.5(1): see the words "person … another person". The argument can only be maintained if the requirement of express statutory modification in *LK* [107] is overruled and there is no basis for overruling it. Moreover, the words "person … person" cannot impliedly oust the SCR because the SCR is incorporated by the word "conspires" thus excluding spousal conspiracies: Reply footnote 1; *Mawji* p.134.9. Namoa does not need to read "person" as if it said "person other than a spouse". And an ouster argument based on "person … person" has been rejected by all courts where it has been argued: *Mawji*, *McKechie*, *Kowbel*.

17. The suggestion at RS [35] and [39] that the intention of the draftsmen on the MCCO Committee would be frustrated if s.11.5 is interpreted as incorporating the SCR should be rejected. This submission offends a basic tenet of statutory construction: the issue is the objective intention of Parliament not the subjective intention of the draftsman (or anyone else): P. Herzfeld *Interpretation* p.9. If the MCCOC had that intention they have failed to translate that intention into the text.

18. No new trial should be ordered. The Crown says it may wish to run a new case based on a pre-marriage conspiracy and may wish to amend the indictment. The Crown should not be permitted to run a new case: it is substantially different and would require an amendment to the indictment. That the conspiracy occurred before marriage is an essential element of the charge: *Midland* p.511A; *R v Won* [42].

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