HIGH COURT OF AUSTRALIA

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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 REPLY

PART I: CERTIFICATION

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

PART II: ARGUMENT

(1) Introduction

2. Namoa's submissions ("AS") may be summarised as follows: (i) the words "conspires" and "conspiracy" in s.11.5(1) of the Code are to be understood as fixed by the common law: those words had an established meaning within the criminal law at the time that the Code was enacted (*LK* at [107]); (ii) those words, with their established legal meaning, deal with questions not addressed in s.11.5 including both "the parties to the conspiracy *and* the sufficiency of their dealings to constitute the agreement" (*LK* at [131]); (iii) that position is "subject to express statutory modification" (*LK* at [107]); (iv) it was well-established at common law at the time that the Code was enacted in 1995 that spouses alone could not be conspirators, that is, parties to a conspiracy; (v) s.11.5 does not expressly oust that well-established common law position; (vi) therefore, spouses alone cannot be conspirators under s.11.5(1) of the Code.

(2) Construction in *LK* of s.11.5(1)

3. The Crown does not dispute [2](i) and (iii) above, but disputes that *LK* states all of proposition [2](ii). Thus, at RS [15], the Crown says that *LK* states that s.11.5(1) picks up the common law on conduct which may amount to an agreement for the law of conspiracy but not the common law on who may be a conspirator. However, the Crown's submission adopts an artificial distinction not borne out by *LK* [131]: *LK* [131] states in terms that the word "conspires", with its established legal meaning, adopts the common law in relation to *two* questions not otherwise addressed in s.11.5, namely, *both* "the parties to the conspiracy *and* the sufficiency of their dealings to constitute the agreement". Thus, *LK* clearly states that s11.5(1) imports the common law on the issue of parties to conspiracy as well as the issue of whether there is an agreement.

(3) *LK* – dicta or binding ratio on the construction of s.11.5(1)?

4. The Crown next submits at RS [17] that if *LK* supports proposition [2](ii) above that statement is obiter because there was no issue in *LK* about parties to the conspiracy. However, *LK* at [131], [133]-[137] and [141] shows clearly that that is not correct.

5. The Crown also submits at RS [17] that even if proposition [2](i) is ratio in *LK* it is not binding ratio because the plurality in *LK* "merely assumed its correctness without argument". However, it cannot fairly be said that the plurality in *LK* merely assumed the correctness of proposition [2](i). The plurality determined the correctness of this specific proposition and lent its authority to its correctness. It was critical to the reasoning in *LK* on the central issues in that case.

(4) Is *LK* wrong in its construction of s.11.5(1)?

6. At RS [18] the Crown submits that, assuming *LK* establishes propositions (i)-(iii) (at [2] above), those propositions are wrong because: they are contrary to the text of s.11.5; they run contrary to the statutory context in the Code; they are contrary to the extrinsic materials; they are contrary to ordinary principles of construction; and they are contrary to *Pickett v WA* (2020) 94 ALJR 629 at [22]-[23]. However, none of these points is developed in RS. Moreover, the reasoning in *LK* on propositions [2](i) and (iii) was recently endorsed by this Court in *Agius v R* (2013) 248 CLR 601 at [32]-[33] and [54]. Further, *Pickett* at [23] clearly supports proposition (i) in *LK*.

(5) Should *LK* be overruled?

7. The Crown next submits that propositions (i)-(iii) in LK (at [2] above), should be overruled. However, the Crown has made little if any headway in RS in establishing that those propositions are wrong, let alone clearly wrong. The Crown has not identified factors justifying reconsideration of *LK*, let alone "a principled reason to depart from it": *Kalbasi v Western Australia* (2018) 264 CLR 62 at [9]. The statements in *LK* which the Crown seeks to impugn were based on principles carefully worked out in the significant succession of cases cited in *R v Wyles, ex parte Attorney-General* [1977] Qd R 169 at 177-182 (cited in turn in *R v LK* (2008) 73 NSWLR 80 at [49] per Spigelman CJ). Those statements were made by five justices of the Court in paragraphs with which Heydon J specifically agreed at [145] and which French CJ did not contradict. And those statements are not said to have occasioned any inconvenience. Moreover, propositions (i) and (iii) were identified as holdings of *LK* in *Agius* and had a "direct bearing on the resolution of" *Agius*: *Agius v R* (2013) 248 CLR 601 at [32]-[33] and [54]. Those holdings have also been applied by intermediate appellate courts: eg *B v R* (2008) 76 NSWLR 533 at [33]; *Miles v R* [2014] ACTCA 18 at [22]; *Papadimitriou v R* (2011) 214 A Crim R 50 at [90]; *Cranney v R* (2017)

269 A Crim R 449 at [260]-[261]. Accordingly, the Crown has not identified a "very good cause" to displace the "conservative cautionary principle against overruling earlier decisions": *Alqudsi v R* (2016) 258 CLR 203 at [67] per French CJ.

(6) Has the common law rule on spouses "ceased to exist"?

8. On the assumption that its arguments on statutory interpretation are rejected, the Crown submits that even if the common law as to parties to conspiracy is imported by s.11.5(1), the common law rule on spouses had *ceased to exist* before the Code was enacted in 1995. It is noteworthy that the Crown does not submit that any of the cases and text writers cited at AS [11]-[67] is wrong in adopting the common law rule. The Crown submission is much narrower.

9. In support of its argument, the Crown makes the following specific submissions: (i) the only rationale for the common law rule on spouses is the unity principle, namely, that husband and wife are but one person in law; (ii) for a variety of reasons, the unity principle had ceased to exist prior to 1995 when the Code was enacted; (iii) therefore, the common law rule has ceased to exist (in accordance with the Latin maxim *cessante ratione legis, ipsa lex cessat*). For this argument to succeed the Crown must establish all of submissions (i)–(iii).

10. Submission (i) requires the Crown to establish that the *only* rationale for the common law rule is the unity principle (*viz* that husband and wife are one person in law), that there is no other rationale for the common law rule and, in particular, that (contrary to AS [49]-[67]) public policy is not the rationale of the rule.

11. The Crown in RS makes a number of points about the public policy rationale which require a response. At RS [54] the Crown attempts to undercut *Midland Bank* by asserting that the discussion of criminal conspiracy in that case was obiter. However, that is incorrect. At RS [54] the Crown asserts that the statements in *Midland Bank* about criminal conspiracy were only "tentative". This too is incorrect. At RS [52](c) and [65](a) the Crown submits that the public policy favouring stability of marriages and non-interference with marital consortium "can no longer be regarded as an accurate reflection of the policy of the law" because the *Family Law Act* 1975 (Cth) introduced no fault divorce. That submission is manifestly unsustainable. Indeed, it was noted by Senator Murphy in the Parliament that that Act was intended to "buttress, rather than undermine, the stability of marriage": Senate Hansard, 13.12.73 at 2827-8.

12. At RS [52](a) the Crown asserts that reliance on marital confidence as a public policy factor is misplaced because there is "no confidence in [an] iniquity". However, the deployment of this glib one liner is based upon the mistaken assumption that permitting spouses to be charged with conspiracy will only lead to the divulging of marital confidences when both

spouses are guilty. However, the proof and defence of such charges (before and after trial) inevitably leads to the revelation of such confidences even when the spouses are innocent and even where there is no prima facie case of conspiracy.

13. At RS [65](b) the Crown submits that the public policy in preserving marital confidences is somehow undercut by the fact that evidence of such communications is admissible and not privileged. However, it is precisely because such confidences may be revealed in evidence that abolition of the rule would undermine that public policy. And communications may be confidential without being privileged. At RS [65](c) the Crown challenges Namoa's point at AS [59]-[60] (that the lenient rules on proof by the Crown of conspiracy would expose spouses to potential charges simply by establishing the ordinary incidents of marital association) by asserting that a conspiracy charge requires proof of an agreement and proof of knowledge. However, Namoa's point is that it is inappropriate and unfair for such proofs to be facilitated by these lenient principles in the marriage context. Contrary to RS [65](c), that these principles unduly favour the Crown in this context is not something which can be raised with the jury. At RS [52](b) the Crown submits that it is fanciful to suggest that there is a risk that the possibility of conspiracy charges against one spouse could be used to pressurise the other spouse into making admissions (AS at [52]). That submission is naïve and contrary to the view of the UK Law Commission: AS [55]. At RS [64] and [66] the Crown submits that Namoa is inviting this Court to invent new public policy justifications for the common law rule and that this is a matter for the legislature. However, the policy grounds relied upon by Namoa are not new and all of them have received endorsement. Moreover, it is the question of whether there should be any alteration of the well-established common law rule that is the issue which should be determined by the legislature.

14. At RS [52](b) and [65](c) the Crown asserts that if Namoa's public policy arguments are good they would be equally applicable to charges other than conspiracy and to conspiracies involving both spouses and third parties. However, the public policy arguments in these other contexts are either inapplicable or of less weight. For that reason, various legislatures (and Law Reform Commissions) have maintained the spousal rule for conspiracies between spouses but not otherwise.

15. In short, the Crown has not established submission (i) (at [9] above) because the Crown cannot show that the common law rule depends upon the unity principle. Nor can the Crown establish submission (ii) (at [9] above) when only some of the consequences of that principle have been removed by statute: AS [87].

16. As to submission (iii) (at [9] above), reliance upon the *cessante ratione* principle by the Crown is misplaced. As noted by this court in *Lamb v Cotogno* (1987) 164 CLR 1 at 11 (mutatis mutandis): the Crown cannot justify the abrogation of the common law rule merely because that seems to be a reasonable or desirable course in the light of the statutory provisions to which the Crown points; that legislation does not expressly or impliedly abrogate the common law rule; the *cessante ratione* maxim cannot be read literally and is erroneous and misleading in its widest signification; that maxim goes no further than to reflect the process of legal reasoning whereby previous authority may be distinguished or restricted in its operation; the maxim may afford a useful guide in the making of a permissible choice but it does not itself create the choice; the maxim is not a licence to courts to change the common law rule if it appears to them that the circumstances in which it was framed have changed.

17. Finally, at RS [61]f the Crown asserts that the unity principle is a fiction. However, if the rationale of the common law spousal rule is public policy rather than the unity principle (as Namoa asserts) this submission leads nowhere. If Namoa is correct, the upshot is that the present understanding of the rationale of the common law rule (viz. public policy) differentiates it from the original understanding of the basis of the rule (viz. the unity principle): *Barclay v Penberthy* (2012) 246 CLR 258 at [40].

(7) Is the common law rule ousted by implication?

18. On the assumption that *LK* is wrong in requiring "express statutory modification", the Crown at RS [20]-[34] asserts that the presence of the words "person … another person" in s.11.5(1) impliedly ousts the operation of the common law rule. This is misconceived. Namoa's argument depends upon the words "conspires" and "conspiracy" not on asserting that a spouse is not a person. For there to be a conspiracy (and conspirators) there must be persons other than spouses involved[1].

(8) Orders if the appeal is allowed

19. The Crown should not be granted a retrial to run a new case.

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G. O'L. Reynolds

Dated: 12 February 2021

[1] See, for example, D. Lanham, M. Weinberg *Criminal Fraud* (1987) at p.443: "[a]t common law an agreement between husband and wife is not a conspiracy"; Gibbs et al *Review of Commonwealth Criminal Law* (1990) at [39.3]: "[a]t common law there can be no criminal conspiracy if the only two parties to the agreement are husband and wife"; *Ross on Crime* (8^{th} ed) at [3.6625]: "[a]t common law husband and wife cannot conspire together"; Stephen *Commentaries on the Laws of England* (21^{st} ed) vol 2 at p.491: "nor can any agreements to which [husband and wife] alone are parties amount to a criminal conspiracy"; J.W. Bryan *The Development of the English Law of Conspiracy* (1909) at 24: "[h]usband and wife … were … incapable of conspiracy with one another"; *Kowbel v R* [1954] SCR 498 at 503: "it is well settled … that a husband and wife cannot alone conspire".