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

RESPONDENT'S SUBMISSIONS

Part I: Internet certification

1. The respondent certifies that this document is in a form suitable for publication on the internet.

Part II: Statement of issues

2. The issue in the appeal is identified in [2] of the Appellant's Written Submissions (**AWS**).

Part III: Section 78B notice

3. The respondent certifies that it considers that no notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

Part IV: Statement of facts

4. In addition to the facts set out at AWS [6]–[9], the following should be noted.

5. On the application for a permanent stay, Fagan J did not make a finding that the appellant and Mr Sameh Bayda were in fact married: *R v Bayda; R v Namoa (No 3)* [2018] NSWSC 1381; (2018) 274 A Crim R 1 (**Stay Reasons**), [18], [20]. There was evidence on the stay application that the appellant and Mr Bayda undertook a marriage

ceremony on 30 December 2015 that was effective to constitute them man and wife according to the beliefs of Sunni Islam: Stay Reasons, [21]. However, unless saved by s 48(3) of the *Marriage Act 1961* (Cth), the marriage was not conducted in accordance with the provisions of Division 2 of Part IV of the Act and was not a valid marriage: Stay Reasons, [26]–[28]. If his Honour had concluded that the *Criminal Code* (Cth) (**Code**) contained an immunity for conspiracy between spouses, his Honour said that it would have been necessary for the jury to determine whether their marriage had been solemnised: Stay Reasons, [18].

6. Because of his Honour's conclusion that the Code does not contain an immunity for conspiracy between spouses, the existence of a marriage between the appellant and Mr Bayda was not one of the issues in the trial: Stay Reasons, [20].

Part V: Respondent's argument

Statutory construction

7. Contrary to the appellant's submissions, the critical issue on the appeal is a question of statutory construction of the Code, not the application of the common law.

8. Section 11.5(1) of the Code provides that:

> (1) A person who conspires with another person to commit an offence punishable by imprisonment for more than 12 months, or by a fine of 200 penalty units or more, commits the offence of conspiracy to commit that offence and is punishable as if the offence to which the conspiracy relates had been committed.

9. The Court of Criminal Appeal was correct to conclude that "[o]n the clear language of the statute, a husband and wife are each a 'person' and can be guilty of conspiring with each other": *Namoa v R* [2020] NSWCCA 62, [85]; (2020) 351 FLR 266 (**CCA Reasons**).

10. The appellant's submissions invert the proper principles for interpreting a statutory code. They start with what is asserted to be the common law position concerning whether spouses can commit conspiracy – see AWS [11]–[67] – and then ask whether the Code has *expressly* ousted the supposed common law rule: AWS [3], [75]. This

approach is said to be required by the Court's decision in *R v LK*:[1] see AWS [68]–[71]. In fact, *R v LK* provides no support for the appellant's approach.

***R v LK* and the principles for interpreting codes**

11. The principles for interpreting a code are clear and well-established. The Code is to be construed according to its natural meaning without any presumption that its language was intended to do no more than restate the common law.[2] "It is not the proper course to begin by finding how the law stood before the Code, and then to see if the Code will bear an interpretation which will leave the law unaltered."[3]

12. There are two established exceptions to using the common law to interpret a code.[4] The first is where a word has a well-established technical meaning under the pre-existing law and the code uses the word without definition.[5] The second is where the code is ambiguous. However, ambiguity cannot be identified by reference to the common law.[6]

13. *R v LK* concerned the first exception.[7] The issue in that case was whether it was necessary to prove that a person charged with conspiracy under s 11.5 of the Code to commit an offence against s 400.3(2) of the Code – dealing with $1,000,000 or more being reckless as to the fact that the money was proceeds of crime – knew or believed that the money was proceeds of crime. The Court concluded that it was.[8]

14. Part of the reasoning was that the verb "conspires" in s 11.5(1), being a word with an established legal meaning and being used without definition in the Code, was to be

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1 (2010) 241 CLR 177.

2 See, eg, *Brennan v The King* (1936) 55 CLR 253, 263 (Dixon and Evatt JJ); *R v LK* (2010) 241 CLR 177, [97] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Pickett v Western Australia* (2020) 94 ALJR 629, [22] (Kiefel CJ, Bell, Keane and Gordon JJ).

3 *Brennan v The King* (1936) 55 CLR 253, 263 (Dixon and Evatt JJ), quoted in *Pickett v Western Australia* (2020) 94 ALJR 629, [22] (Kiefel CJ, Bell, Keane and Gordon JJ).

4 See *Stuart v The Queen* (1974) 134 CLR 426, 437 (Gibbs J), quoted in *Pickett*, [23].

5 *R v LK* (2010) 241 CLR 177, [97].

6 *Mellifont v Attorney-General (Queensland)* (1991) 173 CLR 289, 309 (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ).

7 (2010) 241 CLR 177, [96]–[97].

8 (2010) 241 CLR 177, [117], [122].

understood as fixed by the common law subject to express statutory modification.[9] It was also said at [97] that the meaning of the word "conspiracy" in s 11.5(1) was to be understood as fixed by the common law. That is not to say that the Code adopts, or creates an offence that is identical to, the common law offence. The provisions of the Code operate expressly to "create" the relevant offence.[10] Here, as the Court concluded in *LK*, the law creating the offence is s 11.5(1).[11] No question arises of the court creating new offences or extending the criminal law.[12] The task is to construe the Code. It is plain from the text of s 11.5(1) that the word "conspiracy" in s 11.5(1) is merely descriptive of the offence created by s 11.5(1) itself. As the joint reasons stated at [131], it is the verb "conspires" in s 11.5(1) which creates the physical element of the offence:

> Section 11.5(1) makes it an offence to conspire with another person to commit an offence punishable by imprisonment for more than twelve months or by a fine of 200 penalty units or more (a non-trivial offence). It reads naturally as the law creating the offence. It is by the adoption of the word "conspires", with its established legal meaning, that the drafters of the Code chose to deal with questions that are not otherwise addressed in s 11.5. These may be taken to include the parties to the conspiracy and the sufficiency of their dealings constitute the agreement. [citations omitted] Section 11.5(1) is the specification of a physical element of the offence, namely, conspiring with another person to commit a non-trivial offence. Central to the concept of conspiring is the agreement of the conspirators.

15. Contrary to AWS [75], the reference in this passage to "the parties to the conspiracy" is not concerned with the legal *capacity* of persons to be conspirators. The verb "conspires" identifies the nature of the *conduct* which must be engaged in, central to which is "the agreement of the conspirators". The common law technical meaning of "conspire" requires an agreement to perform the *actus reus* of an offence with knowledge of facts that make the proposed acts unlawful.[13] Properly understood, [131] is alluding to the fact that the common law is relevant to determining whether an individual has "conspired" i.e. is in fact a party to an agreement to commit a non-trivial

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9 (2010) 241 CLR 177, [97], [107], [131].

10 Code ss 3.1, 3.2.

11 (2010) 241 CLR 177, [131].

12 Contra AWS [62].

13 *R v LK* (2010) 241 CLR 177, [94], [114], [131].

offence, and whether the parties' dealings are sufficient to constitute a relevant agreement: see *R v Orton* [1922] VLR 469, 473 (Cussen J) and *Gerakiteys v The Queen* (1984) 153 CLR 317, cited by the joint reasons. The nature of the conduct in a conspiracy between spouses is exactly the same as between non-spouses.

16. Accordingly, there is nothing in *R v LK* which suggests that the supposed common law rule that spouses alone cannot be conspirators is picked up by the verb "conspires". The identity of the participants in the conduct required to commit the offence is addressed separately by the words "*[a] person* who conspires *with another person*".

17. In any event, the observation in *R v LK* at [131] relied upon by the appellant is clearly *dicta*. There was no issue in the case concerning the parties to the conspiracy, let alone any issue concerning the capacity of spouses to commit the offence in s 11.5(1). Furthermore, since the Crown ultimately conceded (see *R v LK* at [107]) that the word "conspires" had its established common law meaning, the case is not authority for that proposition.[14]

18. If, contrary to the submissions above, it is thought that *R v LK* does stand for the wider proposition that the offence of conspiracy under s 11.5 of the Code picks up all aspects of the common law offence of conspiracy (including the alleged rule that spouses alone cannot conspire) and that such aspects apply unless "expressly modified", then the decision should be departed from. Neither proposition was argued in *R v LK*. As to the first aspect, the conclusion is contrary to text and context (as addressed further below). As to the second aspect, it is inconsistent with ordinary principles of statutory construction. There is no basis for a special principle requiring *express* ouster of the common law. Inconsistency or necessary implication must be sufficient. It is inconsistent with the principles for interpreting codes. The proposition that the verb "conspires" has a technical meaning is very different from concluding that all aspects of the common law offence of conspiracy are picked up, let alone that they apply unless expressly ousted. The latter cannot stand with the Court's more recent analysis

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[14] See *CSR Ltd v Eddy* (2005) 226 CLR 1, [13] (Gleeson CJ, Gummow and Hayne JJ); *Bell Lawyers Pty Ltd v Pentelow* (2019) 93 ALJR 1007, [28] (Kiefel CJ, Bell, Keane and Gordon JJ).

concerning codes in *Pickett v Western Australia*.[15] And, as explained below, the text and context of s 11.5 deny the correctness of the proposition.

Text and context of s 11.5

19. The ordinary principles of statutory construction direct attention to the statutory text, read in light of the context, including the Code as a whole and relevant extrinsic materials.[16]

Text: a "person" and "another person" include husband and wife

20. "Person" is defined in the Dictionary to the Code as follows:

> ***person*** includes a Commonwealth authority that is not a body corporate, and ***another*** has a corresponding meaning.
>
> Note: This definition supplements subsection 2C(1) of the *Acts Interpretation Act 1901*. That subsection provides that person includes a body politic or corporate as well as an individual.

21. Applying the ordinary meaning of the text, a husband and wife may be guilty of conspiracy: CCA Reasons, [82], [85]. A husband and wife are not the same person. It is not an open construction to interpret "another person" in s 11.5(1) to mean "another person, other than the first person's husband or wife".

22. The appellant's only answer to the ordinary meaning of the language is to contend that the decisions of the Privy Council, Canadian Supreme Court and New Zealand Court of Appeal support the appellant's position: AWS [77]. In fact, they do not.

23. In *R v McKechie* [1922] NZLR 1 a 3:2 majority of the New Zealand Court of Appeal held that a husband and wife could not commit conspiracy against s 219 of the *Crimes Act 1908* (NZ). However, that Act did not wholly codify the common law. Section 40 provided that "all rules and principles of the common law which render any circumstances a justification or excuse for any or omission, or a defence to a charge" remained in force except as altered or inconsistent with the Act. The majority (Stout CJ and Ostler J dissenting) characterised the law rule regarding conspiracy

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15 [2020] HCA 20; (2020) 94 ALJR 629, [22]–[23].

16 See, eg, *FCT v Consolidated Media Holdings* (2012) 250 CLR 503, 519 [39] (the Court).

between married persons as a defence at common law to the indictment, such that s 40 was engaged.[17] It held that "at common law, as regards a charge of conspiracy, husband and wife are not two persons but only one, and there is no indication that that basic rule is reversed".[18]

24. The reasoning in *Kowbel v R* [1954] SCR 498 was the same. Section 573 of the *Criminal Code* (Can) relevantly provided that "[e]very one is guilty of an indictable offence … who … conspires with any person to commit any indictable offence". However, as in *McKechie*, s 16 of the *Criminal Code* (Can) preserved the common law in the same terms as s 40 of the *Crimes Act 1908* (NZ).[19] Taschereau J (Kerwin, Estey and Cartwright JJ agreeing) held that the common law rule that "husband and wife could not be found guilty of conspiracy, because judicially speaking they form but one person, and are presumed to have but one will" was not displaced.[20] Taschereau J characterised the "incapacity [of spouses] to conspire" as "one of those old common law defences, which an accused person is at liberty to raise before the courts of this country" (by reason of s 16).[21]

25. Finally, in *Mawji v The Queen* [1957] AC 126, the Privy Council considered s 4 of the Penal Code of Tanganyika which provided that expressions used in the code should be presumed "except as may be otherwise expressly provided" to have "the meaning attaching to them in English criminal law" and should be "construed in accordance therewith". It was held that the common law rule that a husband and wife "cannot alone be found guilty of conspiracy, for they are considered in law as one person, and are presumed to have but one will"[22] was incorporated into a provision that "[a]ny person commits a misdemeanour who … conspires with any other person to … obstruct … the course of justice."

26. In each of those cases, the statute contained an express statutory provision that applied the rules of the common law, and those rules were held at the time to include a rule

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17 [1922] NZLR 1, 12.

18 [1922] NZLR 1, 12.

19 [1954] SCR 498, 499.

20 [1954] SCR 498, 499–500.

21 [1954] SCR 498, 500.

22 [1957] AC 126, 134.

that for the purposes of conspiracy husband and wife were considered in law to be one person. Obviously enough, if one starts with the fiction that husband and wife are one person then general language – "a person who conspires with another person" – will not displace that fiction.

27. These decisions placed an artificial and strained construction on the words of the relevant conspiracy provision by reason of the application of a rule incorporated by another express provision of the statute. This reasoning has no application to the Code which contains no equivalent to s 40 of the *Crimes Act 1908* (NZ) or s 4 of the Penal Code of Tanganyika. Without such a provision, the language of s 11.5(1) is not open to the construction advanced by the appellant.

Context: other provisions of the Code

28. The Code read as a whole confirms the ordinary meaning of s 11.5. Other provisions of the Code indicate that a person's spouse is "another person" for the purposes of the Code, and that where Parliament intends to exclude a spouse from "another person" it does so expressly.

29. For example, an element of the offence of associating with terrorist organisations in s 102.8(1) is that on two or more occasions (s 102.8(1)(a)(i)):

> the person intentionally associates with another person who is a member of, or a person who promotes or directs the activities of, an organisation.

30. Section 102.8(4)(a) specifically excludes certain associations with a "close family", which is defined to include a person's spouse: see s 102.1(1).

31. Another example is a person associating with "another person" in support of serious organised criminal activity, which again contains an exception for associations with a "close family member", which include "the person's spouse": ss 390.1(1) and 390.3(6)(a) of the Code.

32. A further example is s 105.34 which provides that, subject relevantly to s 105.35, "a person" being detained under a preventative detention order is not entitled to contact "another person". However, s 105.35 provides that a person is entitled to contact a "family member", which is defined to include a spouse: see ss 105.35(2), 105.35(3)(a).

33. In each of these provisions, a person's spouse is treated as "another person" and the rules applicable to that category of person are specified. Had the legislature intended to exclude spouses from the operation of s 11.5 of the Code it would have specifically prescribed their exclusion. It did not do so. The exclusion of spouses from other provisions of the Code, but not s 11.5, by necessary implication excludes any construction of "person" in s 11.5 which excludes spouses, such as to incorporate the rule of the common law that spouses alone cannot commit conspiracy.

34. A related problem with the appellant's construction is that according to the common law rule a person who conspired with their spouse and another person or persons was guilty of an offence. The text of s 11.5 cannot accommodate that additional complexity in the common law position, and it would be contrary to the explicit treatment of particular categories of persons elsewhere in the Code.

Context: extrinsic materials

35. The ordinary meaning of s 11.5 is further confirmed by the clear statement of intention that emerges from the extrinsic materials. Those materials may be considered either under s 15AB(1) of the *Acts Interpretation Act 1901* (Cth) or the common law. At common law, there is no requirement of ambiguity before the Court may consider extrinsic materials.[23]

36. The Court in *R v LK*[24] placed considerable reliance on the extrinsic materials which led to the Code and, in particular, the Gibbs Committee Report and the *Final Report* of the Model Criminal Code Officers Committee (**MCCOC**). As noted in *R v LK* at [102], Chapter 2 of the Code "is based upon the draft in the MCCOC Report."

37. On this topic, the Gibbs Committee Report stated (at [39.4]):

> The Review Committee can see no valid reason of social policy why the rule that there can be no conspiracy between husband and wife should be retained. That rule is based upon a fiction which is unacceptable in modern society. It is anomalous, since a wife may be guilty as an accessory to an offence committed by her husband although she is not capable of conspiring to commit that offence.

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23 See, eg, *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, [14] (Kiefel CJ, Nettle and Gordon JJ), [36]–[37] (Gageler J).

24 (2010) 241 CLR 177, [51]–[56], [99]–[106].

38. As the Court of Criminal Appeal observed (CCA Reasons [78], [80]) the MCCOC took a similar view. In its chapter on "General Principles of Criminal Responsibility", the MCCOC stated that the draft code did not provide protection for spouses (at p 103):

> **Parties issues**
>
> Conspiracy raises a number of issues which might be described as issues related to the "parties" to the agreement.
>
> No protection is provided for spouses. Clearly a husband and wife can be guilty of conspiring with each other. Marital immunity is outdated; any objections to husband/wife conspiracies are objections which go to the nature of the conspiracy offence itself; see *Mawji* [1957] AC 126; *Kowbel* [1954] SCR 498 and discussion by the Gibbs Committee at para 39.3. Some Griffith Codes are also outdated on this issue: see s.33 Queensland Code (recommended for repeal by O'Regan, p5) and s.297(2) Tasmanian Code, both taking the common law position.

39. This material confirms that the drafters of the Code were using the words "person" and "another person" in accordance with their ordinary meanings. It also confirms that it was not the purpose of s 11.5 merely to pick up all aspects of the common law (including in this case a common law immunity for spousal conspiracies), unless expressly ousted. While the appellant's appeal is based principally on *LK*, her construction would obviously frustrate the intention disclosed in the secondary materials that were critical to the reasoning of the Court in *LK*.

Conclusion on statutory construction

40. For the reasons above, orthodox principles of statutory construction (including those applicable to codes) confirm that, whatever the position at common law, spouses alone may commit an offence of conspiracy against s 11.5 of the Code.

At the time of enactment of the Code, the common law rule had ceased to exist

41. In any event, at the time of the enactment of the Code in 1995, the common law rule that a husband and wife alone could not commit conspiracy had ceased to exist. As stated in the joint reasons in *PGA v The Queen*:[25]

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[25] (2012) 245 CLR 355, [30] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ). See also *Barclay v Penberthy* (2012) 246 CLR 258, [40] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

> …where the reason or "foundation" of a rule of the common law depends upon another rule which, by reason of statutory intervention or a shift in the case law, is no longer maintained, the first rule has become no more than a legal fiction and is not to be maintained.

42. The common law rule was based on the proposition that husband and wife were one person in law and therefore had one will – the "unity doctrine". However, by the time of the enactment of the Code in 1995, the unity doctrine was no longer the law. It follows that by 1995 at the latest the common law rule had ceased to exist (CCA Reasons [66]) and is not incorporated into the Code.

10 *The unity doctrine*

43. The common law rule for which the appellant contends was premised on the unity doctrine. Glanville Williams traces the doctrinal basis of the rule to Staunford and Hawkins.[26] As quoted at AWS [17], the 1607 edition of Staunford's *Pleas of the Crown* based the rule on the proposition that husband and wife represent a single person. Likewise, in the first edition of Hawkins' *Pleas of the Crown*,[27] discussing the 1304 *Ordinance concerning Conspirators*[28] which defined conspiracy, it is said (original capitalisation; emphasis added):

> It plainly appears from the Words of the Statute, That one Person alone cannot be guilty of Conspiracy within the Purport of it; from when it follows, That if all
20 the Defendants who are prosecuted for such a Conspiracy be acquitted but one, the Acquittal of the rest is the Acquittal of that one also; also upon the same Ground it hath been holden, That no such Prosecution is maintainable against a Husband and Wife only, *because they are esteemed but one Person in Law, and are presumed to have but one Will*.

44. Glanville Williams noted that as at 1947 there seemed to be no case in which the rule had been applied in an English Court.[29] As to the Year Book cases cited at AWS [12]–[14], the first two allude to arguments based upon the rule but record no determination

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26 Glanville Williams, "The Legal Unity of Husband and Wife" (1947) 10 Mod L Rev 16, 20.

27 William Hawkins, *A Treatise of the Pleas of the Crown* (1716) Book 1 p 192.

28 *Statutes of the Realm*, Vol 1, p 145.

29 Glanville L Williams, "The Legal Unity of Husband and Wife" (1947) 10 Mod L Rev 16, 21.

on the point. The third was a civil case in trespass.[30] The earliest actual cases otherwise relied upon by the appellant in its submissions are *R v Annie Brown* (1896) 15 NZLR 18 and *DPP v Blady* [1912] 2 KB 89. Neither case concerned conspiracy. In the former, Prendergast CJ expressed the *dictum* that "a husband and wife, being one in the eye of the law, cannot be indicted for conspiracy without alleging that others were in the conspiracy".[31] In the latter case, Lush J (dissenting) said: "Husband and wife being one person could not be indicted or convicted of conspiracy one with the other."[32] The scantness of actual authorities concerning the rule was noted by Winfield.[33]

10 45. The justification for the rule in all of these pre-20th century materials was that husband and wife were legally one person. An associated concept (which does not reflect any freestanding reason or foundation for the rule) was that being one person in law, husband and wife were presumed to have but one will.

46. It was not until the 20th century that there were actual decisions recognising the common law rule: see *McKechie*, *Kowbel* and *Mawji*, discussed above. Significantly in each of those decisions the rule was justified only on the basis of the doctrine of unity.[34] The same applies to the decision of the Hong Kong Court of Appeal in *R v Cheung Ka-Fai*.[35] The United States Supreme Court rejected the common law rule in *United States v Dege* 364 US 51 (1960).

20 47. The appellant cites no Australian case which applied the common law rule before the enactment of the Code. The only decision of an Australian superior court cited by the

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30 See generally Percy H Winfield, *History of Conspiracy and Abuse of Legal Procedure* (1921, Cambridge University Press) pp 64, 88; Glanville L Williams, "The Legal Unity of Husband and Wife" (1947) 10 Mod L Rev 16, 20 fn 16.

31 *R v Annie Brown* (1896) 15 NZLR 18, 32.

32 *DPP v Blady* [1912] 2 KB 89, 92.

33 Percy H Winfield, *History of Conspiracy and Abuse of Legal Procedure* (1921, Cambridge University Press) pp 64, 88.

34 *R v McKechie* [1922] NZLR 1, 12; *Kowbel v R* [1954] SCR 498, 499–500; *Mawji v The Queen* [1957] AC 126, 134

35 [1995] 2 HKCLR 184, 194 – "a husband and wife are legally incapable of conspiring together, for, upon the doctrine of conjugal unity, they are considered as constituting but one juridic person: and being one person in law, they are presumed to have but one will".

appellant is the decision of the Queensland Court of Appeal in *R v Byast*.[36] As Payne JA explained (CCA Reasons, [64]) in that case the two people who were charged with conspiracy were not lawfully married. The Court assumed, without deciding, that at common law husband and wife alone cannot be guilty of conspiracy. Again, the reason for the rule was stated to be "because they are considered as the one person, possessed of the one will".[37]

48. Accordingly, contrary to the appellant's submissions, there is nothing in the decisions referring to the existence of the common law rule to suggest that it was based on broader notions of public policy. The explicit reasoning in *every case* was the doctrine that husband and wife were in law one person: cf AWS [63]. The tentative suggestion in *Tooth & Co Ltd v Tillyer* (1956) 95 CLR 605, 615–616 (partially quoted at AWS [65]) that "one may suppose" that the doctrine of unity was an *ex post facto* justification for the rule that husband and wife could not sue each other in tort says nothing about the basis of the common law rule concerning criminal conspiracy.

No other rationale for the rule

49. The appellant relies on four sources to suggest that the common law rule had other rationales: see AWS [49]–[55].

50. The first in time is the 1975 report of the Victorian Law Reform Commission titled *Criminal Liability of Married Persons (Special Rules) Report No 3*. The second in time is the 1976 report (Law Com No 76) of the UK Law Commission titled *Conspiracy and Criminal Law Reform*. Both reports recommended against changing the existing common law, and the latter led to the enactment of the *Criminal Law Act 1977* (UK), s 2(2)(a) which expressly provided an immunity for spouses from a charge of criminal conspiracy.

51. A fundamental difficulty with the reliance on these reports is that they are the product of law reform commissions. They seek to provide public policy reasons which might

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36 [1999] 2 Qd R 384.

37 [1999] 2 Qd R 384, 385.

be argued to justify the rule, not to summarise reasons found in the decisions of courts or to provide a historical account of the genesis or foundations of the rule.

52. Another difficulty is that the justifications advanced are dubious and contestable:

(a) It is not apparent how making a husband and wife liable for conspiracy is likely to have a significant effect on discouraging marital confidences: there is no confidence in iniquity. In any event, the modern common law recognises that marital confidences cannot trump ordinary principles of law.[38]

(b) The suggestion that removing the rule "might offer excessive scope for pressure to be applied to spouses" is rather fanciful: cf AWS [55]. Another weakness of the argument is as the Gibbs Committee stated "that no steps have been taken to negate other ways in which a wife may become liable for a crime: she may become liable as an accessory or presumably for inciting her husband to commit a crime and there may be a conviction for conspiracy between the husband, the wife and a third person."[39] Nor is there any sound reason why this policy rationale (or any of the others posited in the commission reports) would warrant an immunity in respect of conspiracies as between spouses only, but not in respect of conspiracies between spouses and others. Even where a third party is part of the agreement, the same considerations about spousal confidences and pressure would apply.

(c) The policy justifications about ensuring the stability and sanctity of marriage are substantially undercut by the introduction of "no fault" divorce in Australia following the enactment of the *Family Law Act 1975* (Cth).

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38 See *Rumping v DPP* [1964] AC 814 (no common law privilege attaching to marital communications); *Australian Crime Commission v Stoddart* (2012) 244 CLR 554 (no common law privilege against spousal incrimination).

39 *Review of Commonwealth Criminal Law, Interim Report: Principles of Criminal Responsibility and Other Matters*, p 380 [39.3].

53. As was noted by the Gibbs Committee,[40] the weakness of the policy justifications led to the UK Law Commission changing its view about the rule in its 1989 report concerning codification of the criminal law.[41]

54. The third source the appellant relies upon is the decision of Oliver J in *Midland Bank Trust Co Ltd v Green (No 3)* [1979] 1 Ch 496. However, that case concerned the tort of conspiracy, not criminal conspiracy, and the tentative *dicta* expressed in that case about criminal conspiracy must be understood in the context that s 2(2)(a) of the *Criminal Law Act 1977* (UK) provided a statutory immunity to spouses from criminal conspiracy: see [1979] 1 Ch 496, 510–511; CCA Reasons, [70].

10 55. In the passage quoted by the appellant at AWS [49], Oliver J *inferred* that because the doctrine of unity was a fiction the continued existence of the criminal immunity – preserved by statute – must rest on some public policy basis "for the preservation of the sanctity of marriage". In other words, Oliver J's reasoning was an attempt to rationalise the statutory immunity created by the *Criminal Law Act 1977* in circumstances where the basis of the equivalent common law doctrine (which his Honour described as "ancient and not altogether logical"[42] and deriving from a "primitive and inaccurate maxim"[43]) had ceased to exist. It provides no basis for saying that the common law rule concerning criminal conspiracy was in fact based on something other than the unity doctrine. As the above analysis demonstrates, any such
20 suggestion is historically wrong.[44] To the extent that Oliver J reasoned that an independent and "more logical analysis" was later found in the notion that a wife "had no independent will of her own (her will being overborne by that of her husband, under whose potestas she was)",[45] this is not consistent with the historical accounts, which

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40 *Review of Commonwealth Criminal Law, Interim Report: Principles of Criminal Responsibility and Other Matters*, p 379 [39.2].

41 UK Law Commission, *A Criminal Code for England and Wales* (Law Com No 177, 1989), Vol 2, pp 241–242 [13.30].

42 *Midland Bank Trust Co Ltd v Green (No 3)* [1979] 1 Ch 496, 511.

43 *Midland Bank Trust Co Ltd v Green (No 3)* [1979] 1 Ch 496, 525.

44 It should be noted that Oliver J, at 520, stated that it was "beyond doubt" that the "rule stems originally from the biblical theory of husband and wife as one flesh".

45 *Midland Bank Trust Co Ltd v Green (No 3)* [1979] 1 Ch 496, 521.

express the proposition that husband and wife have "but one will" as an outworking of the notion that they are but one person.

56. On appeal, Lord Denning MR rejected the doctrine of spousal immunity altogether:[46]

> The authorities cited by Mr Munby show clearly enough that mediaeval lawyers held that husband and wife were one person in law: and that the husband was that one. It was a fiction then. It is a fiction now. It has been eroded by the judges who have created exception after exception to it. It has been cut down by statute after statute until little of it remains. It has been so much eroded and cut down in law, it has so long ceased to be true in fact, that I would reject Mr Munby's principle.
>
> … Nowadays, both in law and in fact, husband and wife are two persons, not one. … The severance in all respects is so complete that I would say that the doctrine of unity and its ramifications should be discarded altogether, except in so far as it is retained by judicial decision or by Act or Parliament.

57. Fox LJ, after referring to the *Criminal Law Act 1977* (at 540D), agreed with Oliver J "that the continued existence of the rule in relation to conspiracy as a crime rests not upon the supposed inability of the spouses to agree as a result of a doctrine of physical unity, but upon public policy concerning the marriage relationship." His Lordship later said (at 542C) "[t]here may well be considerations of public policy" which justified the criminal immunity. Again, these statements are tentative attempts to rationalise the statutory immunity, not statements that the common law doctrine is supportable on the basis of generalised public policy considerations, or a historical account of the development of the common law. Sir George Baker refused to apply the unity doctrine to the tort of conspiracy:[47]

> To extend this rule of exemption to the tort of conspiracy because of the legal fiction of ancient times that husband and wife being one person could not agree or combine with each other, would to my mind be akin to basing a judgment on the proposition that the Earth is flat, because many believed that centuries ago. We now know that the Earth is not flat. We now know that husband and wife in the eyes of the law are in fact equal.

58. Accordingly, Payne JA was correct to conclude that *Midland Bank* on appeal (CCA Reasons, [72]):

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46 *Midland Bank Trust Co Ltd v Green (No 3)* [1982] 1 Ch D 529, 538–539.

47 *Midland Bank Trust Co Ltd v Green (No 3)* [1982] 1 Ch D 529, 542G.

> does not on analysis provide any support for the tentative new basis for the immunity which appealed to Oliver J. The context was so completely different as to make the conclusion that Oliver J's obiter formed part of the common law of Australia at the time of the introduction of the Code untenable.

59. The fourth alleged source is the decision of the District Court of South Australia in *R v Won* [2012] SADC 117. This is the only case concerning criminal conspiracy to support the appellant's position. However, that decision well postdates the enactment of the Code and relied solely on Oliver J's reasoning in *Midland Bank* which, for the reasons above, does not support the conclusion that the common law rule was supported by other rationales.

60. It follows that, contrary to the appellant's submissions, the authorities do not support the proposition that the common law rule had any rationale other than the unity doctrine that husband and wife were legally one person.

Unity doctrine is a legal fiction

61. The appellant appears to submit, albeit faintly, that the doctrine of unity persists.[48] The unity doctrine has been characterized as a legal fiction from as early as 1926. In his dissenting judgment in *McKechie*, Ostler J, having noted the absence of decided cases on the rule later than the reign of Edward III, said that in 1893 it was "no longer true that husband and wife were esteemed but one person in law".[49] After reciting the changes in the law concerning married women, and in particular the enactment of the *Married Women's Property Act 1884* (NZ) his Honour said:[50]

> In my opinion these considerations show that the reason for the old rule of the common law had disappeared before the passing of the Criminal Code Act, 1893, owing to the sweeping changes in our social structure and the emancipation of married women which the law had effected since the time when the rule was first formulated; and, that being so, the maxim *Cessante ratione legis, cessat ipsa lex* applies. 'Reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself' … As was said by the late Sir John Salmond in an article in the *Law Quarterly Review* on the 'Theory of Judicial Precedents', 'The tooth of Time will cut away an ancient precedent, and gradually deprive it of all authority and validity. The law becomes animated by a different spirit and assumes a different course, and the older decisions become obsolete and

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48 AWS [87].

49 *R v McKechie* [1922] 1 NZLR 1, 15.

50 *R v McKechie* [1922] 1 NZLR 1, 17.

> inoperative.'[51] … The theory of the absolute subjection of a wife to her husband and the merger of her person in his has been abolished, and it has been again and again recognised in the Court, both civil and criminal, and by the Legislature, that a wife had a separate person, where reason and the spirit of fair dealing required that a separate identity should be imputed to her. She had acquired the rights and liabilities, subject to unimportant exceptions, of a *feme sole*. Consequently the tooth of Time had eaten away the old rule before the passing of the Criminal Code, so that it was not longer common law in 1893.

62. By 1995 in Australia, everything in this passage applied *a fortiori*. During the 1880s and 1890s each of the Australian colonies which became a State at Federation introduced legislation based on the *Married Women's Property Act 1882* (UK) and *Married Women's Property Act 1893* (UK).[52] Among other things, that legislation allowed a married woman to acquire, hold and dispose of property as if she were a *feme sole*, to sue and be sued in her own name, to contract in her own name and to be made bankrupt. One aspect of the common law which was retained was the inability of husband and wives to sue each other in tort.[53] However, during the 1960s and 1970s most of the States and the Territories enacted legislation permitting husband and wives to sue each other in tort.[54] Finally, the Commonwealth enacted s 119 of the *Family Law Act 1975* (Cth) which swept away any remaining immunity preventing spouses suing each other in tort or in contract. In *Midland Bank*, all the judges clearly considered that the doctrine of unity was a fiction: see [1979] 1 Ch 496, 521 (Oliver J); [1982] 1 Ch 529, 538 (Lord Denning MR), 540 (Fox LJ), 542 (Sir George Baker).

63. Accordingly, Payne JA was clearly correct to say (CCA Reasons, [66]) that "[b]y the time of the enactment of the Code in 1995, statutory intervention in the status of

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51 This passage was quoted with approval by the joint reasons in *PGA v The Queen* (2012) 245 CLR 355, [24].

52 NSW: *Married Women's Property Act 1893*. Qld: *Married Women's Property Act 1890*; *Married Women's Property Act 1897*. SA: *Married Women's Property Act 1883*; *Married Women's Property Act 1898*. Tas: *Married Women's Property Act 1883*; *Married Women's Property Act 1900*. Vic: *The Married Women's Property Act 1884*; *Married Women's Property Act 1890*; *Married Women's Property Act 1896*. WA: *Married Women's Property Act 1892*; *Married Women's Property Act 1895*.

53 The common law rule was that no action was possible because of the doctrine of unity: *Phillips v Barnet* (1876) 1 QBD 436, 438–439 (Blackburn J), 440 (Lush J), 441 (Field J). The legislation preserving the common law is noted in *Magill v Magill* (2006) 226 CLR 551, [192] (Heydon J).

54 See the legislation discussed in *Magill v Magill* (2006) 226 CLR 551, [95] (Gummow, Kirby and Crennan JJ), [194] (Heydon J).

married women had made the proposition that a married couple possessed 'one will' and were considered to be 'one person' untenable": cf AWS [87].

New public policy justifications?

64. The appellant's real argument is that the Court should invent new public policy justifications for the common law rule. In this respect, the reasoning of Fagan J is apposite (Stay Reasons, [51]):

> Where the rule in its origins was inseparably dependent upon the legal fiction of a married woman's legal incapacity, and where that fiction has long since vanished, it is not the role of the Court to re-enact the rule upon arguable social policy grounds which were not invoked at its inception.

65. The task of inventing new public policy justifications for the common law rule is quintessentially a legislative task. As is well known, "public policy is a very unruly horse, and once you get astride it you never know where it will carry you".[55] Some of the difficulties with the public policy justifications advanced by the appellant have been noted at [52] above. In addition:

(a) The statement in 1960 of Windeyer J quoted at AWS [57] that the "policy of the law is not merely that marriage should not break up by divorce or separation" must be understood in its historical context. At that time, divorce was fault based (*Matrimonial Causes Act 1959* (Cth), s 28) and difficult to obtain. It is no longer. Windeyer J's statement can no longer be regarded as an accurate reflection of the policy of the law.

(b) As to Ungoed-Thomas J's statements quoted at AWS [58], the common law does not recognise that confidential communications between husband and wife are inviolate. Such communications are admissible and spouses have no privilege to refuse to answer questions on the basis that the answers may incriminate their spouses.

(c) The objection at AWS [59]–[60] that many spouses are intimate with each other and therefore may be more easily exposed to a charge of conspiracy

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55 *Richardson v Mellish* (1824) 2 Bing 229, 252; 130 ER 294, 303 (Burrough J).

ignores the fact that a charge of conspiracy requires proof of an agreement between conspirators to do acts with knowledge of facts which would make the acts unlawful. The considerations raised by the appellant might in a given factual context provide a reason why certain inferences ought not be drawn against a spouse, and hence go to the proof of the charge. They do not provide a reason for excluding spouses altogether from a criminal prohibition. Again, if this policy justification were sound it would apply equally to various other criminal offences that do apply to conduct between spouses.

66. The Court should not invent new public policy justifications to support a rule whose only foundation no longer exists. As in *PGA v The Queen*, the Court should conclude that by 1995 *at the latest*, the common law rule that husband and wife alone could not commit conspiracy no longer existed.

Appropriate orders if the appeal is successful

67. The conspiracy alleged by the Crown at trial spanned the period both before and after the alleged marriage. The respondent accepts that in such circumstances if the appeal were successful the conviction would be quashed. However, it does not follow that there would also be an order for an acquittal. There would remain scope for a re-trial to occur, potentially on an amended indictment directed to the conduct prior to the ceremony on 30 December 2015.[56]

Part VI: Estimate for oral argument

68. The respondent estimates that she will need approximately 1.5 to 2 hours for the presentation of oral argument.

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[56] There is no suggestion that the common law rule applied to a conspiracy between two people before they are married: see *Midland Bank Trust Co Ltd v Green (No 3)* [1979] 1 Ch 496 at 515, citing *R v Robinson and Taylor* (1746) 1 Leach 37.

IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY No S188/2020

BETWEEN: **ALO-BRIDGET NAMOA**

Appellant

and

THE QUEEN

Respondent

SUBMISSIONS OF THE RESPONDENT ANNEXURE A:

LIST OF STATUTES AND STATUTORY INSTRUMENTS REFERRED TO IN RESPONDENT'S SUBMISSIONS

Statutes

Acts Interpretation Act 1901 (Cth), sections 15AB(1) and 2C(1) [Compilation No.28, registered 25 March 2015]

Matrimonial Causes Act 1959 (Cth) (Act No. 104 of 1959), section 28 (as enacted)

Marriage Act 1961 (Cth), section 48(3), Division 2 of Part IV [Compilation No. 22, registered 9 July 1914]

Family Law Act 1975 (Cth) (Act No. 53 of 1975), section 119 (as enacted)

Criminal Code Act 1995 (Cth) Schedule, Dictionary, sections 3.1, 3.2, 11.5, 102.1, 102.8, 105.34, 105.35, 390.1, 390.3, 400.3 [Compilation No. 102, registered 15 December 2015]

Married Women's Property Act 1893 (56 Vic No. 11) (NSW) (as enacted)

Married Women's Property Act 1890 (54 Vic No. 9) (Qld) (as enacted)

Married Women's Property Act 1897 (61 Vic No. 2) (Qld) (as enacted)

Criminal Code Act 1899 (63 Vic No. 9 Sch 1) (Qld) Schedule, section 33 (as enacted)

Married Women's Property Act 1883 (No 300 of 46 and 47 Vic, 1883-4) (SA) (as enacted)

Married Women's Property Act 1898 (No 701 of 61 and 62 Vic, 1898) (SA) (as enacted)

Criminal Code Act 1924 (No. 69) (Tasmania) Schedule, section 297(2) (as enacted)

Married Women's Property Act 1883 (46 Vic No 17) (Tas) (as enacted)

Married Women's Property Act 1900 (64 Vic No 7) (Tas) (as enacted)

The Married Women's Property Act 1884 (48 Vict. No 828) (Vic) (as enacted)

Married Women's Property Act 1890 (54 Vict. No 1116) (Vic) (as enacted)

Married Women's Property Act 1892 (55 Vict. No. 20) (WA) (as enacted)

Married Women's Property Act 1895 (59 Vict. No. 22) (WA) (as enacted)

10 *Married Women's Property Act 1896* (59 Vict. No 1416) (Vic) (as enacted)

Married Women's Property Act 1882 (45 & 46 Vict c. 75) (UK) (as enacted)

Married Women's Property Act 1893 (c. 63) (UK) (as enacted)

Criminal Law Act 1977 (c. 45) (UK), section 2(2)(a) (as enacted)

Married Women's Property Act 1884 (48 Vict 1884 No 10) (NZ) (as enacted)

Criminal Code Act 1893 (57 Vict 1893 No 56) (NZ) (as enacted)

Crimes Act 1908 (Consolidation) (No. 32) (NZ), sections 219 and 40 (as enacted)

Criminal Code RSC 1927 (c. 36) (Can), sections 16 and 573 (as enacted)

Penal Code of Tanganyika (Laws of Tanganyika, 1947 Rev., c. 16), section 4 (as enacted)