HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S188/2020
File Title:	Namoa v. The Queen
Registry:	Sydney
Document filed:	Form 27F - Outline of oral argument
Filing party:	Respondent
Date filed:	11 Mar 2021

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY No 188/2020

BETWEEN: **ALO-BRIDGET NAMOA**

Appellant

and

THE QUEEN

Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

This outline is in a form suitable for publication on the internet.

Part II: Outline of propositions

The interpretation of statutory codes

1. The determinative issue in the appeal is the construction of a statutory code. Section 11.5 of the *Criminal Code* (Cth) (***Code***) is not to be interpreted on the basis that one starts with the common law and sees whether the common law has been displaced: RWS [10], [11]–[12].

> *Pickett v Western Australia* (2020) 94 ALJR 629, 635–636 [22] (Kiefel CJ, Bell, Keane and Gordon JJ), quoting *Brennan v The King* (1936) 55 CLR 253, 263;

2. The common law cannot be used to interpret a code except where (a) a word has a well-established technical meaning under the pre-existing law and the code uses that word without definition or (b) the code is ambiguous on its face: RWS [12].

> *Pickett v Western Australia* (2020) 94 ALJR 629, 636 [23] (Kiefel CJ, Bell, Keane and Gordon JJ), quoting *Stuart v The Queen* (1974) 134 CLR 426, 437; *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289, 309.

Text of s 11.5 and relevant features of the context

3. Applying the ordinary meaning of s 11.5, two spouses may be guilty of conspiracy under the *Code*. The section refers to one person conspiring with another person. Spouses are not the same person: RWS [20]–[27].

4. The Code as a whole confirms the ordinary meaning of s 11.5: RWS [28]–[34].

Code, ss 11.5, 102.1, 102.8(1), 102.8(4), 105.34, 105.35, 390.1, 390.3

5. Recourse to the extrinsic materials is permissible and appropriate. It confirms that the drafters of the Code were (a) using "person" and "another person" in accordance with their ordinary meanings and (b) it was not intended to pick up any common law rule of spousal immunity: RWS [35]–[39].

R v A2 (2019) 93 ALJR 1106 at [32]-[38]

Gibbs Committee Report, [39.3]–[39.4]; MCCOC Report, p 103

6. Accordingly, whatever the common law position, two spouses may be guilty of criminal conspiracy under s 11.5 of the Code: RWS [40].

***R v LK* does not support the appellant's construction**

7. *R v LK* (2010) 241 CLR 177 is authority for the proposition that, subject to statutory modification, the verb "conspires" in s 11.5 has its technical common law meaning of entering into an agreement to perform the *actus reus* of an offence with knowledge of facts that make the proposed acts unlawful: RWS [14]–[15].

R v LK (2010) 241 CLR 177, 220 [97], 223 [105], 227 [114], 228 [117], 231 [131], 234–235 [141];

Agius v The Queen (2013) 248 CLR 601, 609 [28], 611 [34]–[35] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), 615 [54] (Gageler J)

8. *R v LK* is not authority for the proposition that s 11.5 picks up the pre-existing common law concerning the *capacity* of particular types of persons, including spouses, to commit the offence of conspiracy. *R v LK* did not address that issue and cannot be authority for that proposition: RWS [14]–[17].

Bell Lawyers Pty Ltd v Pentelow (2019) 93 ALJR 1007, 1016 [28] (Kiefel CJ, Bell, Keane and Gordon JJ), quoting from *Coleman v Power* (2004) 220 CLR 1, [79] and *CSR Ltd v Eddy* (2005) 226 CLR 1, [13]

9. If proposition 8 is wrong, then *R v LK* is plainly wrong and should be departed from in that respect: RWS [18].

Other authorities relied on by the appellant do not support her construction of s 11.5

10. Appellant's reliance on overseas authorities is misplaced, given the different statutory context.

> Compare *R v McKechie* [1922] NZLR 1, 12 relying on s 40 of the *Crimes Act 1908* (NZ); *Kowbel v The Queen* [1954] SCR 498, 499–500 relying on s 16 of the *Criminal Code* (Can); *Mawji v The Queen* [1957] AC 126, 134–135 relying on s 4 of the *Penal Code of Tanganyika*

The supposed common law rule did not exist as of 1995

11. Changes in statute law may have the result that the foundation of a common law rule no longer exists, in which case the common law ceases to exist: RWS [41].

> *PGA v The Queen* (2012) 245 CLR 355, 373 [30]

12. The only foundation in the case law for the historical common law rule that husband and wife alone could not commit criminal conspiracy was that husband and wife were one person at law: RWS [43]–[48].

> *R v Annie Brown* (1896) 15 NZLR 18, 32; *DPP v Blady* [1912] 2 KB 89, 92; *R v McKechie* [1922] NZLR 1, 12; *Kowbel v R* [1954] SCR 498, 499–500; *Mawji v The Queen* [1957] AC 126, 134; *R v Cheung Ka-Fai* [1995] 2 HKCLR 184, 194; *R v Byast* [1999] 2 Qd R 384, 385

13. The proposition that that the common law rule was supported by other bases is an ahistorical *ex post facto* attempt to invent new public policy justifications. Suggested justifications in reports of law reform bodies do not provide an alternative foundation for a common law rule: RWS [49]–[60], [64]–[66].

14. By 1975, statutory changes in Australian law meant that it was no longer tenable to suggest that husband and wife were one person at law: RWS [61]–[63].

> See the authorities collected at RWS [62]; *Magill v Magill* (2006) 226 CLR 551 at [55], [95]-[101], [192]-[194]

15. Accordingly, by 1975 the common law rule that husband and wife alone could not be liable for criminal conspiracy at common law had ceased to exist.

16. If the appeal were to be allowed and the conviction quashed, the appropriate order would be for re-trial rather than acquittal.

Dated: 11 March 2021

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