Conspiracy under the Commonwealth Criminal Code

R v LK & RK (2010) 84 ALJR 395 | *Ansari v R* (2010) 84 ALJR 433

In its recent decisions in *R v LK & RK* (2010) 84 ALJR 395 and *Ansari v R* (2010) 84 ALJR 433, the High Court resolved previous controversy about the elements of the offence of conspiracy under the Commonwealth Criminal Code ('the Code'). The High Court also held that an offence of conspiring to commit a substantive offence which incorporates a fault (mental) element of recklessness is not bad in law. However, in such a case it will be necessary for the prosecution to prove that the alleged conspirator intended that the substantive offence occur. This will entail proving that the alleged conspirator knew or believed in the facts that make the proposed conduct an offence. Proof of recklessness on the part of the alleged conspirator will not suffice.

The controversy about the elements of the offence of conspiracy under the Code arose out of the drafting of section 11.5. Sub-section 11.5(1) of the Code, provides as follows:

> (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, is guilty of the offence of conspiracy to commit that offence and is punishable as if the offence to which the conspiracy relates had been committed.

A penalty unit is defined in section 4AA of the *Crimes Act 1914* (Cth) as $110. The Code defines 'offence' as an offence against the laws of the Commonwealth. In other words, s 11.5 of the Code makes it an offence to conspire to commit a non-trivial offence under Commonwealth law.

However, sub-section 11.5(1) of the Code is qualified by sub-section 11.5(2). Sub-section 11.5(2) stipulates the following three conditions before a person can be guilty of conspiracy under section 11.5 of the Code:

(a) the person must have entered into an agreement with one or more other persons; and

(b) the person and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement; and

(c) the person or at least one other party to the agreement must have committed an overt act pursuant to the agreement.

This drafting led to competing views on whether the elements of the offence of conspiracy were confined to sub-section 11.5(1) of the Code or included one or more of the conditions in sub-section 11.5(2).

When interpreting these provisions the fundamental approach to discerning the elements of Commonwealth offences set out in Chapter 2 of the Code must be applied. That structure is clear. Offences consist of physical elements and fault elements: s 3.1(1). Before a person can be found guilty of an offence each of the physical elements required to be proved by the law creating the offence must be proved and, for each physical element for which a fault element is required, one of the fault elements for the physical element: s 3.2.

In *R v LK & RK* [2010] HCA17 the majority, comprising Gummow, Hayne, Crennan, Kiefel and Bell JJ, succinctly summarised the relevant provisions of the Code defining the nature of physical and fault elements in the following passages:

> [126] A physical element of an offence may be conduct, a result of conduct, or a circumstance in which conduct, or a result of conduct, occurs [Code s 4(1)]. A fault element for a particular physical element of an offence may be intention, knowledge, recklessness or negligence [Code s 5.1(1). Each is defined in Div 5 of Pt 2.2. However, the law creating an offence may specify a fault element for a physical element other than one of those that is defined in Div 5 [Code s 5.1(2)].
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> [127] Under the common law, identification of the particular mental state that the prosecution is required to prove in order to establish mens rea (the fault element of the offence) may be the subject of controversy. The scheme of Pt 2.2 is intended to avoid uncertainty in this respect. Under the Code, default fault elements attach to physical elements of an offence where the law creating the offence does not specify a fault element for a physical element [Code s 5.6] (subject to express provision that there is no fault element for the physical element [Code s 3.1(2)]). Intention is the default fault element for a physical element of conduct [Code s 5.6(1)] and recklessness is the default fault element for a physical element consisting of a circumstance or a result [Code s 5.6(2)].

In *Ansari v R* the same majority also noted (at [59]) the important provision in sub-section 5.4(4) of the Code, which states, in effect, that proof of intention with

respect to a fact, circumstance or state of affairs, will also constitute proof of recklessness or negligence with respect to that fact, circumstance or state of affairs.

In *R v LK & RK* the trial judge on a demurrer application was held by the High Court to have correctly held that the offence in the indictment of conspiring to deal with proceeds of crime where those who were to deal with the money were reckless to the fact it was proceeds of crime was an offence known to law. The High Court also held that the trial judge correctly directed the jury to acquit the respondents at the close of the Crown case because all the Crown had succeeded in doing was proving that the respondents were themselves reckless as to the money being proceeds of crime. Therefore the Crown had not proved the charge in the indictment which required proof on the part of the alleged conspirators that that knew or believed that the moneys would be proceeds of crime, even though the substantive offence under s 400.3(2) of the Code only required a substantive offender to be reckless as to this. The reasons for this finding were articulated by the majority in *R v LK & RK* (at [117]) as follows:

> The offence of conspiracy under the Code is confined to agreements that *an* offence be committed. A person who conspires with another to commit an offence is guilty of conspiring to commit *that* offence. It was incumbent on the prosecution to prove that LK and RK intentionally entered an agreement to commit the offence that it averred was the subject of the conspiracy. This required proof that each meant to enter into an agreement to commit that offence [Code s 5.2(1)]. As a matter of ordinary English it may be thought that a person does not agree to commit an offence without knowledge of, or belief in, the existence of the facts that make the conduct that is the subject of the agreement an offence (as distinct from having knowledge of, or belief in, the legal characterisation of the conduct). This is consistent with authority with respect to liability for the offence of conspiracy under the common law. Subject to one reservation, it is how the fault element of the offence created in s 11.5(1) operates. The reservation concerns the application of s 11.5(2)(b). As these reasons will show, this provision informs the meaning of 'conspires' in sub-s (1) by making clear that at least one other party to the agreement must have intended that an offence be committed pursuant to the agreement. It also speaks to proof of the accused's intention. The reservation arises because s 11.5(2)(b) is subject to s 11.5(7A), which applies any special liability provisions of the substantive offence to the offence of conspiring to commit that offence. A special liability provision includes a provision that absolute liability applies to one or more (but not all) of the physical elements of an offence[1]. Proof of the intention to commit an offence does not require proof of knowledge of, or belief in, a matter that is the subject of a special liability provision.

The difficulty with the Crown case in *R v LK & RK* was that it only alleged at its highest an intentional agreement to deal with money that may or may not be proceeds of crime. It was not, therefore, capable of proving that LK or RK entered an agreement knowing or believing that the money would be proceeds of crime.

In defining the elements of conspiracy under the Code in *R v LK & RK* the majority held (at [141]) that the Court of Criminal Appeal correctly held that the law creating the offence of conspiracy under the Code was sub-section 11.5(1). The majority held that references to 'agreement' in paragraphs (a) and (b) of sub-section 11.5(2) are references to the agreement referred to in sub-section 11.5(1) and are epexegetical of (that is, clarify) sub-section 11.5(1).

The majority set out the elements of conspiracy under sub-section 11.5(1) of the Code, and the other conditions of proof in sub-section 11.5(2), as follows (at [141]):

> The offence has a single physical element of conduct: conspiring with another person to commit a non-trivial offence. The (default) fault element for this physical element of conduct is intention [Code, s 5.6(1)]. At the trial of a person charged with conspiracy it is incumbent on the prosecution to prove that he or she meant to conspire with another person to commit the non-trivial offence particularised as being the object of the conspiracy. In charging a jury as to the meaning of 'conspiring' with another person, it is necessary to direct that the prosecution must establish that the accused entered into an agreement with one or more other persons and that he or she and at least one other party to the agreement intended that the offence particularised as the object of the conspiracy be committed pursuant to the agreement. Proof of the commission of an overt act by a party to the agreement conditions guilt and is placed on the prosecution to the criminal standard. The Code does not evince an intention in the latter respect to depart from fundamental principle with respect to proof of criminal liability [*R v Mullen* (1938) 59 CLR 124; [1938] HCA 12].

French CJ set out those elements as follows (at [1]):

> The offence of conspiracy created by the *Criminal Code* (Cth) ('the Code') is committed where there is an agreement between the offender and one or more other persons, coupled with an intention, on the part of the offender and at least one of the other persons, that an offence will be committed pursuant to the agreement [Code, s 11.5(2)(a) and (b)]. Proof of commission of an overt act by the offender or another party to the agreement pursuant to the agreement is necessary [Code, s 11.5(2)(c)].

French CJ amplified this analysis (at [75]):

> The charge of conspiracy to commit an offence, which is created by s 11.5(1) of the Code, requires proof of an agreement between the person charged and one or more other persons. Moreover, the person charged and at least one other person must have intended that the offence the subject of the conspiracy would be committed pursuant to the agreement. Intention to commit an offence can be taken to encompass all the elements of the offence (subject to the operation of s 11.5(7A) in relation to special liability provisions in the substantive offence). That intention extends to both physical and fault elements of the substantive offence.

The majority noted (at [117]) that the operation of sub-section 11.5(7A) of the Code means that: 'Proof of the intention to commit an offence does not require proof of knowledge of, or belief in, a matter that is the subject of a special liability provision'. This means, for example, that it is not necessary to prove that an accused charged with conspiring to import a commercial quantity of a border controlled drug under s 307.1 of the Code knew or believed that the quantity to be imported was a commercial quantity.

Therefore, in order to prove the offence of conspiracy under s 11.5(1) of the Code the Crown must prove beyond reasonable doubt that:

(a) The accused intentionally entered into an agreement with one of more persons to commit a non-trivial offence under Australian law;

(b) When he/she entered into that agreement he/she intended that the non-trivial offence would be committed pursuant to the agreement;

(c) At least one other party to the agreement intended that the non-trivial offence would be committed pursuant to the agreement; and

(d) At least one party to the agreement carried out an overt act in furtherance of the agreement.

The essential element of the offence of conspiracy under sub-section 11.5(1) of the Code is set out in sub-paragraph (a) of the preceding paragraph. The other matters referred to in sub-paragraphs (b) – (c),

Verbatim

Meagher on Lehane (from RP Meagher's introductory remarks at the inaugural John Lehane Memorial Lecture, September 2002)

'He had a grand, but concealed and impish, sense of humour. I cannot remember any Voltairean epigrams or Wildean paradoxes bursting from his lips, but I distinctly do remember him often exploding with laughter. He was intrigued by the wording of an easement in South Australia which was expressed to last for 'a term of perpetuity less one day'; he was delighted when I showed him a will in which a testatrix left her residuary estate 'to all the people in Australia, or failing that to their children.' In the first edition of Meagher, Gummow Lehane it was said of s.98 of the amended Common Law Procedure Act that 'Myers J had no hand in begetting it', and John became convulsed with laughter when Glass JA observed that the sentence betrayed an elementary ignorance of biology. He was rarely cross, and when he was it was in the gentlest possible manner. He said of Sir Gerard Brennan's judgment in *Corin v Patton* that it was 'mischievous'. Nobody else would have stopped there.'

whilst not elements as such, are preconditions to proof of guilt for conspiracy and must be proved beyond reasonable doubt by the Crown before a person can be found guilty of conspiracy.

In *Ansari v R* the High Court held that an offence of conspiring to commit a substantive offence which incorporates a fault (mental) element of recklessness is not bad in law. The majority (at [37]) approved of the Court of Criminal Appeal majority's (Howie J with Hislop concurring) finding that there was nothing in the Code to suggest that a person could not conspire to commit an offence of recklessness and no occasion to impose such a restriction. Two reasons for this referred to by the Court of Criminal Appeal and approved by the High Court majority were as follows:

> First, the conspirators' agreement may provide for a third person to carry out the conduct that constitutes the offence. In such a case, provided that the accused conspirators know all of the facts that make the conduct criminal, it would not matter that the third person was acting recklessly. Second, s 5.4(4) provides that recklessness, where specified as a fault element for an offence, may be satisfied by proof of intention or knowledge.

However, in such a case it will be necessary for the prosecution to prove that the alleged conspirator intended that the substantive offence occur. This will entail proving that the alleged conspirator knew or believed in the facts that make the proposed conduct an offence. Proof of recklessness on the part of the alleged conspirator will not suffice.

By Chris O'Donnell

Endnotes

1. The Dictionary to the Code provides that a 'special liability provision' is a provision that absolute liability applies to one or more (but not all) of the physical elements of an offence or that in a prosecution for an offence it is not necessary to prove that the defendant knew a particular thing or that the defendant knew or believed a particular thing.

Verbatim

Bergin CJ in Equity on Mediation (extracts from her Honour's Opening Remarks at the Bar Association's 2010 ADR Workshop)

'Mediation has impacted on the nature of practice at the Bar. More time is now spent in chambers advising how best to settle the dispute than how best to fight it in Court. Advocates have had to adjust to the change in the way the system operates so that they now advocate strategies for settlement behind closed doors rather than utilising the forensic skills and persuasive advocacy in open court. Although the burden on the advocate in mediation is different from the burden on an advocate in a hearing before the Court, the advocate's experience, knowledge and forensic judgments are integral to the client achieving the best outcome from mediation. ...

The issue of the "ripe" time to refer a matter to mediation is vexed. Some matters have a better chance of a mediated settlement if referred later in the litigious process whilst others may settle earlier in the process. It will depend very much on the particular dispute. However I stress that the Court depends on the legal representatives to analyse not only the legal issues in the dispute but when it comes to picking the time for referring the matter to mediation, to also analyse the financial, motivational or emotional issues that are driving their clients. These matters, about which the Court will know little or nothing, may be pivotal to the prospect of reaching a mediated settlement.'