SUPREME COURT OF QUEENSLAND

CITATION:	*R v Formica* [2024] QSCPR 10
PARTIES:	**R** **v** **SALVATORE FORMICA** and **AIDEN ANIS KHODHER** and **GEORGE MACHEM** and **PIERINO FORNI** (Defendants)
FILE NO/S:	SC 106 of 2023
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED EX TEMPORE ON:	28 March 2024
DELIVERED AT:	Cairns
HEARING DATE:	27 March 2024
JUDGE:	Henry J
ORDER:	**In respect of each defendant's application: application dismissed.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – PROSECUTION – where the defendants are charged with conspiracy to import cocaine from Papua New Guinea into Australia rather than substantive importation and attempted importation offences – where the defendants seek exercise of the power in s 11.5(6) *Commonwealth Criminal Code* to dismiss the conspiracy charges – whether prosecutorial discretion should be overridden by the Court's power – whether dismissing the conspiracy charge is required in the interest of justice *Commonwealth Criminal Code 1995* (Cth) s 11.5(6)

Ahern v R (1988) 165 CLR 87, cited

Commonwealth DPP v Knopp and Ledesma [2023] VSCA 315, cited

R v Hoar (1981) 148 CLR 32, discussed

Tripodi v R (1961) 104 CLR 1, discussed

COUNSEL: GF Mahony SC with D Caruana for Crown
M Weinman for Defendant Formica
M Gumbleton with N Freijah for Defendant Khodher
SJ Tovey for Defendant Machem
D Cronin for Defendant Forni

SOLICITORS: Commonwealth Director of Public Prosecutions for Crown
Stephen Andrianakis & Associates for Defendant Formica
Emma Turnbull Lawyers for Defendant Khodher
Theo Magazis & Associates for Defendant Machem
Anthony Isaacs Criminal Lawyers for Defendant Forni

[1] The defendants, Formica and Khodher, were allegedly involved in arranging an importation of cocaine from Papua New Guinea into Australia by light aircraft flown by Cutmore, a pilot, from Far North Queensland to Papua New Guinea and back again on the 30th of August 2018.

[2] Those three were also allegedly involved in a subsequent attempt to do the same thing, by the same means, with the defendants Forni and Machem also allegedly involved. On 26 July 2020, however, after being loaded with the cocaine in Papua New Guinea, the plane piloted by Cutmore crashed on take-off from Papua New Guinea on its return flight. Cutmore remains in custody in Papua New Guinea.

[3] The defendants face prosecution on two indictments in Queensland: one against Formica and Khodher pertaining to the first of these alleged criminal ventures and the other pertaining to all four of them for the second alleged criminal venture.

[4] The evidence presenting itself to the Prosecution can apparently call in aid the principle discussed in *Tripodi v R* (1961) 104 CLR 1, that the prima facie evidence of the relevant defendants' combination, or "pre-concert", to commit an unlawful importation in each case implies an authority to act and speak on the other's behalf, rendering the words and actions of each in furtherance of the pre-concert admissible against all.

[5] *Tripodi* was a larceny case but the application of its principle is of no presently material difference in proof of a criminal conspiracy, as distinct from proof of the substantive offence or offences carried out pursuant to a criminal conspiracy – see *Ahern v R* (1988) 165 CLR 87.

[1] Presented with the straightforward option of charging the substantive offences which the alleged facts of each criminal escapade plainly support – importation and

attempted importation of commercial quantities of border-controlled drugs – the Commonwealth has, in each instance, for reasons not exposed, chosen to charge conspiracy instead. There is no onus on it to expose its reasons.

[6] Its choice prompts the defendants to apply for dismissal of the conspiracy charges without them being heard. The application seeks to invoke the operation of s 11.5(6) *Commonwealth Criminal Code*, which provides:

> "A Court may dismiss a charge of conspiracy if it thinks that the interests of justice require it to do so."

[7] That provision has been described in submissions as "exceptional". It is highlighted the separation of powers ordinarily dictates the Court ought play no part in the Executive's responsibility, even where performed for the Executive by an independent officer such as a Director of Public Prosecutions.

[8] It is the Prosecution's task to choose an appropriate charge to allege. Section 11.5(6) does not say the Court may dismiss a charge of conspiracy because it disagrees with the Prosecution's choice of charge. That choice is no business of the Courts and s 11.5(6) does not alter that elementary equation.

[9] Section 11.5(6) is certainly exceptional, in that it does not confine the dismissal power it confers to any particular stage of the proceeding, for instance, as at the close of the Prosecution case. Implicitly, the circumstances potentially triggering the invocation of the section may go beyond the force of the evidence in support of the charge to other circumstances if they, or their consequence, be so significant as to meet the subsection's high threshold for intervention.

[10] That threshold focuses not upon any prescriptive mix of circumstances and, rather, upon the consequence of the circumstances prevailing in a particular case. The determinative issue is whether the mix of circumstances and consequences meet the high threshold that the interests of justice require the dismissal of the conspiracy charge. That is a high threshold for interference.

[11] As the Victorian Court of Appeal observed in *Commonwealth DPP v Knopp and Ledesma* [2023] VSCA 315 at [33]:

> "[The] word 'require' was intended to connote a course that is necessary or imperative, rather than a course that is merely preferable or permissive. If the criterion were one of preference, a Court exercising the power under s 11.5(6) of the *Criminal Code* could simply substitute its view for the view of the Prosecuting agency."

[12] The Parliament's explanatory memorandum in respect of the then proposed s 11.5 observed of the so-called limitation it was introducing:

> "Given that the crime of conspiracy has been abused on some occasions and attracted criticism from the courts, the limitations were introduced as safeguards."

[13] Amidst the ensuing content, it was said, specifically of s 11.5(6):

> "Additionally, proposed subsection 11.5(6) allows a court to dismiss the conspiracy count if it considers that the interests of justice require

> it to do so. The most likely use of this provision will arise when the substantive offence could have been, a criticism repeatedly voiced by the courts. (See, for example, *Hoar* (1981) 148 CLR 32)."

[14] The example cited of *Hoar* was a case in which conspiracy charges had been brought and heard, yet the related substantive charges persisted before the Courts. It is quite clear the plurality in *Hoar* was concerned with the unfair mischief of that dual pursuit of charges in highlighting the undesirability of conspiracy being charged "when a substantive offence has been committed and there is a sufficient and effective charge that this offence has been committed" – see *R v Hoar* (1981) 148 CLR 32, 38.

[15] In the present case, no such charge is pursued. Here, only a conspiracy charge has been brought. As a matter of law, the dismissal here sought would, if granted, have the Court dismiss two unheard charges committed for trial in respect of which there apparently exists a prima facie case. The applicants would have the Court do so in the absence of any charges before the Court otherwise targeted at conviction and punishment for the same criminality. The interference contemplated by s 11.5(6) is not a stay; it is a dismissal. As a matter of practicality, it may well be the Prosecution would promptly present indictments containing substantive charges in the event of a dismissal. However, the distinction is illustrative of the extraordinary extent to which the present application solicits the Court's adventure into the discretionary decision-making of the Prosecution.

[16] A determinative, persuasive hindrance to the arguments of the applicants in their present application is that the nature of the evidence to be advanced and the source of liability relied upon to establish the conspiracy charges, are not materially different than those which would be advanced in support of the substantive charges.

[17] It is clear from the Crown's summary of evidence and its particulars that the cases in either event would involve a litany of pieces of circumstantial evidence, including the movements, conduct and communications of the defendants and Cutmore.

[18] The applicants emphasise the volume of particulars of conduct relied upon as against each of them as supporting the application, but it is not as if that equation would be different were the substantive charges laid. The prosecution of such charges would rely upon the same principle as already explained per *Tripodi* and *Ahern*. The same dimension of very similar particulars would invariably be advanced against the defendants for the substantive offences.

[19] The point is of pivotal importance. Whether advanced as conspiracies or substantive offences, the fact of the combination or pre-concert underpinning the allegedly coordinated conduct of all the players will be central to the structure of the case against them and the admissibility of evidence against them.

[20] Ironically, the conclusion there is a broadly common pathway to the proof of either the conspiracy charges or the substantive charges was resisted by the Prosecution in an attempt to justify why conspiracy charges would capture the organised criminality in a way substantive charges would not. That attempt was wholly unpersuasive in a case where each alleged conspiracy relates to pursuit of a singular offence. As much is illustrated by the inability of the Prosecution to identify, on my repeated invitation to do so, even one area of material divergence in the evidentiary foundation to be

relied upon in proof of each of the conspiracy charges as compared to what would be relied upon in proof of each of the substantive offences.

[21] That commonality carries through from potential liability to potential sentence. Of course, the elements sustaining the offences to be sentenced are different but the maximum penalties are the same. The conduct allegedly engaged in is the same. The distinction is, on the one hand, the defendants would be sentenced for a sinister agreement, the criminality of which is informed by the misconduct carried out pursuant to it and, on the other, the defendants would be sentenced for misconduct, the criminality of which is informed by the sinister agreement under which it was carried out. It is a distinction which occasions no realistic prospective potential difference in the penalty likely to be imposed.

[22] The absence of apparent advantage to the prospective conduct and outcome of the case in the Prosecution's choice of conspiracy charges over substantive charges engenders frustration. However, that the Court does not have the pleasure of understanding the allure to the Prosecution of choosing a path to conviction which is more than ordinarily difficult to explain to and be understood by a jury, only to result, if successful, in a likely similar, if not identical, sentence outcome, is no basis to interfere.

[23] Further, none of this helps the defendants in their application. To the contrary, the interests of justice cannot conceivably require the Court's intervention so as to manoeuvre the Prosecution into pursuing a different type of charge grounded in the same general evidentiary foundations for liability and culpability foundations for sentence on the basis of mere preference for a charge which is less troublesome to manage at trial.

[24] It is to be appreciated the applicants highlight a number of features which, it is said, accumulate in support of meeting the high threshold of s 11.5(6). Equally, it is to be appreciated an accumulation of a number of insubstantive features does not become substantive by mere weight of their number.

[25] The analysis already engaged in renders it sufficient to quote each factor and briefly explain its corresponding limitation in, or absence of substance relevant to, s 11.5(6):

> *(a) The availability of a substantive charge that would be "sufficient and effective" –*
>
> That the conduct might aptly attract the substantive charge, for which there is an apparently prima facie case, which is not pursued in preference to a conspiracy charge, is frustrating. It does not jeopardise the interests of justice.
>
> *(b) The overlap between the elements of the substantive offence of attempt to import and the overt acts alleged in the conspiracy –*
>
> The coincidence of foundations for proof of liability in either instance is of neutral significance.
>
> *(c) The potential for adverse consequences as to sentencing as a result of a conspiracy charge –*
>
> The cross-admissibility of the acts and words of the players, whether in the context of a conspiracy or substantive charge, will cause, broadly, the same need

for the sentencing judge to assess the relative significance of the evidence in respect of each offender in arriving at a just assessment of relative culpability for sentence. That task would be no more fraught with difficulty for sentencing for conspiracy than it would for a substantive offence in a case like the present.

(d) The fact that [the] conspiracy count does not reflect the criminality involved more appropriately than the substantive count –

As already explained, the criminality reflected by either charge would be broadly the same, but that is no basis to infer a default position in favour of the pursuit of one charge compared to the other.

(e) An indictment on the substantive count would not contain numerous substantive charges –

That is correct, but it is the presence, not the absence, of numerous substantive charges which would be problematic. The point is a neutral one.

(f) The most serious features of the conduct of the accused relate not to the alleged criminal design, but its implementation –

This is merely an argument that the defendants would be better punished if convicted of the substantive charges. I have already concluded there is no apparent prospect of a materially different sentence either way. In any event, if the applicants' submission is correct, it means they may not be as harshly punished if convicted. It is not contrary to the interests of justice that the Prosecution, in its discretion, prefers a less punitive charge.

[26] The upshot is that nothing raised by the application, in its own right or cumulatively, supports the conclusion the interests of justice require the charges of conspiracy to be dismissed.

[27] My order is, in respect of each defendant's application: application dismissed.