CONSPIRACY, A JURY, THE CONSTITUTION AND A SWISS BANK ACCOUNT: *THE QUEEN v LK; THE QUEEN v RK* [2010] HCA 17

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I. INTRODUCTION

The Queen v LK; The Queen v RK[1] has all the ingredients of a John Grisham best seller. There is an alleged conspiracy, large sums of money, a jury, the Constitution[2] and a Swiss bank account. What of the twist? The indictment brought against LK and RK did not disclose an offence known to law.

On 19 May 2008 LK and RK were charged with offences under ss. 11.5 and 400.3(2) of the *Criminal Code*[3] with conspiring to deal with money worth $1 million or more, and being reckless as to the money the subject of the conspiracy being proceeds of crime. The money was part of a larger sum of about $150 million of which the Commonwealth Superannuation Scheme had been defrauded.

Section 11.5 is in the following terms:

> *(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.*
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> *(2)* *For the person to be guilty:*
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> > *(a)* *the person must have entered into an agreement with one or more other persons; and*

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1 [2010] HCA 17 (26 May 2010) ('*LK and RK*').

2 *Commonwealth of Australia Constitution Act* ('*Constitution*').

3 Schedule to *Criminal Code Act 1995* (Cth) ('*the Code*').

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

Section 400.3(2) provides that:

> *(2) A person is guilty of an offence if:*
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> *(a) the person deals with money or other property; and*
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> *(b) either:*
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> *(i) the money or property is proceeds of crime; or*
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> *(ii) there is a risk that the money or property will become an instrument of crime; and*
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> *(c) the person is reckless as to the fact that the money or property is proceeds of crime or the fact that there is a risk that it will become an instrument of crime (as the case requires); and*
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> *(d) at the time of the dealing, the value of the money and other property is $1,000,000 or more.* (emphasis added)

The appeals were brought by special leave application to the High Court of Australia against the order of the NSW Court of Criminal Appeal. The appeals raised issues related to the construction and operation of the *Criminal Code*, relevantly that that the Court of Criminal Appeal fell into error in the interpretation of s. 11.5 of the Code. The issue for determination was whether the Crown had to prove that LK and RK intended to deal with money which was proceeds of crime, or only that there were reckless as to the money being proceeds of crime. The Crown's case, as set out in its application for special leave before the High Court, was that the respondents intentionally agreed to commit an offence (conspiracy, s. 11.5 of the

Criminal Code), "for which a fault element of recklessness is prescribed."

The Crown was committed to proving recklessness at trial as that was the charge on indictment. Before Sweeney DCJ in the District Court, LK and RK demurred and sought an acquittal by direction submitting in application that there was no case to answer. Her Honour upheld the application and directed the jury to acquit LK and RK on the basis that the indictment did not disclose an offence known to law. The Crown appealed to the Court of Criminal under s. 107 of the *Crimes (Appeal and Review) Act 2001* (NSW) (which provides for appeals against directed acquittals). The Court dismissed the appeal, holding that the Crown had to prove the respondents knew the facts constituting the offence the object of conspiracy. The Court held that the trial judge's conclusions were correct.

Special leave to appeal to the High Court was granted on 19 June 2009. The High Court concluded that the trial judge's direction, and the conclusions reached by the Court of Criminal Appeal were correct and that the Crown's appeals should be dismissed. It was incumbent on the Crown to prove *intention* in relation to each physical element of the offence particularised as the object of the conspiracy; not recklessness. The High Court concluded that Chief Justice Spigelman proceeded correctly on the basis that the *Criminal Code* imported the common law concept of conspiracy. So a person cannot enter into a conspiracy under the Code without knowing the facts that make the agreed conduct unlawful. The Crown's appeal was unanimously dismissed.

The respondents argued that no appeal lay to the Court of Criminal Appeal because s. 107 could not operate retrospectively. This argument was rejected. The respondents also argued that an appeal by the Crown against a directed verdict of acquittal infringed the guarantee in s. 80 of the *Constitution* of the trial by jury. This argument was also rejected.

II. THE CASE IN CONTEXT

On 24 December 2003, a fraudulent set of instructions purporting to be those of the Commonwealth Superannuation Scheme's Fund Manager was transmitted by facsimile to its investment bank, JP Morgan. JP Morgan was instructed to transfer a sum in the order of $150 million to four nominated overseas bank accounts. Just as in any best seller, JP Morgan was instructed to transfer, and did transfer, approximately $25 million to a Swiss bank account operated by RK. Before these events began to unfold, LK (who was acting at the requested a third person,

RM) had approached RK and asked if his Swiss bank account could be used for the transfer of funds from Australia. RK agreed.

Following the transfer of the money to RK's account, there were frequent communications between the three men. On 30 December 2003, RK gave a direction to transfer 23 million Swiss francs to a New York bank account. However, the funds transfer was never completed. On the same day, JP Morgan contacted the Swiss bank and advised that the funds in RK's accounts were the subject of fraud and should be returned. RK allegedly retained attorneys in Switzerland for the purpose of providing a power of attorney to the bank to effect the transfer of the funds. However, the funds were subsequently frozen. Unbeknown to LK and RK, they were to be arrested and charged with conspiracy.

III. CONSPIRACY: A PROCEDURAL PATH TO THE HIGH COURT

THE DISTRICT COURT ACQUITS

It was not said that either LK or RK was a party to the fraud or that either had knowledge of it. However, on 16 August 2005 LK and RK were arrested. On 18 October 2006 they were served with an indictment (court attendance notice)[4]. A first indictment was filed with the District Court on 13 September 2007, but was substituted by a further court attendance notice filed on 26 May 2008. That court attendance notice charged LK and BK as follows:

> *… between about 1 December 2003 and about 1 February 2004 at Sydney in the State of New South Wales and elsewhere [they] did conspire with each other, [RM] and with diverse other persons to deal with money to the value of $1,000,000 or more being the proceeds of crime which those persons who were to deal with the*

[4] Pursuant to s. 5 of the *Criminal Procedure Act 1986* (Cth) ("CPA") an offence must be dealt with on indictment unless it is an offence that under the CPA or any other Act is permitted or required to be dealt with summarily. All offences shall be prosecuted by information (to be called an indictment) in the Supreme Court or the District Court on behalf of the Crown (s. 8(1)). Such an indictment may be presented or filed whether or not the person to whom the indictment relates has been committed for trial on respect of an offence specified in the indictment (s. 8(2)). Indictment includes a court attendance notice or any other process or document by which criminal proceedings are commenced (s. 15(2)). Committal proceedings for an offence are to be commenced by the issue and filing of a court attendance notice (see ss. 47(1), 50 and 51). All proceedings are taken to have commenced on the date on which a court attendance notice is filed in the registry of the relevant court (s. 53).

> *money pursuant to the conspiracy were reckless as to the fact that the money was the proceeds of crime.*

LK and RK were charged with offences under ss. 11.5 and 400.3(2) of the *Criminal Code*. The Crown also alleged that RK was aware of a substantial risk that the money was proceeds of crime. On 17 July 2007 LK and RK were committed to stand trial in the District Court of New South Wales.[5] LK and RK were tried together before Sweeney J and a jury in the District Court. The trial commenced on 30 June 2008 and evidence was completed on 4 July 2008.

Before the jury, LK and RK demurred to the indictment,[6] contending that it did not disclose an offence that was known to law. At the close of the Crown's case, LK and RK each sought an acquittal by direction submitting that there was no case to answer. Sweeney DCJ upheld these applications and directed the jury that as a matter of law they should acquit LK and RK of the charge on the indictment. The direction was based not upon any insufficiency in the evidence adduced for the Crown, but upon her Honour's conclusion that the indictment did not disclose an offence known to the law. At her Honour's direction, the jury returned a verdict of not guilty and LK and RK were discharged.

COURT OF CRIMINAL APPEAL AFFIRMS LOWER COURT

An appeal by the Crown against the acquittals was brought in the Court of Criminal Appeal pursuant to s. 107 of the *Crimes (Appeal and Review) Act 2001* (NSW). The section provides for an appeal by the

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[5] A committal hearing is conducted before a Magistrate. When all the prosecution evidence and any defence evidence have been taken in committal proceedings, the Magistrate must consider all the evidence and determine whether or not in his or her opinion, having regard to all the evidence, there is a reasonable prospect that a reasonable jury, would convict the accused of an indictable offence (s. 64, CPA). If the Magistrate is of the opinion that there is a reasonable prospect that a reasonable jury, properly instructed, would convict the accused of an indictable offence, the Magistrate must commit the accused for trial (s. 65, CPA).

[6] Demurrer refers to a pleading which asserts that, even accepting that the facts alleged in an indictment are true, the indictment does not disclose an offence: *R v Boston* (1923) 33 CLR 386. Pursuant to s. 17(1) of the CPA an objection to an indictment for a formal defect apparent on its face must be taken, by demurrer or motion to quash the indictment, before the jury is sworn. The court before which the objection is taken may cause the indictment to be amended and, in that case, the trial is to proceed as if there has been no defect. If an indictment is defective is does not mean that it is automatically held to be invalid. The court can order the indictment be amended so as to cure the defect: see, eg, *Stanton v Abernathy* (1990) 19 NSWLR 656.

State Attorney-General or the Director of Public Prosecutions for the State against, inter alia, the acquittal of a person "by a jury at the direction of the trial judge"[7].

The judgment of the Court dismissing the appeal was delivered by Spigelman CJ, with whom Grove and Fullerton JJ agreed.[8] The Chief Justice said the trial judge had correctly distinguished *R v Ansari*[9] ("*Ansari*") (a case where it was found that persons could conspire to commit an offence with respect to which recklessness was the fault element) and had correctly concluded that the Crown case disclosed no offence known to the law.[10] The Crown's appeal was dismissed.

HIGH COURT DISMISSES THE APPEALS

The Crown lodged applications to the High Court for special leave to appeal on 19 January 2009. Special leave was granted on 19 June 2009. The single ground of appeal in each case was that:

> *The Court of Criminal Appeal erred in interpreting s 11.5 of [the Code], such that to be guilty of conspiracy to commit an offence that has a physical element for which a fault element of recklessness is prescribed, it must be proved that the offender intended that physical element.*

Each of the respondents filed a notice of contention in substantially similar terms with the following grounds:

> 1. *The Court below failed to decide that as a matter of law no appeal lay to it because s 107 Crimes (Appeal and Review) Act 2001 did not come into operation until 15 December 2006, after the proceedings against the respondent had commenced by court attendance notice served on the respondent 18 October 2006. This point was taken in the Court below but not decided in the Court's reasons for judgment.*
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> 2. *In their combined operation, sub-sections (1)(a), (2) and (5) of s107 [of] that Act are invalid because, contrary to s 80 of the Commonwealth*

[7] Sections 107(1)(a) and 107(2), *Crimes (Appeal and Review) Act 2001* (NSW).
[8] *R v LK and RK* [2008] NSWCCA 338; (2008) 73 NSWLR 80.
[9] (2007) 70 NSWLR 89 ('*Ansari*').
[10] *R v LK and RK* [2008] NSWCCA 338; (2008) 73 NSWLR 80 at 94.

> *Constitution, they purport to empower the Court of Criminal Appeal to disregard an essential characteristic of trial by jury of an indictable offence against a law of the Commonwealth viz, the inviolability of a jury's verdict of acquittal. This point was also taken in the Court below but not decided in the Court's reasons for judgment: see paragraph (1) above.*

French CJ concluded that the trial judge's direction, and that the conclusions reached by the Court of Criminal Appeal were correct, and that the Crown's appeals should therefore be dismissed.[11] Gummow, Hayne, Crennan, Keifel and Bell JJ held that the Court of Criminal Appeal was correct to uphold Sweeney DCJ's ruling on each of the 'no case' applications, and also dismissed the appeals.[12] Heydon J held the appeals should be dismissed and the appellant's arguments against that course should be rejected because the reasoning of the Court of Criminal Appeal was correct.[13]

IV. LEGAL FRAMEWORK

CRIMINAL RESPONSIBILITY AND CONSPIRACY

The appeals were brought by special leave application against the order of Court of Criminal Appeal upon a single ground: that the Court erred in its interpretation of s. 11.5 of the *Criminal Code*. The appeals raise the question of whether s. 11.5(2)(b) requires that the prosecution prove intention in relation to each physical element of the substantive offence, even if the fault element prescribed for that offence is a lesser fault element, such as recklessness. The controversy was that the Crown contended that the elements of the offence were wholly contained in s. 11.5(1) of the *Criminal Code* whereas LK and RK contended that the elements were to be found in s. 11.5(2). The High Court concluded that the elements of the offence were found in s. 11.5(1), but resolution of that issue was not determinative of the outcome of the appeal. The issue for determination was whether, in the substantive proceedings, the provisions of s. 11.5 required the Crown to prove that LK and RK actually held the intention to deal with money which was proceeds of crime.

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[11] *LK and RK* at 79.
[12] Ibid at 142.
[13] Ibid at 145.

CRIMINALITY OF CONSPIRACY AND MONEY LAUNDERING UNDER THE CODE

(a) The elements of criminal responsibility

The purpose of Chapter 2 of the Code is to codify the general principles of criminal responsibility under laws of the Commonwealth.[14] Part 2.2 deals with the elements of offences. Fault elements are dealt with under Division 4 and physical elements under Division 5. A fault element for a particular physical element may be intention, knowledge, recklessness or negligence. A person is said to have intention if he or she intends to engage in conduct, or believes a circumstance exists, or will exist, or means to bring about a result that will occur in the ordinary course of events.

(b) Conspiracy

Part 2.4 of the Code concerns extensions of criminal responsibility. Division 11, among other things, deals with conspiracy.[15] The relevant parts of s. 11.5 relating to the offence of conspiracy are worth stating at this point. Section 11.5(1) states, "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." Subsection 11.5(2)(b) states, "For the person to be guilty: the person and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement." Part 2.6 concerns proof of criminal responsibility. The standard of proof is beyond reasonable doubt[16] and it is for the prosecution to prove every element of an offence relevant to the guilt of the person charged.[17]

(c) Money laundering

The offence that was the subject of the conspiracy charge in the present case, money laundering, was that created by s. 400.3(2) in Part 10.2 of the *Criminal Code*. That section principally requires the money or property in question to be proceeds of crime, or risk of becoming an instrument of crime, that the person(s) is reckless as to that fact, and the value of the money or property to be greater than $1,000,000.

[14] Section 2.1, Criminal Code.
[15] Section 11.5, Criminal Code.
[16] See s 141(1) *Evidence Act 1995* (NSW).
[17] Section 13.1(1), Criminal Code.

(d) Intention is a necessary fault element

In 1990, following the release of the Gibbs Committee report,[18] the Standing Committee of Attorneys-General, through the Model Criminal Code Officers Committee, set out then proposed s. 405 of the Model Code, now reflected in s. 11.5 of the *Criminal Code*. The provisions of s. 11.5 were drafted to separate clearly the agreement component of the conspiracy from the intent to commit an offence pursuant to that agreement. Recklessness was not held to be a sufficient fault element. The fault element necessary for the offence of conspiracy was the intention to make an agreement. However, to understand the full purpose of s. 11.5 it is necessary to acknowledge that it imports the common law concept of conspiracy.

(e) Conspiracy at common law

The common law considers the agreement to be the *actus reus*, and the intention to do the unlawful act pursuant to the agreement as the *mens rea*.[19] Conspiracy evolved as a common law offence in England and by 1330 it was prosecuted pursuant to the *Statute of Westminster* as a criminal offence. By the early 1570s, the combination to commit or procure the commission of a crime was prosecuted as a conspiracy.[20] The interaction between statute law and the common law developed over the next 300 years and by 1868 a concise enunciation of the elements of conspiracy was given by the Court of Queen's Bench in *Mulcahy v The Queen*[21] when it was determined that a conspiracy consists not only in intention, but also in agreement. That is, an alleged conspirator must intend to carry into effect the common design of the agreement.[22]

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[18] The origins of the *Criminal Code* relating to conspiracy date back to 1987 when the Commonwealth Attorney-General established a Committee chaired by Sir Harry Gibbs to undertake a review of Commonwealth criminal laws. The third of the Committee's reports dealt with conspiracy and recommended it should be made clear that the mental element required to commit a crime of conspiracy is an intention on the part of the conspirators to agree to commit an offence and that the offence should be committed.

[19] See, for example, *Peters v The Queen* (1998) 192 CLR 493 (McHugh J) ('*Peters*').

[20] See, for example, *Poulterer's Case* [1572] EngR 448.

[21] (1868) LR 3 HL 306 ('*Mulcahy*').

[22] *Mulcahy* was accepted and applied by the High Court of Australia in *R v Kidman* (1915) 20 CLR 425 at 446-446 (Isaacs J); *R v Boston* (1923) 33 CLR 386 at 396 (Isaacs and Rich JJ); and by the Supreme Court of Canada in *R v O'Brien* [1954] SCR 666 at 668 (Taschereau J).

In the United Kingdom the House of Lords in *Director of Public Prosecutions v Nock*[23] ("*Nock*") that divided the offence of conspiracy at common law into *actus reus* and *mens rea*. In *Peters v The Queen*[24] McHugh J, however, was of the opinion that such division was fraught with difficulty because, as he noted, the agreement which is the *actus reus* necessarily includes a mental element.[25] At the very least there must be an intention to enter into the agreement to commit an unlawful act, and there can be no conspiratorial agreement unless it was also intended that the common design should be carried out. But is it necessary that the crime, the subject of the conspiracy, be capable of being carried out? The House of Lords in *Nock*[26] drew the conclusion that it was. If it was in fact impossible to carry out the crime, the offence of conspiracy could not be made out. This proposition elucidates the association between conspiracy and attempt.[27] At common law, an agreement to do a thing which is impossible of performance is not a criminal conspiracy. But it is under the *Criminal Code*![28] Notwithstanding possibility or impossibility of carrying out the subject crime, intention is a necessary element to establish.

In the present case, the Crown contended that the respondents were "reckless". The association between attempt and conspiracy assists in consideration of whether conspiracy to commit an offence can be made out by the Crown where it does not propound, as part of its case, the existence of a physical element, or circumstance.[29] At common law a reckless state of mind is not sufficient to constitute the *mens rea* for the offence of contempt. For many offences sufficient intent is found in law but arguably it is better described as recklessness. The High Court in *Giorgianni v The Queen*[30] held the view that attempt and conspiracy are not offences in which it is possible to speak of recklessness as constituting a sufficient intent to carry out the subject crime.[31] Participation by the person must be intentionally aimed at the commission of the acts that constitute the elements of the offence. Intention is required, and the intention must be based upon knowledge or belief of the necessary facts that constitute the offence. In *Ansari,* the

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[23] [1978] AC 979.
[24] (1998) 193 CLR 493.
[25] *Peters* at 516 per McHugh J.
[26] [1978] AC 979 at 996 (per Lord Scarman).
[27] See, for example, *DPP v Nock* [1978] AC 979; *Giorgianni v The Queen* (1985) 156 CLR 473 at 506 (per Wilson, Deane and Dawson JJ) ('*Giorgianni*'); *Rogerson* (1992) 174 CLR 268 at 275 (Mason J), at 297 (McHugh J).
[28] Section 11.5(3)(a), Criminal Code.
[29] *LK and RK* at 66 (French CJ).
[30] (1985) 156 CLR 473
[31] Cited in *LK and RK* at 67 (French CJ).

Court of Criminal Appeal held that a person could be charged with conspiring to commit an offence, the mental element of which was recklessness, when the Crown relied upon knowledge to prove the element of recklessness.[32] However, in the present case, recklessness was not the requisite mental element of the offence; intention was.

NOVEL JURISDICTION: COMMONWEALTH JUDICIARY ACT AND APPEALS AGAINST ACQUITTALS

Section 107 of the *Crimes (Appeal and Review) Act* provides for appeals against directed acquittals and acquittals without juries; to the acquittal of a person "by a jury at the direction of the trial judge".[33] The Court of Criminal Appeal was also granted statutory leeway to hear appeals against acquittals applying to persons acquitted before the commencement of the amending Acts. An acquittal may be affirmed or quashed, or a new trial can be ordered. However, the Court of Criminal Appeal cannot convict or sentence a person for the offence charged, nor can it direct the lower court conducting the new trial to do so.

Jurisdiction of the Court of Criminal Appeal to hear an appeal against a directed verdict of acquittal derives from s. 68(2) of the *Judiciary Act 1903* (Cth), read with s. 107 of the *Crimes (Appeal and Review) Act*. Federal jurisdiction is conferred upon State and Territory courts by ss. 39 and 68 of the *Judiciary Act*. The appeal to the High Court in the present matter focused on the operation of s. 68 which vests State courts with the power to administer criminal justice in relation to federal offences. Section 68 as first enacted substantially reproduced ss. 2 and 3 of the *Punishment of Offences Act 1901* (Cth), containing no reference to appeals.[34] As the legislative precursor to s. 68 of the *Judiciary Act,* the *Punishment of Offences Act* operated as a temporary measure conferring federal jurisdiction in criminal matters on State courts and applying State laws of a procedural character to the trial on indictment of persons charged with offences against the laws of the Commonwealth.

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[32] *Ansari* is an example of a factual situation in which persons could conspire to commit an offence with respect to which recklessness was the fault element attributed to a physical element of that offence. That could occur where the physical element was to be carried out by a person not a party to the agreement.

[33] Section 107(1)(a). Section 107 was introduced into the *Crimes (Appeal and Review) Act* by the *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006* (NSW) ('*amending Acts*').

[34] Section 4 of the *Punishment of Offences Act* conferred appellate jurisdiction on State courts, an aspect not reproduced in s. 68 of the *Judiciary Act.*

The High Court in *Ah Yick v Lehmert*[35] ("*Lehmert*") considered the question of whether s. 39 of the *Judiciary Act* conferred appellate, as well as original, federal criminal jurisdiction on State courts. It held that it did. Twenty seven years later, the High Court was again asked to consider the issue and in *Seaegg v The King*[36] cast doubt over *Lehmert,* expressing the view that s. 39(2) of the *Judiciary Act* might be insufficient to effect the conversion of appellate jurisdiction conferred by the *Criminal Appeal Act 1912* (NSW) into federal jurisdiction over the different subject matter of appeals against convictions on indictment under federal law. Parliament consequently amended s. 68(1) and (2) of the *Judiciary Act*. State courts with appellate criminal jurisdiction in relation to offences against State law were given like jurisdiction in relation to federal offences. The amended legislation, however, while establishing procedural changes for appeals against convictions under federal law, did not make specific reference to appeals against acquittals for Commonwealth offences. But, as French CJ noted, "the ambulatory character of the amended s. 68 was able to pick up novel appellate jurisdictions created under State law."[37]

Williams v The King [No 2][38] brought one such novel jurisdictional issue to the High Court for consideration – whether s. 68 as amended conferred federal jurisdiction in the terms of the *Criminal Appeal Act 1912* (NSW) providing for a Crown appeal against sentence to the Court of Criminal Appeal. Dixon J held it did, but conceded that such an appeal was a "marked departure from the principles theretofore governing the exercise of penal jurisdiction".[39] Thirty-seven years later, the issue was again the subject of debate before the High Court in *Peel v The Queen*[40] ("*Peel*") The Court held by majority[41] that s 68(2) operated upon s 5D of the *Criminal Appeal Act 1912* (NSW) to confer jurisdiction on the NSW Court of Criminal Appeal to hear an appeal by the Commonwealth Attorney-General against the inadequacy of a sentence imposed for an offence against a Commonwealth law. Seventeen years on, *Peel* was applied by the High Court in *Rhode v Director of Public Prosecutions*.[42]

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[35] (1905) 2 CLR 593.
[36] (1932) 48 CLR 251.
[37] *LK and RK* at 16.
[38] (1934) 50 CLR 551 ('*Williams*').
[39] *Williams* Ibid at 561. His Honour added, however, that it was a "departure sanctioned by State law, and it had already been made when the amendment in the provisions of s 68(2) was introduced.
[40] (1971) 125 CLR 447
[41] Per Owen, Gibbs and Windeyer JJ adopting the reasons of the majority in *Williams*. Particular reference was given to the judgment of Dixon J. Barwick CJ dissented.
[42] (1986) 161 CLR 119.

The parties to the appeals before the High Court did not contend that, as a matter of construction, s. 68(2) could not confer like jurisdiction to hear an appeal against a directed verdict of acquittal as is conferred upon the NSW Court of Criminal Appeal by s. 107 of the *Crimes (Appeal and Review) Act*. French CJ affirmed the contentions of the parties to the present matter that s. 68(2) conferred jurisdiction. [43] Further, the trial commenced after s. 107 came into effect and the question of retrospectivity in the application of s. 107 to the directed acquittals, as raised by the respondents, was dismissed.[44]

A DIRECTED VERDICT OF ACQUITTAL AND THE CONCEPT OF TRIAL BY JURY: A CONSTITUTIONAL QUESTION

In their notices of contention each of the respondents contended that in their combined operation, sub-sections (1)(a), (2) and (5) of s 107 [of] that Act are invalid because, contrary to s. 80 of the *Constitution*, they purport to empower the Court of Criminal Appeal to disregard an essential characteristic of trial by jury of an indictable offence against a law of the Commonwealth viz, the inviolability of a jury's verdict of acquittal.

THE CONSTITUTIONAL VALIDITY OF S. 107

(a) Section 80 – Court of Criminal Appeal Validly Hears Appeal

Andrew Inglis Clark's first draft of the *Constitution* in 1891 provided, in cl 65 that "[t]he trial of all crimes cognisable by any Court established under the Authority of this Act shall be by jury".[45] Today that is not the operational effect of s. 80 of the *Constitution*. Section 80 reads, "[t]he trial on indictment of any offence against any law of the Commonwealth shall be by jury". The respondents relied on the long standing proposition set down in *R v Snow*[46] ("*Snow*") that the finality of a verdict of acquittal, even a directed verdict of acquittal, is an essential function of trial by jury that is protected by s. 80. However, a fortiori, *Snow* did not determine the present case, which turned solely upon questions of law. The present case involveed the question of whether the Court of Criminal Appeal could validly exercise a statutory jurisdiction to hear and determine an appeal against a

[43] *LK and RK* at 20.
[44] *LK and RK* at 23 (French CJ).
[45] Reproduced in John M. Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press: Vic, 2005), p. 89.
[46] (1915) 20 CLR 315 ('*Snow*').

directed verdict of acquittal on an indictment for an offence against the Commonwealth. The Court concluded that the grounds of contention disclosed no error by the Court of Criminal Appeal.[47]

(b) Directed verdict of acquittal

The legal foundation of the principle of verdict by direction dates back to the 15th century English procedural mechanism of a 'demurrer'.[48] It was a mechanism for taking a case away from the jury because, as a matter of law, a conviction was not open. It was for the court to decide, not the jury. Over time, the practice of demurrer became a procedural mechanism for a non-suit, or no case to answer, and the non-suit began to resemble a directed verdict.[49] As a general proposition, and one that extends to offences against the Commonwealth, a no case to answer may be satisfied where the prosecution has failed to make out a prima facie case.[50] It is a trial judge's duty to direct a jury to return a not guilty verdict where there is no evidence upon which a jury could convict.

French CJ opined that such a judicial direction is an expression of the judge's power and duty to decide questions of law, and the position is the same where the direction is made upon the basis that the indictment does not disclose an offence known to the law.[51] *Yager v The Queen*[52] supports the proposition that a trial judge's power to direct a jury to return a particular verdict, whether it is guilty or not guilty, is an incident of the duty of the judge to decide questions of law and to direct the jury accordingly. It is no part of the function of a jury to exercise and discretion in the face of direction to acquit. It is no interference with a jury's function for the law to provide for an appeal against a verdict of acquittal where in obedience to the judge's direction.

(c) Federal jurisdiction conferred

In the present case the provisions of the *Criminal Procedure Act*, a NSW statute, applied by virtue of the operation of s. 68(1) of the *Judiciary Act* to LK's and RK's trial in the District Court. In *R v Murphy* the High

[47] *LK and RK* at 40 (French CJ).
[48] See above, note 6.
[49] This procedural mechanism survives in civil practice today: Uniform Civil Procedure Rules r29.9.
[50] See, eg, *Doney v The Queen* (1990) 171 CLR 207 and *May v O'Sullivan* (1955) 92 CLR 654.
[51] *LK and RK* at 29.
[52] (1977) 139 CLR 28.

Court was of the view "the relationship between committal proceedings and the trial of an indictable offence is such that they are part of the matter which the trial ultimately determines".[53] LK's and RK's directed acquittals in the District Court were the outcome of their trial on indictment for conspiracy. The appellate jurisdiction conferred by s. 107 is a jurisdiction that relates to the outcome of a trial on indictment. When the condition set down in s. 80 of the *Constitution* is satisfied - "indictment" and "law of the Commonwealth" - the law cannot provide for the trial to be other than by jury.[54]

Section 107 is part of the law of the State of NSW and has no application to Commonwealth offences. The constitutional issue, as French CJ saw it, related to the operation of s. 68 of the *Judiciary Act*.[55] The question for determination before the High Court was, "whether the guarantee of trial by jury given by s. 80 of the *Constitution* would be infringed by a law of the Commonwealth, having the same content of s 107, conferring a right of appeal from a directed acquittal of an indictable offence against a law of the Commonwealth."[56] The respondents contended that, having regard to s. 80 of the *Constitution*, it cannot validly do so with respect to directed acquittals. French CJ did not accept this contention. In his Honour's opinion, s. 68 was capable, as a matter of construction in relation to Commonwealth offences, of conferring federal jurisdiction in terms created by s. 107. If the Court accepted the respondent's contention then s. 68 could not be construed as conferring that jurisdiction.

V. OBITER

The Crown presented its case against LK and RK (the respondents) on the basis that they agreed to deal with money in RK's account that was proceeds of crime, and that the respondents were reckless that the money was the proceeds of crime. Sweeney DCJ found that the Crown's evidence was overwhelmingly capable of proving that the respondents entered into the alleged conspiracy and were reckless as to the money being proceeds of crime. But to the contrary, the Crown's case, as set out in its application for special leave, was that the respondents intentionally agreed to commit an offence (conspiracy, s. 11.5 of the *Criminal Code*), "for which a fault element of recklessness is prescribed." For the Crown, what transpired on appeal was something

[53] (1985) 158 CLR 596 at 616.
[54] See, for example, *Kingswell v The Queen* (1985) 159 CLR 264; *Cheng v The Queen* (2000) 203 CLR 248.
[55] *LK and RK* at 25.
[56] *LK and RK* at 25.

quite different; it had wrongly interpreted that s. 11.5(2)(b) imported recklessness from s. 400.3(2)(c) as the requisite fault element. In interpreting codes, it is important to contemplate the notion that certain words and expressions may be used that have an accepted legal meaning and that meaning may not be specifically set out in the code.[57]

The case advanced by the Crown therefore committed it to proving that the respondents were "reckless". Recklessness, however, is not the prescribed fault element under s. 11.5. Rather, the *Criminal Code* imports the common law concept of conspiracy. Following *Ansari,* her Honour was of the opinion the charge offended the longstanding principle of criminal liability that an accused must know of all the facts that would make his conduct criminal. Her Honour concluded that the *Criminal Code* does not displace *Ansari,* but because of the final form of the charge relied on by the Crown the offence with which the respondents were charged was unknown at law.

The appellant's case before the Court of Criminal Appeal was that the trial judge's interpretation of the decision in *Ansari* was incorrect. The Court rejected this contention and held her Honour to be correct. The primary question on appeal for the Crown was whether the offence of conspiracy can be committed when there is an agreement to commit the offence of dealing with money the proceeds of crime where *recklessness* as to the fact that money is proceeds of crime is an element of the substantive offence. The Court of Criminal Appeal upheld the trial judge's direction,[58] and concluded that it could not.

Chief Justice Spigelman concluded that the Crown case, as presented, could not have succeeded. His Honour's conclusion was based on the reasoning that the words "to commit an offence" in s. 11.5(1) and the words "intended that an offence would be committed" in s. 11.5(2)(b) were to be interpreted by reference to the common law.[59] Spigelman CJ supported the view that a person *cannot* be found guilty of an offence under s. 11.5(1) unless he/she knows the facts that make the act unlawful. The Court concluded that the law creating the offence of conspiracy is s. 11.5(1). The offence has a single physical element of conduct: conspiring with another person to commit an indictable offence. The fault element in s. 11.5 for this physical element of conduct is intention; not recklessness.

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[57] Pearce and Geddes, *Statutory Interpretation in Australia* cited in *LK and RK* at 96 (Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[58] Spigelman CJ with whom Grove and Fullerton JJ agreed.
[59] *LK and RK* at 94 (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

The Court also decided that the District Court had validly exercised federal jurisdiction, and that the jurisdiction of the Court of Criminal Appeal derived from s. 68(2) of the *Judiciary Act 1903* (Cth), read with s. 107 of the *Crimes (Appeal and Review) Act 2001* (NSW), provided a right of appeal from a directed acquittal involving a question of law alone. This point of appeal raised by the respondents was rejected.

The Crown brought before the High Court the complaint that Spigelman CJ wrongly interpreted the requirement in s. 11.5(2)(b) for necessity of proof of intention in respect of each physical element of the substantive offence, regardless of the fault element that the law creating the substantive offence specifies. In the High Court's opinion the Crown misconceived Spigelman CJ's reasoning and held that His Honour's analysis of the law creating the offence was consistent with the analysis in *Ansari*. It was incumbent on the Crown to prove *intention* in relation to each physical element of the offence particularised as the object of the conspiracy; not recklessness. In Chief Justice French's opinion, "the formulation of the [Crown's] question throws up a fault line in the Crown's argument."[60]

The High Court concluded that Chief Justice Spigelman proceeded correctly on the basis that the *Criminal Code* imported the common law concept of conspiracy. So a person cannot enter into a conspiracy under the Code without knowing the facts that make the agreed conduct unlawful. The Crown did not put forward the case that the respondents *knew* the money was proceeds of crime; only that they were reckless as to whether the money was proceeds of crime. The Crown's appeal was unanimously dismissed. On this basis the High Court said his Honour rightly concluded, consistent with *Ansari*, that Sweeney DCJ was correct to find that the Crown case disclosed no offence known to the law.

As to the respondents' contention that the Court of Criminal Appeal could not validly exercise a statutory jurisdiction to hear and determine an appeal against a directed verdict of acquittal, the Court was of the opinion that the appeal did not offend against s. 80 of the *Constitution*.[61] As a question of law it did not infringe upon any of the essential functions of trial by jury.

VI. CONCLUSION

[60] *LK and RK* at 1.
[61] *LK and RK* at 40 (French CJ).

The Crown's case on appeal was premised on proving LK and RK were reckless as to whether the money was proceeds of crime, but this interpretation of the prescribed fault elements of the offence under the *Criminal Code* was incorrect. The *Criminal Code* imports the common law concept of conspiracy and it was incumbent on the Crown to prove intention. Right from the beginning was there ever a case for LK and RK to answer? Consequently, at law, LK and RK could not have entered into a conspiracy under the *Criminal Code* without knowing the facts that make the agreed conduct unlawful.

The Crown appealed under s. 107 of the *Crimes (Appeal and Review) Act 2001* (NSW). The argument of LK and RK that s. 107 operated retrospectively was rejected by the High Court. However, could the Crown appeal against a directed acquittal? LK and RK also argued that an appeal by the Crown against a directed verdict of acquittal infringed the guarantee in s. 80 of the *Constitution* of the trial by jury. The High Court did not accept this contention and also rejected this argument. In the Court's opinion s. 68 of the *Judiciary Act* is capable, as a matter of construction in relation to Commonwealth offences, of conferring federal jurisdiction on State courts in terms of that created by s. 107.

Against a backdrop of conspiracy, money laundering and constitutional challenge LK and RK's directed acquittal was upheld. The indictment, as issued by the Crown, simply did not disclose an offence known to the law.