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H054661

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JES:CAT:6

THE DISTRICT COURT  
OF NEW SOUTH WALES  
CRIMINAL JURISDICTION

NOT FOR  
LOAN

5 JUDGE KELEMAN  
AND A JURY OF TWELVE

FOURTH DAY: TUESDAY 10 JUNE 2003

10 02/11/0999 - REGINA v FUI MAN LIU & SIN CHUN WONG

15 IN THE ABSENCE OF THE JURY

THE FOLLOWING ERRATA WAS NOTED

- 1 At p 42 line 8 insert "was" after "Ms Lieu" and at  
line 41 delete "to" after "to".
- 20 2 At p 43 line 2 "she" amended to "you".
- 3 At p 43 line 31 "Wong" amended to "White" and at line  
30 "with" amended to "within".
- 25 4 At p 44 line 19 amend "?" to "," and "or" to "were".
- 5 At p 50 lines 11 and 12 "iron" amended to "ion".
- 30 6 At p 56 line 41 add to Exhibit D1 "TENDERED, ADMITTED  
WITHOUT OBJECTION".
- 7 At p 61 line 20 "this" amended to "there".
- 35 8 At p 61 line 34 insert "by you with the jury so they  
can mark their copies of the transcripts of the  
interview."
- 9 At p 69 line 11 after "rooms" insert "where".
- 40 10 At p 71 line 44 "a mere" amended to "more than a",  
"it says" amended to "is said", and "transcribes" to  
"describes".
- 45 11 At p 73 line 1 amend "at this stage" to "tape". At  
line 3 after "time" insert "left".
- 12 At p 75 line 25, "Mr Ali Ung" amended to "Mr Ah  
Leung".

50 HIS HONOUR: There is something that arises already out  
of that query I raised on Friday about joint enterprise.  
Correct me if I am wrong, Madam Crown, the Crown is  
relying on joint enterprise in respect of both accused to  
55 establish that the total amount of the importation was in  
the order of 2.8 kilograms.

CROWN PROSECUTOR: Yes, your Honour..

.10/06/03

76

JES:CAT:6

D4

HIS HONOUR: Is that right?

CROWN PROSECUTOR: Yes.

5 HIS HONOUR: So the understanding I have is essentially based on your opening address and what you also said on Friday afternoon.

CROWN PROSECUTOR: Yes.

10 HIS HONOUR: I had a look at the Commonwealth Criminal Code over the weekend, and I don't know whether you got this far into the code, Madam Crown, and it will help enormously to have, and you probably all have it with you, the book that's described the Commonwealth Criminal Code Guide For Practitioners. Have you got that?

15 CROWN PROSECUTOR: Yes, I've got it.

20 HIS HONOUR: You, Mr McGrath?

McGRATH: No.

25 HIS HONOUR: It's important that you both have one or at least share one. The three of you might have a look at it together. If you just go to 11.2 of the Commonwealth Criminal Code, and it will be necessary for all of you to look at this together. Madam Crown, I am wondering if you wouldn't mind perhaps sitting between Mr McGrath and Mr Peluso. That way they will have the opportunity of looking over your shoulders and will be able to follow this as we go through it. It starts at p 262 of the guide.

30 CROWN PROSECUTOR: Or 248.

35 HIS HONOUR: We can go back even earlier. Go to 260 where there is a discussion about joint enterprise on the opposite page, 261. But for these purposes let's start with 11.2. The heading is "Complicity and Common Purpose". It says, "(1) A person who aids...punishable accordingly." Then it says, "(2) For the person...the other person."

40 If you go to the commentary at p 261 in the guide, I don't know whether you have looked at that, but I think it is very important that you look at what's recorded at p 261 and p 263. That portion of the guide that's headed "The Common Law doctrine of acting in concert has no counterpart in the code," refers to the principle stated by the former Chief Judge at Common Law, Hunt J, in Tangye which is really one of the most recent statements of the principle of joint enterprise.

45 It then refers to what McHugh J said in Osland which is essentially consistent with the principle expounded by Hunt J in Tangye, and at the top of p 263 it says, referring to the principle of joint enterprise or the

JES:CAT:6

D4

doctrine of joint enterprise, and this is where you need to hold onto your seats, "The doctrine has no application under the code. The argument in support of that assertion is short and conclusive." Then there are three points. The first is, "The code contains altogether the general principles of criminal responsibility that apply to any offence. It cannot be supplemented by extraneous principles imported from the Common Law," and it refers to 2.1 of the code. It refers to two further matters, and then it goes on to say, "Since the doctrine of joint criminal enterprise or acting in concert is taken to be a form of direct liability, it is incompatible with the structure of the code and has no place in Commonwealth criminal jurisprudence." I must admit, when I first read that portion of the guide, I thought I must have misread it and I read it again and I read it again.

At first blush it would seem to me that the failure to refer to joint enterprise has to be some sort of oversight and I would like to think that someone at the Commonwealth, particularly at the Commonwealth DPP, has given some consideration to this aspect of the code because the reality is, in a large majority of criminal trials where there are co-offenders, joint enterprise frequently exists and the Crown invariably relies upon joint enterprise to establish liability.

Madam Crown, it seemed to me that the Crown in this case, and indeed perhaps other cases, may not have been aware of this part of the legislation and what is said in respect of this part of the legislation in the guide that was issued it seems under the auspices of the Commonwealth Attorney-General's Department.

I am deeply troubled because, quite frankly, until I read this in the guide over the weekend, I had assumed that joint enterprise had applied as it had always done under the law. It would seem from what is contained in the guide that that was clearly a misconception on my part.

If what is contained in the guide is accurate, and it would seem to be accurate in so far as how the law is presently left as a result of the application of the code, it has ramifications in terms of the nature of the charge in this particular indictment with which this trial is concerned. It would seem to me, Madam Crown, that without the application of the principle of joint enterprise, the Crown here would really be looking at two importations rather than one because it's the case, is it not, that the joint enterprise principle that the Crown relied upon or is relying upon is <sup>used</sup> to assert there is one importation.

CROWN PROSECUTOR: Yes, your Honour.

HIS HONOUR: So that if joint enterprise does not apply, there are really, are there not, two importations; one committed by the accused Wong in respect of what he brought in, and the other in respect of the accused Liu in

JES:CAT:6

D4

5 respect of what she brought into the country. It seems that the only basis for complicity now under the code is that contained in 11.2 of the code, namely in relation to a person who aids, abets, counsels or procures the commission of an offence by another person.

10 You may want to think about this, Madam Crown, because I must admit it caused me to reflect considerably on the weekend and, correct me if I am wrong, Madam Crown, is it something that persons at the Commonwealth DPP have just assumed is the case because that is certainly what I did.

15 CROWN PROSECUTOR: If I can put it this way: There are publications within the DPP by those who I understand to have considered the code and they are people from the head office.

20 HIS HONOUR: Have they considered this aspect of joint enterprise?

CROWN PROSECUTOR: I don't know. There is a 300 page document contained on the system as I recall it and I would need to have a look at that.

JL:CAT:6

D3

5 CROWN PROSECUTOR: My understanding of Tangye was as applied to the situation where two people agree, say, to go and steal a vehicle, to go and commit a robbery, with the understanding between them that they may have to use some sort of violence; one of them during the course of the robbery uses a weapon and inflicts grievous bodily harm on a person. The person who agreed to go along to commit the robbery is, as I understand it, then responsible as a principal for those offences.

10 HIS HONOUR: That is the common purpose principle, not the joint enterprise principle. You have just stated the principles the High Court has discussed on a number of occasions but one case is the case of Johns. The issue in  
15 Tangye was that the Judge had sought to deal in Tangye with joint enterprise on the basis that joint enterprise involved this notion of one of the co-offenders committing an act that was possibly within the contemplation of the parties. And in Tangye they made it clear that that was  
20 the incorrect approach because in Tangye the case involved not common purpose but indeed joint enterprise, and it is joint enterprise with which we are concerned here. Your understanding of what Tangye sought to address is not quite right.

25 CROWN PROSECUTOR: I have not looked at it for a while, your Honour.

30 HIS HONOUR: You will see in Tangye the Judge had sought to direct in accordance with joint enterprise in terms of common purpose principles. I have not read it for some time either, but my recollection is that that was an approach that was incorrect because the Court was not  
35 really concerned with common purpose, it was concerned with joint enterprise, where the parties actually agreed to commit an act rather than an act that is in the possible contemplation of the parties. But indeed, in any event there is nothing specifically said in 11.2 about  
40 common purpose either, for that matter, even though it is there in the heading. So it is rather problematic and I didn't want this trial to proceed on what was clearly from what I could see a misconception as to the effect of the law.

45 It may well be I am mistaken, <sup>Crown</sup> but I wanted to raise it at the first opportunity, because it did occur to me that it was something the Commonwealth may not have considered. One must take into account this was relatively new  
50 legislation, and also that the portion of the guide dealing with this provision is right at the end of the guide. I find it very hard to believe, indeed, that the Commonwealth could have contemplated doing away with a concept or doctrine such as joint enterprise. It is very  
55 difficult to understand why they would want to do away with that, because the responsibility involved in aiding and abetting, for example, is different to the responsibility arising through joint enterprise. As McHugh J pointed out in the Adsland judgment, <sup>joint</sup> enterprise

JL:CAT:6

D3

involves direct liability, whereas aiding and abetting involves derivative liability, which is different. And the difficulty arises here because there is essentially one joint count involving both accused, so that if joint enterprise does not apply in effect we have two importations, and the joint single count is potentially defective because it could be said that it is duplicitous, if indeed there are two importations as opposed to one.

10 CROWN PROSECUTOR: I would argue that if in fact the Crown is not able to rely on the doctrine of joint enterprise then the jury could simply be directed to consider the case against each accused separately with respect to the amounts, and that as a result they could then be asked to, directed effectively, that they would find it was a traffickable quantity with respect to Mr Wong only.

20 HIS HONOUR: But you need then two separate counts in the indictment. At the moment you have one common count and the count relates to both accused. That is where duplicity comes into play, because the count can't relate to both importations. Assume for the moment there is no joint enterprise that can be considered because of the code, and if that is the case there is the duplicity problem and the indictment is defective.

30 X The way to overcome that problem is to simply have a separate count for each accused relating to the quantity each of them brought in. Now it is a matter of some considerable implication and I wanted to raise it because it is clearly something that needs to be considered, and be considered carefully. I didn't want the trial to proceed for some days and then find out towards the end of the trial there was a defect, that was of considerable moment. I don't know whether either defence counsel has considered this issue before, but it is certainly troubling.

40 PELUSO: I made an assumption, an incorrect assumption, I need look at the law on this point.

45 HIS HONOUR: I think we all made an incorrect assumption; I certainly did at the outset of the trial. I think the Crown did.

50 PELUSO: The problem I see with the matter proceeding with the jury is already there has been evidence allowed against both accused, it has been commonly admitted and there is going to be a problem if your Honour allowed the trial to proceed. It would have to be explained to the jury that is no longer the case and these sort of issues are really judicial.

55 HIS HONOUR: I am more concerned at this stage Mr Peluso with the question of the indictment, and what can be done, if anything, to address that problem. I don't know whether anything can at this stage.

JL:CAT:6

D3

PELUSO: That is the fundamental threshold.

5 HIS HONOUR: That is why I wanted to raise this matter at the earlier stage and not at a later point of time when it would be even more difficult and potentially more time-wasting.

10 Mr McGrath, you don't need to say anything if you don't wish.

10 MCGRATH: No, I accept that I suppose the first fundamental thing we must do is ascertain for ourselves as quickly as we can whether the assumption we have operated under is in fact incorrect. There may be a respectable opinion held by  
15 those in the Attorney General's Department or the Commonwealth DPP who have considered this.

20 HIS HONOUR: At the end of the day it is a matter for me to consider. But what is contained in the guide is, on its face, quite compelling, particularly in terms of what is contained in 2.1 of the guide. 2.1 of the guide states "The purpose of this chapter is to codify the general principles of criminal responsibility under laws of the Commonwealth. It contains all the general principles of  
25 criminal responsibility that apply to any offence irrespective of how the offence is created". And that is one of the three arguments that is raised by the author of the guide when he deals with this issue of joint enterprise.

30 MCGRATH: As the guide says, the argument contained therein is compelling in its simplicity, it is a very short series of simple steps based on the codification.

35 HIS HONOUR: You see, 11.2 is headed Complicity and Common Purpose, and common purpose is not joint enterprise. What also troubled me that isn't really a problem in relation to this trial is that I did reflect on what other trials might have been conducted ostensibly in accordance with  
40 the Commonwealth criminal code where reliance was placed upon joint enterprise, but that is not really an issue that directly concerns this trial. The code has been in place now for how long, Madam Crown?

45 CROWN PROSECUTOR: December 2001, for offences occurring after that time. I don't know that there is a huge number of trials that have so far concerned events to which the code is applicable.

50 HIS HONOUR: In any event that <sup>it does then</sup> is a matter that may be of concern to the Commonwealth DPP, it is not a matter that directly concerns us, but ~~I do say~~ my reading of the guide had indeed been initially correct. There are issues that arise that have to be investigated. Let us assume for the  
55 moment that joint enterprise no longer applies to a prosecution under the Commonwealth criminal code. There are a number of considerations; firstly, can the indictment be amended by in effect inserting a new and

JL:CAT:6

D3

5 separate count in relation to the accused Wong. We are not looking here at simply amending a particular charge, we are looking at in effect I suppose amending the first charge and inserting a completely new charge in respect of Wong.

10 I have not really given consideration to this concept in terms of raising it as an issue, but query whether the indictment can be properly amended in that way. If it can the trial could proceed, but of course the Crown would not be able to rely on joint enterprise, and it would be necessary to redirect the jury about the way in which certain evidence could be used. If it can't be properly amended, and I have not given consideration to this other than to raise it in my own mind, but if it can't be amended the only option would be to start again.

20 MCGRATH: Perhaps the answer may lie with respect to which condition under s 63A of the Criminal Procedure Act which contains an amendment of the indictment which allows the substitution of the indictment, an instance where the leave of the Court or where the consent of the accused is obtained it appears possible to amend an indictment by substituting an indictment, if my reading of 63A is correct of the Criminal Procedure Act.

30 HIS HONOUR: I see all sorts of difficulties with that from a procedural point of view because the indictment is really the initiating document. The accused plead to a particular indictment, the jury is then sworn and the accused are put in charge of the jury in respect of the original indictment to which the accused have pleaded. I am conscious of what s 63A says. I don't know whether it will accommodate this situation. Not only that, but the Crown has opened on it on a particular basis and evidence has already been adduced in a particular way, consistent with the Crown's belief at least at the time the trial commenced, that it was able to rely on joint enterprise. But I am conscious of the fact the trial has now been running for two days and it is expected to be something in the order of a two week trial, and that was why I was most anxious to raise this matter when it became apparent to me. So I think we might just put 63A aside for one moment, but even if we do keep it in the back of our minds what troubles me is some of the procedural difficulties that may result from such a course at a later point in time. Does that make much sense?

50 MCGRATH: It does, your Honour. I have raised the ~~provision~~ <sup>not to</sup> provision, I wasn't necessarily saying it would ~~fall~~ <sup>be</sup> applied in this particular trial. I had not thought that through, your Honour.

55 HIS HONOUR: I don't think any of us have really thought these things through. I am raising it now because it is of such a moment that it has had certainly on me, and I suspect on counsel at the Bar table, an enormous impact, and indeed, an impact that certainly was not anticipated



JL:CAT:6

D3

by anybody.

5 MCGRATH: I agree: In practical terms should we spend some little time considering this problem and in the mean time advise the jury a legal matter has arisen.

10 HIS HONOUR: The jury certainly has to be advised there is some legal discussion taking place. I think it is necessary to tell the jury through the officer that a legal issue has arisen, and simply leave it at this point, but there may well be something the Crown may well like to look at and I don't think it would be resolved in five minutes, but this particular part of the Commonwealth Criminal Code has ramifications that not only concern this trial but indeed the way in which the Commonwealth Crown conducts trials where it hopes to rely on joint enterprise, as it did in this case.

20 Madam Crown, it may be that despite what was contained in the guide this particular matter <sup>physical</sup> has simply been overlooked. You see the bulk of discussion I have heard and the bulk of discussion in papers that I have read really relate to the issues arising as a result of a need to ascertain under the code ~~fundamental~~ elements and fault elements, rather than this issue of complicity. And I can understand why that may have distracted some of the discussion from parts of the code such as this, even though the author of guide has contemplated the impact of 11.2 of the code and 2.1 of the code.

30 You see the author of guide is a highly respected practitioner, but quite apart from that his reasoning at first blush would seem to be impeccable. Now the issue needs to be considered carefully and, as I said, Madam Crown, I don't expect you to resolve it in five minutes. It will be necessary to raise that matter with the appropriate people at the Commonwealth DPP and it may be necessary to raise it directly with "the" Commonwealth DPP. So what I propose to do at this stage is adjourn briefly and allow you to make some telephone calls if you wish, and we might just take it from there. Is that a suitable course?

45 CROWN PROSECUTOR: I don't know how far I will get even on that basis, but certainly we will try.

50 HIS HONOUR: I understand that, that is why I want this dealt with at this point in time and not later on down the track, but it may have, at the end of the day, an impact that may result in the need to commence this trial again. I am not suggesting that it will, but it may.

55 Madam Crown, if you have a look at Tangye again you will see that distinction that is made between common purpose and joint enterprise, if you need to refresh your memory about that.

PELUSO: May we have a bit longer than the usual break?

JL:CAT:6

D3

HIS HONOUR: Do you want an hour? I am not suggesting that we will come to any definitive resolution within an hour, but at this stage if we simply stand it down for an hour and allow you all to commence some preliminary consideration of the issues, I will resume in an hour's time and we can discuss it further.

PELUSO: Could we have an hour and a half, because it is quite important.

HIS HONOUR: It <sup>may</sup> well be that we will need to spend a large part of today dealing with this issue. The whole purpose in just at this stage adjourning for an hour is to enable some of the preliminary inquiries to commence. I don't suggest for one moment there is necessarily going to be a resolution of this issue within an hour. Is that clear?

PELUSO: Yes.

HIS HONOUR: I will resume in an hour. If any of you need to communicate with my Associate in that time feel free to do so and I will resume in a moment's notice, but I don't suggest resolution of the problem is simple, and it clearly may require ramifications to be considered of some import.

MCCRATH: Whilst your Honour is considering matters, what has just come to my notice is it appears that in conjunction with the enactment of the criminal code the offence of conspiring to import prohibited drug imports which previously fell under 233B1C(b) of the ~~car~~ Customs Act has been repealed. That may be consistent with the views of the code that says there is no joint -- it is has been transferred into the code.

HIS HONOUR: I will try and pick that up.

MCCRATH: So even though 11.2 deals with common purpose --

HIS HONOUR: 11.2 doesn't really deal with common purpose. If you actually read 11.2 it deals with aiding and abetting, counselling and procuring, it doesn't deal with common purpose, even though there is a reference to common purpose in the heading of that provision. That is why I just wondered whether or not the authors of the Commonwealth code as a result of some oversight overlooked the operation of the principles of joint enterprise. At this stage that is just total speculation but it is very difficult to understand why such a doctrine would be discarded, particularly in cases involving offenders where the case is based on an arrangement by the persons to commit an offence, which is what is alleged here. What I will do is I will adjourn and we will see how things are moving along in an hour's time.

SHORT ADJOURNMENT

.10/06/03

85

JES:CAT:6

D4

5 CROWN PROSECUTOR: Might I just say it was fortunate that  
your Honour realised that this issue was a live one when  
your Honour did because I have nothing to offer that will  
take the matter any further than as is indicated in the  
10 Guide For Practitioners. It would appear, indeed, that  
joint enterprise has been done away with effectively, the  
result of which would be that, in a case such as the  
present, one accused would need to be charged with the  
principle offence with respect to his or her own amount  
and then aiding and abetting or conspiracy.

15 To say that it was an unintended consequence of the  
provision of the Criminal Code would tend to suggest that  
this had actually been given consideration to the effect  
that it might have on Commonwealth prosecutions. I don't  
know that I would take it that far. The situation is that  
in the circumstances there is no alternative but to  
20 discharge this jury and to proceed in a manner that may be  
the subject of some argument by one of my friends. I  
don't know.

HIS HONOUR: What was the Crown proposing to do assuming  
the jury was discharged?

25 CROWN PROSECUTOR: A new indictment be prepared containing  
two counts.

HIS HONOUR: One in respect of--

30 CROWN PROSECUTOR: Mr Wong.

HIS HONOUR: And one in respect of Miss Liu?

35 CROWN PROSECUTOR: Yes. I think that would be the  
situation. There would just be one count in respect of  
each.

HIS HONOUR: That would simplify things.

40 CROWN PROSECUTOR: However, the question whether the  
matter proceeds as a joint trial may in the circumstances  
arise for consideration by one of my friends. I don't  
know at this stage.

45 HIS HONOUR: Have both of you had time to consider this  
development?

50 McGRATH: Yes, your Honour. I make no application that  
this trial could proceed by way of amendment or  
substitution of the indictment. I respectfully agree with  
Madam Crown. This jury would need to be discharged and  
the matter commence afresh in the way in which she has  
indicated, and I would need to get some better  
instructions than I presently have concerning whether I  
55 would have an application for a separate trial from Miss  
Liu.

HIS HONOUR: Mr Peluso?

.10/06/03

85

(CROWN PROSECUTOR)

JES:CAT:6

D4

PELUSO: I have a similar attitude.

5 HIS HONOUR: There is consensus that the jury ought to be discharged as a result of this procedural difficulty and the only issue is whether or not, if there is to be a trial, it should proceed as a joint trial or separate trials, is that right?

10 PELUSO: That's the case.

HIS HONOUR: From what I understand, both defence counsel need to consider further this question of whether there should be a joint or separate trials, is that correct?

15 PELUSO: Yes, your Honour.

McGRATH: Yes, your Honour.

20 HIS HONOUR: What I propose to tell the jury is that there has been a procedural difficulty and arising as a result of recent changes to the law which I need not go into with them, and simply say, as a result of that development, there is no option but to discharge them. Are the parties content with something along those lines?

25 McGRATH: Yes, your Honour.

PELUSO: Yes, your Honour.

30 HIS HONOUR: As I understand the jury, who were told a little earlier that there was this legal issue, have been allowed to go out for a short time and they will be back by 12 which is only in about 7 or 8 minutes or so, so when they return, I propose to discharge the jury as requested by all parties. For what it was worth, Madam Crown, it seemed to me when I looked at this on the weekend that that really was the only alternative.

40 CROWN PROSECUTOR: Yes.

45 HIS HONOUR: But I was comforted that the parties have quite independently come to that view. Madam Crown, are you aware whether anyone at the Commonwealth DPP has considered this particular issue before?

50 CROWN PROSECUTOR: Anyone? I don't know, your Honour. I spoke to one person within the Commonwealth DPP's office in Canberra who I might have expected to be the person who might have considered that had it arisen. He had indicated that he had, but I think in slightly different circumstances. But certainly when I raised the facts of this case with him, he was of course aware of the commentary by Leader Elliott.

55 HIS HONOUR: The author of the guide?

CROWN PROSECUTOR: Of the guide, yes, and he was of the view that that would appear to be the situation indeed.

JES:CAT:6

D4

5 HIS HONOUR: The troubling situation is that, putting this case to one side, many of the larger importations invariably involve joint enterprise where the Crown, in order to establish a particular person's criminal responsibility, needs to establish the context against which that conduct of the accused occurs and the Crown invariably relies upon joint enterprise to do that.

10 CROWN PROSECUTOR: I did raise that with the person concerned and I indicated my view that, off the top of my head as it were, it would appear that the Crown would need to rely upon conspiracy counts in those circumstances. I note that the reference in the Guide To Practitioners in passing, while we are waiting for the jury to come in, in 15 any event, at p 277, the third paragraph says, "The charge of conspiracy...Prosector's armory." The authority for that is given as a judgment of Gallop J in the case of Nirta from 1938. There have, of course, been a number of 20 decisions of the CCA in this state certainly that have expressed a different view over the years.

25 HIS HONOUR: The laying of a charge of conspiracy complicates the method of proof. The reliance upon joint enterprise principles is a much more straight forward and readily understandable concept, more so than conspiracy charges in so far as my experience has been over the last 20 odd years doing this type of work, and I don't think any practitioner experienced in the law would take a 30 different view.

30 CROWN PROSECUTOR: No, your Honour.

35 HIS HONOUR: But Madam Crown, can something be done at a fairly high level to ensure that persons at the Commonwealth DPP are aware of this particular issue and it may well be that if many others, under a similar 40 misapprehension about the law as we all were until recently, consideration might even be given to having the Commonwealth code amended and this would of course have to be done at the highest of levels. Madam Crown, would you 45 undertake for what it's worth to have this ventilated at the highest level, if you can possibly do so?

50 CROWN PROSECUTOR: I certainly will. I spoke to one of the Senior Assistant Directors during the break and she was of the opinion that no other trial, as far as she knew had, certainly within the Sydney office, proceeded on the basis of joint enterprise, but people are being made aware of the unexpected consequences of the Criminal Code as they arise in practice.

55 HIS HONOUR: I understand that. This is one matter that needs to be not only conveyed to everyone in the Sydney or New South Wales office--

CROWN PROSECUTOR: I know, your Honour.

HIS HONOUR: -- but it needs to be conveyed to every

JES:CAT:6

D4

person in the offices of the Commonwealth Director of Public Prosecutions throughout Australia and it needs to be brought to his attention, that is, the DPP's attention, to ensure that that's done.

5

CROWN PROSECUTOR: Yes, your Honour.

HIS HONOUR: Are you aware that something to that effect is going to be done fairly quickly?

10

CROWN PROSECUTOR: If I have anything to do with it, something will be done.

15

HIS HONOUR: You do have something to do with it, don't you, Madam Crown? It's just that I find this issue very troubling because it is such a well-established implement in the armory of any prosecuting authority, and I would have thought that the application of the principle - and I say this with respect to those who were involved in drafting the legislation - wouldn't have been inconsistent with the terms of the code if it was appropriately drafted, and one would have thought it would have been drafted in terms of those expressed either in Tangye or in Osland without too much trouble.

20

25

CROWN PROSECUTOR: I will have the assistance of the transcript of this morning's argument and I certainly--

HIS HONOUR: It really wasn't an argument.

30

CROWN PROSECUTOR: A discussion, I suppose, and I will certainly be, together with my own views about the issue, conveying that in a way to ensure that firstly the other regional offices and the head office of the Commonwealth DPP are made aware of the issue, and secondly, that something might be considered.

35

The reason I answered in terms of when an amendment might be likely to be made, I made an enquiry following discussion with your Honour last week as to when the amendment to s 233 B, and the application of the fault elements to that offence, might arise and I think the effect of what I was told was maybe some time later this year. So these things take time.

40

HIS HONOUR: One would have thought that, quite apart from the legal considerations, the political implications of the loss of such a weapon in the Prosecutor's armory would have considerable impact, one would have thought, if it became known by the public that such a situation had occurred. But, of course, we are not concerned with those political considerations. Our concerns are very much directed at the practical reality of running trials as efficiently and properly as possible. It is in that context that this issue was raised.

45

CROWN PROSECUTOR: And the problems with what appear to be unintended consequences of the provisions of the Criminal

JES:CAT:6

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Code.

5 HIS HONOUR: It seems to me that the matter was overlooked. I really find it hard to believe that anyone who was experienced in the criminal law, and particularly in criminal prosecution and criminal defence, could overlook the significance of such a concept, but stranger things have happened.

10 CROWN PROSECUTOR: Copies of the Guide For Practitioners have been made available to my friends from the DPP's library.

*now*