

73. Evidence in Conspiracy Cases (Acts and Declarations of Co-Conspirators out of the Presence of the Defendant)

**Where the trial judge has concluded that there is independent
evidence admissible against the defendant to show he was a
participant in the conspiracy**

73.1 Legislation

[Last reviewed: January 2025]

[Section 541](#) – Conspiracy to commit crime

73.2 Commentary

[Last reviewed: January 2025]

In conspiracy cases, initially evidence of the acts and words of alleged co-conspirators out of the defendant's presence may only be used as proof of the alleged agreement, that is, the conspiracy (*Ahern v The Queen* [\(1988\) 165 CLR 87](#); *Tripodi v The Queen* [\(1961\) 104 CLR 1](#)). The trial judge must determine whether there is reasonable evidence, independent of the acts and words of alleged co-conspirators out of the defendant's presence, from which an agreement can be inferred. If there is, then the acts and declarations of the participants in furtherance of the agreement may be used to prove not only the existence of the conspiracy, but also the defendant's participation in it (*Ahern v The Queen* [\(1988\) 165 CLR 87](#), 100).

'Reasonable evidence' implies an element of judicial discretion to limit the use which might be made of the co-conspirator's acts and declarations when its admission might operate unfairly against an defendant (*R v Gouloff* [\[1979\] VicSC 619](#); [\(1979\) 1 A Crim R 367](#), 371-372; *R v Masters* [\(1992\) 26 NSWLR 450](#); *Ahern v The Queen* [\(1988\) 165 CLR 87](#), 100).

The trial judge alone and not the jury must determine the sufficiency of the independent reasonable evidence of the participation of the defendant in the agreement before evidence can be led of acts and declarations of the other participants in further proof of the participation of the defendant (*Ahern v The Queen* [\(1988\) 165 CLR 87](#), 103; *R v Moore* [\[1988\] 1 Qd R 252](#)).

The jury should be directed about any shortcomings in the evidence of the acts and declaration of others and the absence of opportunity to cross-examine them and, in an appropriate case, be told to scrutinise the evidence carefully, not concluding guilt merely on the say so of an alleged conspirator (*Ahern v The Queen* [\(1988\) 165 CLR 87](#), 104).

73.3 Suggested Direction

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You have heard evidence of acts done and things said by [alleged co-conspirators] out of the presence and hearing of the defendant. The prosecution says that [alleged co-conspirators] in combination with the defendant were parties to the conspiracy alleged against each defendant and that the acts and declarations of [alleged co-conspirators] were in furtherance of the agreed common purpose and go to establish the conspiracy alleged and the defendant's participation in it.

Ordinarily such evidence, of acts done or things said by another or others out of the presence and hearing of the defendant, would not be admissible against the defendant, because it relates to acts done and things said when [he/she] was not present. However, evidence of acts done and things said by [alleged co-conspirators] out of the presence and hearing of the defendant, in furtherance of the common purpose, can be considered by you as proof of the defendant's guilt, in cases in which it is alleged that a number of persons (in this case the [alleged co-conspirators] and the defendant) have entered into an agreement to do something unlawful.

If you are satisfied the acts or things alleged were done or said and were done or said in furtherance of the agreed common unlawful purpose you may use this evidence in deciding whether the prosecution has proven beyond reasonable doubt that there was the conspiracy alleged and that the defendant participated in it. Before you may find the defendant's guilt proven you must be satisfied of the existence of the conspiracy and that the defendant was a participant in it.

In your consideration of this sort of evidence (of the acts and declarations of [alleged co-conspirators]) as evidence of the existence of the alleged conspiracy and the defendant's participation in it, you should give consideration to [refer to any shortcomings in the evidence including *if it be the fact* that there has been no opportunity to cross-examine the co-conspirators and the absence of corroborative evidence]. So you should scrutinise this sort of evidence with care and you should not conclude that a defendant is guilty merely on the say so of another alleged co-conspirator.

(In some cases, the following additional direction may be required):

There is a qualification to what I have said about the use of the evidence of acts and statements of alleged co-conspirators. Evidence as to the acts and statements of existing members of a conspiracy, made before a particular defendant was recruited, but from which an inference is available that the conspiracy existed, may be used against that defendant not yet recruited, in order to establish the fact of the conspiracy.