

Evidence in Conspiracy Cases (Acts and Declarations of Co-Conspirators out of the Presence of the Defendant)¹

**Where the trial judge has concluded that there is independent
evidence admissible against the defendant to show he was a
participant in the conspiracy²**

You have heard evidence of acts done and things said by (A & B) out of the presence and hearing of the defendant. The prosecution says that (A & B) in combination with the defendant were parties to the conspiracy alleged against each defendant and that the acts and declarations of (A & B) 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 was not present. However, in the case against each defendant, evidence of acts done and things said by (A & B) out of the presence and hearing of a particular 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 prosecution alleges (A & B) 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

¹ Initially such evidence may only be used as proof of the alleged agreement: *Ahern v The Queen* (1988) 165 CLR 87; *Tripodi v The Queen* (1961) 104 CLR 1. Once there is reasonable evidence from which an agreement can be inferred, 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. "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 accused: *Gouroff* (1979) 1 A Crim R 367 at 371-372; *R v Masters* (1992) 26 NSWLR 450; *Ahern* at 100. The trial judge alone and not the jury must determine the sufficiency of the independent 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: *R v Moore* [1988] 1 Qd R 252.

² In *Ahern* at 103, the High Court made it clear that it is for the trial judge to decide whether there was independent evidence of the participation of the defendant in the illegal combination sufficient to let in against him evidence of the acts and declarations of the other participants in further proof of that participation. That question should not be left to the jury.

doubt that the conspiracy or combination alleged existed 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 or combination and that the defendant was a participant in it.

In your consideration of this sort of evidence (of the acts and declarations of (A & B)) as evidence of the existence of the alleged conspiracy and the defendant's participation in it you should give consideration to (any shortcomings in the evidence including *if it be the fact* that there has been no opportunity to cross-examine (A) and/or (B) 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.³

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.⁴

³ *Ahern* at 104.

⁴ See *Masters*.