**FACC No. 1 of 2019**

**[2019] HKCFA 36**

**IN THE COURT OF FINAL APPEAL OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**FINAL APPEAL NO. 1 OF 2019 (CRIMINAL)**

(ON APPEAL FROM CACC NO. 95 OF 2017)

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BETWEEN

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|  | **HKSAR** | **Respondent** |
|  | **and** |  |
|  | **LAI KAM FAT (黎錦發)** | **Appellant** |

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| Before: | Chief Justice Ma, Mr Justice Ribeiro PJ,  Mr Justice Fok PJ, Mr Justice Cheung PJ and  Lord Reed NPJ |
| Date of Hearing: | 3 September 2019 |
| Date of Judgment: | 18 October 2019 |

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|  | **JUDGMENT** |  |

Chief Justice Ma:

1. I agree with the judgment of Mr Justice Fok PJ.

Mr Justice Ribeiro PJ:

1. I agree with the judgment of Mr Justice Fok PJ.

Mr Justice Fok PJ:

***A. Introduction***

1. The appellant was tried[[1]](#footnote-1) on one count of conspiracy to traffic in a dangerous drug, contrary to sections 4(1)(a), 4(3) and 39 of the Dangerous Drugs Ordinance[[2]](#footnote-2) and sections 159A and 159C of the Crimes Ordinance.[[3]](#footnote-3) The indictment stated that the particulars of the offence were that:

“[The appellant], between the 19th day of September, 2014 and the 8th day of October, 2014, both dates inclusive, in Hong Kong, conspired together with a male known as ‘Ko Lo’, TANG Kwong-ho, and other persons unknown, to unlawfully traffic in a dangerous drug, namely cocaine.”

1. On 24 March 2017, the jury being unanimous, the appellant was convicted on that count and, on 27 March 2017, the judge sentenced him to 29 years’ imprisonment. His application for leave to appeal against his conviction was dismissed by the Court of Appeal on 26 June 2018.[[4]](#footnote-4) By its judgment dated 4 October 2018,[[5]](#footnote-5) the Court of Appeal refused to certify a point of law for this Court.
2. On 18 January 2019, the Appeal Committee granted the appellant leave to appeal to this Court in respect of the following question of law:

“Where an indictment or charge of conspiracy to traffic in a dangerous drug (contrary to sections 4(1)(a), 4(3) and 39 of the Dangerous Drugs Ordinance, Cap 134, and sections 159A and 159C of the Crimes Ordinance, Cap 200), particularises a specific drug alleged to be the subject of the conspiracy, must the prosecution prove that the defendant charged with that conspiracy knew that that specific drug was the subject of the conspiracy or is it sufficient to prove that he knew that what was agreed to be trafficked was a dangerous drug?”[[6]](#footnote-6)

***A.1 The undisputed facts***

1. In September 2014, German customs officers intercepted three postal parcels from Bolivia which each contained quantities of a powder containing a total of 4.23 kilogrammes of cocaine. The parcels, shipped under three separate air waybills, were addressed to three different recipients in Hong Kong. In October 2014, a German customs officer escorted the three parcels to Hong Kong where one of the parcels was made the subject of a controlled delivery by Hong Kong customs officers. A Hong Kong customs officer telephoned the mobile phone number shown on that parcel. The Hong Kong customs officer brought the parcel to the address in Sham Shui Po shown on the parcel and again called the same mobile number shown on the parcel. A man, later identified as Tang Kwong Ho (“Tang”), opened the main door of the delivery address and the customs officer handed it over to him and asked him to sign to acknowledge receipt. When Tang returned to the building with the parcel he was arrested.
2. Shortly thereafter, on the same day, another customs officer intercepted the appellant nearby and arrested him. The appellant was searched and five mobile phones were found on him. One of those phones had screenshots tracking the three parcels. One had records of 10 calls with Tang’s mobile phone. Two others were the contact numbers shown on two of the parcels and had call records showing incoming calls from the customs officer who had called to set up the delivery of the parcel in Sham Shui Po. In addition, amongst the items seized from the appellant were three pieces of paper with the air waybill numbers and the names of the recipients of the three parcels of drugs.
3. The cocaine found in the three parcels had an aggregate market value of approximately HK$4.8 million.

***A.2 The prosecution case***

1. It was the prosecution case that the appellant had agreed with a man called “Ko Lo” and Tang to receive the three parcels of cocaine from Bolivia. Apart from the undisputed facts set out above, the prosecution relied on the evidence of Tang, who pleaded guilty to trafficking in relation to his receipt of the first parcel, and testified against the appellant as an accomplice. The gist of Tang’s evidence was that, in September 2014, the appellant asked him to receive postal parcels for him containing “可樂” (“coke”) and that they would split a reward of HK$100,000 for doing so. Tang said he knew “coke” was a dangerous drug but did not know what kind of dangerous drug it was. Having agreed with the appellant to receive the parcels, in October 2014, Tang said he was directed by the appellant to go to the location in Sham Shui Po to collect the first parcel, where, after receiving it, he was arrested.

***A.3 The defence case***

1. The appellant’s case was that he was acquainted with a man called “Ko Lo”, who did not know how to use computers but who had various parcels to be collected for which he had the tracking numbers. In September 2014, Ko Lo asked him to check their status online and send a screenshot of the online tracking status of the parcels. In early October 2014, Ko Lo told the appellant that he was busy and asked the appellant to receive the parcels for him. The appellant asked Ko Lo what the parcels contained and was told they were “not guns, not stoves, not dangerous drugs”.[[7]](#footnote-7) Ko Lo gave the appellant a piece of paper with the names and addresses of the recipients of the parcels, two mobile phones and HK$500 as travelling expenses. On 8 October 2014, having just returned to Hong Kong from the Mainland, the appellant received a call from a courier company informing him of the imminent delivery of the first parcel. Thinking he would not get to Sham Shui Po in time, he called Tang and asked him to receive the parcel for him. The appellant denied Tang’s evidence and any knowledge that the parcels contained dangerous drugs. He was, he maintained, set up by Ko Lo.

***A.4 The trial judge’s summing up***

1. The trial judge summed up to the jury on the basis that the two major issues in the case were, first, whether or not the appellant knew the postal parcel contained a dangerous drug, and secondly, whether or not the appellant conspired with Tang and Ko Lo to receive the postal parcels containing dangerous drugs.
2. In relation to the conspiracy the judge directed the jury that the prosecution had to prove (i) that the appellant, Ko Lo and Tang had an agreement to traffic in dangerous drugs, (ii) that the appellant knowingly participated in this agreement, and (iii) that the appellant and the others had the intention to carry out this agreement.
3. In relation to the meaning of drug trafficking, the judge directed the jury consistently with the substantive offence of drug trafficking. Specifically, in respect of the mental element of the offence, the judge directed the jury as follows:

“Alright, in the present case the Prosecution needs only to prove that the Defendant knew the postal parcel contained a dangerous drug; the Prosecution doesn’t need to prove that the Defendant knew which kind of dangerous drug it was. In short, that he knew the postal parcel was a dangerous drug would suffice; he didn’t need to know which kind, because there are many kinds of dangerous drug. It can be cocaine, heroin, ‘ice’, so on and so forth. Do you understand? In law, it does not require the Prosecution to prove that the Defendant knew which kind of dangerous drug it was. It will be sufficient for the Prosecution to prove that the Defendant knew what the postal parcel contained was a dangerous drug.”

***B. The appellant’s contentions on this appeal***

1. It was accepted by the appellant that, to establish the *mens rea* of the substantive offence of trafficking in a dangerous drug, the prosecution needs to prove that the defendant intended the act of trafficking and knew that *a* dangerous drug was being trafficked in. There is no requirement to prove that the defendant knew the specific type of dangerous drug being trafficked in.
2. However, it was the appellant’s case that, on a charge of conspiracy to traffic in a dangerous drug particularised on an indictment, it is necessary for the prosecution to prove beyond reasonable doubt that the defendant knew and intended that *that* specific particularised drug (and not merely *a* dangerous drug or *any* dangerous drug) would be trafficked in. The appellant’s case is based on two arguments, one being a matter of statutory construction and the other a common law argument relying on decisions from various jurisdictions. Both of these arguments will be addressed in more detail below (in Sections D and E respectively).
3. The appellant’s contention is thus that the question of law for the Court’s determination (at [5] above) is to be answered in the manner set out in the preceding paragraph. If that is so, then clearly the appeal must be allowed, given the trial judge’s directions to the jury (in particular that set out at [13] above).

***C. The Dangerous Drugs Ordinance***

***C.1 The offence of trafficking in a dangerous drug***

1. The offence of trafficking in a dangerous drug is a statutory offence. Section 4 of the Dangerous Drugs Ordinance provides:

“**4. Trafficking in dangerous drug**

(1) Save under and in accordance with this Ordinance or a licence granted by the Director hereunder, no person shall, on his own behalf or on behalf of any other person, whether or not such other person is in Hong Kong –

(a) traffic in a dangerous drug;

(b) offer to traffic in a dangerous drug or in a substance he believes to be a dangerous drug; or

(c) do or offer to do an act preparatory to or for the purpose of trafficking in a dangerous drug or in a substance he believes to be a dangerous drug.

(2) Subsection (1) shall apply whether or not the dangerous drug is in Hong Kong or is to be imported into Hong Kong or is ascertained, appropriated or in existence.

(3) Any person who contravenes any of the provisions of subsection (1) shall be guilty of an offence and shall be liable –

(a) on conviction on indictment, to a fine of $5,000,000 and to imprisonment for life; and

(b) on summary conviction, to a fine of $500,000 and to imprisonment for 3 years.

(4) This section does not apply to –

(a) a preparation specified in Part II of the First Schedule; or

(b) a dangerous drug which is in transit and –

(i) is in course of transit from a country from which it may lawfully be exported to another country into which it may lawfully be imported; and

(ii) was exported from a country which is a party to the Conventions and is accompanied by a valid export authorization or diversion certificate, as the case may be.”

1. The term “dangerous drug” is defined in section 2 of the Dangerous Drugs Ordinance as meaning “*any* of the drugs or substances specified in Part I of the First Schedule” (italics added). Part I of the First Schedule contains 11 paragraphs setting out various substances and compounds which are statutorily defined as dangerous drugs. “Cocaine” is listed in paragraph 1(a) of Part 1 of that schedule. No distinction is made in the Dangerous Drugs Ordinance between different classes of dangerous drugs and sentencing tariffs for trafficking in different types of dangerous drugs are a matter of judicial precedent and not specified statutorily.[[8]](#footnote-8)
2. The *actus reus* of the offence of trafficking in a dangerous drug is established by the prosecution proving that a person has done one of the acts listed in paragraphs (a), (b) or (c) of section 4(1)[[9]](#footnote-9) and in the absence of proof that the person concerned is entitled to do the act lawfully under and in accordance with the Dangerous Drugs Ordinance or a licence granted by the Director of Health thereunder. As a matter of statutory language, the offence in section 4(1)(a) is expressed to be to “traffic in a dangerous drug” and not, for example, to traffic in any specific type or class of dangerous drug.
3. It will also be noted that the acts in paragraphs (b) and (c) of section 4(1) include offering to traffic or do acts preparatory to trafficking “in a dangerous drug *or in a substance he believes to be a dangerous drug*” (italics added). In such cases under paragraphs (b) and (c), there can be no question of proving that the substance concerned is any specific dangerous drug since the offence can be committed even where the offer or preparatory act relates to a substance which is not in fact a dangerous drug. Nor does the defendant need to be proved to believe that it is one type of dangerous drug rather than another.
4. Similarly, it is relevant to refer to section 4A of the Dangerous Drugs Ordinance which concerns trafficking in a purported dangerous drug. Section 4A(1) provides:

“(1) No person shall, on his own behalf or on behalf of any other person, whether or not such other person is in Hong Kong –

(a) traffic in any substance represented or held out by him to be a dangerous drug but which is not in fact a dangerous drug;

(b) offer to traffic in any substance represented or held out by him to be a dangerous drug but which is not in fact a dangerous drug; or

(c) do or offer to do an act preparatory to or for the purpose of trafficking in any substance represented or held out by him to be a dangerous drug but which is not in fact a dangerous drug.”

Clearly, under section 4A, there is no requirement to prove that the substance concerned is any specific dangerous drug since, like the offences under section 4(1)(b) and (c), the offences under section 4A can also be committed even where the substance is not in fact a dangerous drug.

1. Since section 4(1)(a) is to be construed in the context of the Dangerous Drugs Ordinance as a whole, including these other offence creating sections, their content provides further support for the conclusion that the essential ingredient of the *actus reus* of the offence in section 4(1)(a) is confined to trafficking in a dangerous drug and not any specific type or class of dangerous drug.

***C.2 The mens rea of the offence***

1. The *mens rea* of the offence in section 4(1)(a) is established by proof that the defendant knew that he was trafficking in a dangerous drug and it is not necessary to prove that he knew or believed which particular type of dangerous drug he was trafficking in. As Macdougall VP held, in *R v Tam Chun Fai*:[[10]](#footnote-10)

“We have emphasized the indefinite article ‘a’ in the expression ‘a dangerous drug’ because the offence on which the accused stands indicted is that of trafficking in *a* dangerous drug. The allegation in the particulars of offence that the drug is, for example, salts of esters of morphine, is nothing more than a particular. It is not an ingredient of the offence. The offence is not one of trafficking in salts of esters of morphine, but, as we have said, one of trafficking in a dangerous drug.

…

We of course accept that there are cases in which the prosecution may be tied to the particulars of offence, for example, where time is an ingredient of the offence or where the defence is prejudiced by a misstatement of a particular and that particular is not amended. No prejudice could possibly arise from the reference in the particulars of offence to a particular dangerous drug where the offence alleged is one of trafficking in a dangerous drug.

The fact that an accused thought that he was trafficking in a dangerous drug different from that stated in the particulars of offence is irrelevant to the issue of guilt. It can only be relevant to sentence. In such a case, the accused must plead guilty and seek to persuade the judge in a Newton hearing that he thought he was trafficking in that other drug. This, of course, could only avail the accused if the dangerous drug that he thought he was trafficking in was one that the courts recognize as attracting a lesser sentence than the one stated in the particulars of offence.” [[11]](#footnote-11)

(Emphasis in original)

1. Although there was some inconsistency in the appellant’s case in this regard (discussed below in Section C.3), the correctness of the proposition in the preceding paragraph was common ground in this appeal. In his oral submissions, Mr Osmond Lam, counsel for the appellant,[[12]](#footnote-12) confirmed the following submission in the appellant’s printed case:

“For the *substantive* offence of trafficking in a dangerous drug, so far as *mens rea* is concerned, the prosecution need only prove that the defendant knew that *a* dangerous drug was being trafficked in. There is no requirement to prove that the defendant *knew* that the *specific* *particularised* dangerous drug was being trafficked in (or indeed *any* specific drug). He can incur liability for the substantive offence without knowledge of (or being reckless as to) the specific drug involved.”[[13]](#footnote-13)

(Emphasis in original)

1. It is material to note that the *mens rea* for the offence under section 4(1)(a) of the Dangerous Drugs Ordinance is a full *mens rea* in the sense that the prosecution is required to prove a defendant’s knowledge that the substance being trafficked in is a dangerous drug: *HKSAR v Mohammed Saleem*.[[14]](#footnote-14) It is, therefore, plainly not an offence of absolute liability. Nor is any lesser mental state as to the nature of the item being trafficked being a dangerous drug, such as recklessness or negligence, sufficient to prove the mental element of the offence.

***C.3 The appellant’s inconsistent stance on the elements of the offence***

1. Despite the clarity of the proposition set out in the appellant’s case (quoted at [24] above) that, to establish liability for the substantive trafficking offence, it is *not* necessary for the prosecution to prove that the defendant knew the specific type of dangerous drug being trafficked in, there were other parts of his case which were or appeared to be inconsistent with that proposition and which suggested that the nature and identity of the specific drug is an essential ingredient of the offence.[[15]](#footnote-15)
2. This confused stance appears to have arisen from reliance in the appellant’s printed case on a number of English decisions said to support the contention that proof of the fact that the substance involved is in fact the drug specified is an essential physical element or ingredient of the *actus reus* of the offence of drug trafficking in Hong Kong. These were *R v Parsons*,[[16]](#footnote-16) *R v Hill*[[17]](#footnote-17) and *R v Hunt*.[[18]](#footnote-18)
3. It is not necessary to discuss those cases at length in this judgment because, properly understood, they are not authority for the proposition sought to be advanced on behalf of the appellant. They are simply decisions arising in the particular statutory context of the offences of possessing or supplying a controlled drug under the Misuse of Drugs Act 1971 and on their own particular facts. Two (*R v Parsons* and *R v Hill*) were cases in which proof of dealing in drugs could not be established without proving that the particular thing dealt in was in fact the drug charged. One (*R v Hunt*) was a case involving a charge of unlawful possession of morphine, the possession of which is only criminalised under the English legislation if of a quantity above a certain threshold amount, so that the precise composition and quantity of morphine have to be proved to sustain the charge.
4. Nor does the appellant’s reliance on *HKSAR v Zou Bicai*[[19]](#footnote-19) support the contention that the prosecution must prove possession or knowledge of the specific type of drug specified in the indictment as an essential element of the trafficking offence. On the contrary, the Court of Appeal in that case approved[[20]](#footnote-20) the trial judge’s direction based on section 61 of the Hong Kong Judicial Institute’s Specimen Directions on Jury Trials in respect of the offence of trafficking in a dangerous drug, which requires the jury to be sure, in order to convict, that (i) the defendant possessed dangerous drugs, (ii) he knew they were dangerous drugs, and (iii) he possessed them for the purpose of supply, export or sale. The Specimen Direction lays down no requirement, in an ordinary case, to direct the jury that the defendant must possess or know the particular type of dangerous drug involved.
5. Finally, in this regard, it was argued by the appellant that the need to prove knowledge of the type of drug being trafficked in was also consistent with the presumption in section 47(2) of the Dangerous Drugs Ordinance, namely that “Any person who is proved or presumed to have had a dangerous drug in his possession shall, until the contrary is proved, be presumed to have known *the nature of* such drug” (emphasis added).[[21]](#footnote-21) However, as explained by this Court in *HKSAR v Hung Chan Wa*,[[22]](#footnote-22) the effect of this statutory presumption is that, upon it being established that the accused was “in physical possession of an item that transpired to be a dangerous drug”,[[23]](#footnote-23) it is then presumed that “the accused was aware that the item was *a* dangerous drug” (emphasis added), that is to say, a drug having the nature of *a* dangerous drug. The operative presumptions are therefore entirely consistent with the requirement that the prosecution need only prove knowledge on the part of the accused that the substance he possessed was a dangerous drug rather than any specific type of drug.
6. In sum, none of the appellant’s arguments, somewhat inconsistently advanced, support the proposition that, for the substantive offence of trafficking, it is necessary for the prosecution to prove that the defendant knew that the substance being trafficked in was a specific type of drug. On the contrary, the proposition set out in the appellant’s printed case (quoted above at [24]) is a correct statement of the law. Nor is proof of the particular nature or identity of the dangerous drug an essential ingredient of the *actus reus* of the offence in section 4(1) of the Dangerous Drugs Ordinance (see Section C.1 above).

***D. The appellant’s statutory construction argument***

***D.1 The offence of conspiracy***

1. At common law, the offence of conspiracy consisted of the making of an agreement between two or more persons to do an unlawful act or to do a lawful act by unlawful means. Statute has now provided a more precise definition of the offence of conspiracy. Part XIIA of the Crimes Ordinance, addressing preliminary offences, abolished common law conspiracy, with the exception of the common law offence of conspiracy to defraud, [[24]](#footnote-24) and introduced a statutory offence of conspiracy.
2. The offence is contained in section 159A(1), which provides:

“**159A. The offence of conspiracy**

(1) Subject to the following provisions of this Part, if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either –

1. will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement; or
2. would do so but for the existence of facts which render the commission of the offence or any of the offences impossible,

he is guilty of conspiracy to commit the offence or offences in question.” [[25]](#footnote-25)

1. Conspiracy is an inchoate offence, meaning that it is constituted by an agreement to pursue a future course of conduct with the necessary intent and does not require the actual carrying out of the agreed upon acts. It is a different offence from the commission of the underlying substantive offence and criminal liability for conspiracy depends on the alleged conspirators’ intentions. As Lord Nicholls of Birkenhead observed, in *R v Saik*:

“… conspiracy imposes criminal liability on the basis of a person’s intention. This is a different harm from the commission of the substantive offence. So it is right that the intention which is being criminalised in the offence of conspiracy should itself be blameworthy. This should be so, irrespective of the provisions of the substantive offence in that regard.”[[26]](#footnote-26)

1. Under section 159A(1), if two or more persons make an agreement to carry out a course of conduct in the future and if their intentions, when making that agreement, are such that if the course of conduct is carried out in accordance with their intentions it will necessarily amount to or involve the commission of an offence by one or more of them (i.e. the underlying offence), they will be guilty of conspiracy to commit the underlying offence. This is so even if the facts are such that commission of the relevant underlying offence is impossible. The intention to carry out the underlying offence is a critical element of the offence of conspiracy.
2. In satisfying the requirement that a course of conduct, if carried out in accordance with the parties’ intentions, will necessarily amount to or involve the commission of an offence, it is important that both the *actus reus* and the *mens rea* elements of the underlying offence are satisfied. Thus, in *Saik*, Lord Nicholls emphasized that under the English equivalent of section 159A(1):

“… the mental element of the offence, apart from the mental element involved in making an agreement, comprises the intention to pursue a course of conduct which will necessarily involve commission of the crime in question by one or more of the conspirators. The conspirators must intend to do the act prohibited by the substantive offence. The conspirators’ state of mind must also satisfy the mental ingredients of the substantive offence. If one of the ingredients of the substantive offence is that the act is done with a specific intent, the conspirators must intend to do the prohibited act and must intend to do the prohibited act with the prescribed intent.” [[27]](#footnote-27)

1. The requirement that a conspirator’s state of mind must itself be blameworthy irrespective of the provisions of the substantive offence in respect of *mens rea* derives from section 159A(2) of the Crimes Ordinance, which provides:

“(2) Where liability for any offence may be incurred without knowledge on the part of the person committing it of any particular fact or circumstance necessary for the commission of the offence, a person shall nevertheless not be guilty of conspiracy to commit that offence by virtue of subsection (1) unless he and at least one other party to the agreement intend or know that that fact or circumstance shall or will exist at the time when the conduct constituting the offence is to take place.” [[28]](#footnote-28)

1. This sub-section was introduced to codify the common law principle enunciated by the House of Lords in *R v Churchill (No.2)*.[[29]](#footnote-29) That case concerned a defendant charged with the common law offence of conspiracy to commit a strict liability statutory offence. The House of Lords held that the conspirator was not guilty of the offence of conspiracy if on the facts known to him the act he agreed to do was lawful. The Law Commission of England and Wales explained the argument for the codification of the principle in *Churchill* as follows:

“What the prosecution ought to have to prove is that the defendant agreed with another person that a course of conduct should be pursued which would result, if completed, in the commission of a criminal offence, and further that they both knew any facts which they would need to know to make them aware that the agreed course of conduct would result in the commission of the offence.” [[30]](#footnote-30)

1. As Lord Nicholls further explained, in *Saik*, in respect of the English equivalents of sections 159A(1) and 159A(2):

“6. Section 1(2) qualifies the scope of the offence created by section 1(1). … Its essential purpose is to ensure that strict liability and recklessness have no place in the offence of conspiracy. …

…

8. It follows from this requirement of intention or knowledge that proof of the mental element needed for the commission of a substantive offence will not always suffice on a charge of conspiracy to commit that offence. In respect of a material fact or circumstance conspiracy has its own mental element. In conspiracy this mental element is set as high as ‘intend or know’. This subsumes any lesser mental element, such as suspicion, required by the substantive offence in respect of a material fact or circumstances. In this respect the mental element of conspiracy is distinct from and supersedes the mental element in the substantive offence. When this is so, the lesser mental element in the substantive offence becomes otiose on a charge of conspiracy. …”[[31]](#footnote-31)

To similar effect, see Lord Hope’s speech in *Saik* at [56] to [58]. In Hong Kong, the Court of Appeal has applied this construction of section 159A(2) in *HKSAR v Yung Lai Lai*, holding that its essential purpose is, as Lord Nicholls stated in *Saik*, “to ensure that strict liability and recklessness have no place in the offence of conspiracy.” [[32]](#footnote-32)

1. Thus, on a charge of conspiracy to commit a substantive offence, where the mental element of that substantive offence is less than knowledge or intention, it will be necessary, by reason of section 159A(2), to establish liability for the conspiracy, to prove intention or knowledge that a fact or circumstance necessary for the commission of the substantive offence will exist.
2. As to the meaning of the words “fact or circumstance necessary for the commission of the offence” in section 159A(2), Lord Nicholls held in *Saik*:

“The phrase … is opaque. Difficulties have sometimes arisen in its application. The key seems to lie in the distinction apparent in the subsection between ‘intend or know’ on the one hand and any particular ‘fact or circumstance necessary for the commission of the offence’ on the other hand. The latter is directed at an element of the actus reus of the offence. A mental element of the offence is not itself a ‘fact or circumstance’ for the purposes of the subsection.”[[33]](#footnote-33)

And Lord Hope similarly held:

“The knowledge which section 1(2) requires is knowledge of the facts and circumstances that must be proved as part of the actus reus of the substantive offence.”[[34]](#footnote-34)

In Hong Kong, this construction of section 159A(2) has been applied by the Court of Appeal in *HKSAR v Lung Ming Chu*.[[35]](#footnote-35)

1. With these preliminary observations concerning the operation of sections 159A(1) and 159A(2) in mind, I now turn to consider the appellant’s contentions on this appeal.

***D.2 The appellant’s construction of section 159A(2)***

1. The appellant’s construction argument is summarised in his printed case in these terms:

“(1) Section 159A(2) of the Crimes Ordinance (Cap.200) governs the mental/fault element of the statutory offence of conspiracy.

(2) In ***R v Saik*** [2007] 1 AC 18, the House of Lords held that the equivalent English statutory provision, s.1(2) of the Criminal Law Act 1977, requires proof by the prosecution that a person charged with conspiracy had knowledge of the facts and circumstances that must be proved as part of the *actus reus* of the corresponding substantive offence. In ***HKSAR v Lung Ming Chu*** [2009] 3 HKC 137 at §35, Hartmann JA endorsed the ***Saik*** approach and applied it to s.159A(2).

(3) Where a person is charged with the *substantive* offence of trafficking in a dangerous drug (namely cocaine), it is essential that the prosecution proves, as a ‘fact necessary for the commission of the offence’ (or as a physical element/essential *actus reus* of the offence), that the substance involved was *in fact* cocaine.

(4) It follows, through the application of s.159A(2), that for a charge of *conspiracy* to traffic in a dangerous drug (namely cocaine), the prosecution must prove that the accused person knew and intended *specifically* that *cocaine* was involved.

(5) That the prosecution only has to prove, for the *substantive* offence of trafficking in a dangerous drug (being cocaine), that the accused person had knowledge of *any* dangerous drug is thus completely irrelevant, given that there is no requirement in relation to substantive offences that the requisite elements of *mens rea* equate to the ingredients of the *actus reus*.”[[36]](#footnote-36)

1. The appellant’s construction argument therefore appears to run as follows:
   1. On a charge of trafficking in a dangerous drug, in order to prove the *actus reus*, the prosecution will have to prove that the substance being trafficked in is one of the drugs or substances specified in Part I of the First Schedule and, if particularised in the charge, that specific drug. This will require, for example, a chemist’s certificate to establish the precise nature of the substance in question (say, cocaine).
   2. To establish the *mens rea* of the substantive offence of trafficking in a dangerous drug, the prosecution need only prove that the defendant knew that the substance being trafficked in was a dangerous drug and not any specific type of drug.
   3. It therefore follows that the qualification in the opening clause of section 159A(2) applies, namely that liability for the substantive offence of trafficking in a dangerous drug may be incurred without knowledge on the part of the defendant of the fact that the substance being trafficked in is the particular drug (say, cocaine) involved, this being (it is said) a “particular fact or circumstance necessary for the commission of the offence”.
   4. That being the case, the latter part of section 159A(2) stipulates that the defendant shall not be guilty of conspiracy to traffic in a dangerous drug “unless he and at least one other party to the agreement intend or know that that fact or circumstance [i.e. that the drug being trafficked in is cocaine] shall or will exist at the time when the conduct constituting the offence is to take place”.
   5. There being (it is said) no evidence that the appellant or any of his co-conspirators knew that the drugs in the three postal parcels were cocaine, he cannot have been guilty of the offence of conspiracy charged.
2. The crux of the appellant’s argument is that “proof of the substance being the specified drug is a *fact* necessary for the commission of the substantive offence of drug trafficking” and that section 159A(2) therefore “requires that the conspirators knew or intended *that fact* to exist in order to be guilty of statutory conspiracy.”[[37]](#footnote-37)

***D.3 The flaw in the appellant’s construction of section 159A(2)***

1. For the following reasons, the appellant’s argument as to the construction of section 159A(2) is fundamentally flawed and cannot be accepted.
2. As explained in Section D.1 above, the genesis of section 159A(2) was the House of Lords’ decision in *Churchill* and its essential purpose was to ensure that lesser forms of *mens rea*, such as recklessness or negligence, or offences of strict liability, would not be sufficient for the offence of conspiracy. Where any such lesser *mens rea* applies for the substantive offence, it will not be sufficient for the offence of conspiracy to commit that offence to establish liability unless the *mens rea* of conspiracy, namely a full *mens rea* of intent or knowledge, is proved. For the offence of conspiracy, the mental element must be satisfied on a full subjective basis and not on any objective basis or on the basis of strict liability. As pointed out above, in *Saik* at [8], Lord Nicholls referred to section 159A(2) *subsuming* these lesser mental elements and the higher mental element of conspiracy *superseding* those other lesser mental elements.
3. As explained in Section C.2 above, the offence of trafficking in a dangerous drug is clearly not an offence with a lesser mental element than knowledge. It is necessary for the prosecution to prove the defendant knew that the substance being trafficked in is a dangerous drug. There is therefore no purpose served by the application of section 159A(2) to the offence of conspiracy to traffic in a dangerous drug.
4. What is required, however, to be proved in a conspiracy to traffic in a dangerous drug is an intention to pursue a course of conduct which involves the commission of the *actus reus* of the underlying offence of trafficking with the *mens rea* of that offence. Here, as stated earlier, the *actus reus* consists of trafficking in *a* dangerous drug, rather than a specific dangerous drug or type or class of drug. The *mens rea* consists of the defendant knowing that he was trafficking in *a* dangerous drug, rather than a specific dangerous drug or type or class of drug.
5. Whilst it is correct that the fact that the nature of the dangerous drug which is the subject of a charge of trafficking must be proved at trial, it does not follow that this is therefore an ingredient of the offence. As Ribeiro and Cheung PJJ recently pointed out in their joint judgment in *HKSAR v Chen Keen (alias Jack Chen) & Others*, a case concerned with the common law offence of conspiracy to defraud:[[38]](#footnote-38)

“It is accordingly essential not to confuse the facts and matters provided by way of particulars with the essential constituent elements of the conspiracy alleged. Particulars set out in the indictment or separately given by the prosecution function to inform the accused of the case they have to meet.”

For the reasons set out in Section C above, the particular nature of the dangerous drug which is the subject of a trafficking charge is not an element or ingredient of the *actus reus* of the offence. The particulars of the offence in the indictment, specifying the drug as cocaine, were given to inform the appellant of the case against him.

1. The flaw in the appellant’s reasoning, therefore, is to treat proof of the precise nature of the substance being trafficked in as an ingredient of the substantive offence of trafficking in a dangerous drug. That, as explained in Section C above, is incorrect. The only necessary fact or circumstance which is necessary for a person to know for the commission of the offence of drug trafficking is knowledge that what is being trafficked in is *a* dangerous drug, not any particular type of dangerous drug. It is the existence of that particular fact or circumstance which is an ingredient of the offence and it is to that ingredient that section 159A(2) applies. However, since liability for the offence of trafficking cannot be established without full subjective knowledge of that ingredient (i.e. that what is being trafficked in is a dangerous drug), section 159A(2) does not impose any greater burden on the prosecution in respect of a charge of conspiracy to traffic in a dangerous drug.

***D.4 No absurdity in rejecting the appellant’s construction argument***

1. It was argued in the appellant’s printed case that rejecting his construction of section 159A(2) would lead to absurdity. One such scenario identified was where, on a charge of conspiracy to traffic in cocaine, a defendant might nevertheless still be convicted even if the substance agreed to be trafficked in was proved to be cannabis. This could, it was submitted, lead to uncertainty at trial.
2. This is a highly artificial argument. In practice, the nature of the drug forming the basis of the charge would have been ascertained long before the indictment was laid. But even if, for some reason, the wrong drug was identified in the charge, the appropriate course would be for the prosecution to apply to amend the charge.
3. Other examples of supposed absurdity were put forward by the appellant of cases involving two types of drugs or two separate conspiracies. Whilst there may be fair trial issues depending on the facts of the particular case (see further below), these examples do not provide a compelling reason for elevating the nature of the drug to an essential ingredient of the offence of trafficking in a dangerous drug or for accepting the appellant’s erroneous construction of section 159A(2).

***E. The appellant’s common law argument***

***E.1 Preliminary observations***

1. The appellant’s alternative argument in support of the appeal is based on the contention that there is a general common law principle that, on a charge of conspiracy to traffic in a dangerous drug, the prosecution “must prove knowledge of an agreement to traffic in the specific drug as particularised in the indictment”.[[39]](#footnote-39) This broad principle was said to be articulated in various decisions of the courts of England and Wales, Canada and Australia upon which the appellant relied.
2. At first sight, it might be thought difficult to see what assistance is available to the appellant from the common law in relation to the offence of conspiracy. As already noted, section 159E(1) of the Crimes Ordinance abolished the common law offence of conspiracy and section 159A of that ordinance introduced the new statutory offence of conspiracy. It is therefore to that latter section, properly construed, that one must look in the first instance for the law in respect of the offence of conspiracy rather than the common law. Nevertheless, even treating the appellant’s argument based on the common law principle prayed in aid simply as support for its argument of construction of section 159A(2), the cases do not establish the broad principle relied upon.

***E.2 The English cases***

1. The appellant primarily relied on dicta in *R v Siracusa*[[40]](#footnote-40) to support the existence of the general common law principle said to be relevant. In that case, O’Connor LJ stated:

“The *mens rea* sufficient to support the commission of a substantive offence will not necessarily be sufficient to support a charge of conspiracy to commit that offence. An intent to cause grievous bodily harm is sufficient to support the charge of murder, but is not sufficient to support a charge of conspiracy to murder or of attempt to murder.

We have come to the conclusion that if the prosecution charge a conspiracy to contravene section 170(2) of the Customs and Excise Management Act by the importation of heroin, then the prosecution must prove that the agreed course of conduct was the importation of heroin. This is because the essence of the crime of conspiracy is the agreement and in simple terms, you do not prove an agreement to import heroin by proving an agreement to import cannabis.”[[41]](#footnote-41)

1. It is important, when considering English cases dealing with drug related offences to take account of the different statutory context prevailing in the United Kingdom. The various pieces of legislation in the United Kingdom governing dangerous drugs[[42]](#footnote-42) distinguish between different classes of drugs (which may be of Class A or B or C, each of which may attract different maximum penalties depending on the legislation in question) and the specific drug particularised in the indictment may be a material averment because, properly construed, the legislation may create different offences depending on the different maximum penalties which may be imposed. See, in this context, the speech of Lord Bridge in *R v Shivpuri*, in which he said:

“… section 170 of the Act of 1979 creates three distinct offences in relation to the importation of prohibited goods according to the category of goods in relation to which the offence was committed. The effect of section 170(3) and (4) and Schedule 1 is that the commission of any offence under section 170(1) or (2) in relation to the importation of drugs of Class A or Class B under the Misuse of Drugs Act 1971 attracts a maximum sentence of 14 years’ imprisonment; the commission of any such offence in relation to the importation of drugs of Class C attracts a maximum sentence of five years’ imprisonment; and the commission of any such offence in relation to any other category of prohibited goods attracts a maximum sentence of two years’ imprisonment. It follows from this, applying the reasoning in *R v Courtie* [1984] AC 463, that each of the three distinct offences has different ingredients and, leaving aside considerations of impossibility arising under the Criminal Attempts Act 1981, part of the actus reus of the offence which must be proved in each case is the importation, actual or attempted, of goods which were in fact of the appropriate category to sustain the offence charged.”[[43]](#footnote-43)

1. The above passage was cited with approval by Woolf LJ (as he then was) in *R v Patel & Others*.[[44]](#footnote-44) *Patel* concerned two charges, one a charge of conspiracy to produce a Class B drug (amphetamine sulphate), and the other a charge of conspiracy to supply a Class B drug (amphetamine sulphate). After citing the passage quoted above, Woolf LJ referred to *Siracusa* and explained:

“We consider that the effect of the *Siracusa* decision is that if a count in an indictment identifies the specific drug which it is alleged is the subject of the conspiracy, then if a defendant joined a conspiracy believing it involved one Class of drug, he is not guilty of that conspiracy if he believes the drug involved is a drug which belongs to a lesser Class to that named. This is because the conspiracy in which the defendant intended to become involved would then relate to a different and less serious offence. The *Courtie* case makes this clear. Furthermore, this is the position notwithstanding the fact that a count of conspiracy could be preferred which only alleged that the conspiracy concerned a controlled drug without specifying which controlled drug was involved. However, this does not mean that all the conspirators must know which drug which is involved because the drug is named in the particulars to the count in the indictment. What the *Siracusa* case establishes is that if you believe you are joining one conspiracy with one objective, that does not make you guilty of a conspiracy which has a different and less serious objective. The *Siracusa* 90 Cr App Rep 340, [1989] Crim LR 712 decision was not dealing with a situation where the drugs which were the subject of the conspiracy were of the same Class, so in accordance with *R v Courtie* they would be the subject of the same substantive offence. Nor was the *Siracusa* decisions dealing with a different situation where a defendant intended to join a conspiracy to produce controlled drugs but did not know what was the drug which was to be manufactured or supplied.”[[45]](#footnote-45)

1. Woolf LJ went on to explain:

“… by referring to a single drug in the Particulars of Offence the prosecution are identifying which Class of drugs is involved. If heroin is specified, a Class A or hard drug; if cannabis is specified, a Class B or soft drug. The naming of the drug is a material allegation because it makes clear the gravity of the offence which is the objective of the conspiracy. This will be relevant to sentence. It can also be of assistance to a defendant in a situation such as that which existed in *Siracusa* because it makes clear which of two possible conspiracies he is alleged to have joined. However, *where all that is being considered in connection with an offence of conspiracy (where there is not the complicating factor on the evidence of more than one possible conspiracy) is prohibited drugs of the same Class, the name of the drug in the Particulars of Offence is not a material averment*. Thus if the conspiracy concerns a Class A drug it does not matter that a conspirator, who agreed to join the conspiracy, though[t] that the conspiracy concerned a different drug, so long as that drug was not in a less serious Class. He would have entered into an agreement to commit an offence in respect of Class A drugs. The position would be otherwise if he intended to enter into a conspiracy which he believed involved a Class B drug. Then he would believe that a different offence was the objective of the conspiracy.

A defendant could have entered into a conspiracy, knowing that prohibited drugs were involved, but without knowing that the precise drug named in the indictment was invol[v]ed. The position would then be that he intended to join the conspiracy involving whatever prohibited drug was in fact the subject of that conspiracy and this being the case his ignorance of the precise drug, be it Class A, B or C, would not affect his guilt. The reason for this is that he would have intended to be a party to the conspiracy irrespective of the category of the drug involved.”[[46]](#footnote-46)

(Emphasis added)

1. More recently, *Patel* was considered by the English Court of Appeal in *R v Ayala*,[[47]](#footnote-47) concerning the state of mind that the prosecution has to prove in order to convict a person of conspiracy to supply drugs where the count alleges a conspiracy to supply a controlled drug of Class A, namely cocaine. After referring to section 1(1) of the Criminal Law Act 1977,[[48]](#footnote-48) Buxton LJ said:

“13. What that means in the context of a conspiracy to supply controlled drugs in cases where there is, or may be, some doubt about whether the conspirators are agreed on the nature of the drug concerned has been considered in a number of recent cases, including *Siracusa* 90 Cr App R 340, *R v Patel*, an unreported decision of this Court presided over by Woolf LJ, as he then was, of August 7th, 1991, and more recently in the case of *Taylor and Others* mentioned in [2002] Crim LR at 205, and more extensively to be found in the full transcript which we have caused to be obtained.

14. Relying on those three cases, the learned editors of Archbold at paragraphs 33–16 say this:

‘The effect of these decisions is that where a conspiracy count identifies in the particulars of offence a particular controlled drug [we interpose, this is this case], it must be proved against any defendant not merely that he knew that the agreement related to the importation, production, supply et cetera, of a controlled drug; he must be proved either (i) to have known that it related to the particular drug mentioned in the indictment, or (ii) to have known it related to a drug of the same ‘Class’ {as specified in the Misuse of Drugs Act 1971} as the drug mentioned, without having any knowledge or belief as to it involving any particular drug, or (iii) to have believed that it related to another particular drug of the same class, or of a class attracting a greater penalty, or (iv) to have believed that it related to a drug of a class attracting a greater maximum penalty, without having any belief as to any particular drug, or (v) to have not cared at all what particular drug was involved. A defendant would escape liability only where he mistaken believed that the conspiracy related to a controlled drug of a class attracting a lesser maximum penalty.’

15. We turn to subparagraph (v) of that summary: a summary which, we should have said, we respectfully think to be an accurate statement of the law.

16. It may at first sight seem surprising, or at least to need comment, that, where the offence as defined in the statute requires an agreement, that is to say a subjective agreement, to a course of conduct that will necessarily amount to the commission of an offence, a party can agree to the commission of the particular offence of supplying a controlled drug, namely cocaine, where he does not have a positive view as to the nature of the drug involved, but merely agrees to the supply of what he knows is a drug, and not giving his mind, or at least not caring, what particular drug was involved. However, we have no doubt that subparagraph (5) of Archbold’s summary does indeed represent the law.”

1. As these passages from *Patel* and *Ayala* show, the name of the specific drug is not a material averment in a charge of trafficking in a dangerous drug unless there are different classes of drugs involved (in which case each class of drugs represents a separate offence)[[49]](#footnote-49) or there are separate conspiracies alleged concerning different drugs (in which case each conspiracy is a separate offence). In either of those situations (and *Siracusa* was such a case), the identity of the specific drug will be a material averment, but not otherwise. In the present case, on the other hand, neither of those conditions exists: the Dangerous Drugs Ordinance does not create separate offences for different classes of drugs and the present case is one of a single conspiracy involving one type of drug.
2. In the present case, the Court of Appeal referred to *Siracusa* and stated that “the penalty for conspiracy to import cannabis is lighter than that for conspiracy to import heroin”.[[50]](#footnote-50) This was strictly incorrect because the charge in *Siracusa* was not brought under the Misuse of Drugs Act 1971 (which specifies different maximum penalties for different classes of drug) but under the Customs and Excise Management Act 1979 (which at the relevant time specified the same maximum penalty for importation of both Class A and B drugs).[[51]](#footnote-51) However, this was immaterial since, notwithstanding the error, the Court of Appeal would have been correct to treat *Siracusa* as being distinguishable from the present case on the basis that it involved two different conspiracies.
3. For the above reasons, the English cases do not support the existence of the common law principle relied upon by the appellant.

***E.3 The Canadian and Australian cases***

1. As with the English cases, neither the Canadian nor the Australian cases cited by the appellant support the existence of the general common law principle relied upon.
2. Contrary to the submissions advanced on behalf of the appellant, a proper reading of those cases shows no more than that the general common law principle that a defendant is entitled to a fair trial may require the prosecution to prove his knowledge of the particular drug specified in a charge of conspiracy to traffic in dangerous drugs.
3. In respect of Canadian authority, the appellant relied primarily on *R v Saunders*,[[52]](#footnote-52) a decision of the Supreme Court of Canada in which McLachlin J (as she then was) noted:

“… It is a fundamental principle of criminal law that the offence, as particularized in the charge, must be proved. In *Morozuk v. The Queen*, [1986] 1 S.C.R. 31, at p. 37, this Court decided that once the Crown has particularized the narcotic in a charge, the accused cannot be convicted if a narcotic other than the one specified is proved. The Crown chose to particularize the offence in this case as a conspiracy to import heroin. Having done so, it was obliged to prove the offence thus particularized. To permit the Crown to prove some other offence characterized by different particulars would be to undermine the purpose of providing particulars, which is to permit ‘the accused to be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and a fair trial’: *R. v. Côté*, [1978] 1 S.C.R. 8, at p. 13.”[[53]](#footnote-53)

1. However, the result in the case is explained by the fact that the Crown had opened the case on the basis that it intended to prove that the accused conspired to import heroin, whereas, during the trial, it became clear that the imported drug by which the Crown intended to prove the conspiracy was in fact cocaine and the accused testified that, whilst he had been involved in conspiracies to import other drugs, he had not been involved in a conspiracy to import heroin. In a subsequent passage in McLachlin J’s judgment, she held:

“Crown counsel suggests that the import of the decision of the Court of Appeal is that the Crown will necessarily fail in every case if it cannot prove that the conspiracy related to a particular narcotic, as opposed to any prohibited narcotic. I cannot accept that suggestion. I agree with Crown counsel that the gravamen of the offence is conspiracy to import a narcotic, rather than a particular kind of narcotic. The purpose of specifying the narcotic in a case such as this is to identify the transaction which is the basis of the alleged conspiracy. The fundamental requirement that the charge must provide sufficient particulars to reasonably permit the accused to identify the specific transaction may be met in a variety of ways. Where the Crown has evidence of the particular drug involved, this may properly be required to be provided as a particular identifying the transaction. But where the Crown is uncertain as to the particular drug which was the subject of the conspiracy, it may properly decline to give particulars of the drug. The charge may nevertheless stand, provided that it sufficiently clearly identifies the alleged conspiracy in some other way. There must be a new trial in this case, not because a conviction for conspiracy to import a narcotic cannot be supported without proof of the type of narcotic involved, but rather because the Crown chose in this case to particularize the drug involved and failed to prove the conspiracy thus particularized.”[[54]](#footnote-54)

1. As can be seen, the rationale for the decision in *Saunders* is not the general common law principle relied upon by the appellant here but rather the need properly to inform an accused of the transaction that constitutes the charge in order to ensure a fair trial and avoid prejudice to the accused. That this is the true rationale of *Saunders* is confirmed by *R v Rai*,[[55]](#footnote-55) *R v Taylor*,[[56]](#footnote-56) and *R v Morrissey & Gould*.[[57]](#footnote-57)
2. Similarly, the Australian authorities of *R v LK*[[58]](#footnote-58) and *Quaid v The Queen*[[59]](#footnote-59) do not support the appellant’s proposition that there is a common law rule that in a charge of conspiracy to traffic in (say) cocaine, it must be proved that the defendant knew that the substance of the conspiracy was in fact cocaine.
3. *R v LK* involved a charge of conspiracy to deal with money that was the proceeds of crime (i.e. a conspiracy to money launder). The High Court of Australia examined the proper construction of section 11.5(1) of the Criminal Code (Cth) in that context and addressed the specific question of whether recklessness was a sufficient mental element for the offence of conspiracy to money launder.
4. In *Quaid*, which involved a charge of conspiracy to traffic in a controlled drug, the issue was whether a trial judge should have directed the jury about the fault elements of the substantive trafficking offence, for which recklessness was a sufficient mental element. The Court of Appeal of Western Australia held that the judge erred in directing the jury on the lesser fault element of the substantive offence since it was potentially confusing and an irregularity in the trial. However, since there was no miscarriage of justice, the appeal was dismissed.
5. These Australian decisions are examples, in the context of the relevant Australian statutory framework, of a lesser mental element for a substantive charge being subsumed or superseded by the fault element applicable to the offence of conspiracy. These decisions were, as Pullin JA observed in *Quaid*,[[60]](#footnote-60) an application of the reasoning of Lord Nicholls in *Saik*.

***F. Answering the question of law***

1. The essential ingredients of the offence of trafficking in a dangerous drug are addressed in Section C above. The specific type of dangerous drug, as particularised in the indictment, was not an essential ingredient of that offence. The mental element of the substantive offence was satisfied upon proof that the appellant knew that the contents of the parcels were a dangerous drug, as defined in the Dangerous Drugs Ordinance. Despite the fact that the charge in the present case was one of conspiracy to traffic in a dangerous drug, nothing in section 159A(2) of the Crimes Ordinance required the prosecution to prove any additional mental element in this case, for the reasons set out in Section D above.
2. In answer to the question of law (set out at [5] above), where an indictment or charge of conspiracy to traffic in a dangerous drug particularises a specific drug alleged to be the subject of the conspiracy, it is sufficient to prove that the defendant knew that what was agreed to be trafficked was a dangerous drug rather than the specific drug particularised. Depending on the circumstances, however, this answer may be subject to qualifications in order to ensure the defendant is afforded a fair trial. For example, where the defence case is that the defendant believed the subject of the conspiracy was to traffic in a particular type of drug different to that specified in the prosecution case and to which a lesser sentence tariff applies, the requirements of a fair trial may require the prosecution to prove his knowledge of the particular drug specified. Similarly, where there are multiple charges on an indictment alleging different conspiracies involving different types of dangerous drug, the requirements of a fair trial may require the prosecution to prove knowledge of the specific dangerous drug that is the subject of each separate conspiracy in order that the defendant will know the nature of each charge against him.
3. In the present case, the indictment charged a single conspiracy involving a single type of drug. The appellant’s case was that he did not know the parcels contained any type of dangerous drug. In convicting him, the jury clearly disbelieved his defence. There were no circumstances that might give rise to the risk of an unfair trial by reason of the appellant admitting to drug trafficking but of a type of drug carrying a lesser sentence or by reason of there being multiple conspiracies to which he might admit to one or more but not to others.
4. In the circumstances, it was not necessary for the prosecution to prove that the appellant knew the subject of the conspiracy was specifically cocaine rather than any dangerous drug and there was no misdirection on the part of the trial judge in respect of the mental element of the offence of conspiracy to traffic in a dangerous drug (as set out in the passage from his summing up quoted at [13] above).

***G. Disposition***

1. For the reasons set out above, I would dismiss the appeal.

Mr Justice Cheung PJ:

1. I agree with the judgment of Mr Justice Fok PJ.

Lord Reed NPJ:

1. I agree with the judgment of Mr Justice Fok PJ.

Chief Justice Ma:

1. For the above reasons, the appeal is unanimously dismissed.

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| (Geoffrey Ma)  Chief Justice | (R A V Ribeiro)  Permanent Judge | (Joseph Fok)  Permanent Judge |

|  |  |
| --- | --- |
| (Andrew Cheung)  Permanent Judge | (Lord Reed)  Non-Permanent Judge |

Mr Osmond Lam, Mr Benson Tsoi, Mr Ernest Yuen and Mr Dexter Leung, instructed by Or & Lau, for the Appellant

Ms Vinci Lam, DDPP (Ag) and Ms Karen Ng, SPP (Ag), of the Department of Justice, for the Respondent

1. Before Li J, sitting with a jury, in HCCC 222/2015. [↑](#footnote-ref-1)
2. (Cap.134). Sections 4(1) and 4(3) are set out below. Section 39 concerns the penalty upon conviction of a conspiracy to commit an offence under that ordinance and matters of proof and provides:

   “Any person convicted of conspiracy to commit an offence under this Ordinance shall be liable to the penalty prescribed for that offence and any special rules of evidence which apply with respect to the proof of that offence under this Ordinance shall apply in like manner to the proof of conspiracy to commit such offence.” [↑](#footnote-ref-2)
3. (Cap.200). [↑](#footnote-ref-3)
4. CACC 95/2017 (Yeung VP, Poon JA and Albert Wong J), [2018] HKCA 322. [↑](#footnote-ref-4)
5. [2018] HKCA 586. [↑](#footnote-ref-5)
6. FAMC 47/2018, [2019] HKCFA 4 (Ribeiro PJ, Cheung PJ and Stock NPJ). [↑](#footnote-ref-6)
7. The reference to the contents not being “stoves” was understood to mean that they were not paraphernalia for the consumption of drugs. [↑](#footnote-ref-7)
8. The cases are summarised in Archbold Hong Kong, 2019 Edition at [5-533]; and, for cocaine, see *HKSAR v Suwanti* [2014] 1 HKLRD 619 at [5]. [↑](#footnote-ref-8)
9. The conspiracy charged in this case was one to traffic in a dangerous drug contrary to paragraph (a). Section 2 of the Dangerous Drugs Ordinance defines “trafficking” in relation to a dangerous drug and how “traffic in a dangerous drug” is to be construed. [↑](#footnote-ref-9)
10. [1994] 2 HKC 397 at 401G-402C. [↑](#footnote-ref-10)
11. See also, *HKSAR v Chui Chi Wai* [1999] 3 HKLRD 841 per Stuart-Moore JA (as he then was) at 846F. [↑](#footnote-ref-11)
12. Appearing with Mr Benson Tsoi, Mr Ernest Yuen and Mr Dexter Leung. [↑](#footnote-ref-12)
13. The Case for the Appellant at [2] (footnote omitted). The omitted footnote, appearing at the end of the first sentence of this paragraph refers to *R v Tam Chun Fai* [1994] 2 HKC 397 at 401F-402C and to *HKSAR v Chui Chi Wai* [1999] 3 HKLRD 841 at 846F. [↑](#footnote-ref-13)
14. [2009] 1 HKLRD 369 at [36]-[38]; and see, also, Archbold Hong Kong, 2019 Edition at [29-27A]. [↑](#footnote-ref-14)
15. The Case for the Appellant at [4(i)], [26(3)], [30] and [40]. [↑](#footnote-ref-15)
16. [2011] EWCA Crim 2591. [↑](#footnote-ref-16)
17. (1993) 96 Cr. App. R. 456. [↑](#footnote-ref-17)
18. [1987] AC 352. [↑](#footnote-ref-18)
19. [2018] HKCA 64. [↑](#footnote-ref-19)
20. *Ibid.* at [13]-[14]. [↑](#footnote-ref-20)
21. The Case for the Appellant at [47]. [↑](#footnote-ref-21)
22. (2006) 9 HKCFAR 614 per Sir Anthony Mason NPJ at [57]. [↑](#footnote-ref-22)
23. By reason, if necessary, of the presumption in section 47(1) of the Dangerous Drugs Ordinance that he intended to possess such a drug. [↑](#footnote-ref-23)
24. Crimes Ordinance (Cap.200), sections 159E(1) and 159E(2). [↑](#footnote-ref-24)
25. The wording of section 159A(1) is the same as the equivalent English legislation on which it is modelled, namely section 1(1) of the Criminal Law Act 1977 (as amended by the Criminal Attempts Act 1981). [↑](#footnote-ref-25)
26. [2007] 1 AC 18 at [13]. [↑](#footnote-ref-26)
27. *Ibid*. at [4]. [↑](#footnote-ref-27)
28. Equivalent to section 1(2) of the Criminal Law Act 1977. [↑](#footnote-ref-28)
29. [1967] 2 AC 224. [↑](#footnote-ref-29)
30. *Report on Conspiracy and Criminal Law Reform* (1976) (Law Com No 76), at [1.39]. [↑](#footnote-ref-30)
31. [2007] 1 AC 18 at [6], [8]. [↑](#footnote-ref-31)
32. [2012] 5 HKLRD 670 at [70]. [↑](#footnote-ref-32)
33. *Ibid.* at [9]. [↑](#footnote-ref-33)
34. *Ibid.* at [69]. [↑](#footnote-ref-34)
35. [2009] 3 HKC 137 at [28]-[35]. [↑](#footnote-ref-35)
36. The Case for the Appellant at [26] (emphasis in original). [↑](#footnote-ref-36)
37. *Ibid.* at [29]-[30] (italics in original). [↑](#footnote-ref-37)
38. FACC Nos. 26, 27 & 28/2018, [2019] HKCFA 32, at [49], cross-referring to the Indictment Rules (Cap.221C) rule 3(1). [↑](#footnote-ref-38)
39. The Case for the Appellant at [4(ii)]. [↑](#footnote-ref-39)
40. (1990) 90 Cr. App. R. 340. [↑](#footnote-ref-40)
41. *Ibid.* at p.350. [↑](#footnote-ref-41)
42. Principally the Misuse of Drugs Act 1971 and the Customs and Excise Management Act 1979, which both create various drug offences and provide for different maximum penalties for each. [↑](#footnote-ref-42)
43. *R v Shivpuri* [1987] AC 1 per Lord Bridge at p.15D-G. [↑](#footnote-ref-43)
44. Unreported, 7 August 1991, Lexis Official Transcripts (1990-1997), [1991] Lexis Citation 1588. [↑](#footnote-ref-44)
45. *Ibid*. at pp.6-7. [↑](#footnote-ref-45)
46. *Ibid.* at p.7. [↑](#footnote-ref-46)
47. [2003] EWCA Crim 2047. [↑](#footnote-ref-47)
48. The English equivalent of section 159A(1) of the Crimes Ordinance. [↑](#footnote-ref-48)
49. This is not a situation that could arise in Hong Kong for the reason set out at [18] above. [↑](#footnote-ref-49)
50. CA Judgment at [51]; see also at [45]. [↑](#footnote-ref-50)
51. *R v Siracusa* (1990) 90 Cr. App. R. 340 at p.343. [↑](#footnote-ref-51)
52. [1990] 1 SCR 1020. [↑](#footnote-ref-52)
53. *Ibid.* at p.1023c-g. [↑](#footnote-ref-53)
54. *Ibid.* at pp.1023h-1024c. [↑](#footnote-ref-54)
55. [2011] BCCA 341 at [16] (British Columbia Court of Appeal). [↑](#footnote-ref-55)
56. [2011] ONSC 5734 at [12] (Ontario Superior Court of Justice). [↑](#footnote-ref-56)
57. [2014] CanLII 37670 at [73], [75]-[76] (Newfoundland and Labrador Provincial Court), similarly explaining two other cases cited by the appellant in support of his interpretation of McLachlin J’s judgment in *Saunders*, namely *R v Clyke* [2002] OJ No. 5319 at [10] and *R v Henareh* [2014] ONSC 2588 at [211]. [↑](#footnote-ref-57)
58. (2010) 241 CLR 177. [↑](#footnote-ref-58)
59. (2011) 210 A Crim R 374. [↑](#footnote-ref-59)
60. *Ibid.* at [97], referring to *LK* at [112]; see also per Hall J at [260]. [↑](#footnote-ref-60)