

THE QUEEN v HOLLIDAY (C3/2017)

Court appealed from: Court of Appeal of the Supreme Court of the
Australian Capital Territory
[2016] ACTCA 42

Date of judgment: 26 August 2016

Special leave granted: 10 February 2017

In 2014 the respondent stood trial on an indictment containing five counts. Count 1 was a charge that the respondent had attempted to pervert the course of justice. Counts 2 and 3 were charges of incitement to murder, while counts 4 and 5 were for incitement to kidnap.

The charges related to a two-month period in 2010, when the respondent was in custody awaiting trial on child sexual offence charges. The Crown alleged that the respondent had offered to reward a fellow inmate, Mr Darren Powell, for arranging for someone to kidnap and murder two people who were witnesses for the prosecution in the case against the respondent. According to the alleged proposal, the murders were to occur after the witnesses had been filmed retracting their testimony against the respondent. The video recordings were allegedly to be used to secure the respondent's acquittal. Mr Powell did not participate in the proposal and instead reported it to the prison authorities.

Kidnapping and murder are offences prescribed by the *Crimes Act 1900* (ACT). Section 47 of the *Criminal Code 2002* (ACT) ("the Code") provides that a person commits an offence of incitement if he or she urges another person to commit an offence, even if the commission of that offence was impossible. Section 47(5) provides that any limitation or qualifying provision that applies to an offence applies to the offence of incitement in relation to the incited offence. As drafted, counts 2 to 5 on the indictment charged the respondent with having committed incitement by urging Mr Powell to kidnap and murder both witnesses. The Crown case was that the respondent had urged Mr Powell to commit offences of procuring another person to kidnap and murder the witnesses. Section 45(1) of the Code relevantly provides that a person is taken to have committed a particular offence if he or she procures its commission by someone else. Section 45(2)(a) however requires that the offence in fact be procured by the person's conduct and s 45(3) provides that "*the person is taken to have committed the offence only if the other person commits the offence.*"

A jury found the respondent guilty on counts 1, 4 and 5 (and not guilty on counts 2 and 3), whereupon Justice Burns sentenced him to imprisonment for 2½ years. The respondent then appealed against his conviction.

The Court of Appeal (Murrell CJ, Refshauge & Wigney JJ) unanimously allowed the appeal in relation to the offences of incitement to kidnap (and dismissed it in relation to perversion of the course of justice). Murrell CJ held that a person could not be convicted of incitement on the basis that he or she incited another to procure a third person to commit a substantive offence, at least where the substantive offence did not occur. Her Honour considered that, since the Code

expressly provided that there could be no offence of inciting to attempt, inciting to conspire or inciting to incite, it would be a strange result if there was an offence of inciting another to be an accessory to a substantive offence. Wigney J (with whom Refshauge J agreed) held that s 45(2)(a) and s 45(3) limited or qualified the operation of s 45(1) of the Code. Since the kidnappings had not been carried out, there was no procurement of them by Mr Powell. Section 47(5) applied that limitation to the incitement offences with which the respondent had been charged, which therefore could not be made out.

The Court of Appeal ordered that the respondent's conviction of the incitement offences be set aside and that verdicts of not guilty be entered.

The ground of appeal is:

- The Court of Appeal erred in setting aside each verdict of guilty of inciting to commit kidnapping and in lieu entering verdicts of not guilty.

Particulars:

- i) the Court of Appeal erred in finding that s 45(2)(a) and s 45(3) constitute a "limitation or qualifying provision" for the purposes of s 47(5) of the *Criminal Code 2002* (ACT);
- ii) Murrell CJ erred in finding that inciting to procure kidnapping is not an offence known to law.

The respondent has filed a Notice of Contention with the ground of which is:

- The court below erred in failing to hold that inciting to procure kidnapping is not an offence known to law.