

THE QUEEN v KHAZAAL (S344/2011)

Court appealed from: New South Wales Court of Criminal Appeal
[2011] NWCCA 129

Date of judgment: 9 June 2011

Date of grant of special leave: 7 October 2011

On 10 September 2008 the Respondent was found guilty of an offence of making a document connected with preparation for, the engagement of a person in, or assistance in a terrorist act, knowing of that connection, contrary to section 101.5(1) of the *Criminal Code Act 1995* (Cth) ("the Code"). The jury was unable to reach a verdict on the second count in the indictment, which charged an attempt to urge the commission by others of an offence, namely engaging in a terrorist act contrary to section 101.1(1) of the Code. On 25 September 2009 Justice Latham sentenced the Respondent to 12 years imprisonment, with a non-parole period of 9 years.

On 9 June 2011 a divided Court of Criminal Appeal allowed the Respondent's appeal and ordered a retrial. Of the four grounds of appeal against conviction argued, Justices Hall & McCallum upheld Ground 4. That ground alleged that Justice Latham had erred in holding that the Respondent had failed to discharge the evidentiary burden provided by section 101.5 of the Code. Justice Hall would have also allowed Grounds 1 & 3, while Justice McCallum (but for Ground 4) otherwise agreed with Justice McLellan who would have dismissed the appeal.

The grounds of appeal are:

- The majority in the Court below erred in finding that the Respondent had discharged the evidential burden on him under subsection 101.5(5) of the Code having regard to the definition of "evidential burden" in subsection 13.3(6) of the Code.
- The majority in the Court below erred in finding that, at the close of the evidence in the trial, there was evidence that suggested a reasonable possibility that the making of the subject document by the Respondent was not intended to facilitate assistance in a terrorist act so as to engage the defence in subsection 101.5(5) of the Code.
- The majority in the Court below erred in upholding the Respondent's appeal against his conviction of the offence in Count 1 in the indictment, quashing the conviction and ordering a re-trial.

On 26 October 2011 the Respondent filed a notice of contention, the grounds of which include:

- In concluding the learned trial judge's directions were sufficient and proper, the majority of the Court of Criminal Appeal (McClellan CJ at CL and McCallum J) erred in finding that the words "connected with" as employed in section 101.5 [of the] Code were words of ordinary meaning and did not require any further explanation.