



HIGH COURT OF AUSTRALIA

6 September 2017

THE QUEEN v AARON JAMES HOLLIDAY [2017] HCA 35

Today the High Court unanimously dismissed an appeal from the Court of Appeal of the Supreme Court of the Australian Capital Territory. The High Court held that it was not possible to convict the respondent, Holliday, of inciting another person to procure a third person to commit a criminal offence under the *Criminal Code* 2002 (ACT).

Holliday was in custody pending sentence for sexual offences. The prosecution alleged that, while in custody, Holliday offered another inmate, Powell, a reward for organising people outside prison to kidnap two witnesses, to force the witnesses to adopt a statement prepared by Holliday that was designed to exculpate him of the offences, and then to kill the witnesses. Powell did not go through with the plan and reported Holliday.

Holliday was tried on indictment before a judge and jury in the Supreme Court of the Australian Capital Territory on five counts. Counts 4 and 5 charged that Holliday "committed the offence of incitement in that he urged [Powell] to kidnap" each witness contrary to s 47 of the *Criminal Code* and s 38 of the *Crimes Act* 1900 (ACT). However, at trial, the prosecution did not allege that Holliday urged Powell to commit the kidnappings personally. The prosecution case was that Holliday urged Powell to procure a third person to commit the kidnappings. Holliday was convicted on these counts. He appealed to the Court of Appeal, which set aside the verdicts and entered verdicts of not guilty on counts 4 and 5.

By grant of special leave, the prosecution appealed to the High Court. The High Court unanimously dismissed the prosecution's appeal. The principal issue was whether Holliday could be convicted of an offence – specifically, an offence of inciting the commission of an offence – by urging Powell to procure a third person to commit the substantive offence of kidnapping. The Court held that, at least in circumstances where no offence of kidnapping was committed, Holliday could not be convicted of urging Powell to commit the offence of kidnapping contrary to s 47 of the *Criminal Code*. A majority of the High Court reached that conclusion on the basis that in order for a person to be convicted of an offence of incitement under s 47 of the *Criminal Code*, that person must have urged the commission of a discrete offence. The majority concluded that procuring the commission of an offence is not a discrete offence under the *Criminal Code*.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*