

HIGH COURT OF AUSTRALIA

14 October 2020



THE QUEEN v ZAINAB ABDIRAHMAN-KHALIF [2020] HCA 36

Today the High Court, by majority, allowed an appeal against a judgment and orders of the Full Court of the Supreme Court of South Australia sitting as the Court of Criminal Appeal. The appeal concerned whether the majority of the Full Court erred in quashing the respondent's conviction of an offence of intentionally being a member of a terrorist organisation contrary to s 102.3(1) of the *Criminal Code* (Cth) ("the Code").

On 13 July 2016, the respondent purchased a one-way ticket for a flight from Adelaide to Istanbul, Turkey. The following day, she was detained at Adelaide Airport whilst attempting to board the flight and was interviewed by Australian Federal Police ("AFP") officers about her reasons for travelling. The respondent's mobile phone was seized and was found to contain propaganda and extremist material produced by and expressing support for Islamic State, a "terrorist organisation" within the meaning of s 102.1 of the Code. Upon her phone being returned to her, the respondent used the phone to communicate with women who later carried out a terrorist attack in Mombasa, Kenya, in the name of Islamic State. A laptop computer subsequently seized from the respondent's home revealed that the respondent had accessed numerous blog posts containing practical advice for women travelling to Islamic State-controlled territory, which at that time included regions of Syria and Iraq bordering Turkey. A covert listening device installed in the respondent's home captured the respondent swearing a bay'ah (pledge of allegiance) to the then leader of Islamic State.

On 23 May 2017, the respondent was charged with intentionally being a member of a terrorist organisation, namely Islamic State, contrary to s 102.3(1) of the Code. Section 102.1 of the Code defined "member of an organisation" as including "a person who has taken steps to become a member of the organisation". The Crown case at trial was that the respondent had intentionally taken steps to become a member of Islamic State. In addition to evidence of the respondent's attempted travel to Istanbul, evidence extracted from the respondent's electronic devices, records of the respondent's interviews with AFP officers and transcripts of audio files captured by listening devices installed in the respondent's home, the Crown adduced expert evidence as to the nature and activities of Islamic State, its aims and ideology, and its methods of attracting recruits and communicating with those adhering to its ideology. The jury returned a unanimous verdict of guilty.

The respondent appealed against her conviction to the Full Court. By majority, the Full Court allowed the appeal and ordered that the respondent's conviction be quashed, finding that the evidence adduced at trial was incapable of sustaining the conviction because it did not establish how members of the terrorist organisation were recruited or selected or the process by which members were inducted and accepted into the organisation. By grant of special leave, the Crown appealed to the High Court. By notice of contention, the respondent contended that the trial judge's summing up was unbalanced and that the trial judge failed to properly direct the jury as to the elements of the offence.

By majority, the High Court allowed the appeal and dismissed each of the grounds raised in the respondent's notice of contention, holding that it was open to the jury to be satisfied beyond

reasonable doubt on the evidence adduced that the respondent intentionally took steps to become a member of Islamic State. The nature and purpose of the offence-creating provisions in Pt 5.3 of the Code dictate that they must be taken to extend to groups devoid of structural hierarchy that function in secrecy, with little formality, without a written constitution or set of rules, and without a contractual relationship between members. The offence of taking steps to become a member of a terrorist organisation in s 102.3(1) of the Code allows for the practical difficulties associated with the penetration of the unstructured and opaque nature of terrorist organisations to be surmounted by proof falling short of evidence establishing the process by which a terrorist organisation recruits, inducts and accepts members. The majority further held that the trial judge neither conflated the physical and mental elements of the offence nor failed to give the jury sufficient guidance as to what constituted steps to become a member of a terrorist organisation. The trial judge's summing up, though imperfect, was not unbalanced.

- *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.*