SHORT PARTICULARS OF CASES
APPEALS
SYDNEY
JUNE 2017

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THE DIRECTOR OF PUBLIC PROSECUTIONS v CHARLIE DALGLIESH (A PSEUDONYM) (M1/2017)

Court appealed from: Court of Appeal of the Supreme Court of Victoria [2016] VSCA 148

Date of judgment: 29 June 2016

Special leave granted: 16 December 2016

This appeal concerns whether the legislature by enactment of section 5(2)(b) of the *Sentencing Act* 1991 (Vic) intended to alter the common law of sentencing which requires that a sentence be imposed by means of the application of a sentencing judge's instinctive synthesis. This is a process whereby all relevant sentencing matters are taken into account and synthesised to arrive at what is essentially a value judgment about the sentence.

The respondent pleaded guilty to committing four sexual acts on two sisters under the age of 16 years between 2009 and 2013. This appeal concerns the sentence imposed on Charge 1 - a charge of incest. This charge alleged that the respondent, contrary to section 44(2) of the *Crimes Act* 1958 (Vic), between 16 January 2013 and 13 March 2013 took part in an act of sexual penetration of the complainant - a person under the age of 18 years whom the respondent knew to be the child of his then de facto wife. The child was then 13 years of age and became pregnant and then had a termination of the pregnancy.

The learned sentencing judge sentenced the respondent to 3 years and 6 months' imprisonment on Charge 1 and lesser periods on the other 3 charges. The sentence imposed on charge 1 was the base charge. The remaining sentences were ordered to be served cumulatively upon the base sentence and upon each other resulting in a total effective sentence of 5 years' and 6 months' imprisonment.

The appellant ("DPP") appealed to the Court of Appeal on 2 grounds. These grounds were that the sentence imposed on Charge 1 (Ground 1) and the total effective sentence (Ground 2) were manifestly inadequate. The Deputy Registrar of the Court of Appeal subsequently wrote to the parties informing them that the Court considered the present case to be an appropriate vehicle for consideration to be given to the adequacy of "current sentencing practices" for the offence of incest.

On 18 March 2016 the Court of Appeal dismissed the DPP's appeal and published its reasons on 29 June 2016. In Part A of its reasons, the Court determined that the DPP had failed to establish that the sentence imposed on Dalgleish was outside the range of sentences reasonably open to the learned sentencing judge based upon the existing sentencing standards. In Part B of its reasons the Court went on to determine that current sentencing practices for the offence of incest in Victoria were inadequate. Had it not been for the '*constraints of current sentencing which…reflect the requirements of consistency, we would have had no hesitation in concluding that the sentence imposed on the respondent was manifestly inadequate*.' The Court went on to say that a sentence of '*significantly higher'* than 7 years' imprisonment on Charge 1 would have been warranted on the basis of the principles it had set out.

The DPP appealed to the High Court on essentially the same as the first of the grounds of appeal relied upon before the Court of Appeal.

The ground of appeal by the DPP is:

- That the Court of Appeal erred by failing to find that the sentence imposed on Charge 1 was manifestly inadequate and in particular, in so doing, committed an error of sentencing principle by failing to properly apply the instinctive synthesis methodology and by elevating the notion of current sentencing practices to the level of determinative sentencing criterion.

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.