HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	A5/2022
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Important Information

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

ON APPEAL FROM THE COURT OF APPEAL
OF THE SUPREME COURT OF SOUTH AUSTRALIA

No. A5 of 2022

B E T W E E N: DARRYL MARTIN HORE
Appellant

-and-

THE QUEEN
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Issues

2. The issues raised by this appeal are the same as the issues raised by the appeal in *Wichen v The Queen* (A6/2022). The appellant Mr Hore adopts the statement of the issues set out in the written submissions of the appellant Mr Wichen at [2]-[3].

Part III: Notice pursuant to s 78B of the *Judiciary Act 1903* (Cth)

3. The appellant has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth). No such notice is required to be given.

Part IV: Authorised reports of the judgments of the courts below

4. The judgment of the primary judge (Hughes J) is not reported in any authorised report, but is reported as *Hore v The Queen* (2020) 285 A Crim R 9. The judgment of the Court of Appeal is not reported in any authorised report, but is reported as *Hore v The Queen* (2021) 289 A Crim R 216.

Part V: Facts

5. The factual circumstances of the appellant are set out in detail in the judgment of Hughes J at first instance (**TJ**) at [2]-[77] (CAB 2-53) and [104]-[118] (CAB 59-62) – including a summary of the report of the forensic psychologist Ms Bruggemann, the reports of three psychiatrists, Dr Jennings, Dr Furst and Dr Nambiar, and relevant

evidence given on the application by Dr Furst, Dr Nambiar, and the appellant himself. The facts are also briefly summarised in the judgment of the Court of Appeal (**CA**) at [5]-[10] (CAB 75-6).

6. Without attempting to be exhaustive, some key background facts may be summarised as follows:

   (a) The appellant's offending spanned a period of 10 years between 2003 and 2013.

   (b) The most recent in a series of relatively short sentences for sexual offending was imposed in 2015. It was a sentence of 16 months' imprisonment with a non-parole period of ten months, imposed following a successful prosecution appeal against a sentence which had been partially suspended at first instance, relating to the possession of child exploitation material and failing to comply with reporting obligations as a registrable offender.

   (c) While the appellant was serving that sentence, the respondent applied for an order pursuant to s 23 of the *Criminal Law (Sentencing) Act 1988* (SA) that the appellant be detained following the completion of his sentence, on the ground that he was "incapable of controlling or unwilling to control his sexual instincts".

   (d) In making the order sought by the respondent, the judge (Nicholson J) accepted the appellant's submission that his offending to that point, although very serious, was "not of the most serious type when regard is had to the range of potential sexual offending against young children".[1]

7. As in the case of Mr Wichen, at the time when the order under s 23 of the *Criminal Law (Sentencing) Act* was made, detaining the appellant indefinitely, the provisions governing discharge of such orders or release on licence did not require the appellant to prove that he or she was capable of controlling or willing to control their sexual instincts before the order could be discharged or the person released on licence. That requirement was first introduced by a legislative amendment that took effect in 2018.[2]

8. The appellant is trapped in a similar "paradox" to that described by Kourakis CJ in *Wichen v The Queen*.[3]

9. As the primary judge pointed out (TJ [28] CAB 41), at the time she delivered judgment (in October 2020) the appellant had already concluded serving the sentence for the

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1 *R v Hore* [2016] SASC 21 at [34] (CAB 24)
2 *Sentencing (Release on Licence) Amendment Act 2018* (SA).
3 [2020] SASC 157 at [124] (*Wichen* CAB 53).

offences he had committed, and had been detained for an additional four years, "a period longer than any of the sentences he received for the offences he has committed".

10. On the appellant's application for release on licence pursuant to s 59 of the *Sentencing Act*, the primary judge held that the word "willing" in s 59(1a) of the *Sentencing Act* meant the converse of the word "unwilling" as defined in s 57 of the Act (TJ [91]-[93], CAB 55-56).

11. The primary judge further held (TJ [99] and [100], CAB 58):

> On the approach advocated for by the Director, a risk that may be mitigated in a manner that is considered by the medical experts and the Court to be likely to be highly effective in reducing the risk posed by the applicant is nonetheless to be disregarded when determining whether the applicant is willing to control his sexual instincts within the meaning of the Act. The imposition of conditions is only considered after the applicant establishes that he is willing and capable of controlling his sexual instincts. The effect of this construction is to place a significant - and in some cases it will be an impossible burden on an offender. It also relieves the State of the burden of monitoring compliance with conditions that may be agreed to achieve a significant reduction in risk. The task facing an applicant for release on discharge is to establish that they have, whilst detained, sufficiently reduced the risk that they pose notwithstanding the limited scope for effecting such change that the prison environment offers.
>
> Notwithstanding the effect that the interpretation gives rise to, I am satisfied that it reflects the legislature's intent. It is sufficiently clear by the language and form of s 59 that the first step in the applicant's case is that he must establish that he is both capable of and willing to control his sexual instincts when an opportunity to fail to do so arises. The Court cannot release the person without that having been established.

12. The primary judge thus held that the Court could not consider the risk having regard to the actual circumstances likely to confront the appellant in the event of his release on licence (ie, taking into account the amelioration of risk which could be effected by the imposition of appropriate conditions). This is the issue to which appeal ground 2 of the appeal is directed.

Part VI: Argument

13. In the Court of Appeal, the appellant relied on the same arguments as were advanced by the appellant in *Wichen v The Queen*.[4] The Court of Appeal rejected those arguments for the same reasons as it gave in *Wichen v The Queen* (CA [1], [24], [26], CAB 75, 80).

14. The appellant therefore relies upon the same argument as the appellant Mr Wichen, set out at [9]-[60] of the written submissions filed in *Wichen v The Queen* (A6/2022).

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[4] (2021) 138 SASR 134 (*Wichen* CAB 64-76).

Part VII: Orders sought

15. The appellant seeks the following orders:

    1. Appeal allowed.

    2. Set aside the orders of the Court of Appeal of the Supreme Court of South Australia made on 7 May 2021 and, in their place, order that:

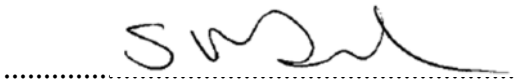
        (a) the appeal to that Court be allowed; and

        (b) that the appellant's application for release on licence be remitted to the Justice Hughes to be determined according to law.

Part VIII: Estimate of time required

16. The appellant estimates that he will require up to one and a half hours for the presentation of the oral argument (wholly overlapping with the time required for the presentation of oral argument in the *Wichen* appeal).

Dated: 1 April 2022



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ANNEXURE: LIST OF RELEVANT STATUTORY PROVISIONS

1. *Sentencing Act 2017* (SA), Part 3, Division 5 (as presently in force)
2. *Criminal Law (Sentencing) Act 1988* (SA), Part 2, Division 3 (as in force on 19 February 2016)
3. *Criminal Law (Sentencing) Act 1988* (SA), Part 2, Division 3 (as in force on 1 March 2018)
4. *Sentencing (Release on Licence) Amendment Act 2018* (SA) (Act No 2 of 2018), Part 2 (as enacted)