



HIGH COURT OF AUSTRALIA

15 June 2022

HORE v THE QUEEN; WICHEN v THE QUEEN [2022] HCA 22

Today, the High Court unanimously allowed appeals from two judgments of the Court of Appeal of the Supreme Court of South Australia. The appeals concerned the operation of s 59 of the *Sentencing Act 2017* (SA) ("the Act"), under which the Supreme Court of South Australia may authorise the release "on licence" (that is, with conditions attached) of a person subject to an order for indefinite detention.

Under Div 5 of Pt 3 of the Act, s 57 provides that the Supreme Court may order that a person who has been convicted of certain sexual offences be detained in custody until further order. Section 58 empowers the Court to discharge the detention order and allow a person to be released from custody, and s 59 empowers the Court to release such a person on licence. Section 59(1a)(a) provides that a person cannot be released on licence unless the person satisfies the Court that the person is, relevantly, "both capable of controlling and willing to control [his or her] sexual instincts". "Willing" is not defined in the Act, but s 57(1) provides that, in that section, a person to whom s 57 applies "will be regarded as unwilling to control [his or her] sexual instincts if there is a significant risk that the person would, given an opportunity to commit a relevant offence, fail to exercise appropriate control of the person's sexual instincts". Before determining an application under s 59, the Court must obtain medical reports as to whether the person is "unwilling" to control his or her sexual instincts, and must consider, relevantly, a report from the Parole Board as to the probable circumstances of the person if he or she were to be released on licence.

Each of the appellants is subject to a detention order made under the predecessor to s 57 of the Act. Each appellant applied for, and was refused, release on licence. The primary judge in each application held that "willing" in s 59(1a)(a) means the converse of "unwilling" in s 57(1) ("the first issue"). Each primary judge also held that the Supreme Court, in considering whether to release a person on licence, may not have regard to the likely effect of any conditions of release on licence upon the person's willingness to control his or her sexual instincts ("the second issue"). The Court of Appeal dismissed each appellant's appeal.

On the first issue, the High Court held that the construction of "willing" adopted by the courts below was correct. There would be no point in requiring the Supreme Court to obtain and act upon the medical reports if those reports were not directed to the task required of the Court by s 59(1a). The term "significant risk" in the deemed meaning of "unwilling" in s 57(1) serves to establish the level of risk by reference to which the regime is engaged in s 57 or relaxed under s 58 or s 59. On the second issue, the High Court held that the courts below erred in construing s 59(1a)(a) as if it required a determination of "willingness" as a condition precedent to final consideration of the application for release on licence. The text of s 59(1) is clear that there is but one determination to be made, being whether the person should be granted release on licence. The context in which s 59(1a)(a) is found, in particular the requirement to consider the report from the Parole Board, confirms the relevance of the probable circumstances of the person to the determination contemplated by s 59(1a)(a). This conclusion was not inconsistent with the purpose of the amendments which introduced s 59(1a)(a).

- *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.*