



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

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**IN THE HIGH COURT OF AUSTRALIA  
SYDNEY REGISTRY**

**BETWEEN:**

**THE KING**

Appellant

and

**FAYEZ HATAHET**

Respondent

**OUTLINE OF ORAL SUBMISSIONS OF THE APPELLANT**

10 **PART I INTERNET PUBLICATION**

This outline of oral submissions is in a form suitable for publication on the internet.

**PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT**

1. For a federal offender, the sentencing discretion is to be exercised by reference to the factors in s 16A of the *Crimes Act 1914* (Cth) **JBA 31** and any common law principles accommodated by s 16A. **AS [13] – [16]**.
  - (a) There is nothing, either express or implied, in s 16A which permits the sentencing judge to take into account the likelihood or unlikelihood of a grant of parole.
  - (b) At common law, a judge is not permitted to take into account the likelihood or unlikelihood that an offender may be released after having served any non-parole
 

20 period fixed. **AS [27]**; *Attorney-General v Morgan* (1980) 7 A Crim R 146, 156 **JBA 355**; *R v Yates* [1985] VR 41, 44 – 47 **JBA 377-380**; **AS [20] – [25], Reply [3] – [7]**; *Hoare v The Queen* (1989) 167 CLR 348 **JBA 270**.
2. The purpose of fixing a non-parole period is to provide for mitigation in favour of rehabilitation through conditional release at a point in time after a prisoner has served the minimum term that justice requires. *Knight v Victoria* (2017) 261 CLR 306, 318 [8] **JBA 302, 323, [25] – [28], JBA 307**.
3. The purposes of parole are set out in s 19AKA. The decision concerning parole is solely a matter for the Executive, here the holder of the office of Attorney-General: s 19AL. The decision is discretionary and is made by reference to a non-exhaustive list of factors in
 

30 s 19ALA and, if applicable, in accordance with s 19ALB. **AS [17] – [19]**.

4. The decision whether to grant, or refuse to grant, parole at the end of the non-parole period, which may be many years hence, and the conditions on which it might be granted at that time involves:
  - (a) the application of statutory provisions, the consideration of guidelines and the application of policy, all of which may change from time to time, and
  - (b) the weighing of various factors, some of which may be competing, and about which reasonable minds may differ.
5. The legislative intent of s 19ALB is to make it more difficult for certain persons to be released into the community (on parole). **AS [54] – [55]**.
- 10 6. The Court of Criminal Appeal held (at [84] – [85], **CAB 99**, *cf* [50] **CAB 88**) that a grant or refusal to grant parole bears on the conditions of imprisonment and is thus accommodated by s 16A.
7. A refusal to grant parole does not bear on the conditions of imprisonment. There is no right to parole. And there can be no reasonable expectation that parole will be granted, even more so with the higher bar in s 19ALB. There is therefore no basis on which custody would become more onerous if parole is not granted. **AS [49]**; *Crump v New South Wales* (2012) 247 CLR 1 at [41] **JBA 220**; *Knight v Victoria* (2017) 261 CLR 306 at [29] **JBA 307-8**; *Minogue v Victoria* (2019) 268 CLR 1 at [14] – [21] **JBA 326 – 329**.
8. By reducing the head sentence, the Court of Criminal Appeal:
  - 20 (a) subverted the legislative intent of s 19ALB. **AS [53]-[57]**; **Reply [12], [14]**, it being improper to vary a sentence to avoid the impact of a statutory scheme: *R v Yates* [1985] VR 41, 46 **JBA 379**; *Sikaloski v The Queen* [2000] WASCA 387, [19] **JBA 393**; and
  - (b) disregarded the requirements of s 16A(1) to impose a sentence “that is of a severity appropriate in all the circumstances of the offence”.

**Dated: 14 May 2024**

Raelene Sharp

Paul Holdenson

Christopher Tran