HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, BELL AND GAGELER JJ

GREGORY JOHN YATES APPLICANT

AND

THE QUEEN RESPONDENT

Yates v The Queen
[2013] HCA 8
14 March 2013
P21/2012

ORDER

1. *Dispense with compliance with the time limit for filing the application for special leave to appeal and grant the application, treat the appeal as instituted and heard instanter and allowed.*

2. *Set aside the order of the Court of Criminal Appeal of the Supreme Court of Western Australia declining to interfere with the order made by Wallace J under s 662 of the* Criminal Code *(WA) and in lieu thereof quash that order.*

On appeal from the Supreme Court of Western Australia

Representation

K J Farley for the applicant (instructed by Legal Aid WA)

B Fiannaca SC with S H Linton for the respondent (instructed by Director of Public Prosecutions (WA))

CATCHWORDS

Yates v The Queen

Criminal law – Sentence – Detention during Governor's pleasure on expiration of sentence under s 662 of *Criminal Code* (WA) – Whether evidence capable of supporting conclusion that applicant a constant danger to community – Whether order demonstrably necessary to protect society from physical harm.

Criminal Code (WA), s 662.

1 FRENCH CJ, HAYNE, CRENNAN AND BELL JJ. The applicant is an intellectually disabled man. He has been in continuous custody since 8 August 1986 when he was charged with two related offences arising out of the aggravated sexual assault of a seven year old child. He was convicted on 12 February 1987 and sentenced on 13 March 1987 for these offences in the Supreme Court of Western Australia (Wallace J). The term of the sentences expired in June 1993. His custody since that time has been authorised by an order made by Wallace J pursuant to s 662 of the *Criminal Code* (WA) ("the Code") directing his indefinite detention at the Governor's pleasure.

2 Wallace J imposed concurrent sentences of seven years' imprisonment for each of the offences[1]. The applicant appealed against the severity of the sentences and against the making of the s 662 order to the Court of Criminal Appeal of the Supreme Court of Western Australia (Burt CJ, Brinsden and Smith JJ). On 29 July 1987, the Court of Criminal Appeal allowed the appeal against the severity of the sentences and reduced each by nine months to give the applicant credit for a period of pre-sentence custody[2]. The majority (Brinsden and Smith JJ) declined to interfere with the s 662 order.

3 On 20 June 2012, the applicant filed an application for special leave to appeal from the Court of Criminal Appeal's refusal to set aside the s 662 order. He seeks an order dispensing with the time for filing an application for special leave to appeal[3]. In support of this dispensation the applicant relies on the affidavit of his solicitor, Karen Farley, who is employed by Legal Aid WA. Ms Farley states that the applicant first came to the attention of Legal Aid WA in

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1 The applicant was convicted of one count of "deprivation of liberty" contrary to s 333 of the the Code and one count of "aggravated sexual assault" contrary to s 324E of the Code – the circumstances of aggravation were that bodily harm was done to the complainant and that the complainant was under the age of 16 years.

2 The applicant had been in custody for seven months and five days at the date of the sentencing.

3 The High Court Rules 2004 (Cth) at r 41.02.1 provide that an application for special leave to appeal shall be filed within 28 days after the judgment below was pronounced. At the date the judgment of the Court of Criminal Appeal was handed down, O 69A rr 3(1) and 5(1) of the High Court Rules 1952 (Cth) required an application for special leave to appeal to be filed and served within 21 days after the date of the judgment below. Rule 4.02 of the current Rules provides that any period of time may be enlarged by order of the Court whether made before or after the expiration of the time fixed.

early 2011. On 1 June 2011, the Director of Legal Aid WA wrote to the Attorney-General of Western Australia asking that the applicant's case be referred to the Court of Appeal pursuant to s 140 of the *Sentencing Act* 1995 (WA). On 14 September 2011, the Attorney-General notified the Director that his petition was declined. Thereafter an application was made on the applicant's behalf for a grant of legal aid to institute the present proceedings. That grant was made on 26 March 2012. Delays in filing the application were occasioned by the need to retrieve copies of documents held by the Court of Appeal from archival storage.

4 On 16 November 2012, Hayne, Crennan and Bell JJ referred the application to an enlarged Court for further hearing and argument as on an appeal. For the reasons that follow, the requirement of the Rules respecting time should be dispensed with, special leave to appeal should be granted, and the appeal should be allowed.

Indefinite sentencing – s 662 of the Code

5 Section 662 of the Code provided:

> "When any person is convicted of any indictable offence, (whether such person has been previously convicted of any indictable offence or not), the court before which such person is convicted may, if it thinks fit, having regard to the antecedents, character, age, health, or mental condition of the person convicted, the nature of the offence or any special circumstances of the case –
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> (a) direct that on the expiration of the term of imprisonment then imposed upon him he be detained during the Governor's pleasure in a prison; or,
>
> (b) without imposing any term of imprisonment upon him sentence him to be forthwith committed to a prison, and to be detained there during the Governor's pleasure."

6 Section 662 was inserted into the Code in 1918[4] at the same time as amendments to the *Prisons Act* 1903 (WA) established reformatory prisons and the Indeterminate Sentences Board[5]. The history is discussed in *Tunaj v The*

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4 *Criminal Code Amendment Act* 1918 (WA), s 27.

5 *Prisons Act Amendment Act* 1918 (WA).

Queen[6]. Burt CJ (with whose reasons Pidgeon and Rowland JJ agreed) commented that the scheme as enacted reflected the idea that with appropriate training and treatment in custody prisoners could be "reformed"[7]. In deciding whether to recommend the release of a person serving an indeterminate sentence, the Indeterminate Sentences Board was required to consider not only the safety of the public but also "the welfare of the person whom it is proposed to release"[8]. Burt CJ doubted that the scheme had authorised the detention of a person in a reformatory prison for the "single purpose" of advancing the person's "welfare"[9]. His Honour concluded that any such idea could not have survived the enactment of the *Offenders Probation and Parole Act* 1963 (WA), which established the Parole Board as the successor to the Indeterminate Sentences Board[10]. *Tunaj* held that an order under s 662 should be made "only in very exceptional circumstances" and that those circumstances must "firmly indicate that the convicted person ha[d] shown himself to constitute a danger to the public"[11].

7 The requirement of proof of dangerousness stated in *Tunaj* was affirmed by this Court in *Chester v The Queen*[12]. In *Chester* it was said that the "extraordinary power"[13] to make an order authorising indefinite detention is "confined to very exceptional cases where the exercise of the power is demonstrably necessary to protect society from physical harm"[14]. Acceptable evidence of one or more of the matters specified in s 662 was required to establish that the convicted person was "so likely to commit further crimes of

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6 [1984] WAR 48.

7 *Tunaj v The Queen* [1984] WAR 48 at 51.

8 *Tunaj v The Queen* [1984] WAR 48 at 51 citing s 64E(5) of the *Prisons Act* 1903 (WA).

9 *Tunaj v The Queen* [1984] WAR 48 at 51.

10 *Tunaj v The Queen* [1984] WAR 48 at 51 citing the *Prisons Act Amendment Act* 1963 (WA), s 9 of which effected the repeal of s 64E of the *Prisons Act*.

11 *Tunaj v The Queen* [1984] WAR 48 at 51.

12 (1988) 165 CLR 611; [1988] HCA 62.

13 *Chester v The Queen* (1988) 165 CLR 611 at 617.

14 *Chester v The Queen* (1988) 165 CLR 611 at 618.

violence (including sexual offences) that he constitutes a constant danger to the community"[15].

8 The primary issue raised by the application is the sufficiency of the evidence to satisfy that test.

The offences

9 The offences were committed on 7 August 1986. The applicant was then aged 25 years. The complainant, a seven year old girl, was inside a cubicle in the ladies toilets at a suburban shopping centre. She became aware that the applicant was looking at her through a hole in the cubicle door. He entered the cubicle. His penis was exposed and he put it into the complainant's mouth, telling her to suck on it and drink or swallow what came out. After ejaculating the applicant struck the complainant about the head. She screamed and the applicant fled.

10 The applicant was arrested on the following day and charged with the two offences. He had been observed openly masturbating in the public toilets of another shopping centre in the period immediately before the commission of the offences.

The proceedings before Wallace J

11 The applicant was arraigned before Wallace J and a jury on 11 February 1987. He entered pleas of not guilty to each count. At the close of the prosecution case, the applicant elected to give evidence. During his examination-in-chief the applicant admitted that he had watched the complainant walk into the ladies toilets and that he had waited and then walked into the toilet. He said that the complainant "sucked me off". The evidence was inconsistent with the applicant's instructions to his counsel. Following a short adjournment the applicant was re-arraigned and he entered pleas of guilty to each count. The jury returned verdicts of guilty consistently with his pleas.

12 The sentencing of the applicant took place one month after the verdicts. The evidence at the sentence hearing included an antecedent report prepared by the officer in charge of the investigation. The report recorded that the applicant was an invalid pensioner who "is retarded to [a] certain degree". Annexed to the antecedent report form was a copy of the applicant's criminal history. A fuller

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15 *Chester v The Queen* (1988) 165 CLR 611 at 619.

account of the nature of much of that history[16] was contained in a pre-sentence report prepared by Mr Levitt[17].

13 Mr Levitt reported that the applicant had been placed on 12 months' probation in July 1980 following his conviction for stealing three packets of cigarettes. The applicant successfully completed his probation, which in light of his "behavioural problems" had been "a commendable effort on his part". In March 1985, the applicant was convicted in the District Court of an offence of gross indecency with a male person. He was released on probation for a period of three years. He did not successfully complete his probation on this occasion. He was convicted on separate occasions of stealing and receiving, stealing money, fraudulent trick and evil designs. In all, he was fined $130 for these offences. He was called up before the District Court for breaching his probation and fined $500. In January 1986 he was charged with wilful exposure. The offence occurred in a car park. Also in January 1986 he was charged with being on the curtilage of premises without lawful excuse. In July 1986 he was charged with stealing $12 worth of newspapers. He was subsequently convicted of these offences and fined $400.

14 Mr Levitt reported that the applicant had been diagnosed by the Division for the Intellectually Handicapped as having "minimal brain damage" when he was three years old. At the date of report the applicant was assessed as functioning at the level of a 14 year old. Mr Levitt recommended that the applicant, as a prospective parolee, should be referred to a psychiatrist for ongoing assessment.

15 No current psychiatric evidence was before Wallace J. Several reports prepared in connection with the applicant's earlier court appearances were in

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16 The antecedent report recorded convictions, to which no reference is made in the pre-sentence report, for stealing, unlawful use of a motor vehicle, insulting behaviour, riding a pushbike in a reckless manner, and breaking and entering with intent (for which the applicant was fined $150).

17 The copy of the pre-sentence report contained in the material filed in support of the application is dated 23 March 1987, 10 days after the date of sentence. However, it appears that an earlier copy of Mr Levitt's report was before Wallace J. Brinsden J recorded that his Honour obtained a pre-sentence report. On the hearing of the application in this Court senior counsel for the respondent informed the Court that reference to the pre-sentence report appears in the transcript of the sentence hearing.

evidence. These included a report prepared in October 1982 by SK Robertson, a psychologist. The applicant was described in this report as functioning in the "mild to borderline intellectually handicapped range". The report confirmed that the applicant had been known to the Division for the Intellectually Handicapped since he was three years old. The whole of his schooling had been at special schools. At the date of the report the applicant was living in a residential facility for intellectually handicapped adults and participating in a Community Skills Training Program. He was being trained in preparation for employment in a Sheltered Workshop.

16 SK Robertson reported concerns expressed by the applicant's parents about the applicant's "sexual associations" with young children. The police were said to have been informed of "incidents" in 1976, 1977, 1978 and 1981. No further description of the nature of these incidents was given save that one had led to a charge in 1978. This appears to be a reference to a charge of loitering for which the applicant appeared before the Fremantle Children's Court in May 1978. The charge was dismissed under s 26 of the *Child Welfare Act* 1947 (WA). Following this, the applicant was placed in a residential facility where he received counselling about sexual conduct. He also participated in "Human Relationships/Sex Education" programs. SK Robertson concluded that the applicant's participation in sex education programs and counselling had failed to modify his behaviour.

17 In June 1985, Professor German, a psychiatrist, prepared a report on the applicant for the Division for the Intellectually Handicapped. The applicant was late for his consultation with Professor German. In the event, Professor German's report was based on a consultation with the applicant lasting "a few minutes". Professor German considered the applicant was suffering from "a variety of personality trait disorder[s] resulting from diffuse brain damage". He doubted that the condition was treatable. He commented:

> "[The applicant] really presents the problem of the young brain-damaged person in our society who is not sufficiently damaged to obviously require custodial or other institutional care. At this juncture I would be inclined to agree with his parents that he is likely to end up in gaol, as many of these persons do."

18 Dr Booth, a consultant psychiatrist with the Prison Health Service, prepared a report in December 1986 in connection with the applicant's forthcoming sentencing on charges of "being on the curtilage", "wilful exposure", and "stealing and receiving". Dr Booth assessed the applicant as "a man of low normal intelligence who has a life-long history of psychiatric abnormality resulting in poor socialization".

19 Ms McHugh, a clinical psychologist in training, prepared a report in December 1986 in connection with the pending sentencing hearing for the same charges. She referred to the applicant's long history with the Authority for Intellectually Handicapped Persons and reported that minimal progress had been achieved in modifying his offending behaviour and improving his ability to cope with independent living. She concluded that unless the applicant could be persuaded to complete "adaptive functioning programmes", he would be at risk of re-offending on his release into the community.

Wallace J's reasons for sentence

20 Wallace J's reasons for sentence were brief. His Honour referred to the circumstances of the offence and said:

> "Unfortunately you are in some ways retarded as the result of having suffered brain damage. You have a record of frequently offending against the law and at the time in question you were on parole.
>
> From a community point of view you appear unable to control your deviant sexual instincts. In my opinion you represent a danger to the community and in particular to young people."

21 His Honour noted that the maximum sentence for the offence of deprivation of liberty was 10 years' imprisonment and that the maximum sentence for the offence of aggravated sexual assault had been increased to 20 years' imprisonment. In determining the punishment for the offences, he took into account the community's abhorrence of the offences, general deterrence, and protection of the community. After pronouncing the s 662 order, his Honour said:

> "It may be that you can receive and accept counselling and treatment for your unfortunate deviant conduct whilst you are incarcerated and in that event earn your release upon a reasonable period of parole to be served within the community. That will be up to you."

The applicant's submissions

22 The applicant's primary submission is that the evidence before Wallace J was incapable of supporting the order for his indefinite detention. His alternative submission is that Wallace J's discretion miscarried in that his Honour, wrongly, took into account that an order under s 662 would permit the Parole Board to fix a more appropriate parole period than that applicable to the determinate

sentences[18]. The applicant points to a statement made by his Honour at the sentence hearing as casting light on the reference in his remarks on sentence to the possibility that the applicant might earn his release "upon a reasonable period of parole". In response to the prosecutor's submission that determinate sentences should be coupled with a s 662 order, Wallace J said:

> "I am inclined to agree with you there where the prisoner is viewed as a danger to the community, and the benefit that flows, which I think is largely misunderstood, is that instead of having the useless formality of a long term of parole to be served the authorities can fix at the appropriate time the proper period of parole".

23 At the time, the Parole Board was empowered to release a prisoner who was subject to a s 662 order after two-thirds of any determinate sentence had been served. In such a case the parole period could not exceed two years[19]. By contrast, a sentence of seven years' imprisonment would result, in the ordinary course, in a parole period of three and a half years[20]. The applicant's contention

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18 *Offenders Probation and Parole Act* 1963 (WA), s 37 and s 41(1)(c) and (3)(b).

19 *Offenders Probation and Parole Act* 1963 (WA), s 41(1)(c) and (3)(b).

20 *Offenders Probation and Parole Act* 1963 (WA), s 37. At the relevant time, the *Offenders Probation and Parole Act* did not prescribe the length of any minimum term imposed under that Act. Rather, s 37(1) merely stated that the court may impose a minimum term for a sentence of 12 months or more if it considered that course to be appropriate, having regard to the nature of the offence, the circumstances of its commission, and the antecedents of the convicted person (see also *R v Simpson* unreported, Court of Criminal Appeal of the Supreme Court of Western Australia, 20 June 1984 at 4 per Wallace J; *Power v The Queen* (1974) 131 CLR 623 at 627 per Barwick CJ, Menzies, Stephen and Mason JJ; [1974] HCA 26). It appears at the time that there was an "accepted practice" in Western Australia that minimum sentences would generally be fixed at half of the head sentence (*Hayden v Byfield* unreported, Supreme Court of Western Australia, 24 September 1984 at 2 per Wallace J). No doubt that practice took into account the combined operation of s 29 of the *Prisons Act* 1981 (WA) and s 39 of the *Offenders Probation and Parole Act*. At the time, s 29 of the *Prisons Act* provided that a prisoner would generally be entitled to remission of one-third of the period of his or her sentence. Section 39(3) of the *Offenders Probation and Parole Act* provided that s 29 of the *Prisons Act* did not apply to any sentence for which a minimum term was fixed, but that if a prisoner had served the minimum term but had not been released on parole, the prisoner should be released on the date he or

(Footnote continues on next page)

is that Wallace J considered it likely that, given the applicant's intellectual disability, he would struggle to successfully complete a lengthy period on parole and that an order under s 662 would give him the benefit of release subject to a shorter period of supervision on parole. The respondent submitted that no inference should be drawn from observations made by Wallace J in the course of the hearing and that his Honour's reference in his sentencing remarks to the applicant's possible release on parole was a conventional exhortation.

24 Regardless of whether Wallace J erred in the specific respect identified by the applicant, his Honour's contemplation that the applicant might "earn [his] release upon a reasonable period of parole" may be thought to be inconsistent with satisfaction that it was demonstrably necessary to direct that the applicant be detained indefinitely to protect the community from physical harm.

The Court of Criminal Appeal

25 The applicant applied for leave to appeal against the severity of the sentences imposed by Wallace J. He appealed as of right against the making of the s 662 order[21]. He contended that Wallace J erred in the exercise of his discretion in that the s 662 order was not justified having regard to his antecedents, character, age, health and mental condition, the nature of the offences or any special circumstances.

26 On the hearing of the application in this Court, the respondent correctly acknowledged that Wallace J's reasons were insufficient to support the making of the s 662 order. His Honour's brief references to the circumstances of the offences and to the applicant's mental condition were made with respect to the imposition of the determinate sentences. His reasons do not serve to show which of the factors specified in s 662 were taken into account in making the indefinite detention order.

27 No point was taken respecting the sufficiency of Wallace J's reasons before the Court of Criminal Appeal. The ground of challenge in the Court of Criminal Appeal was that the evidence was not capable of supporting the order applying the *Tunaj* test. The respondent contended that the majority rejected that challenge in terms which made clear that they were satisfied, taking into account

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she would have been released if the head sentence had been remitted in accordance with s 29 of the *Prisons Act*.

21 Code, s 688(1a)(a).

several of the factors specified in s 662, that the order was appropriate judged by the *Tunaj* test.

28 Brinsden J expressed his conclusion in this way:

> "In my view his Honour's decision to utilize s 662 was appropriate in this case as it is one that meets the requirements discussed in *Tunaj*. Counsel for the applicant, as well as the experts who have examined him, have expressed little confidence that he could undergo a long period of parole without re-offending. The provisions of s 662 coupled with the Offenders' Probation and Parole Act enable the Parole Board to fix a term of parole more readily suitable to his requirements than would be so if a minimum term had been fixed which could not have been less than three years."

29 In the Court of Criminal Appeal the prosecutor argued that the s 662 order conferred a practical benefit on the applicant. Burt CJ, in dissent, recorded the prosecutor's submission that the applicant would be unlikely to complete three and a half years on parole without re-offending, and that re-offending would see him "permanently locked into the system both legally and as a fact"[22]. It had been suggested that this outcome might be avoided by a s 662 order[23]. Burt CJ put this "essentially pragmatic" submission to one side. Since the applicant's primary challenge must succeed, it is unnecessary to determine whether, as the applicant asserts, Brinsden J is to be understood as adopting the prosecutor's pragmatic submission in the concluding two sentences of the passage above.

30 At the commencement of his reasons, Brinsden J identified the issue in the appeal against the s 662 order by reference to the test articulated in *Tunaj*. In purporting to apply that test, his Honour took into account three of the factors specified in s 662: the nature of the offence, and the applicant's character and mental condition. His Honour said that the applicant was "a man with serious sexual problems which in the past have resulted in the commission of sexual offences". The reference to past sexual offences appears to be to the offences of gross indecency and wilful exposure and, perhaps, "evil designs". His Honour noted that the applicant had not been prepared to admit these offences, indicating that he had not developed insight into the factors that had led to their commission. Added to this was the applicant's "inability to accept the

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22 *Offenders Probation and Parole Act* 1963 (WA), s 44(4).

23 *Offenders Probation and Parole Act* 1963 (WA), s 41(1)(c) and (3)(b).

advantages offered to him in hostel and workshop settings". In the light of these considerations, Brinsden J concluded:

> "The applicant is a man about whom it is very difficult to have any real confidence that his behaviour pattern will improve and that he will not re-offend, and seriously offend, when released into the community."

31 This was not a conclusion that the nature of the offence and the applicant's character and mental condition made it so likely that he would commit further crimes of violence, including sexual offences, that he was a constant danger to society[24]. Again, contemplation that the applicant might be released on a relatively short period of parole "more readily suitable to his requirements" does not sit with satisfaction of the demonstrable necessity to make an order authorising his indefinite detention.

32 Burt CJ, in dissent, adhered to the views he had expressed in *Tunaj*. He observed that the applicant's criminal record did not include previous offences of personal violence and that his past offences appeared to be devoid of any sexual element, save for the convictions for gross indecency, "evil designs" and wilful exposure. His Honour concluded that there was nothing in the applicant's record of prior convictions which could justify a conclusion that he had "shown himself to be a danger to the public".

The respondent's submissions

33 The respondent submitted that the applicant had not adequately explained the inordinate delay in bringing the present application. The extension of time was opposed. The respondent pointed out that s 662 was repealed in 1995[25] and provision for the making of an order authorising indefinite detention is now found in the *Sentencing Act* 1995 (WA)[26]. The terms of the latter differ from the terms of s 662 and it follows that the grant of special leave will have no wider significance. The respondent also opposed the grant of special leave, contending that setting aside the order for indefinite detention would produce an anomalous result: the applicant would be released into the community without parole supervision.

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24 *Chester v The Queen* (1988) 165 CLR 611 at 618-619.

25 *Sentencing (Consequential Provisions) Act* 1995 (WA), s 26.

26 Section 98.

34 The respondent acknowledged that the material before the courts below, judged by today's standards, was not as "rigorous" as might be expected. It is now the practice to apply for orders in the case of dangerous sexual offenders under the *Dangerous Sexual Offenders Act* 2006 (WA) ("the DSO Act"). An offender who is found to be a "serious danger to the community" may be subject to indefinite detention or to a supervision order under the DSO Act[27]. The court may not make such an order unless satisfied by acceptable and cogent evidence to a high degree of the probability that the person is a serious danger to the community[28]. The respondent submitted that the relative paucity of material concerning the applicant's character, antecedents and mental condition when compared with the evidence that would be required to support an order under the DSO Act should not undermine the validity of the majority's conclusion. The respondent maintained that, by the standards of 1987, the majority was right to conclude that the s 662 order had been properly made. The respondent put it this way in written submissions: "The combination of the nature of the offending and the applicant's mental state, which did not augur well for rehabilitation, provided a sufficient basis for the order of an indefinite sentence." The submission must be rejected. In 1987 courts in Western Australia were not authorised to make orders for the indefinite detention of a convicted person other than on acceptable evidence proving the demonstrable necessity for the order.

35 The respondent correctly acknowledged that the nature of the offences in this case could not alone support a conclusion of the necessity for the order. The evidence respecting the applicant's antecedents, character, age, health and mental condition did not support a conclusion that he posed a constant danger of physical harm to the community[29]. The applicant's past record of offences, which included relatively minor sexual offences, did not involve violence. Such psychiatric and psychological evidence as was before the Supreme Court did not identify the applicant as a person who posed a danger to the community of physical harm including by serious sexual offending. Ms McHugh's opinion that the applicant was at risk of re-offending was not an opinion that he was a constant danger to the community. Ms McHugh was addressing the applicant's denial that he had wilfully exposed himself and his denial of "the on curtilage offences". She considered that his denials limited his insight into the factors that had contributed to the commission of these offences. Her conclusion also took

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27 *Dangerous Sexual Offenders Act* 2006 (WA), s 17(1).

28 *Dangerous Sexual Offenders Act* 2006 (WA), s 7(1) and (2).

29 *Chester v The Queen* (1988) 165 CLR 611 at 618-619.

into account the applicant's denial of participation in homosexual activities and his unwillingness to discuss his sexuality. The significance of the last-mentioned considerations to Ms McHugh's conclusion needs to be understood in the context that homosexual acts between consenting males in private were criminal offences in Western Australia in 1986[30].

36 Burt CJ was plainly correct to conclude that the evidence did not support the making of the order. The evidence was not capable of demonstrating that the applicant was so likely to commit further crimes of violence, including sexual offences, that he constituted a constant danger to the community[31].

37 From the time when Legal Aid WA became aware of the applicant's circumstances in early 2011, it has acted with reasonable dispatch in seeking to pursue an appropriate remedy for him. Given unchallenged evidence of the applicant's intellectual disability, his failure to more actively pursue redress while in prison should not stand in the way of the grant of leave.

38 The applicant has now served six years more than the maximum sentence that a court could have imposed for the offence of aggravated sexual assault. The s 662 order should not have been made. Notwithstanding the great delay in bringing the application, the interests of the administration of justice require that special leave to appeal be granted. The appeal must be allowed. In the result, the order made under s 662 will be set aside and the applicant will be released from custody without parole supervision.

39 The applicant has served the sentences for the serious offences of which he was convicted in 1987. The respondent's submission that to release him almost 20 years after completing those sentences would produce an anomalous result cannot be countenanced.

40 It may be assumed that the applicant will receive such support and assistance as he may require from the Disability Services Commission on his

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30 Section 184 of the Code made it an offence for a male, whether in public or private, to commit an "act of gross indecency with another male person" or to procure another male person to commit an act of gross indecency with him. The *Law Reform (Decriminalization of Sodomy) Act* 1989 (WA) repealed s 184 and replaced it with a provision limited to criminalising homosexual acts of gross indecency committed in public.

31 *Chester v The Queen* (1988) 165 CLR 611 at 618-619.

release[32]. In the event that there are grounds for considering the applicant poses a risk to the sexual safety of one or more children, or children generally, it is open to the proper authorities to bring an application for a child protection prohibition order before a court[33]. The court making such an order may prohibit certain conduct, including associating with specified persons, being in specified locations and engaging in specified behaviour[34]. Orders may prohibit conduct absolutely or on the terms that the court considers appropriate[35]. To observe that there is a statutory scheme designed to protect the community from the risk of harm posed by persons who have been convicted of sexual offences and who are at liberty in the community is to say nothing about whether the scheme should be engaged in this case.

Orders

41 Orders should be made as follows:

1. Dispense with compliance with the time limit for filing the application for special leave to appeal and grant the application, treat the appeal as instituted and heard instanter and allowed.

2. Set aside the order of the Court of Criminal Appeal of the Supreme Court of Western Australia declining to interfere with the order made by Wallace J under s 662 of the *Criminal Code* (WA) and in lieu thereof quash that order.

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32 The Court was informed during the hearing that the Commission is the successor to the Authority for Intellectually Handicapped Persons.

33 *Community Protection (Offender Reporting) Act* 2004 (WA), s 87.

34 *Community Protection (Offender Reporting) Act* 2004 (WA), s 93(1).

35 *Community Protection (Offender Reporting) Act* 2004 (WA), s 93(3).

42 GAGELER J. The discretion to grant special leave to appeal, which "cannot be reduced to a formula", "must always make allowance for the exceptional case of manifest injustice"[36]. This is such a case. Unless special leave to appeal from the judgment of the Court of Criminal Appeal of the Supreme Court of Western Australia is granted 25 years out of time, the applicant will remain in indefinite detention by reason of a court order that should never have been made.

43 The Court of Criminal Appeal gave its judgment in 1987[37]. In 1988 the High Court decided *Chester v The Queen*[38]. In 1989 Brinsden J stated his view since *Chester* to have become that s 662(a) of the *Criminal Code* (WA) "should not be used if the [sentencing] judge is not clearly satisfied that the [convicted person] will remain a constant danger to the community in the future" and "cannot be used where there is only the probability of the offender re-offending as he must be seen as a constant danger to the community"[39]. That view correctly reflected *Chester*.

44 The misfortune of the applicant is that *Chester* had not been decided at the time that the Court of Criminal Appeal gave its judgment in 1987. If it had been, Brinsden J could not have upheld the sentencing judge's order under s 662(a) on the basis that "[t]he applicant is a man about whom it is very difficult to have any real confidence … that he will not re-offend, and seriously offend, when released into the community"[40]. That formulation by Brinsden J, with whom Smith J agreed, reflected their Honours' adoption of what, in the light of *Chester*, was a wrong test. The other member of the Court of Criminal Appeal was Burt CJ. He adopted the correct test. He dissented. He was right.

45 The correct test, properly applied, could have led to only one conclusion. The highest the evidence before the sentencing judge went was an expression, by a clinical psychologist in training, of "fear" that the applicant "will be at risk of re-offending on his release to the community". The sentencing judge could not possibly have been satisfied that the applicant would remain a constant danger to the community. The order made under s 662(a) should have been quashed.

46 I therefore agree with the orders proposed in the joint reasons for judgment.

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36 *Lowe v The Queen* (1984) 154 CLR 606 at 611; [1984] HCA 46.

37 *Yates* (1987) 25 A Crim R 361.

38 (1988) 165 CLR 611; [1988] HCA 62.

39 *Gooch* (1989) 43 A Crim R 382 at 396.

40 (1987) 25 A Crim R 361 at 369.