HIGH COURT OF AUSTRALIA

KEANE, GORDON, EDELMAN, STEWARD AND GLEESON JJ

Matter No A5/2022

DARRYL MARTIN HORE — APPELLANT

AND

THE QUEEN — RESPONDENT

Matter No A6/2022

JACOB ARTHUR WICHEN — APPELLANT

AND

THE QUEEN — RESPONDENT

Hore v The Queen
Wichen v The Queen
[2022] HCA 22
Date of Hearing: 11 May 2022
Date of Judgment: 15 June 2022
A5/2022 & A6/2022

ORDER

In each matter:

1. *Appeal allowed.*

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

   (a) the appeal to that Court be allowed;

   (b) the decision of the primary judge be set aside; and

(c) the appellant's application for release on licence be remitted to the primary judge to be determined according to law.

On appeal from the Supreme Court of South Australia

Representation

S A McDonald SC with G P G Mead SC for the appellant in each matter (instructed by Legal Services Commission (SA))

M J Wait SC, Solicitor-General for the State of South Australia, with L M Boord SC for the respondent in each matter (instructed by Office of the Director of Public Prosecutions (SA))

CATCHWORDS

Hore v The Queen
Wichen v The Queen

Criminal law – Sentencing – Indefinite detention – Release on licence – Where s 57 of *Sentencing Act 2017* (SA) ("Act") conferred upon Supreme Court of South Australia discretion to order that persons convicted of certain sexual offences be detained in custody until further order – Where s 59(1a)(a) of Act provided that person detained in custody could not be released on licence unless person satisfied Supreme Court that person capable of controlling and willing to control sexual instincts – Where "willing" not defined in Act – Where s 57(1) of Act provided that, in that section, person regarded as "unwilling" to control sexual instincts if a significant risk that person would, given opportunity to commit relevant offence, fail to exercise appropriate control of person's sexual instincts – Whether "willing" in s 59(1a)(a) meant converse of "unwilling" in s 57(1) of Act – Whether Supreme Court obliged to reach state of satisfaction required by s 59(1a)(a) by excluding from consideration likely effect of conditions of release on licence upon person's willingness to exercise appropriate control of sexual instincts.

Words and phrases – "capable", "conditions of release on licence", "exercise appropriate control of the person's sexual instincts", "ongoing capability and willingness", "release on licence", "reliable commitment to control", "significant risk", "state of mind", "unwilling", "willing".

Sentencing Act 2017 (SA), ss 57, 58, 59.

1 KEANE, GORDON, EDELMAN, STEWARD AND GLEESON JJ. Under Div 5 of Pt 3 of the *Sentencing Act 2017* (SA) ("the Act"), the Supreme Court of South Australia may order that a person who has been convicted of certain sexual offences be detained in custody until further order. Within that Division, s 59(1) provides that the Supreme Court may authorise a person who has been detained in custody to be released into the community "on licence" – that is, with conditions attached to the person's release. In this regard, s 59(1a)(a) provides that a person applying for release from custody on licence cannot be released unless the person satisfies the Supreme Court that the person is, relevantly, "both capable of controlling and willing to control the person's sexual instincts".

2 Each of the appellants, Mr Wichen and Mr Hore, is subject to an order for detention in custody under s 23 of the *Criminal Law (Sentencing) Act 1988* (SA) ("the Repealed Act"), the predecessor to s 57 of the Act[1]. Each of them applied for, and was refused, release on licence into the community pursuant to s 59 in the current regime. In each case, the primary judge (Kourakis CJ in respect of Mr Wichen[2] and Hughes J in respect of Mr Hore[3]) held that, on the proper construction of s 59(1a)(a), "willing" means the converse of "unwilling" as defined in s 57(1). On that basis, in each case, the primary judge was not satisfied that the relevant appellant was "willing" to control his sexual instincts.

3 "Willing" is not defined in the Act, but s 57(1) of the Act 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".

4 The primary judge in each case also held that, under s 59, the Supreme Court may only consider the imposition of conditions on the person's release on licence after the person applying for release succeeds in establishing to the satisfaction of the Court that the person is both capable of controlling and willing to control his or her sexual instincts, without regard to the likely effect of any such conditions on the person's willingness to exercise appropriate self-control.

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1 *Wichen v The Queen* [2020] SASC 157 at [2]; *Hore v The Queen* (2020) 285 A Crim R 94 at 96 [1].

2 *Wichen v The Queen* [2020] SASC 157.

3 *Hore v The Queen* (2020) 285 A Crim R 94.

5 The Court of Appeal of the Supreme Court of South Australia (Kelly P, Lovell and Bleby JJA) dismissed an appeal by each appellant[4].

6 In this Court, the appellants contend that "willing" in s 59(1a)(a) of the Act should be given its ordinary meaning and, on that understanding, each appellant satisfies that prerequisite for release on licence. Alternatively, the appellants contend that the Supreme Court, in considering whether to release a person on licence, may properly have regard to the conditions which may be imposed upon the release of the person as affecting the willingness of the person to control his or her sexual instincts. For the reasons that follow, the appellants' first contention should be rejected, but their alternative contention should be upheld. In consequence, each appeal must be allowed.

7 Before turning to address the arguments agitated by the parties, it is convenient to summarise the circumstances in which each appellant came to be detained, the terms of the legislative scheme in Div 5 of Pt 3 of the Act, and the course of proceedings in the courts below in relation to each appellant's application for release on licence.

The detention of the appellants

Mr Wichen

8 On 5 February 2003, Mr Wichen pleaded guilty to one count of serious criminal trespass in a place of residence and one count of assault with intent to rape[5]. By that time, he had a significant history of criminal offending, which commenced when he was 12 years old and included convictions for two attempted rapes and indecent assault[6]. On 26 July 2005, he was sentenced to ten years' imprisonment, which was backdated to commence on 29 April 2002, the date he was first taken into custody[7].

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4 *Wichen v The Queen* (2021) 138 SASR 134; *Hore v The Queen* (2021) 289 A Crim R 216.

5 Contrary to, respectively, ss 170(2) and 270B of the *Criminal Law Consolidation Act 1935* (SA). See *Wichen v The Queen* [2020] SASC 157 at [2].

6 *R v Wichen* (2005) 92 SASR 528 at 532-533 [18]-[22].

7 *R v Wichen* (2005) 92 SASR 528 at 555 [128]-[129].

9 At the time of sentencing, the Director of Public Prosecutions ("the DPP") applied, pursuant to s 23 of the Repealed Act, for a declaration that Mr Wichen was incapable of controlling his sexual instincts, and for an order for his indefinite detention[8].

10 The sentencing judge, Gray J, adjourned that application until the Court could receive further information about the steps taken to address the mental condition of Mr Wichen while in custody[9]. The adjourned application was heard on 30 August 2011. Having received further evidence, including from two psychiatrists and one psychologist, the sentencing judge declared that Mr Wichen was incapable of controlling his sexual instincts and directed that he be detained in custody until further order from the expiry of his sentence on 29 April 2012[10].

Mr Hore

11 Mr Hore's criminal history includes offences against children, namely indecent assault and aggravated indecent assault. As a consequence of that offending, he became a "registrable offender" under the *Child Sex Offenders Registration Act 2006* (SA)[11]. On 24 February 2015, Mr Hore pleaded guilty in the Magistrates Court of South Australia to three counts of failing, as a registrable offender, to comply with reporting conditions without reasonable excuse[12] and one count of possessing child pornography knowing of its pornographic nature[13]. Mr Hore was sentenced in the Supreme Court, following a prosecution appeal against his original sentence, to 16 months' imprisonment with a non-parole period of ten months[14].

12 On 9 February 2016, shortly before the expiry of Mr Hore's non-parole period, the sentencing judge, Nicholson J, made an order pursuant to s 23(4) of the

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8 *R v Wichen* (2005) 92 SASR 528 at 530 [2], 531 [4].

9 *R v Wichen* (2005) 92 SASR 528 at 554 [123].

10 *R v Wichen [No 2]* [2011] SASC 194 at [14], [30].

11 *R v Hore* [2016] SASC 21 at [5]-[6], [8].

12 Contrary to s 44(1) of the *Child Sex Offenders Registration Act 2006* (SA).

13 Contrary to s 63A of the *Criminal Law Consolidation Act 1935* (SA).

14 *Police v Hore* [2015] SASC 150 at [28].

Repealed Act that Mr Hore be detained in custody until further order, with such detention commencing upon the expiry of his term of imprisonment. In his Honour's reasons, delivered at a later date, Nicholson J held that the risk of Mr Hore committing further sexual offences against children if he were released was very high and would remain so unless he engaged with, and responded to, further counselling and rehabilitative programs. His Honour declared that Mr Hore was incapable of controlling his sexual instincts[15].

The legislative scheme

13 The "primary purpose" for sentencing a defendant for an offence pursuant to the Act is to "protect the safety of the community (whether as individuals or in general)"[16].

14 Part 3 of the Act provides for the imposition of custodial sentences. Within that Part, Div 5 is headed: "Offenders incapable of controlling, or unwilling to control, sexual instincts". The legislative scheme within Div 5 is comprised of three main sections: s 57 empowers the Supreme Court to detain such persons in custody until further order; s 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 persons on licence.

15 Section 57(7) confers upon the Supreme Court a discretion to order that "a person to whom this section applies be detained in custody until further order if satisfied that the order is appropriate". A "person to whom this section applies" means: a person convicted by the Supreme Court of a relevant offence; a person remanded by the District Court of South Australia or the Magistrates Court under s 57(2) to be dealt with by the Supreme Court under s 57; or a person who is the subject of an application by the Attorney-General for the State of South Australia under s 57(3)[17].

16 Before the Supreme Court may determine whether to make an order under s 57, in accordance with s 57(6) the Court must direct that at least two legally qualified medical practitioners "inquire into the mental condition of [the] person

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15 *R v Hore* [2016] SASC 21 at [3], [39].

16 s 3 of the Act.

17 s 57(1) of the Act, definition of "person to whom this section applies".

... and report to the Court on whether the person is incapable of controlling, or unwilling to control, the person's sexual instincts".

17 As to the expression "unwilling", s 57(1) provides:

> "In this section –
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> ...
>
> ***unwilling*** – a person to whom this section applies will be regarded as unwilling to control 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."

18 Consistently with the primary purpose of the Act, s 57(8) provides that, in determining whether to make an order under s 57, the "paramount consideration" of the Supreme Court "must be to protect the safety of the community (whether as individuals or in general)".

19 Section 57(9) lists matters which the Supreme Court "must" take into consideration in determining whether to make an order under that section, including the reports of the medical practitioners provided to the Court[18], any relevant evidence or representations that the person may desire to put to the Court[19], and any other matter that the Court thinks relevant[20].

20 As noted above, there are two possible avenues for the release of a person subject to an order under s 57. Pursuant to s 58, the order for detention may be discharged, in which event the person is released unconditionally. Pursuant to s 59, the person may be released on licence. As the appeals are concerned with release on licence, it is convenient to consider s 59 before noting the terms of s 58.

21 By s 59(1), the Supreme Court "may, on application by the DPP or the person, authorise the release on licence of a person detained in custody" under Div 5. By s 59(1a), the person detained in custody cannot be released on licence unless the person satisfies the Court that:

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18 s 57(9)(a) of the Act.

19 s 57(9)(b) of the Act.

20 s 57(9)(d) of the Act.

"(a) the person is both capable of controlling and willing to control the person's sexual instincts; or

(b) the person no longer presents an appreciable risk to the safety of the community (whether as individuals or in general) due to the person's advanced age or permanent infirmity."

22 Section 59(2) imposes a requirement, relevantly identical to s 57(6), that, before determining an application under s 59, the Court obtain medical reports on "whether the person is incapable of controlling, or unwilling to control, the person's sexual instincts".

23 The "paramount consideration" in determining an application under s 59 is also identical to s 57(8), namely to protect the safety of the community[21].

24 Section 59(4) states the matters the Supreme Court "must" take into consideration when determining an application under s 59. Those matters include, relevantly: the reports of the medical practitioners provided to the Court under s 59(2)[22]; any relevant evidence or representations that the person may desire to put to the Court[23]; a report provided to the Court by the "appropriate board" (relevantly, the Parole Board[24]), including any opinion of the Parole Board on the effect that the release on licence of the person would have on the safety of the community, a report as to the probable circumstances of the person if the person were to be released on licence, and the recommendation of the Parole Board as to whether the person should be released on licence[25]; evidence tendered to the Court of the estimated costs directly related to the release of the person on licence[26]; and any other matter the Court thinks relevant[27].

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21 s 59(3) of the Act.

22 s 59(4)(a) of the Act.

23 s 59(4)(b) of the Act.

24 s 59(20) of the Act, definition of "appropriate board".

25 s 59(4)(c) of the Act.

26 s 59(4)(d) of the Act.

27 s 59(4)(g) of the Act.

25 Sections 59(7) and 59(8) address the conditions to be imposed on a person upon release on licence. Section 59(7) provides that "[s]ubject to this Act, every release of a person on licence under this section" is subject to two conditions, which are to the effect that a person is prohibited from possessing a firearm, any part of a firearm, or ammunition, and is required to submit to tests for gunshot residue.

26 Section 59(8) then provides:

> "Without limiting subsection (7), the release of a person on licence under this section will be subject to such conditions as the [Parole Board] thinks fit and specifies in the licence (including a condition that the person be monitored by use of an electronic device approved under section 4 of the *Correctional Services Act 1982*)."

27 Section 59(4a) provides that, when determining an application under s 59, the Supreme Court must not have regard to the length of time that the person has spent in custody or may spend in custody if the person is not released on licence.

28 Section 58 empowers the Supreme Court, on application by the DPP or the person in detention, to discharge an order under s 57. The order cannot be discharged unless, relevantly, the person subject to the order satisfies the Court of the matters in s 58(1a), which are identical to the matters in s 59(1a). There is also, in s 58(2), a requirement that the Court obtain medical reports in respect of the same matters identified in ss 57(6) and 59(2).

Legislative history

29 The *Sentencing (Release on Licence) Amendment Act 2018* (SA) ("the Amending Act") inserted ss 58(1a), 59(1a) and 59(4a) into the Act. The Attorney-General's Second Reading Speech explained the background to the Amending Act[28]:

> "In the past, the court has expressed the view that, despite the risks an offender might pose to the safety of the community, it was appropriate to release the offender into the community on licence as the community could be adequately protected through a number of steps to be taken by the

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28 South Australia, House of Assembly, *Parliamentary Debates* (Hansard), 29 May 2018 at 583-584.

> Department for Correctional Services and other agencies to manage those risks.
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> This bill amends [the Act] to address concerns that have been raised about this approach. The reforms create a two-step process. Firstly, a detained person will need to satisfy the court that they are both capable of and willing to control their sexual instincts. It is a reversal of onus. If the court is so satisfied, the court can then consider whether they should be released on licence or have their indefinite detention order discharged, with the paramount consideration being the safety of the community in making that decision. This means that if the person cannot satisfy the court that they are both capable [of] and willing to control their sexual instincts, then the court is unable to make an order to release the person on licence or to discharge their order of detention subject to one exception."

The "exception" referred to in the final sentence was the alternative prerequisite in s 59(1a)(b), being if the person no longer presents an appreciable risk to the safety of the community due to his or her advanced age or infirmity.

The applications for release on licence

30 Each appellant applied to the Supreme Court for release on licence pursuant to s 24(1) of the Repealed Act[29]. By reason of the transitional provisions in Pt 3 of Sch 1 to the Act, each application fell to be determined pursuant to s 59 of the Act[30].

Mr Wichen

31 Kourakis CJ held that "willing" in s 59(1a)(a) means the converse of the special meaning of "unwilling" in s 57(1)[31] – that is, "a person is willing to control their sexual instincts where there is not a significant risk that the person would,

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29 *Wichen v The Queen* [2020] SASC 157 at [1], [5]; *Hore v The Queen* (2020) 285 A Crim R 94 at 100 [29].

30 *Wichen v The Queen* [2020] SASC 157 at [98]; *Hore v The Queen* (2020) 285 A Crim R 94 at 100 [31].

31 *Wichen v The Queen* [2020] SASC 157 at [110].

given an opportunity to commit a relevant offence, fail to exercise appropriate control of their sexual instincts"[32].

32 His Honour said that if the relevant condition for release on licence were whether Mr Wichen was willing to control his sexual instincts, in the ordinary meaning of that word, his Honour would have found that Mr Wichen was so willing. But his Honour considered that, due to the serious abuse to which Mr Wichen was exposed as a child and his innate disposition manifested by his previous offending, there was a significant risk that Mr Wichen would fail to exercise appropriate control if an opportunity to commit an offence were to arise. Accordingly, his Honour was not satisfied that the requirement in s 59(1a)(a) had been met[33].

33 To arrive at this construction of "willing", Kourakis CJ considered the scheme of ss 57 and 59 and made three preliminary observations. First, the opening words of s 57(1) apply definitions set out therein only to s 57. Secondly, the power to make an indefinite detention order under s 57 is not expressly conditioned on a finding that the person is incapable of controlling, or unwilling to control, his or her sexual instincts. His Honour considered, however, that if that power was not implicitly subject to such a condition, an order was nonetheless unlikely to be made in the absence of such a finding. The third observation was that the power to make an order for release on licence is expressly conditioned upon a finding by the Supreme Court that the person is both capable of controlling and willing to control the person's sexual instincts[34]. It followed that reading "willing" as the converse of "unwilling" was the only way in which ss 57 and 59, read together, could provide a "coherent regime" for detention and release on licence[35].

34 Kourakis CJ then turned to consider whether s 59 allows the Supreme Court to consider the conditions which a person will face after being released from custody in deciding whether to make an order for release on licence. Having already noted that the power to release on licence is expressly conditioned on a finding that the person is both capable of controlling and willing to control his or

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32 *Wichen v The Queen* [2020] SASC 157 at [112]-[113], quoting *R v Iwanczenko* [2019] SASC 140 at [112].

33 *Wichen v The Queen* [2020] SASC 157 at [122]-[123].

34 *Wichen v The Queen* [2020] SASC 157 at [107]-[108].

35 *Wichen v The Queen* [2020] SASC 157 at [110].

her sexual instincts, his Honour considered that it had to be demonstrated "from within the artificial constraints of prison ... that there is no significant risk that [the person] will fail to exercise the appropriate control"[36].

35 His Honour referred in particular to the evidence of a psychiatrist, Dr Nambiar, who said that it would be "best to take a stepped down approach", where Mr Wichen is moved from an environment of "total control, within reason" to the community but monitored at all times, such as by electronic monitoring and home detention[37]. Even though his Honour was confident that if Mr Wichen were released on licence with conditions properly safeguarding against reoffending there was no significant risk of reoffending, as the "stepped down" approach to which Dr Nambiar testified "might show", his Honour concluded that s 59 did not permit that course[38].

36 Kourakis CJ was troubled by the conclusion at which he arrived. His Honour observed that Mr Wichen was "trapped in a paradox" by this construction of s 59(1a)(a), since Mr Wichen was not able to demonstrate his ability to control his sexual instincts in ordinary social circumstances outside prison without being released from prison. As a result, Kourakis CJ said that there was little prospect that Mr Wichen would be released until he meets the criteria for infirmity pursuant to s 59(1a)(b), an outcome which his Honour described as "harsh, and some may say cruel"[39].

Mr Hore

37 Hughes J came to the same conclusions as Kourakis CJ on both issues which form the grounds of the present appeals[40].

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36 *Wichen v The Queen* [2020] SASC 157 at [124].

37 *Wichen v The Queen* [2020] SASC 157 at [24].

38 *Wichen v The Queen* [2020] SASC 157 at [124].

39 *Wichen v The Queen* [2020] SASC 157 at [124].

40 *Hore v The Queen* (2020) 285 A Crim R 94 at 112-113 [91]-[93], 114-115 [99]-[101].

38 As to the relevance of conditions of release on licence, her Honour held[41] that it is only once it is established that there is not a significant risk that the person would fail to exercise appropriate control of his or her sexual instincts that the imposition of conditions is considered, in order to consider whether any remaining risk could be reduced or obviated[42]:

> "It is sufficiently clear by the language and form of s 59 that the first step in [Mr Hore'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. However, it does not follow from such a conclusion that the risk is wholly removed, and the balance of s 59 is directed at other factors to be incorporated into the decision as to what is an appropriate order to make." (emphasis in original)

39 Similarly to Kourakis CJ, her Honour acknowledged that the effect of this construction was to place a significant – and in some cases impossible – burden on the person[43].

The Court of Appeal

40 The Court of Appeal dismissed both appellants' appeals, in separate judgments delivered on the same day[44]. The decision in *Hore v The Queen*[45] substantially adopted the reasoning in *Wichen v The Queen*[46]. It is sufficient for present purposes to examine the Court of Appeal's reasoning in *Wichen*.

41 The Court of Appeal addressed Mr Wichen's submission, repeated in this Court for both appellants, that "unwilling" is defined in s 57 and that definition is preceded by the words "[i]n this section" so that, absent express words expanding

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41 *Hore v The Queen* (2020) 285 A Crim R 94 at 114 [99], 115 [101].

42 *Hore v The Queen* (2020) 285 A Crim R 94 at 115 [101].

43 *Hore v The Queen* (2020) 285 A Crim R 94 at 114 [99].

44 *Wichen v The Queen* (2021) 138 SASR 134; *Hore v The Queen* (2021) 289 A Crim R 216.

45 (2021) 289 A Crim R 216 at 217 [1], 221 [24], 222 [26].

46 (2021) 138 SASR 134.

the application of this definition across the Division, the principle of legality[47] required the Court to presume against reading "willing" in s 59(1a)(a) as the opposite of "unwilling". The Court of Appeal accepted that the principle of legality favoured a construction of "willing" that would not have a more deleterious effect on the liberty of the individual than the ordinary meaning of the word; but their Honours held that any presumption to that effect was displaced by the terms of the statute[48].

42 To that point, the Court of Appeal held that it was a "necessary conclusion" from the text, structure and purpose of the Act that the word "willing" in s 59(1a)(a) meant the opposite of "unwilling"[49]. In the view of the Court of Appeal, the "fundamental difficulty" with the construction proposed by Mr Wichen was the incoherency described by Kourakis CJ[50]: that, if "willing" was not the converse of "unwilling", a person would be detained under one test (under s 57), but would potentially be amenable to discharge (under s 58) or immediate release on licence (under s 59) under another. Such an outcome would be, it was said, "capricious" and "nonsensical" and would frustrate the purpose of the legislative scheme[51].

43 The Court of Appeal also referred to the circumstance that each of ss 58(2) and 59(2) requires the Supreme Court to obtain medical reports in the same terms as s 57(6). The Court of Appeal observed that unless "willing" meant the opposite of "unwilling", those inquiries would, inexplicably, be directed at different outcomes[52].

44 As to the relevance of conditions of release on licence, the Court of Appeal agreed with Hughes J that it is only after the Supreme Court determines that the criteria in s 59(1a)(a) (or the infirmity criterion under s 59(1a)(b)) are satisfied in

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47 See *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 259 [15]; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 581 [11].

48 *Wichen v The Queen* (2021) 138 SASR 134 at 140-141 [24], 142 [28].

49 *Wichen v The Queen* (2021) 138 SASR 134 at 142 [28].

50 *Wichen v The Queen* [2020] SASC 157 at [110].

51 *Wichen v The Queen* (2021) 138 SASR 134 at 143 [31].

52 *Wichen v The Queen* (2021) 138 SASR 134 at 142-143 [29]-[30].

relation to the person that the power to release on licence is enlivened, and only then can the question of conditions arise[53].

The meaning of "willing" in s 59(1a)(a)

45 In this Court, the appellants submit that in s 59(1a)(a), "capable" is directed at whether the psychological condition of the person is such that he or she is effectively able to make a free choice to control his or her sexual instincts; by contrast, "willing" signifies a subjective state of mind on the part of the detained person, of being open or prepared to make that choice, and "willing" in s 59(1a)(a) should be given its ordinary meaning.

46 The appellants submit that the construction of "willing" adopted by the Court of Appeal relies, erroneously, on the definition of a different word, "unwilling", that definition being expressed to be limited in its operation to s 57. The appellants argue, again invoking the principle of legality[54], that the defined meaning of "unwilling" in s 57(1) should be confined to its use in that section. The appellants submit that the purpose of the definition in s 57(1) is to identify the practical content of the reports of medical practitioners required by s 57(6), and that the Court of Appeal's construction gives the meaning of "unwilling" an operation beyond that limited purpose. These submissions are not persuasive.

47 It may be said immediately that it is not correct to say that "unwilling" is defined in s 57(1). It is more accurate to say that s 57(1) deems a person to whom s 57 applies to be "unwilling" to exercise appropriate control of the person's sexual instincts in circumstances where the risk of a failure to exercise appropriate control is "significant". A person seeking discharge under s 58 or release on licence under s 59 is, and can only be, a person to whom s 57 applies.

48 Moreover, the appellants' argument cannot be reconciled with ss 58(2), 58(4)(a), 59(2) and 59(4)(a) of the Act. There would be no point in requiring the Supreme Court to obtain and act upon the reports of medical practitioners if those reports were not directed to the task required of the Court by ss 58(1a) and 59(1a).

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53 *Wichen v The Queen* (2021) 138 SASR 134 at 144-145 [41]-[42].

54 See *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 259 [15]; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 581 [11].

49 The focus of the medical reports required by each of ss 57(6), 58(2) and 59(2) is upon whether the person is either *incapable of controlling* the person's sexual instincts, or (to interpolate the deemed meaning of "unwilling") *at significant risk of failing to control* those instincts if given the opportunity to commit a relevant offence. In s 57(1), the particular use of the expression "unwilling" recognises that a person's willingness to control his or her sexual instincts may fall somewhere on a spectrum of states of volition, at some point on which the community is at "significant risk" of harm for reasons other than a want of capability on behalf of the person to control his or her sexual instincts. It requires no leap of imagination to appreciate that, in this context, when s 59(1a)(a) speaks of positive satisfaction that the person is willing to control his or her sexual instincts, it is speaking of an affirmative conclusion that the person falls within that part of the spectrum of states of volition which would not pose a significant risk of harm to the community should the person's commitment to appropriate self-control be tested after release from detention. In this context, the term "significant risk" 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. The Court of Appeal rightly rejected the appellants' invocation of the principle of legality in this context.

50 The construction of "willing" adopted by the Court of Appeal also rightly rejected the appellants' contention that willingness is established exclusively by reference to the subjective views expressed by the person seeking release, rather than by reference to an evaluation of the person's actual willingness when presented with an opportunity to exercise control of the person's sexual instincts. The unmistakeable intention of the Act is that the question of a person's willingness in s 59(1a)(a) is not to be resolved by uncritical acceptance of the person's expressed inclination to control the person's sexual instincts. Whether a person is "willing" in the relevant sense cannot depend on assertions by the person that may reflect subjective wishful thinking, if not feigned commitment, on the part of the person. The Supreme Court's assessment of the person's state of mind is concerned with whether the person is likely to have a reliable commitment to control the person's sexual instincts at the time when any occasion for the exercise of control arises.

51 In summary, in relation to the first ground of appeal, the courts below were correct to hold that, for the purposes of s 59(1a)(a), a person is "willing" to control his or her sexual instincts where there is not a significant risk that the person would, given an opportunity to commit a relevant offence, fail to exercise appropriate control of his or her sexual instincts.

52 It remains now to consider the relevance of conditions of release on licence.

The relevance of conditions of release on licence

53 The appellants submit that whether there is a risk that a person would, given an opportunity to commit an offence, fail to exercise appropriate control over the person's sexual instincts must depend on the circumstances in which such opportunity may arise. Those circumstances may include the effect on the person's commitment to appropriate self-control of the conditions of the licence upon which the person's release was authorised under s 59(1) of the Act. There is force in this submission.

54 The respondent submits that s 59 invites a two-step analysis: first, a determination whether the threshold test established by s 59(1a) is met; and then, and only then, a determination to exercise the discretion to make an order for release on licence with conditions. It is also argued that the imposition of conditions upon release on licence is relevant only to address any residual risk posed by the release of the person. The respondent points to the excerpt from the Second Reading Speech for the Amending Act set out above as supporting this approach. These submissions should not be accepted.

55 The courts below adopted the approach urged by the respondent 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. One cannot reconcile that approach with the text of s 59(1), which is clear that there is but one determination to be made by the Supreme Court, that determination being whether the person should be granted release on licence. Section 59(1a)(a) simply does not call for a determination as to willingness as an exercise separate from, and anterior to, the determination whether or not to grant release on licence.

56 True it is that s 59(1a) commands that a determination under s 59(1) may not be made in favour of release on licence unless the person satisfies the Court of the matters in either s 59(1a)(a) or (b); but the satisfaction required by s 59(1a) is not required to be established by an exercise separate from, and carried out without regard to, the likely behaviour of the person in the circumstances in which the extent of the risk of a failure to exercise appropriate self-control is to be assessed by the Court. The likely effect of the conditions of release on licence upon the strength of the person's commitment to exercising appropriate self-control may have a bearing on the assessment required by the Court. The power conferred by s 59(1) is concerned with whether the Supreme Court should "authorise the release on licence of a person detained in custody under [Div 5]". Integral to the exercise of that power is consideration of the conditions referred to in s 59(7) and (8).

57 The evaluation of the person's capability and willingness for the purposes of s 59(1a)(a) is not concerned, or more precisely not solely concerned, with the person's capability and willingness at the point in time at which the application for release on licence is determined. Rather, s 59(1a)(a) is vitally concerned with the person's ongoing capability and willingness to exercise appropriate self-control, on the assumption that the person is released, when any occasion for the exercise of self-control arises. Since the person cannot be released on licence without the conditions required by s 59(7) and (8), the evaluation of the person's likely response to an occasion calling for the exercise of the person's ability to control his or her sexual instincts must also proceed on the assumption that the conditions of the licence are in place on the hypothetical occasion for the exercise of appropriate control. If this assumption is not made, the evaluation of the person's likely behaviour would proceed by reference to a state of affairs that can never arise under s 59, that is, release on licence without conditions. An intention to enlist the Supreme Court in such an arid exercise cannot be discerned in the legislation.

58 Section 59, unlike s 58, is concerned with release *on licence*. There is no suggestion in the text of s 59 that the Court is required or permitted to disregard the likely effect of the conditions of release on licence on the person's willingness to control the person's sexual instincts when the Court is assessing whether there is a "significant risk" that the person would, if given an opportunity to commit a relevant offence, fail to exercise appropriate self-control. To say that the conditions of release on licence may have some bearing upon the Court's assessment of the person's willingness to control his or her sexual instincts is not to say that the Court must assume that the person will comply with the conditions, or that the Court must ignore the possibility that the conditions will not be effective in bolstering the person's willingness to exercise self-control. It is simply to acknowledge that consideration of the effect of the conditions on the person's willingness is integral to the determination whether there is not a "significant risk" that the person will fail to exercise appropriate control upon the person's release on licence.

59 To interpret s 59 as if it did require a determination whether to exercise the power to order release on licence without taking into account the effect of conditions on the person's willingness to exercise self-control would substantially reduce the utility of s 59. That is because, on the approach urged by the respondent, the only practical avenue for the release of a person detained under s 57 would be that provided by s 58. On that approach, s 58 would provide a sufficient basis for the discharge of a detention order if the person's willingness were established to the satisfaction of the Supreme Court. That being so, there would be no good reason not to discharge the order made under s 57 and it is difficult to see how there could be any occasion for release on licence under s 59. For all practical purposes, s 59 would be rendered a dead letter.

60 The immediate context in which s 59(1a)(a) is found confirms that the Supreme Court is not obliged to reach the state of satisfaction required by s 59(1a)(a) by excluding from consideration the likely effect of the conditions of the release on licence upon the person's willingness to exercise appropriate self-control. In that regard, s 59(4) provides:

> "The Supreme Court must also take the following matters into consideration when determining an application under this section for the release on licence of a person detained in custody under this Division:
>
> ...
>
> (c) a report provided to the Court by the [Parole Board] in accordance with the direction of the Court for the purposes of assisting the Court to determine the application, including –
>
> (i) any opinion of the [Parole Board] on the effect that the release on licence of the person would have on the safety of the community; and
>
> (ii) a report as to the probable circumstances of the person if the person is released on licence; and
>
> (iii) the recommendation of the [Parole Board] as to whether the person should be released on licence".

61 That s 59(4)(c)(ii) requires the Supreme Court to consider a report from the Parole Board that identifies the "probable circumstances of the person if the person is released on licence" confirms the relevance of such matters to the determination contemplated by s 59(1a)(a) of the Act.

62 As to the respondent's contention that the imposition of conditions upon release on licence is relevant only to address any residual risk posed by the release of the person, nothing in s 59 suggests that the relevance of the report or reports referred to in s 59(4)(c) is limited in this way. It is of some significance in this regard that s 59(1) does not suggest that the determination required of the Supreme Court includes the prescription of conditions by the Court as a bespoke regime for the release of the person on licence. The terms of the conditions governing release on licence are determined by the Act under s 59(7) or by the appropriate board under s 59(8).

63 It is not inconsistent with the purpose of the Amending Act stated in the Second Reading Speech for the Supreme Court to take into account, under

s 59(1a)(a), the effect of conditions of release on licence insofar as those conditions may have a positive effect upon the person's willingness to exercise appropriate control of his or her sexual instincts. The respondent's submission to the contrary misapprehends the thrust of the Second Reading Speech.

64 The purpose of s 59(1a)(a), as explained in the Second Reading Speech, is to ensure that the Court not order the release of a person on licence where the safety of the community is dependent upon the efficacy of external controls such as monitoring, supervision and pro-social support. It is to be noted that the excerpt from the Second Reading Speech set out above commences with a reference to the Supreme Court "in the past" having "expressed the view that, despite the risks an offender might pose to the safety of the community, it was appropriate to release the offender into the community on licence as the community could be adequately protected through a number of steps to be taken by the Department for Correctional Services and other agencies to manage those risks". The case referred to was the decision in *R v Humphrys*[55] at first instance.

65 In *R v Humphrys*, the primary judge held that release on conditions was appropriate given that the risk posed to the safety of the community by Mr Humphrys could be sufficiently addressed by the "regime proposed to be put in place immediately upon his release"[56]. The conclusion of the primary judge was that the external controls imposed on Mr Humphrys' behaviour under that regime could be relied upon to keep the community safe. No finding was made that the conditions of release on licence could be expected to bolster Mr Humphrys' willingness to exercise appropriate self-control sufficiently to warrant an affirmative finding of willingness on his part. Indeed, to the contrary, from the reasons of the Court of Criminal Appeal of South Australia (which were delivered on the same day as the enactment of s 59(1a)), it is apparent that Mr Humphrys was viewed as an intelligent and manipulative individual who, by "deceitful manipulation", might thwart the regime to be put in place upon release[57]. The amendments that introduced s 59(1a) into the Act were not directed to precluding release on licence of a person who is a different kind of individual, one who can be found to have a firm commitment to the exercise of appropriate self-control of his or her sexual instincts.

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55 [2018] SASC 39.

56 *R v Humphrys* [2018] SASC 39 at [57]. See also at [37]-[44].

57 *R v Humphrys* (2018) 131 SASR 344 at 355-360 [29]-[44].

66 The amendments introducing s 59(1a) were directed to ensuring that the external constraints upon behaviour provided by the licence conditions should not be relied upon to protect the community where, even with those external constraints, the Court is unable to be satisfied of the person's willingness to exercise appropriate self-control. The amendments were not concerned to deny the possibility that a positive finding can be made as to the person's willingness to exercise appropriate self-control on the basis that the support afforded by the conditions to be imposed may help to bolster the person's willingness to exercise that self-control so that the Court is able to be satisfied there is not a "significant risk" of a failure in that regard.

67 The appellants' alternative contention must be accepted. In determining whether to order release of a person on licence under s 59(1a)(a), the Supreme Court is not obliged to reach the state of satisfaction required by the word "willing" in s 59(1a)(a) by excluding from consideration the likely effect of the conditions of the release on licence upon the person's willingness to exercise appropriate self-control of his or her sexual instincts.

Orders

68 In each case, the appeal must be allowed. The order of the Court of Appeal must be set aside, the appeal to that Court be allowed, the decision of the primary judge in each matter be set aside, and each appellant's application for release on licence be remitted to the primary judge to be determined according to law.