HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY
BETWEEN:

C7 and C8 of 2023

RAYMOND JAMES CHOI HURT
Appellant

and

THE KING
Respondent

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APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification for publication

1. This outline is in a form suitable for publication on the internet.

Part II: Outline of Appellant's Propositions

The transitional issue

2. S474.22A(1)(c) describes two elements (cf s474.22A(3)). **JBA p81 Tab 5 .** The issue is whether the element that the accused "obtained or accessed" the child abuse material is "relevant conduct … engaged in" for the purpose of the Application provisions: item 3 of Schedule 6. **JBA p107 Tab 7.** The offence may only be committed if the accused has both obtained or accessed the material, and possessed the material. Each of those elements is "conduct engaged in".

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The *Bahar* issue

3. ***Statutory construction and the principle of legality***. The parties agree this is an issue of statutory construction and both resort to extrinsic material. The principle of legality is not of "limited assistance" (cf **RD [63]**), on the contrary, it assists in the resolution of the construction issue to achieve the least interference with liberty: *NAAJA v NT* (2015) 256 CLR 569 **(JBA p680 Tab 35)**, at [11], [222], cf [81]. There is no absolute curtailment of rights such as to exclude operation of the principle.

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4. ***S16AAB has no effect on the task of severity.*** The mandate in s16A(1) to impose a sentence "of a severity appropriate in all the circumstances of the offence" is untrammeled by the Amending Act, as are the matters to take into account under s16A(2). S16AAB has no effect on the determination of severity, it does not require the determination of severity by reference to a predetermined base not reflecting the circumstances of the offending - **RepH [10]** cf *Pot* per Riley CJ **(JBA p1372 Tab 67)** *Dui Kol* [2015] NSWCCA 150 **(JBA p1002 Tab 47) at [12],** per Adams J. While removing the power of the sentencing judge to impose a lesser sentence, 16AAB does

not supplant the function of assessing the appropriate proportionate penalty for the offending, cf *Dui Kol* **JBA p1002 Tab 47) at [29]** per McCallum J, *Hurt* **JCAB p103 Tab 7 at [90]** per Loukas-Karlsson J. And the availability of a s19B non conviction order emphasizes this. The sentencing court will have to consider the s16A factors *en route* to a s19B outcome. **cf RD [55].**

5. ***"At least".*** This is a minimalist command *Hurt (No 2)* **JCAB p29 Tab 3at [78]** per Mossop J. A sentencing judge is required to undertake an instinctive synthesis and if the result is less than the required minimum, to impose the minimum *Hurt* **JCAB p103 Tab 7 at [92]** per Loukas-Karlsson J. That is the extent of the arbitrary intervention in the sentencing process *Dui Kol* **JBA p1007 Tab47 at [13]** per Adams J.

6. ***The note.*** The note simply warns that despite the mandate in s16A, some nominated offences have applicable minimum penalties EM **JBA p1606 Tab 78.** It does not provide that the operation of s16A must give "precedence" to the "commands" of ss 16AAA, 16AAB and S16AAC (cf **RD [51]**), it leaves s16A to do its work but advises that for certain offences, the sentence determined in accordance with s16A will have to be adjusted upwards *Hurt (No 2)* **JCAB pp29 - 30 Tab 3 at [79]** per Mossop J; *Hurt* **JCAB p100 Tab 7 at [74]** per Loukas-Karlsson J. The majority in the Court of Appeal missed the significance of the Note (cf *Hurt* **JCAB p109 Tab 7 at [124], [144(a)]** per majority.)

7. ***s16AAC(2) – court "is taking into account" guilt / cooperation.*** The matters specified in s16AAC(2)(a) and (b) are matters that the court will have to consider in its task under s16A. If it "is" taking into account those matters in its consideration of the s16A factors (ie engaging in instinctive synthesis), then, when it comes to adjust its sentence to "at least" the minimum, the reduction of penalty provisions in s16AAC(2) and (3) come into play. Indeed the only time s16AAC is relevant is where the instinctive synthesis has led to a sentence of below the minimum, which has to be increased to "at least" the minimum. This confirms that the consideration of the s16A factors is untrammeled by the subsequent provisions, other than the minimalist command.

8. ***No discernable purpose of increasing sentences generally.*** The seriousness of an offence is indicated by the maximum penalty and the usual way to increase sentences for an offence is to increase the penalty – cf *Muldrock v The Queen* (2011) 244 CLR 120 at [31] **JBA p656 Tab 34**. The Amending Act did increase the maximum penalties for some offences, but not for most of the offences subject to s16AAB, in particular not for the offence here. The extrinsic material does not support an interpretation of a

generalized increase in sentences, rather the emphasis is on a desire to avoid non-custodial sentences and ensure a minimum period for the head sentence. *Hurt (No 2)* **JCAB p32 Tab 3 at [90]** Mossop J. The Minister refers to "insufficient time in custody to undergo even treatment programs or receive any significant rehabilitation" (H of R 11 September 2019 p2445). This is reinforced by the insertion of s16A(2AAA) by the Amending Act **JBA p45 Tab 3**, and by the amendment of s20(1)(b).

9. ***Yardstick?*** To dub the minimum penalty a "yardstick" and then assert that it operates in the same manner as a maximum penalty assumes the argument. If it is a yardstick it operates differently from the yardstick of maximum penalties: it can be reduced so is not a "floor" to match the "ceiling" of maximum penalties. (**AH [49], RepH [8]**). *Bahar* **JBA Tab 42 at [49]** simply asserts an equivalence and refers to *Muldrock v The Queen*, but the passage cited does not provide support for that assertion. Mossop J rightly criticizes this conclusory reasoning *Hurt (No 2)* **JCAB p30 Tab 3 at [80].**

10. ***Compression, and Allsop P's additional reason.*** In *Karim* (2011) 227 A Crim R 1 **JBA p1111 Tab 54 at [45],** Allsop P having offered tepid endorsement of *Bahar* posited an "independent reason" of "unequal justice". But the unequal justice is not suffered by (other) individuals, so there is no parity issue. There will be compression, but that is the consequence of the legislation. Further, individual circumstances can be reflected in the minimum terms applied in each case, allowing differentiation and ameliorating compression.

11. ***Bahar rests on flawed assumptions:***

- The assumed, but false equivalence between maximum and minimum penalties **AH [49];**
- It failed to address the statutory language **AH [51];**
- It failed to address the principle of legality **AH [50].**

12. ***The cases which followed Bahar did so uncritically***. Without separate analysis, appellate courts expressed themselves bound to follow *Bahar* unless it was plainly wrong. In *Karim* Allsop P acknowledged that *Pot* was arguable, and did attempt a further justification, but it is wanting. **AH [53, [54].**

Dated: 8 November 2023

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