HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 15 Mar 2024 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	M77/2023
File Title:	Obian v. The King
Registry:	Melbourne
Document filed:	Form 27F - Outline of oral argument
Filing party:	Appellant
Date filed:	15 Mar 2024

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

Saer Obian
Appellant

And

The King
Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: This outline is in a form suitable for publication on the internet.

Part II: Outline of propositions to be advanced in oral argument

Statutory scheme

1. Section 233(2) of the *Criminal Procedure Act 2009* (Vic) (the **CPA**) does not alter the fundamental proposition that the prosecution is to put before the jury all of the evidence on which it relies for proof of the prosecution case before an accused is called upon to elect whether to give or call evidence (**AS[34], [45]-[50]**).

2. The power at s 233(2) of the CPA (unlike the common law power preserved by s 233(3)) is framed by reference to the responses of an accused, as required under s 183 of the CPA, to the summary of prosecution opening and notice of pretrial admissions (**AS[46]-[50]**).

    a. The meaning of "evidence which could not reasonably have been foreseen by the prosecution having regard to" the responses of an accused to the summary of prosecution opening and notice of pretrial admissions is necessarily informed by the content of what s 183 of the CPA requires an accused to do (**AS[50]**; **Reply[13]**).

    b. The structure of the CPA, including ss 183(4), 225, 226 and 231, precludes the meaning or content of the term "basis" in s 183(3) from including the substance or an affirmative account of an accused's likely evidence (**AS[46]-[49]**).

    c. The narrowing of issues in dispute – as was the policy objective of the *Crimes (Criminal Trials) Act 1993* (Vic) and *Crimes (Criminal Trials) Act 1999* (Vic) – does not necessitate an accused disclosing an affirmative version of events (**AS[51]-[54]**).

d. While framed by reference to the responses of an accused to the summary of prosecution opening and notice of pretrial admissions, the assessment of reasonable foreseeability required to enliven the discretion under s 233(2) is not confined to consideration of those two documents (**Reply[10]**).

The case at trial

3. The Crown case at trial alleged that the appellant hired the Hiace van and was present when the van was used in the movement of 1,4-BD on the night of 14 June 2016 (**AS[9]-[10], [15]**).

4. The Crown were on notice that, if the appellant elected to give evidence, he would admit to hiring the van (**AS[22]-[24]**).

5. The combination of that likely admission together with:

   a. the response of the appellant to the summary of prosecution opening (which disputed that the appellant was present at any of the premises from or to which 1,4-BD was moved); and

   b. the appellant's notice of alibi (which asserted that the evidence to be called by the appellant included him leaving his house, for approximately one hour, to attend a car rental establishment before returning home),

   meant that the appellant's obvious – not merely reasonably foreseeable – position was that he ceased to be in or with the van shortly after it was hired, and before it was used in the movement of 1,4-BD (**AS[65], [69]-[70]; AFM 120, 125-126 [57]-[88]**).

6. Prior to the close of the prosecution case, the course of the appellant's trial included:

   a. evidence that Moustafa contacted Allouche at 11:20pm on 13 June 2016, to request that he organise a van or truck (**AS[66]**);

   b. cross-examination of Moustafa suggesting that Allouche was not then old enough to hire a van or truck himself (**AFM 15, line 29**);

   c. cross-examination of Moustafa to the effect that he would not know whether, after his conversation with Allouche, Allouche then contacted the appellant about hiring a van (**AS[67]-[68]**);

   d. evidence that Allouche had been a target of the investigation into the trafficking of 1,4-BD (**Extract of trial transcript, 4.9.19, 267.18-268.15**); and

   e. the agreed fact that Allouche and the appellant were known to one another (**AS[69]**).

7. The prosecution closed its case without leading evidence of surveillance operatives as to the whereabouts of Allouche over the period during and immediately after the hiring of the van, notwithstanding that the evidence was relevant and admissible in the Crown case (**AS[64]-[70], [72]-[74]**).

The false basis of the application to reopen the prosecution case

8. By reason of the mistakes of both prosecution and defence counsel, the trial Judge determined the application to reopen the prosecution case on the basis that the admission in the appellant's evidence at trial that he had hired the van contradicted all previous indications to the Crown of the appellant's position (**AS[21]-[26]**).

9. The majority of the Court of Appeal was wrong to regard the misconception upon which the argument and decision proceeded as immaterial to the trial Judge's decision (**AS[57]-[63], [75]-[76]**).

The foreseeability of the role of Allouche

10. The majority of the Court of Appeal was wrong to conclude that the appellant's evidence as to the role of Allouche in the hiring of the van was not reasonably foreseeable by the close of the prosecution case (**AS[64]-[70]**).

11. The majority of the Court of Appeal was wrong to base the reasonable foreseeability required to enliven the statutory discretion under s 233(2) of the CPA, and which informs its exercise, on an expectation of more than the law requires from the accused by way of pre-trial disclosure (**AS[71]**; **Reply[13]**).

Conclusion

12. The Court of Appeal correctly held, and it is common ground in this Court, that, given the lack of credibility of Moustafa as the central prosecution witness, had the application to reopen the prosecution case been refused, the appellant had a chance of acquittal fairly open to him. The lost chance of acquittal was such as to justify an order for retrial (**AS[78]**).

Dated: 14 March 2024

Bret Walker
(02) 8257 2527
caroline.davoren@stjames.net.au