HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY

BETWEEN:

SAER OBIAN

Appellant

and

THE KING

Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

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

Part II: Statement of issues

2. Did a majority of the Court of Appeal of the Supreme Court of Victoria (the **Court of Appeal**) err by failing to find that a miscarriage of justice occurred as a result of an error or irregularity in the decision by the trial judge to allow the prosecution to reopen its case under s 233(2) of the *Criminal Procedure Act 2009* (Vic) (the **CPA**)?

Part III: Notice under s 78B of the *Judiciary Act 1903*

3. The appellant considers that no notice under s 78B of the *Judiciary Act 1903* (Cth) is required to be given.

Part IV: Citation of judgment below

4. *Obian v The King* [2023] VSCA 18.

Part V: Statement of relevant facts

5. The appellant was convicted by a jury in the County Court of Victoria on three counts of trafficking in not less than a commercial quantity of a drug of dependence, 1,4-Butanediol (**1,4-BD**), contrary to s 71AA of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) (the **DPCS Act**).

6. On 26 June 2020, the appellant was sentenced to a total effective sentence of close to 18 years' imprisonment, with a non-parole period of close to 13 years.[1]

7. 1,4-BD is a drug of dependence within the meaning of s 4 of the DPCS Act, except when possessed or used "for a lawful industrial purpose and not for human consumption".[2] The prosecution case at trial was that the appellant imported and possessed 1,4-BD for the purposes of sale for human consumption. The defence case (albeit with the onus on the prosecution to negative) was that the appellant imported and used 1,4-BD in the course of his cleaning business, SAA Cleaning Services Pty Ltd (**SAA Cleaning**).

8. Charges 1 and 2 on the indictment related to two shipments of 1,4-BD into Australia. On 13 July 2015, 800 litres of 1,4-BD ordered by SAA Cleaning arrived in Australia from China.[3] On 27 November 2015, a further 16,000 litres of 1,4-BD ordered by SAA Cleaning arrived in Australia.[4] The appellant bought plastic bottles and cardboard boxes to package and store the 1,4-BD.[5] There was no dispute at the appellant's trial as to the events the subject of charges 1 and 2.[6] The dispute in respect of those charges was confined to the appellant's intended use of the 1,4-BD.

9. On charge 3, the prosecution case was that the appellant participated with others in the transportation of 1,4-BD between various premises around Melbourne in the early hours of 14 June 2016. The movement of the drug that night was facilitated in part by the use of a white Toyota HiAce van (the **HiAce van**). The prosecution case relied on the appellant's alleged involvement in charge 3, amongst other things, to support the intent necessary for charges 1 and 2.[7]

<u>The events of 14 June 2016</u>

10. The principal witness for the prosecution was the appellant's co-accused, Khaled **Moustafa**. Moustafa gave evidence of an incident at a florist shop in Lygon St on 13 June 2016 following which he said that he and the appellant decided urgently to move boxes and drums of 1,4-BD from a storage facility rented by Moustafa on Ashley

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1 Core Appeal Book (**CAB**) 116.
2 Column 1 of Part 3 of Sch 11 to the DPCS Act.
3 VSCA [126] (CAB 152).
4 VSCA [127] (CAB 152).
5 VSCA [128] (CAB 152).
6 VSCA [129] (CAB 152). The trafficking the subject of charges 1 and 2 was alleged to have been made out on the basis of possession for the purpose of sale or, alternatively, common law trafficking: see VSCA [22] (CAB 126).
7 VSCA [129] (CAB 152).

Street in Braybrook.[8] He said that the appellant rented the HiAce van for that purpose and that, together with others, he and the appellant used the van to move 1,4-BD from the Braybrook storage facility to a number of other locations.

11. A telephone conversation was intercepted between Moustafa and another man, Bilal **Allouche**, at 11:20pm on 13 June 2016.[9] In that call, Moustafa asked Allouche to obtain a van or truck urgently. Allouche told Moustafa that he would try.

12. Under cross-examination, Moustafa claimed that he was with the appellant when he made the 11:20pm call.[10] He said that he, the appellant and another co-accused attended Allouche's house shortly thereafter, where Allouche told them that he was unable to assist.[11]

13. Although the prosecutor understood the identity of the hirer of the van to be a contested issue at trial, and although it would have assisted the Crown case on that issue, the prosecutor did not call evidence of surveillance operatives as to Allouche's whereabouts from around midnight until 1:26am on 14 June 2016 as part of the Crown case to prove that Allouche did *not* hire the van as requested.

14. Wei Wei Wang, an employee of Mini Koala Car Rental, gave evidence that a fat man knocked on the door of the rental agency just after midnight on 14 June 2016 saying that he needed an urgent rental car to "move a box".[12] She said that after she told him he needed a credit card and a driver's licence, the man left. He then returned with a South Australian licence in the name of "Saer Pbian" and a debit card. He paid the $800 bond in cash and gave her a telephone number that evidence showed was registered to the appellant.[13] She provided the keys to the HiAce van to the man. Records of the transaction showed that the debit card was processed at 12:42am.[14]

15. At 4:45am that morning, the HiAce van was seen at relevant premises with cardboard boxes being unloaded from it into a shed.[15] Police seized approximately 1,160 kg of 1,4-BD from the van. Some 3,123kg of 1,4-BD was seized from Moustafa's

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8 VSCA [197]-[200] (CAB 164).
9 Transcript of Telephone Intercept, 13 June 2016 (Appellant's Book of Further Materials (**AFM**) 150). See also Summary of Prosecution Opening, 25 October 2018, [51] (AFM 137).
10 Playback T74.19-.22, 19 November 2018 (AFM 5).
11 Playback T74.30-75.2, 19 November 2018 (AFM 5-6); Playback T2.9-6.4, T8.5-9.3, 20 November 2018 (AFM 9-13, 15-16).
12 VSCA [133](c) (CAB 153).
13 VSCA [133](c) (CAB 153).
14 VSCA [218] (CAB 168).
15 VSCA [133](d) (CAB 153).

Braybrook storage facility and other locations.[16] Moustafa and three other co-accused were apprehended at the scene. The prosecution case was that the appellant had been present but evaded police.[17]

The appellant's evidence in chief and cross-examination after close of the prosecution case

16. At the close of the prosecution case, the appellant elected, under s 226 of the CPA, to give evidence, and to call other witnesses to give evidence.[18]

17. In his evidence, the appellant said that SAA Cleaning was a legitimate industrial cleaning company and that he had imported and possessed 1,4-BD for lawful use as a cleaning product.[19]

18. In relation to the events of 14 June 2016, the appellant said that he was the person who rented the HiAce van from Mini Koala Car Rental.[20] He said he hired the van on behalf of Allouche, because Allouche had called that night and asked him to do so.[21] The appellant said that he left the car hire premises to attend Allouche's house and obtain money for the bond, before returning and renting the van.[22] He then delivered the van to Allouche. The appellant said that he had no further involvement with the van after delivering it to Allouche, and denied having agreed to move, or participated in moving, 1,4-BD from Moustafa's Braybrook storage facility that evening. He denied having seen Moustafa at all on 13 or 14 June 2016.[23]

19. Before making her application to reopen the prosecution case, the prosecutor commenced cross-examination of the appellant.[24] In that cross-examination, the prosecutor established, among other things, the approximate times at which the appellant said he attended Allouche's residence on 14 June 2016 (being sometime before 12:30am, to collect money for the bond, and again at approximately 12.55am to deliver the van).[25] She asked the appellant where specifically on the street he parked relative to Allouche's house and which specific part of Allouche's house he

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16 VSCA [130] (CAB 152).
17 VSCA [119] (CAB 151).
18 T485.3-.9 (AFM 20).
19 VSCA [35]-[38] (CAB 129-130).
20 T542.23-547.31 (AFM 23-28).
21 T542.23-543.18 (AFM 23-24).
22 T543.30-544.5, 545.4-.6 (AFM 24-26).
23 T541.26-542.8 (AFM 22-23).
24 As to the relevance to the exercise of the trial judge's discretion of this cross-examination having taken place prior to the application to reopen, see *Niven v The Queen* (1968) 118 CLR 513 at 517.
25 T587.2-.14, 589.20-.26 (AFM 35, 37).

approached when he arrived.[26]

The application to reopen the prosecution case

20. Part-way through the appellant's cross-examination,[27] the prosecutor made an application under s 233(2) of the CPA to reopen the prosecution case.[28] She sought to introduce evidence from surveillance operatives 116 and 26, who had been watching Allouche's house from 12:12am until 1:26am on 14 June 2016 and would say that they did not see the appellant in that period.[29]

21. The prosecutor made the application on the basis that: it was "always disputed" that the appellant was the person who hired the van;[30] "there has always been a denial that it was [the appellant] that was there at Mini Koala";[31] the appellant's evidence in chief was "the first time that [the Crown] heard that [the appellant] now says he did hire this van";[32] and it has "always been maintained through the various trials that have gone before that he denies being at Mini Koala Car Rentals".[33]

22. Those statements were patently incorrect. In an email to the prosecution dated 24 July 2019, for example, the appellant's solicitor on his behalf explicitly admitted the paragraphs of the prosecution's notice of pre-trial admissions that alleged the appellant had hired the van.[34] The allegations the appellant positively admitted included allegations that he: attended Mini Koala Car Rental at 12:40pm on 14 June 2016, made enquiries to rent a van, left and returned a short time later, produced a driver's licence, paid in cash, and was loaned the white van.[35]

23. In a previous trial that had resulted in discharge of the jury, the appellant's counsel stated in answer to a direct question from the trial judge (then a different trial judge) that it was not disputed that the appellant rented the HiAce van.[36]

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26 T589.27-590.18 (AFM 37-38).

27 When asked why she had not made the application before commencing cross-examination, the prosecutor said it was necessary to ascertain the specific times the appellant said he visited Allouche's house in order to make the evidence of the surveillance operatives relevant: T601.14-.21 (AFM 48).

28 T593.1-.4 (AFM 40).

29 Surveillance operatives drove by Allouche's house at 12:03am but did not begin continuous surveillance until 12:12am: see VSCA [298] (CAB 181).

30 T593.11-.13 (AFM 40).

31 T598.3-.5 (AFM 45).

32 T601.5-.6 (AFM 48).

33 T605.18-.20 (AFM 52).

34 AFM 118.

35 The appellant explicitly admitted [37]-[41]. He did not admit [42], which alleged that the appellant said he needed the van to move boxes: Notice of Pre-trial Admissions, 17 June 2019 (AFM 115).

36 Extract of trial before Judge Fox, T509.24-510.13 (AFM 18-19). He further confirmed that it was "the van that was being used on the night".

24. Finally, in a notice of alibi dated 22 November 2018, the appellant asserted that he was at his family home at relevant times on 13 and 14 July 2016 "except for explained absences [including] … *attending at a car rental establishment and returning home*".[37] In an email dated 14 May 2019, the appellant's solicitor confirmed that the appellant would be relying on the notice of alibi.[38]

25. Defence counsel opposed the application to reopen the prosecution case but did not correct the prosecutor's errors.[39] That was despite the trial judge asking him repeatedly to "indicate to me where there's anything prior to the close of the Crown case that would put the Crown on notice that this was going to be part of the defence."[40]

The trial judge's ruling

26. Having apparently accepted the prosecutor's misrepresentations,[41] the trial judge granted the application to re-open the prosecution case. In doing so, his Honour expressly incorporated his "discussion with counsel" into his reasons for the ruling. The trial judge said relevantly:[42]

> ... I am satisfied that the accused gave evidence which could not reasonably have been foreseen by the prosecution having regard to the response of the accused to the summary of the prosecution opening and the response of the accused to the notice of pre-trial admissions. There was no response to the notice of pre-trial admissions, was there? No. As served on the prosecution and filed in court. And so I will allow the Crown to lead that evidence in reply.
>
> I note that s 233(2) … does not provide any guidance on how that discretion is to be exercised other than that it can only be exercised where the evidence in the defence case could not reasonably have been foreseen by the prosecution. …
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> I note that the Bench Notes in the Criminal Procedure manual say this:
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> > At common law the prosecution could only reopen its case in special or exceptional circumstances and not if the need for the evidence ought reasonably to have been foreseen.

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37 Notice of Alibi, 22 November 2018 (AFM 119-120) (emphasis added).
38 AFM 121.
39 See *Shaw v The Queen* (1952) 85 CLR 365 at 382 (Fullagar J): "The applicant was entitled to have those considerations weighed, and, in a case of this kind, it can make no difference that he was represented by a barrister who ought to have drawn his Honour's attention to them".
40 See T620.13-.16 (AFM 67).
41 See comments by the trial judge at, for example, T598.8 "Yes, yes"; T598.20 "And that's the van that he says he never hired"; T601.7-.11: "Yes. … Yes" (AFM 98, 48).
42 The trial judge's ruling is set out in full at VSCA [287] (CAB 178-179).

> And it quotes *Chin*, *Lawrence* and *Killick*. And then this is the comment by the author of the Bench Notes:
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> > … It appears that s 233(2) … lowered the threshold for a judge to allow the prosecution to reopen its case.
>
> However, in my view this case falls into that exceptional situation where the evidence that is central to the Crown's case on Charge 3 had absolutely no reasonable foresight of the evidence being led and it has available to it credible evidence which would allow a jury to find that the defence evidence was contradicted.
>
> And, consequently, had I been required to exercise the discretion at common law I would have done so, and I would have done so for the reasons which will become apparent from my discussion with counsel in the course of this application which I incorporate into these reasons.

27. The trial judge did not expressly identify the evidence given by the appellant that he was satisfied the prosecution could not reasonably have foreseen, other than by incorporating into his reasons his discussion with counsel. That discussion included the matters set out at [21] above.

28. The trial judge determined that surveillance operative 116[43] would be called following the conclusion of the appellant's cross-examination and prior to his re-examination.[44]

29. In reexamination, the appellant emphasized that he had given an estimate as to the timing of events and that after the debit card transaction recorded at 12:42am he remained at the rental agency to complete paperwork including insurance forms and engaged in further conversation with Ms Wang.[45]

The proceedings below

30. The appellant contended in the Court below that the trial judge erred in granting leave to the prosecutor to call evidence in reply on the basis that the appellant had given evidence that could not reasonably have been foreseen by the prosecution.[46] He contended that there was an error or irregularity giving rise to a miscarriage of justice because the trial judge determined the s 233(2) application on the basis of the incorrect propositions advanced by the prosecutor, that the appellant had consistently

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43 It was agreed that surveillance operative 116 could give the evidence of surveillance operative 26.
44 T648.1-650.5 (AFM 93-95).
45 VSCA [299](c)-(d) (CAB 182) .
46 See grounds of appeal set out at VSCA [164] (CAB 159).

denied hiring the HiAce van, and wrongly found that the appellant's evidence relevant to that topic was not reasonably foreseeable.

31. Macaulay JA (Niall JA largely agreeing) accepted that the prosecutor had (unwittingly) misled the trial judge but held that the relevant aspect of the evidence of the appellant for the purpose of the s 233(2) application was not his admission to hiring the van but, rather, the fact that he had done so on behalf of Allouche.[47] Macaulay JA determined that that aspect of the appellant's evidence had not been reasonably foreseeable such that, if there was an error or irregularity arising from the prosecutor's misrepresentations, it did not give rise to a miscarriage of justice.[48]

32. Macaulay JA rejected the submission by the Crown that the appellant's conviction was inevitable in any event, finding instead that, because of the significant credibility issues affecting the evidence of Moustafa as the principal prosecution witness (and the only person who positively asserted the appellant's involvement in the events of 14 June 2016),[49] his Honour could not be satisfied that, absent the re-opening of the prosecution case, a jury could not have entertained a reasonable doubt as to the appellant's guilt.[50]

33. In dissent, Priest JA held that the judge's discretion under s 233(2) "miscarried because he exercised it on an objectively false factual basis".[51] His Honour further observed:[52]

> had the judge been made aware that the [appellant] had admitted the very matter which the prosecutor told him the [appellant] had not, I have no doubt that the judge would have exercised his discretion differently and refused the application.

Part VI: Outline of argument

34. The principle that the prosecution must not split its case and must present its case completely before an accused is called upon to make his or her defence is "not merely a technical rule".[53] It is "an important rule of fairness."[54] It reflects an essential

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47 VSCA [334], [337] (CAB 191-192).
48 VSCA [344]-[345] (CAB 194), [354]-[355] (CAB 196).
49 See VSCA [372]-[373] (CAB 201): Moustafa's evidence had "apparent holes"; his "overall version of events had some difficulties"; his "credit was certainly put under real strain".
50 VSCA [371]-[375] (CAB 200-201).
51 VSCA [72] (CAB 139).
52 VSCA [71] (CAB 138).
53 ***Killick*** *v The Queen* (1981) 147 CLR 565 at 569; ***Lawrence*** *v The Queen* (1981) 38 ALR 1 at 3.
54 Ibid.

feature of the accusatorial system of criminal justice.[55]

35. The central issue in this appeal is whether the appellant's trial miscarried because, contrary to that essential principle, the trial judge wrongly allowed the prosecution to reopen its case to call further evidence after the appellant's cross-examination.

36. In the Court of Appeal, a majority: accepted that the prosecutor's application was made on a false factual basis;[56] and held that the outcome of the trial might have been different were it not for the trial judge's ruling;[57] yet failed to find that a substantial miscarriage of justice occurred as the result of an error or an irregularity in the appellant's trial. Their Honours were wrong to do so because:

    a. *First,* the error with respect to the admission to hiring the van was material in and of itself;

    b. *Secondly,* a majority of the Court below wrongly found that the appellant's evidence regarding Allouche's role in hiring the van (as distinct from the appellant's admission to hiring the van at all) was not reasonably foreseeable*;* and

    c. *Thirdly,* the two issues are necessarily interconnected, such that the foreseeability of the appellant's admission to hiring the van necessarily affected the foreseeability of his evidence of Allouche's role in that hiring, and for that reason necessarily affected the ruling.

37. Accordingly, the real possibility cannot be excluded that, but for the trial judge's error, the outcome of the s 233(2) ruling – and therefore that of the appellant's trial – might have been different. For that reason, there has been a substantial miscarriage of justice, as a result of an error or irregularity in the appellant's trial, such that the appeal should be allowed.

38. Before each of those propositions is developed, the test for reopening the prosecution case (and in particular what appears to be the new, lower test under s 233(2) of the CPA introduced by Macaulay JA) is addressed below.

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55 *R v* ***Soma*** (2003) 212 CLR 299 at [38] "the relevant principle is rooted in the nature of such proceedings"; and [27] "the underlying principle of the accusatorial and adversarial system that it is for the prosecution to put its case both fully and fairly before the jury, before the accused is called on to announce the course that will be followed at trial".

56 VSCA [269]-[271] (CAB 175). See also VSCA [111] (CAB 148).

57 VSCA [374]-[375] (CAB 201).

The test for reopening the prosecution case

Section 233(2) of the CPA

39. Contained within Part 5.7 of the CPA, s 233 is entitled "Introduction of evidence not previously disclosed". Sub-section (1) addresses the circumstances in which parties may introduce evidence at trial which was not previously disclosed and which represents a substantial departure from the summary of prosecution opening or the response of the accused to the summary of prosecution opening or notice of pre-trial admissions.

40. Section 233(2) then provides:

> If, after the close of the prosecution case, the accused gives evidence which could not reasonably have been foreseen by the prosecution having regard to—
>
> (a) the response of the accused to the summary of the prosecution opening; and
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> (b) the response of the accused to the notice of pre-trial admissions—
>
> as served on the prosecution and filed in court, the trial judge may allow the prosecutor to call evidence in reply.

41. Under sub-s (3), "nothing in this section limits any other power of the trial judge to allow the prosecutor to call evidence after the prosecutor has closed the prosecution case."

The common law

42. In ***Shaw*** *v The Queen,*[58] Dixon, McTiernan, Webb and Kitto JJ articulated the common law principles applicable to the reopening of the prosecution case. Their Honours said:[59]

> Clearly the principle is that the prosecution must present its case completely before the prisoner's answer is made. There are issues the proof of which do not lie upon the prosecution and in such cases it may have a rebutting case, as when the defence is insanity. When the prisoner seeks to prove good character evidence may be allowed in reply. But the prosecution may not split its case on any issue. The Court possesses a power to allow further evidence to be called, but it must be exercised according to rule and the rule is against reopening the Crown case unless the circumstances are most exceptional.

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58 (1952) 85 CLR 365.
59 (1952) 85 CLR 365 at 379-380.

> … It seems to us unsafe to adopt a rigid formula in view of the almost infinite variety of difficulties that may arise at a criminal trial. It is probably enough to say that the occasion must be very special or exceptional to warrant a departure from the principle that the prosecution must offer all its proofs during the progress of the Crown case and before the prisoner is called upon for his defence.

43. In subsequent cases this Court has emphasized the fundamental importance of the principle articulated in *Shaw* as an incident of the accusatorial nature of a criminal trial. In *Lawrence v The Queen*, Gibbs CJ said:[60]

> The rule that the prosecution may not split its case, but must offer all its proofs before the prisoner is called upon for his defence, is not merely technical but is an important rule of fairness. … The rule cannot be eroded by too ready an acceptance of a suggestion by the Crown that the circumstances are exceptional.

44. Using language that was later reflected in s 233(2) of the CPA, Gibbs CJ and Wilson J in *R v Chin*[61] said the trial judge's discretion to allow the prosecution to call further evidence after evidence has been given for the defence should be exercised "only if the circumstances are very special or exceptional and, generally speaking, not if the occasion for calling the further evidence ought reasonably to have been foreseen".

A criminal trial under the CPA

45. Part 5.7 of the CPA contains provisions regulating the trial of an accused person charged on indictment in Victoria. Within Part 5.7, s 226 of the CPA, headed "Accused entitled to respond after close of prosecution case", provides for the accused to respond, after the close of the case for the prosecution, by: submitting that there is no case to answer; giving or calling evidence; or not giving or calling evidence.

46. The references in s 233(2) of the CPA to the "responses" of the accused to the "summary of prosecution opening" and the "notice of pre-trial admissions" are references to ss 182 and 183 of the CPA, which form part of the pre-trial disclosure regime contained in Div 2 of Part 5.5 of the CPA. Under s 183(2), an accused's response to the summary of prosecution opening is required to "identify the acts, facts, matters and circumstances with which issue is taken and the basis on which issue is taken". Under s 183(3), the response of the accused to the notice of pre-trial

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60 (1981) 38 ALR 1 at 3. See also *Killick* (1981) 147 CLR 565 at 569; *Soma* (2003) 212 CLR 299 at [27], [38].

61 (1985) 157 CLR 671 at 676. See also *Lawrence* (1981) 38 ALR 1 at 3.

admissions must indicate what evidence as set out in that document is agreed to be admitted without further proof, what evidence is in issue and, if issue is taken, the basis on which issue is taken. Section 183(4) confirms that, despite sub-ss (2) and (3), an accused is not required to state the identity of any witness (other than an expert witness) to be called by the accused; or whether the accused will give evidence. The only affirmative defence disclosure obligations in Div 2 of Part 5.5 of the CPA are those contained in ss 189 and 190, related to expert evidence and alibi evidence.

47. In *Alfarsi v The Queen*,[62] which involved an unsuccessful challenge to the adequacy of an accused's response under s 183(2) to the summary of prosecution opening, the Court of Appeal observed that "s 183(2) of the CPA does not – expressly or by necessary intendment – make any fundamental alteration to the accusatorial system of criminal justice". The provision does not require an accused to "make any positive statements of fact".[63]

48. Indeed, it would be inappropriate to include positive statements about the accused's account of events in the defence response. Section 225(1) of the CPA requires the accused's counsel, immediately after the oral prosecution opening, to present the defence response to the jury. Yet, as s 226 recognises, the decision as to what evidence, if any, the accused will adduce does not fall to be made until after the end of the prosecution case; the inclusion of positive assertions of fact in the defence response would require counsel to present those factual assertions to the jury, without any basis for expecting that there would be evidence to support them. Section 231 of the CPA by contrast provides for an accused who elects to put on evidence to, following that election, give an opening address to the jury outlining the evidence proposed to be given.

49. Whether in Part 5.5, Part 5.7 or elsewhere, the CPA does not modify or detract from – and to the contrary it is premised on and reflects – the underlying principles and structure of an accusatorial criminal trial.[64]

50. The scope of s 233(2), also, reflects those principles. By requiring consideration of what could not "reasonably have been foreseen by the prosecution having regard to"

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62 [2021] VSCA 283 at [33].

63 [2021] VSCA 283 at [31]. And see Victoria, *Parliamentary Debates*, Legislative Assembly, 4 December 2008, 4974 (Robert Hulls, Attorney-General): "This regime [at ss 182-183] is important in narrowing the issues at trial to make sure that valuable court and jury resources are carefully used."

64 See *Soma* (2003) 212 CLR 299 at [27], where an observation to the same effect is made about Ch 62 of the Queensland *Criminal Code*.

the responses of the accused to the summary of prosecution opening and notice of pre-trial admissions, s 233(2) imports an understanding of the limited scope of the responses required of an accused under s 183. Foreseeability is to be assessed from the standpoint that the defence response is not the opportunity for the accused to present his or her affirmative version of events. Inasmuch as Macaulay JA's judgment rests upon his criticisms of the appellant for failing to do so,[65] those criticisms reflect a misconstruction of the statute.

Legislative history

51. Macaulay JA approached the interpretation of s 233(2) on the basis that it had no legislative precursor.[66] That, too, was wrong. Provisions in relevantly equivalent terms existed in s 15(2) of the *Crimes (Criminal Trials) Act 1999* (the **1999 Act**) and, before that, in s 15(4) of the *Crimes (Criminal Trials) Act 1993* (the **1993 Act**).

52. The power now resident in s 233(2) of the CPA was introduced in the 1993 Act as part of reforms designed to increase the efficiency of criminal trials.[67] The reforms required the prosecution to file a document which provided "a concise account of the facts and inferences sought to be drawn from those facts … on which the prosecution case is based",[68] and the accused to respond with a document which indicated "the facts and inferences contained in the prosecution case statement with which issue is taken".[69] There was no requirement to state whether the accused or any other non-expert witness would give evidence for the defence.[70] Departures from the respective cases thus outlined were controlled by s 15 which contained, amongst other things, provisions to the same effect as s 233(2) and (3) of the CPA.

53. The purposes of the 1999 Act, too, included "improving the efficiency of criminal trials".[71] Sections 6 and 7 were to similar effect as ss 182 and 183 of the CPA, and departures by parties were addressed by s 15, which was to similar effect as s 233 of the CPA.

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65 VSCA [336], [343] and [345] (CAB 191-192, 193-195).
66 VSCA [311] (CAB 185).
67 Section 1.
68 Section 8(3)(b).
69 Section 11(2)(a).
70 Section 11(3). Under s 13 of the 1993 Act, the accused had the right to reply immediately after the prosecution opening address to the jury (that is, before any evidence was led) by indicating briefly what was and was not in issue in the trial.
71 Section 1.

54. Like the CPA, the 1993 and 1999 Acts in no way modified the underlying principle of the accusatorial system that it is for the prosecution to put its case fully and fairly before the jury, before the accused is called on to announce the course that will be followed at trial. Their purpose was instead to increase efficiency by providing a regime for the identification and narrowing of the issues in dispute.

Conclusion

55. Macaulay JA said of s 233(2) of the CPA that his Honour would not qualify the discretion by imposing any requirement that the circumstances must be "exceptional" or "very special", even if only as a guideline.[72] Instead, his Honour appears to have introduced a new test, namely that the discretion must be exercised "with great care and caution" or "with care and caution".[73]

56. Insofar as Macaulay JA interpreted s 233(2) as introducing a new, lower standard[74] for the reopening of the prosecution case, and one which was to be approached as a sanction for an accused who does not include his or her affirmative version of events in the defence response,[75] that interpretation is not supported by either the CPA or its legislative history.

The materiality of trial judge's error

57. All members of the Court below agreed that the representations made to and apparently accepted by the trial judge to the effect that the appellant had "always denied" hiring the HiAce van were incorrect.[76] The error was material in and of itself.

58. The discussion that the trial judge incorporated into his Honour's reasons reveals the centrality to the s 233(2) application of the prosecutor's insistence that the Crown was caught unawares by the appellant's admission to hiring the van. This exchange serves as an example:[77]

> HIS HONOUR: Now, why could you not have foreseen that this would

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72 VSCA [324] (CAB 189).

73 VSCA [326] and [329] (CAB 189-190).

74 See VSCA [348] ("this 'higher standard' [the common law test] was unnecessary"); [317], [324]-[325] (CAB 187, 189, 194).

75 See VSCA [325], [336]-[337] and [345] (CAB 189, 191-192, 194).

76 See VSCA [352] (Macaulay JA) (CAB 195) "it may be accepted that the prosecutor overstated the position"; [111] (Niall JA) (CAB 148) "In the event that the applicant gave evidence it was reasonably foreseeable that he would admit to hiring the van"; [46] (Priest JA, in dissent) (CAB 131) "the prosecutor's submissions were wrong in material respects."

77 T605.16-606.12 (emphasis added) (AFM 52-53). See also the trial judge at T598.20 "And that's the van that he says he never hired" (AFM 45); and T603.22-.23: "It's a fact in issue whether Mr Obian hired this vehicle. Clearly that's a fact in issue" (AFM 50).

happen?

MS BORG: Because the defence response, and has always been maintained through the various trials that have gone before, that he denies being at Mini Koala Car Rentals. And the questions of Wei Wei trying to establish who the chubby guy was, it makes it clear that in the running of all of these trials that the defence response has been the position the whole way through. The first time the Crown hears that he is saying, 'Well, yes, I did, but hey, I gave it to someone else. That wasn't me'.

HIS HONOUR: And then nicked off. And, 'Everything that happens thereafter I know nothing about'. That first time that comes out is in evidence-in-chief.

MS BORG: That's right. … So, that's the first time we hear about it.

HIS HONOUR: So, there's no record of interview. So, he hasn't said anything in his record of interview about this.

MS BORG: No.

HIS HONOUR: So, the Crown has no notice. In fact, quite the opposite.[78] It's told in the defence response that in fact he didn't hire it at all.

MS BORG: That's right.

59. To the appellant's counsel the trial judge said:[79]

> This is pretty exceptional, isn't it? I mean you've got a defence response in which you say that it's disputed that [the appellant] hired [the HiAce van][80] … and then you don't seek leave to change that and call evidence that's inconsistent with your defence response. I can't find any way the Crown would have had any notice of this.

60. The factual matrix by reference to which the trial judge exercised his discretion on this important ruling was wrong in material respects. The factors his Honour weighed in the balance were distorted as a result. Significantly in and of itself, the trial judge proceeded on the basis that there had been no response to the notice of pre-trial admissions,[81] when in fact the appellant's emailed response to the notice of pre-trial

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78 See also T767.27-.29: "in fact to the extent you've said anything about this it's contradictory to the evidence that's been given" (AFM 106).

79 T613.12-.18 (emphasis added) (AFM 60).

80 Later in the argument it emerged that the most recent defence response, dated 5 November 2018, did not admit (as opposed to "denying") that the appellant hired the van: see T617.10-.14 (AFM 64).

81 VSCA [287] (CAB 178).

admissions specifically admitted, at least in part, the very evidence in issue on the application.[82]

61. The extent of the prosecution's forewarning both of the admission to hiring the van and of Allouche's role in that hiring was at least relevant to the exercise of the discretion. Whether or not the trial judge would have found that the evidence of Allouche's role was reasonably foreseeable for the reasons set out below (so that the power under s 233(2) of the CPA was not enlivened), it was not the case that such disclosure as the defence did provide *contradicted* the evidence the appellant gave.

62. Nor was it true that it was evidence of which the prosecutor had no notice. At the very least, the extent of the appellant's non-disclosure of his defence was significantly less than the trial judge apprehended, and the extent of the prosecution's lack of forewarning was significantly less than the trial judge apprehended.

63. These were material errors given the trial judge said that the prejudice occasioned by the reopening of the prosecution case was "of [the appellant's] own making"[83] and "flows from the manner in which the defence has conducted its case";[84] and yet the judge (having been misinformed) mistook the manner in which the defence conducted its case.

<u>The Allouche connection was reasonably foreseeable</u>

64. Contrary to the conclusion of the majority below,[85] it was reasonably foreseeable that, if the appellant gave evidence, he would not only admit to hiring the van but would nominate Allouche as the person on whose behalf he did so.

65. As a starting point, it was likely that, if the appellant gave evidence, he would admit to hiring the van.[86] Building on that premise, because the appellant pleaded not guilty to charge 3, and denied that he was present for the movement of 1,4-BD in the early hours of 14 June 2016, it followed as a matter of logic that, if he admitted hiring the van, he was likely to say that he did so on behalf of another person.[87] To do otherwise would have been inconsistent with his plea of not guilty on charge 3. In answer to

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82 See [22] above.
83 T767.25 (AFM 106).
84 T769.25-.26 (AFM 108).
85 VSCA [112] and [344] (CAB 148 and 194).
86 See VSCA [111] (CAB 148).
87 See VSCA [112] (Niall JA) (CAB 148): "It was a realistic prospect that the applicant would seek to confess and avoid".

the question of who that other person might have been, the evidence naturally pointed to Allouche.

66. First, and significantly, in the covertly recorded call at 11:20pm on 13 June 2016, Moustafa is heard asking Allouche:[88] "Cuz, can you – can you – can you organize a van or a truck for me, like asap, now? … I need, cuz, a van … a van or a truck … I got no time." Allouche responds: "I'll try".[89] While Moustafa sought to explain the call by saying that Allouche later told him that he could not assist, there was no direct evidence supporting this aspect of Moustafa's account.[90]

67. Secondly, Moustafa was cross-examined for some eight pages of transcript specifically about his request to Allouche that he hire a van or truck.[91] The cross-examination included more than a full page of transcript on the specific issue of Moustafa not being able to say whether Allouche spoke to the appellant after the 11:20pm call. Moustafa was asked, for example:[92]

> Now, you requested Mr Allouche - Belal Allouche to organise a van or a truck? ---Yes, but he couldn't organise one. I requested it, I asked him if he can um, and he couldn't help us.
>
> …
>
> Now, are you aware that Mr Allouche rang Mr Obian?---When on that night? H'mm?---No.

68. It was later put to Moustafa:[93]

> So you wouldn't know whether Mr Allouche had a telephone conversation with Mr Obian about hiring a van, would you?---It's his - he was there with us. Mr Saer was there with us.
>
> …
>
> After Mr Obian, on your version left you, you were not in a position to say that Mr Obian and Mr Allouche did not have a conversation, correct?

Moustafa eventually agreed with that proposition. He agreed also that he was not present

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88 AFM 150.
89 AFM 150.
90 Moustafa's evidence as to where and when that discussion occurred varied.
91 Playback T74.19-75.14, 19 November 2018 (AFM 5-6); T2.9-6.4, 8.5-10.13, 20 November 2018 (AFM 9-13, 15-17). Moustafa's cross-examination was pre-recorded at an earlier trial before Judge Fox in 2018 and edited and played to the jury in the final trial. That fact meant that the prosecution had ample opportunity to consider Moustafa's cross-examination prior to the close of the prosecution case.
92 Playback T74.30-75.14, 19 November 2018 (AFM 5-6).
93 Playback T9.4-.17, 20 November 2018 (AFM 16).

at the time the van was hired.[94]

69. Also relevant, it was an agreed fact that Allouche and the appellant were known to one another.[95] The appellant had denied in response to the notice of pre-trial admissions having told Ms Wang that he needed the van to "move boxes", and he had specifically said in his notice of alibi that he "returned home" after hiring the van.[96]

70. Bringing those strands together, it was reasonably foreseeable that, if the appellant gave evidence, he would both admit to hiring the van and nominate Allouche as the person on whose behalf he did so. For that reason, the effect of the evidence properly understood was that the trial judge's discretion under s 233(2) of the CPA was not enlivened.

71. When Macaulay JA at VSCA [344]-[345] assessed the foreseeability of this aspect of the appellant's evidence and concluded otherwise, his Honour wrongly inflated the extent of the defence disclosure obligations under s 183 of the CPA.

The splitting of the prosecution case

72. There is an additional significance to the prosecutor's insistence before the trial judge that she had expected the appellant to deny hiring the van. That is that it underscores why the evidence of surveillance operative 116 ought to have been led as part of the prosecution case on that fact in issue.[97]

73. The discussion incorporated into the trial judge's ruling included this exchange:[98]

> [Prosecutor]: And Allouche has not been nominated as … being anywhere near these storage facilities. In fact, Moustafa gave evidence that, 'I rang him and I said, "Can I get a van" and he said, "I'll try" and then he never came through with it'. So, Allouche is out of the picture.
>
> HIS HONOUR: So, there's no evidence the Crown had that Allouche was involved on this night on the hiring or use of that van. Is that right?
>
> [Prosecutor]: That's correct.
>
> …
>
> HIS HONOUR: So, there was no need to call evidence of what Allouche was doing at the relevant time, because he wasn't in the picture, as far as the Crown was concerned. Have I got that right?
>
> [Prosecutor]: That's correct …

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94 Playback T10.27-.28, 20 November 2018 (AFM 17).
95 VSCA [168](4) (CAB 160).
96 See VSCA [66]-[67] (CAB 137-138).
97 Contra VSCA [291], [354] (CAB 180, 196).
98 T606.18-.27-607.1 (emphasis added) (AFM 53-54).

74. In fact, it was not at all correct that Allouche was "out of the picture" with respect to the hiring of the van. The intercepted telephone call put Allouche squarely in the mix as a suspect (indeed the lead alternate suspect to the appellant) for the person who hired the van. It was only Moustafa – a witness with significant credibility problems – who asserted that Allouche declined his request for assistance at some point after the 11:20pm call. In light of the content of that intercepted call, and particularly noting the centrality of the hiring of the HiAce van to proof of charge 3, it would have assisted the Crown case to lead evidence of the surveillance of Allouche from around midnight on 14 June 2016 to demonstrate that he was not at Mini Koala Rental when the 12:42am transaction was processed. Having failed to do so, the prosecution split its case by leading that evidence in reply.

The false division of the appellant's evidence

75. Finally, by focusing singularly on the foreseeability of the appellant's evidence regarding Allouche's role in hiring the van, the majority of the Court of Appeal overlooked that the foreseeability of the appellant's evidence concerning Allouche's role cannot be divorced from the foreseeability, as an antecedent matter, of the appellant's admission to having hired the van. For the reasons explained at [65] above, the latter made the former more likely. As Macaulay JA acknowledged,[99] the foreseeability of the appellant's evidence was relevant both to the enlivening of the trial judge's discretion and to its proper exercise. The trial judge proceeded on the basis of a misapprehension as to the foreseeability of the appellant's evidence, not just in relation to the admission to hiring the van but necessarily, because the two propositions are interlinked, in relation to the van having been hired on behalf of Allouche.

76. For that reason alone, there was an error or irregularity in the appellant's trial and, noting the significance of the s 233(2) ruling to the outcome of the trial, a substantial miscarriage of justice.

Conclusion

77. The expression "an error or irregularity in, or in relation to, the trial" in s 276(1)(b) of the CPA "encompass[es] any departure from trial according to law".[100] A substantial miscarriage of justice results from such an error or irregularity if "the

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99 VSCA [327] (CAB 189).

100 ***Baini*** *v The Queen* (2012) 246 CLR 469 at [25] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

Court of Appeal cannot be satisfied that the error or irregularity did not make a difference to the outcome of the trial".[101]

78. Permitting the prosecution to lead the evidence of surveillance operative 116 after the cross-examination of the accused was an "unusual" course to take.[102] It fundamentally altered the proper course of the appellant's trial in which, at least as a general proposition, he was entitled to determine what course he wished to take in the defence case after hearing all of the evidence in the case for the prosecution. The trial judge exercised his discretion on a misapprehension of the facts before him and, had he been informed of the true facts, he might have exercised the discretion differently. The appellant's trial miscarried as a result, and a retrial ought to have been ordered.

Part VII: Orders sought

79. The appellant seeks the following orders:

a. Appeal allowed.

a. Set aside Order 2 of the Court of Appeal made on 16 February 2023, quash the appellant's convictions on all counts and order a retrial.

Part VIII: Time required for oral argument

80. The appellant estimates that up to one and a half hours will be required for the presentation of his oral argument.

Dated: 1 December 2023

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

C T Carr
(03) 9225 7000
chris.carr@vicbar.com.au

H L Canham
(03) 9225 7999
hannah.canham@vicbar.com.au

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101 *Baini* (2012) 246 CLR 469 at [26] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), see also [54] (Gageler J dissenting). See also *Simic v The Queen* (1980) 144 CLR 319 at 332.

102 See T648.29-31, where the trial judge observed: "One of the reasons why at common law this is such an unusual course is because of the prejudice it causes the defence" (AFM 93).

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

SAER OBIAN
Appellant

and

THE KING
Respondent

ANNEXURE TO APPELLANT'S SUBMISSIONS

1. *Crimes (Criminal Trials) Act 1993* (Vic), ss 1, 8, 11, 13, 15 – as enacted
2. *Crimes (Criminal Trials) Act 1999* (Vic), ss 1, 6, 7, 15 – as enacted
3. *Criminal Procedure Act 2009* (Vic), ss 182, 183, 225, 226, 231, 233 – current
4. *Drugs Poisons and Controlled Substances Act 1981* (Vic), ss 4, 71AA, Pt 3 of Sch 11 – as at 13 July 2015, 27-30 November 2015 and 14 June 2016