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 - Respondent's Outline of oral argument
Filing party:	Respondent
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

BETWEEN: **Saer Obian**
Appellant

and

The King
Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

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

Part II: Outline of propositions

2. The trial judge was not distracted by the prosecutors' submissions regarding the hiring of the van, and indeed understood that the antecedent fact of the appellant hiring the van was distinct from him having done so for Bilal Allouche and then delivering it to him — the former in no way being capable of shedding light on the latter. Having correctly made this distinction, the judge correctly found that the Allouche evidence could not have been reasonably foreseen. The prosecution was permitted to reopen its case only to address that issue by adducing surveillance evidence which, until the appellant had given the Allouche evidence, had not been relevant to the trial. As such, there was no impermissible splitting of the prosecution case. The result is unchanged whether the construction of s 233(2) of the *Criminal Procedure Act 2009* (Vic) (the **Act**) aligns with the approach (correctly) adopted by Macaulay JA: J[311]–[329] (**CAB 185–90**) or that adopted by Niall JA: J[94]–[106] (**CAB 146–8**).

A. Appellant's mischaracterisation of factual basis of trial judge's ruling

Allouche connection was not inextricably intertwined with appellant's hiring of van

3. The prosecution's case was that the appellant was the sole person who attended Mini Koala to hire a van, and evidence was adduced to prove that fact (**RFM 88–9**). In conversations with Khaled Moustafa, Allouche stated that he could not assist in hiring a van or truck. The appellant was also present during these conversations (**AFM 5–17; RFM 11–14**). That ended Allouche's involvement in events on 13 and 14 June 2016.

4. The fact that the appellant hired a van from Mini Koala was distinct from the facts that

the hiring was done at the behest of Allouche and the van was later delivered to him. Even if it may have been anticipated that the appellant might claim he hired the van on some other person's behalf, knowing only that the appellant would admit to hiring the van, without more, could not shed any light on the identity of who that person was or the van's later movements. Thus, while the facts were related to the same subject matter — the hiring of a van — they were not inextricably intertwined in the sense that proving the antecedent fact would concurrently prove why the appellant hired the van, whether he did so on behalf of another person, or what he then did with the van. They were different facts requiring different evidence to prove. The trial judge was correct to distinguish the facts in that way.

Trial judge ruled on correct factual basis unaffected by prosecutor's initial overstatement

5. Appreciating the true significance of the appellant's evidence, the trial judge correctly determined the application under s 233(2) based on what notice had been given about his purpose for hiring the van and Allouche's involvement, as distinct from the mere fact that he hired the van. The trial judge was not led astray by any earlier overstatement by the prosecutor that the appellant had 'always' denied hiring the van, as discussion with both parties reveals (**RS[50]–[56]; AFM 40–109**). That the rebuttal evidence related only to disproving the appellant's claims he had hired the van for Allouche and delivered it to him, and had no logical bearing on who hired the van in the first place, highlights that the trial judge permitted the reopening of the prosecution case *only* on the basis of the Allouche connection — and *not* on the fact the appellant had hired the van.

Appellant's Allouche evidence was not reasonably foreseeable

6. The array of 'clues' left by the appellant were incapable of raising any reasonable foresight of the appellant's intended evidence about the Allouche connection: J[93], [107]–[113], [338], [341]–[344] (**CAB, 146, 148–149, 192–194**). As defence counsel repeatedly conceded during discussion with the trial judge, there was not the "slightest suggestion" in any pre-trial communications, filed documents or other evidence which could have reasonably put the prosecution on notice of the appellant's 'affirmative defence' that he hired the van for Allouche and gave it to him (**RS[59]–[68]**).

Prosecution did not split its case

7. The surveillance evidence was not relevant to any fact in issue until the appellant gave evidence that he had hired the van *for Allouche* and left it with him. All evidence pointed

to the appellant being the hirer of the van (see **RFM 1–6**). There was nothing which 'naturally pointed' to Allouche as being an 'obvious' alternative to the appellant as the hirer of the van (***c.f.*** **Reply[6], [8]**). Some evidence dispelled that notion including puttage to Moustafa that Allouche did not have a drivers licence, and unchallenged evidence that a person other than Allouche had arrived at the storage units with the van: J[339] (**CAB 193**). As the surveillance evidence could not have assisted the prosecution in establishing the identity of the person who hired the van, the evidence was not relevant and was inadmissible: *Evidence Act 2008* (Vic), s 56(2) (**JBA 84; CAB 20**). The appellant's giving of this new evidence, for the first time at trial, was a "very special or exceptional" circumstance warranting the reopening of the Crown case. There was no infringement of the general rule against splitting the prosecution case.

B. Correct construction of s 233(2)

8. Sections 233(2) of the Act supplements the power available at common law to permit the prosecution to reopen its case to adduce rebuttal evidence. Consistent with the text and purpose of s 233(2), the power is *engaged* if, having regard to relevant pre-trial disclosure documents, the evidence of an accused could not have been reasonably foreseeable by the prosecution. While the defence is not required to make any positive statements of fact in documents prepared and filed under s 183 of the Act, the absence of that information from those documents can have the consequence of triggering the gateway to s 233(2). This does not operate as a 'sanction'. Similar observations about the consequences of a decision not to disclose an affirmative defence were made in *Killick v The Queen* (1981) 147 CLR 565, 571–2 (**JAB 131**). Once engaged, factors such as fairness to an accused and general adherence to the accusatorial system of criminal justice continue to guide the exercise of the *discretion* — which must still be done so with 'great care and caution'.

9. There is no legislative warrant to reading down s 233(2) to incorporate an 'exceptionality' test akin to that applied at common law. This sits at odds with the text of the provision and limits its desired remedial effect.

Dated: 14 March 2024

Elizabeth H Ruddle KC
Senior Crown Prosecutor
Telephone: 0421540320
Email: Elizabeth.Ruddle@opp.vic.gov.au

Gregory L Buchhorn
Telephone: 0438 839 218
Email: Gregory.Buchhorn@vicbar.com.au