HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	M77/2023
File Title:	Obian v. The King
Registry:	Melbourne
Document filed:	Form 27D - Respondent's submissions
Filing party:	Respondent
Date filed:	12 Jan 2024

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **Saer Obian**
Appellant

and

The King
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

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

Part II: Statement of issues

2. The respondent contends that the appeal presents the following issues:

   a. The correct construction of s 233(2) of the *Criminal Procedure Act 2009* (Vic) (the **Act**).

   b. Whether the majority of the Court below (comprising of Macaulay JA and Niall JA writing separately) was correct in determining that that the trial judge granted leave, on a correct factual basis, to the prosecution to reopen its case to adduce rebuttal evidence under s 233(2) of the Act.

   c. Whether the majority of the Court below was correct in determining that the evidence given by the appellant at his trial was not reasonably foreseeable by the prosecution.

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

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

Part IV: Statement of contested material facts

Sequence of relevant procedural events

4. The prosecution could not have reasonably foreseen that the appellant would say that, not only did he hire the van, but that he: did so at the behest of Bilal **Allouche**; attended

Allouche's residence twice on 14 June 2016; delivered the van to him; and then went home.[1] To understand why, it is necessary to briefly outline the relevant procedural history to the appellant's various trials

5. On 1 September 2017, the prosecution prepared an initial summary of prosecution opening (**SPO**) (the **initial SPO**) in accordance with s 182(1)(a) of the Act.[2] At [55]–[57] of the initial SPO, it was alleged that the appellant attended **Mini Koala** Car Rentals to hire the van.

6. On 8 February 2018, the defence filed a response to that initial SPO (**RSPO**) (the **initial RSPO**) under s 183 of the Act.[3] In response to [55]–[57] of the initial SPO, it was stated that 'it is disputed that Obian was present.'

7. On 25 October 2018, an amended SPO was prepared (the **second SPO**).[4] At [53]–[55] the second SPO repeated the allegation that the appellant hired the van from Mini Koala.

8. On 5 November 2018, the defence filed a response to the second SPO (the **second RSPO**).[5] In response to [53]–[55], it was stated that 'it is not admitted that Obian hired YPZ805 from Mini Koala …' There was no response to the other allegations contained in those paragraphs including that the appellant advised Wei Wei **Wang** (an employee at Mini Koala) 'he was moving boxes'.

9. On 12 November 2018, the second trial before Judge Fox began. On 14 November 2018, Wang gave evidence (summarised at [216]– [219] of the Judgment below).[6] Relevantly, Wang stated she rented a van to a person who used a drivers licence in the name 'Saer Pbian' who claimed to need the van to 'move a box'. Defence counsel cross-examined Wang about whether she compared the photograph in the licence with 'the gentleman' who was hiring the van. However, there was no challenge to Wang's evidence about that person stating he required the van to move boxes.

10. From 15 November 2018, Khaled **Moustafa** gave evidence (summarised at [188]–[210] of the Judgment below).[7] As Macaulay JA accurately described, Moustafa was cross-

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[1] See also *Obian v The Queen* [2023] VSCA 18 (**Judgment below**), [144]–[163] (Macaulay JA) (Core Appeal Book (**CAB**),155–159).

[2] Initial Summary of Prosecution Opening dated 1 September 2017 (Respondent's Further Materials (**RFM**), 127–160).

[3] Initial Response to Summary of Prosecution Opening dated 8 February 2018 (RFM, 71–74).

[4] Second Summary of Prosecution Opening dated 25 October 2018 (Appellant's Further Materials (**AFM**), 128–149).

[5] Second Response to Summary of Prosecution Opening dated 5 November 2018 (AFM, 123–127).

[6] Playback transcript of Wei Wei Wang evidence, 1.05–6.21 (RFM, 5–10).

[7] See Playback transcript of Khaled Moustafa evidence, 1.03–10.28 (AFM 5–17). See also Further extract of playback transcript of Khaled Moustafa evidence, 60.29–63.11, (RFM, 11–14).

examined on almost every piece of evidence he gave about the appellant, particularly in relation to the hiring of the van. In effect, defence counsel put to Moustafa that: he was not present with the appellant at any 'establishment'; the appellant was not present with Moustafa or anyone else in moving materials; and Moustafa was not present when the van was hired. Additionally, the puttage included that Allouche did not have a drivers licence and that Omar Bchinnati — not Allouche — arrived in the van at the storage unit where the 1,4-butanediol (**1,4-BD**) was being stored.[8]

11. On 19 November 2018, Judge Fox sought clarification from defence counsel as to what was being put to Moustafa about the hiring of the van. When asked if it was being challenged that the appellant had rented the van, defence counsel replied: '[r]ented the van, no.'[9] Notwithstanding this response, flying in the face of this apparent concession, defence counsel then immediately put to Moustafa that he '[didn't] have any knowledge at all about who hired the van or the truck from Ms Wang'.[10]

12. On 22 November 2018, **Bassel** Obian (the appellant's brother) gave evidence for the defence which amounted to an alibi without notice contrary to s 190(2) of the Act, ultimately resulting in the abandonment of the second trial. Bassel said that after he and the appellant had returned home after dropping off their parents at the airport, the appellant left the house and returned about half an hour later, before they went to bed a short time later. In both examination-in-chief and under cross-examination, Bassel said he did not know why the appellant had left the house or where he was going. Bassel said he presumed Joseph **Saad**, whilst 'forgetful', would give the same evidence.[11]

13. Following this evidence, the defence prepared and filed an unsigned alibi notice (the **alibi notice**).[12] The notice stated that Bassel and Saad would give alibi evidence as to the appellant's 'explained absences' from his family's residence including taking his parents to the airport, attending at 'a car rental establishment' and returning home. On 14 May 2019, the appellant's solicitor confirmed with the Office of Public Prosecutions (**OPP**) that the alibi notice would continue to be relied upon.[13]

14. On 17 June 2019, a final SPO was prepared (the **final SPO**).[14] At [66]–[67] of the final SPO, it was again alleged that the appellant hired the van from Mini Koala. In addition,

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[8] Judgment below, [339] (Macaulay JA) (CAB, 193).
[9] Trial 2 transcript, 509.24–510.13 (AFM, 18–19).
[10] Playback transcript of Khaled Moustafa evidence, 75.03–75.05 (AFM 6).
[11] Trial 2 transcript, 746.25–747.30, 765.07–771.24 (RFM, 15–23).
[12] Notice of alibi dated 22 November 2018 (AFM, 119–120).
[13] Email exchange between Will May and Christy Kerr on 14 May 2019 (AFM, 121–122).
[14] Final Summary of Prosecution Opening dated 17 June 2019 (RFM, 75–98).

a draft notice of pre-trial admissions (under s 182(1)(b) of the Act) was prepared and provided to the defence for consideration.[15] The circumstances concerning the hiring of the van were outlined at [37]–[42] of that notice.

15. On 19 July 2019, the appellant's solicitor informed the OPP that a meeting with defence counsel was scheduled to 'settle the admissions'. On 24 July 2019, the OPP sent a follow-up email enquiring into the status of the admissions. On that same day, the appellant's solicitor replied that he had not met with defence counsel but had instructions on the admissions. All but five paragraphs of the draft the notice of pre-trial admissions, one of which was [42] concerning the statement to Wang about moving boxes, were noted as being 'admitted'.[16]

16. Notwithstanding this email exchange, no response to the final SPO or the notice of pre-trial admissions was filed with the prosecution or the Court.

17. On 5 August 2019, ahead of the third trial before Judge Trapnell, his Honour asked the parties about a response to the notice of pre-trial admissions. The (new) prosecutor, with apparent consent from defence counsel, explained that a statement of agreed facts was being prepared instead of a response to that notice.[17] Following discussions between the parties about the contents of the statement, no agreement was reached about whether the appellant admitted to hiring the van.[18]

18. On 6 August 2019, the prosecutor sent an email to defence counsel with a draft statement of agreed facts. Defence counsel modified the statement and returned it to the prosecution. The statements contained no mention of any agreement that the appellant attended Mini Koala and hired the van.[19]

19. On 8 August 2019, during the third trial, Wang's unedited evidence was played in full to the jury by agreement. The prosecution also tendered a photograph of the appellant from 2016 and the statement of agreed facts. This position remained unchanged at the fourth trial.[20]

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[15] The matters contained in the notice of pre-trial admissions mirror the content of the second SPO. It included content the appellant had both disputed *and* not disputed in the second RSPO. Notice of pre-trial admissions dated 17 June 2019 (AFM, 110–118).
[16] Email exchange between Will May and Christy Kerr between 19 July 2019 and 24 July 2019 (RFM, 99–100).
[17] Trial 3 pre-trial transcript, 10.15–11.01 (RFM, 24–25).
[18] Second affidavit of Susan Borg dated 14 October 2022, [7]–[13] (RFM, 45–47).
[19] Email exchange between prosecutor and defence counsel between 6 August 2019 and 26 August 2019 (RFM, 101–123).
[20] Trial 4 transcript, 40.24–41.18 (RFM, 26–27). Judgment below, [162] (Macaulay JA) (CAB, 158).

20. On 20 August 2019, during openings at the final trial, defence counsel told the jury that charge 3 concerned 'a desperate run around' to move the 1,4-BD and that 'Mr Obian was not there at *any of those establishments*'.[21] The context of this statement seemingly suggested to the jury that the appellant was not present at *any place* related to the movement of the drugs — including the 'car establishment' Mini Koala.

21. Similarly, during the final trial, the whole of Wang's pre-recorded evidence was played unedited to the jury. Moustafa's pre-recorded evidence pertaining to the hiring of the van was also played.

22. On 5 September 2019, another statement of agreed facts was settled and signed by both the prosecutor and defence counsel.[22] The settled statement was effectively consistent with the matters identified as not being in dispute in the second RSPO. Relevantly, the statement contained no reference to the appellant renting the van from Mini Koala and, on defence counsel's request, a paragraph was added which stated the appellant, Moustafa and Allouche 'were known to each other … and on occasions they would meet together'.

23. Also on 5 September 2019, defence counsel made a 'no case' submission. In support of this submission, he expressly relied on both the second RSPO and the agreed statement of facts which he said needed to be read together.[23]

24. In summary, the different stances adopted by the appellant during the course of his matter were 'equivocal'[24] and left an 'ambiguous and Delphic breadcrumb trail about what his true defence was.'[25] Focusing principally on the email dated 24 July 2019, as the appellant does, ignores this important overall context as is outlined above. In effect, by the time of the final trial, the appellant had resiled from any earlier statement which could be treated as an 'admission' that he had hired the van from Mini Koala. Moreover, and most notably, nowhere in the RSPOs, the alibi notice, the intimated responses to the draft notice of pre-trial admissions, the agreed statements of facts, or the cross-examination of any Crown witness did the appellant indicate that: he was directed by Allouche to hire a van for him; or he had attended Allouche's premises twice, including to leave the van with him.

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[21] Trial 5 transcript, 16I.23–16J.01 (RFM, 28–29).
[22] Agreed Statement of Facts dated 5 September 2019 (RFM, 124–126).
[23] While the 'no case' concerned Charges 1 and 2 only, the submission was premised on the accuracy of the second RSPO and the agreed statement of facts as a whole. See Trial 5 transcript, 461.10–474.18 (RFM, 30–44).
[24] Judgment below, [111] (Niall JA) (CAB, 148).
[25] Judgment below, [342] (Macaulay JA) (CAB, 193).

Appellant's evidence and trial judge's ruling

25. After the close of the prosecution case in the final trial, the appellant elected to give evidence (summarised at [242]–[265] of the Judgment below). Relevantly, the appellant stated that he had hired the van from Mini Koala. He also gave an affirmative account about the circumstances which surrounded the hiring including that: he had hired the van on Allouche's request; he had originally travelled to Mini Koala by taxi; after having originally gone to Mini Koala he went to Allouche's place and collected a debit card and cash; he returned to Mini Koala by taxi and hired the van; he then drove the van to Allouche's residence; and he returned home leaving the van with Allouche.[26] Under cross-examination, the appellant gave evidence as to the times at which these events took place and more details about what he purportedly did at each location.[27]

26. After cross-examining the appellant, the prosecutor applied to reopen the prosecution case to adduce evidence from surveillance officers 116 (**SO116**) and 26 (**SO26**).[28] The deposition material — a copy of which the appellant had been given[29] — contained the observations of the surveillance operatives accounting for Allouche's movements between 12:03 am and 1:26 am on 14 June 2016. These observations were never suggested to be inaccurate at the committal proceedings or at any previous trial.

27. As recorded at [267]–[286] of the Judgment below, there was an extensive discussion between the trial judge, the prosecutor, and defence counsel about this application.[30]

28. During this discussion, and with reference to the final SPO and two RSPOs, the prosecutor made statements to the effect that the appellant had 'always' disputed or denied hiring the van and that the first time that the Crown heard that the appellant would say that he hired the van was when he gave his evidence in chief (the **prosecutor's impugned statements**). Defence counsel did not contradict these statements.

29. However, as both Macaulay JA and Niall JA correctly identified,[31] the trial judge recognised shortly after the prosecutor's impugned statements were made that the rebuttal evidence was not merely relevant to the appellant's credit, but also went to facts

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[26] Trial 5 transcript, 540.01–548.07 (AFM, 21–29).
[27] Trial 5 transcript, 582.19–591.05 (AFM, 30–39).
[28] In the event, SO26 was not called to give evidence.
[29] Affidavit of William May dated 19 August 2022, 5 [30] (RFM, 48–70).
[30] Transcript of legal argument, 593.01–645.15, 648.01–650.05 (AFM, 40–95).
[31] Judgment below, [113] (Niall JA); [277] (Macaulay JA) (CAB, 149, 176).

in issue.[32] Specifically, the trial judge appreciated that the true significance of the proposed rebuttal evidence concerned the issues relating to the appellant's purpose for hiring the van and what he did with the van after it had been hired. The discussion then concentrated primarily on those issues. Indeed, the trial judge asked defence counsel on several occasions where in the RSPO, or in puttage to Moustafa or other relevant witnesses, did the appellant suggest that he had hired the vehicle on Allouche's behalf and then taken it over to Allouche's place.[33] Defence counsel replied that there was no such indication. As Macaulay JA explained in the Judgment below at [282]:

> Nothing had been said in the defence response, in any other document filed by the defence in the proceeding, in Obian's evidence, or put by way of question or suggestion to a Crown witness, to put the Crown on notice that even if Obian had hired the van he had done so for Allouche, had delivered the van to Allouche and had then gone home.

30. After being given an opportunity to review the evidence to check whether there might have been something which put the prosecution on notice about what the appellant might say, defence counsel did not add anything further but instead applied to exclude the evidence under s 137 of the *Evidence Act 2008* (Vic). In reply, the prosecutor relevantly observed that it had not been put to Wang that she was wrong about the urgency in hiring the van, or that it was needed to move boxes.

31. The trial judge granted leave under s 233(2) of the Act permitting the prosecution to reopen its case. His Honour's ruling, which expressly incorporated his discussion with counsel, is outlined in full in the Judgment below at [287]. In short, having regard to the SPO and RSPO, the trial judge found that the prosecution could not have reasonably foreseen the appellant's evidence. The trial judge also observed that, had the common law power permitting the prosecution to reopen its case applied, the 'special or exceptional circumstances' threshold would have been met.

32. However, the trial judge did not permit the prosecution to reopen its case at large. Rather, the prosecutor was permitted *only* to adduce evidence from SO116 of the surveillance of Allouche's residence between around midnight and 1:26 am on 14 June 2016 — evidence which was only probative to the issues of the appellant's purpose in hiring the van and what he did with it afterwards. Strict parameters were set as to how and what evidence the prosecutor could adduce, as well as when the rebuttal evidence would be called, to minimise any prejudice to the appellant and remove any undue

[32] Transcript of legal argument, 601.26–607.20 (AFM, 48–54).
[33] Judgment below, [277] (Macaulay JA) (CAB, 176). See [55] below.

prominence it might otherwise attract.

33. After cross-examination of the appellant concluded, defence counsel applied in effect for the trial judge to reconsider his ruling.[34] This was refused with the trial judge noting that, until the appellant had given evidence about hiring the van for Allouche, going to Allouche's house, getting money from him, and returning later with the van before walking home, SO116's evidence was not relevant. Defence counsel did not resist that proposition,[35] which is clearly correct. The appellant was then re-examined, including on SO116's evidence.

The rebuttal evidence

34. In the event, SO116 gave evidence after cross-examination of the appellant was concluded consistent with what is outlined above at [26] (summarised at [296] to [298] of the Judgment below) (the **rebuttal evidence**). Notably, this evidence was not led to prove that the appellant hired the van. Such evidence could not have rationally affected the question of whether the appellant hired the van. Rather, the evidence indirectly rebutted the appellant's account about the lead up to the hire of the van and what occurred after he had hired it.

35. Contrary to what is submitted at [13] of the Appellant's Submissions (**AS**), up until the appellant had given evidence nominating Allouche as the person orchestrating the hiring of the van and it being delivered to him, the evidence of SO116 was irrelevant to a fact in issue in the trial. The prosecution adduced evidence positively to establish that the identity of the person hiring the van was the appellant. Absent some suggestion that Allouche hired or possessed the van, it was entirely unnecessary to show that some other person did *not* hire the van. This is especially so in circumstances where defence counsel did not suggest to Wang that her identification of the appellant (as the person hiring the van) was wrong, nor suggest to Moustafa that Allouche was at any stage in possession of the van.

Part V: Argument in answer to appellant's argument

36. For the reasons outlined below, the majority of the Court below correctly determined that the trial judge did not wrongly permit the prosecution to reopen its case by: misapplying s 233(2); by approaching his task on an incorrect factual basis; or by finding that the appellant's evidence — that he hired the van from Mini Koala for

[34] Transcript of legal argument, 758.08–770.14 (AFM, 96–109).
[35] Judgment below, [291] (Macaulay JA) (CAB, 180).

Allouche and returned home after delivering it to him — was not reasonably foreseeable having regard to, inter alia, the appellant's RSPO. It follows that there was no irregularity in the trial judge's ruling and the prosecution did not impermissibly split its case.

37. Before responding to the appellant's submissions, it is first appropriate to deal with the issue of the correct construction of s 233(2) of the Act.

Construction of s 233(2) of the Act

38. Chapter 5 of the Act regulates the procedure relating to a trial of an accused person charged on indictment.[36] It relevantly sets out the pre-trial disclosure framework under pt 5.5 and the usual sequence of a trial by jury under pt 5.7. These parts operate alongside each other and give critical context to understanding how s 233 operates.

39. Beginning with div 2 of pt 5.5, the Act requires the prosecution to file a SPO and a notice of pre-trial admissions. Under s 183(2), the accused is required to file a RSPO which identifies the acts, facts, matters and circumstances with which issue is taken and 'the basis on which issue is taken'. A similar requirement exists in relation to a response to the notice of pre-trial admissions under s 183(3). These responses do not require the accused to identify any witness to be called by the accused or state whether the accused will give evidence. In *Alfarsi (a pseudonym) v the Queen*,[37] the Court of Appeal explained that while the response under s 183(2) must identify the acts, facts, matters and circumstances set out in the SPO with which issue is taken and the reason for disagreement, it does not *require* the accused to make any positive statements of fact.

40. The course of a jury trial as regulated under pt 5.7 is, in large respects, relevantly guided by the contents of the SPO and RSPO filed with the trial court.[38] For example, under s 184, parties must, in advance of the trial, notify the trial court and any other party of any intention to depart substantially from the SPO or RSPO. Further, under div 4 of pt 5.7, ss 224 and 225 require the prosecutor and defence counsel to restrict their opening addresses to matters respectively set out in the filed SPO and RSPO.

41. Section 233 provides for the introduction of evidence in circumstances representing a departure from a party's disclosure obligations under pt 5.5. Under s 233(1), leave is

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[36] *Criminal Procedure Act 2009* (Vic), s 158.

[37] *Alfarsi (a pseudonym) v The Queen* [2021] VSCA 283, [31] (emphasis added).

[38] Any notice of pre-trial admissions filed with the court, being another document filed under pt 5.5, is also an important guiding document at a jury trial. However, for ease of reference, this discussion omits reference to that document.

required before evidence may be introduced which represents a substantial departure from, in the case of the prosecutor, the SPO or, in the case of the accused, the RSPO.

42. Section 233(2) also provides that the trial judge *may* permit the prosecution to reopen its case to adduce reply evidence if an accused *gives* evidence — that is, where the accused provides testimony on their own behalf — which could not be reasonably foreseen by the prosecution having regard to the RSPO filed with the court. This power supplements the common law power but does not overrule it.[39] Put another way, s 233(2) provides an additional power to reopen the prosecution case so long as the statutory preconditions are met — namely, that an accused personally gives evidence and that evidence represents a reasonably unforeseeable departure from the filed RSPO and response to any notice of admissions. If met, the statutory discretion to permit the prosecution to re-open its case can be exercised.

43. This pre-trial disclosure framework, including what is now section 233,[40] picked up and strengthened the regimes established under the *Crimes (Criminal Trials) Act 1993* (Vic)[41] and the *Crimes (Criminal Trials) Act 1999* (Vic).[42] As noted in the Judgment below at [313]–[314], this regime was designed to improve the efficiency of criminal trials. Previously, the absence of any requirement on the defence to reveal anything to the prosecution required the prosecution to 'be prepared to address every possible issue' and frequently resulted in the judge and jury 'only becom[ing] aware of the issues at stake during the course of the trial'.[43] This caused avoidable delays and complexity. The broad outlines of the parties' respective cases were aimed at addressing these difficulties so that it was 'clear to both parties and the court which issues will be in dispute in the trial' thereby saving court time, preventing the inconveniencing of witnesses, and greatly simplifying matters for the jury.[44]

44. As Macaulay JA correctly explained (with whom Niall JA agreed),[45] the pre-trial disclosure regime does not detract from the accused's 'orthodox entitlement' to respond to the prosecution case *after* it had been fully presented to the jury, as is evident in div 5

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[39] *Criminal Procedure Act 2009* (Vic), s 233(3).
[40] Macaulay JA's comment at [311] of the Judgment below that there was no equivalent provision to s 233 in the earlier statutes had no impact on his analysis (CAB, 185).
[41] See *Crimes (Criminal Trials) Act 1993* (Vic), ss 8, 11, 15.
[42] See *Crimes (Criminal Trials) Act 1999* (Vic), ss 6, 7, 15.
[43] Victoria, *Parliamentary Debates*, Legislative Assembly, 6 May 1999, 812 (Jan Wade, Attorney-General).
[44] Explanatory Memorandum, Crimes (Criminal Trials) Bill (Vic), cl 7; Victoria, *Parliamentary Debates*, Legislative Assembly, 6 May 1999, 812 (Jan Wade, Attorney-General).
[45] Judgment below, [99]–[102] (Niall JA) (CAB, 146–147).

of pt 5.7.[46] Accordingly, his Honour was not endorsing a view departing from the general rule requiring the prosecution not to split its case.[47]

45. There is, however, no legislative warrant for reading down s 233(2) to require the discretionary power to be exercised only in 'exceptional' or 'very special' cases as is required by the separate common law power.[48] This is most clearly evidenced by the legislature's choice not to 'employ the same language or erect the same threshold to the exercise of the statutory discretion as found in the common law principles'.[49] This view is bolstered by the underlying purpose of the pre-trial disclosure regime. In order to achieve the desired efficiencies to the criminal trial process brought about by the regime and other obligations stemming from it, non-compliance must be capable of meaningful remediation.[50] Imposing an 'exceptionality' test on the availability of the power under s 233(2) unnecessarily limits this remedial mechanism. Accordingly, whether the power under s 233(2) is *enlivened* at the threshold stage is not dictated by whether a case is exceptional or special. Thus, even though the trial judge considered the appellant's case fell within the 'exceptional' category of cases which might attract the common law power, such a finding was strictly unnecessary for the power under s 233(2) to be engaged.

46. Macaulay JA was also cognisant that, once the discretion is enlivened,[51] the dangers in allowing the prosecution to reopen its case under the statutory rule are the same as they are under the common law.[52] Accordingly, exercising the discretion must be done 'reasonably' and with 'great care and caution' especially to ensure fairness to an accused and to adhere to the accusatorial system of criminal justice.[53]

47. In reaching this conclusion, Macaulay JA did not construe s 233(2) to be a 'sanction' on an accused who does not conform with s 183. As reflected in s 233(2)(a) and (b), the discretionary task is referable, at least in part, to an accused's formal disclosure obligations. His Honour did not inflate the role of the defence's disclosure obligations but rather correctly interpreted the 'gateway' to the exercise of that discretion identified in the section. Indeed, Macaulay JA (like Niall JA) did not offer an assessment of the

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[46] Judgment below, [316] (Macaulay JA) (CAB, 187).
[47] *Shaw v The Queen* (1952) 85 CLR 365, 378–80, 383–4.
[48] *Killick v The Queen* (1981) 147 CLR 565, 568–71, 575–6; *Lawrence v The Queen* (1981) 38 ALR 1, 3, 7, 22–3; *R v Chin* (1985) 157 CLR 671, 676–7.
[49] Judgment below, [317], [324] (Macaulay JA) (CAB, 187, 189).
[50] Judgment below, [320] (Macaulay JA) (CAB, 188).
[51] Judgment below, [322]–[323] (Macaulay JA) (CAB, 189).
[52] Judgment below, [326] (Macaulay JA) (CAB, 189).
[53] Judgment below, [322]–[327] (Macaulay JA) (CAB, 189).

required level of defence disclosure in any general sense — each case will turn on its own facts. Rather, in appropriate cases, the failure to make adequate, or any, disclosure may have the consequence of *engaging* s 233(2). Put differently, while an accused may not be obliged to make any positive statement of fact in the RSPO, if the accused intends to rely on a (reasonably unforeseeable) affirmative defence as the basis for taking issue with an aspect of the SPO and that basis is not disclosed in accordance with s 183, that non-disclosure would be relevant to the evaluative judgment as to whether the threshold question under s 233(2) is satisfied and the discretion should be exercised. That is the plain legislative intent of s 233(2). Macaulay JA was correct in his interpretation of the 'triggering' mechanism in s 233(2).[54] That the position taken in the RSPO and formal response to notice of admissions is the question to be considered in the applicability of s 233(2) is consistent with the plain wording of the section.

48. Regardless, while Niall JA's construction differed from that of Macaulay JA on the question as to what matters were relevant in determining whether the power under s 233(2) was *engaged*, there was no material difference on the key question of the exercise of the discretion. Both agreed that principles of fairness and the interests of justice remained significant to the exercise of the discretion.[55] For the reasons outlined below, this divergence was not material to the result.

The trial judge proceeded on a correct factual basis

49. The trial judge did not exercise his discretion based on a false 'factual matrix'. The majority of the Court below were correct in finding that the prosecutor's impugned statement had no material impact on the trial judge's ruling so as to produce a substantial miscarriage of justice as the real relevance of the rebuttal evidence was teased out in discussion between counsel and the learned trial judge. Picking out and focusing on individual statements in argument and their counterfactuals, rather than the whole of the debate between the trial judge and counsel and the true relevance of the rebuttal evidence, is apt to mislead in the context of a developing argument and it is for this reason that the appellant's position — as accepted by Priest JA in dissent — should be rejected.

50. As noted above at [27]–[33], the prosecution's application to reopen its case developed over the course of argument. This discussion was incorporated into the trial judge's ruling. In the result, the trial judge was not led astray by the prosecutor's initial

[54] Judgment below, [320], [329] (Macaulay JA) (CAB, 188, 190–191).
[55] Judgment below, [99], [105] (Niall JA); [325]–[326], [329] (Macaulay JA) (CAB, 147–148, 189–191).

overstatement that the appellant had 'always' denied hiring the van.

51. The discussion understandably commenced with determining what notice, if any, had been given about the appellant's hiring of the van. However, as explained by Macaulay JA,[56] the trial judge astutely focused his inquiry on the notification given of the purpose of the hiring and the involvement of Allouche.

52. Several passages reveal the evolution of the discussion. When conversing with the prosecutor, the trial judge correctly identified that the appellant's evidence touched on several facts in issue:

> HIS HONOUR: I mean, it's a fact in issue whether Mr Obian hired this vehicle. Clearly that's a fact in issue.
>
> PROSECUTOR: Yes.
>
> HIS HONOUR: And he says he did hire it and he hired it for Mr Allouche but not for his own purposes. *So, it's a fact in issue whether he hired it the intent with which he hired it. In other words, did he hire it with the intent of using it to move this 1,4-Butanediol from one storage facility to another.* Is that right? Have I got that right?
>
> PROSECUTOR: Yes. …[57]

53. This passage preceded the passage set out at [58] of the AS. When read in context, the trial judge's attention had clearly turned from what notice the appellant gave about hiring the van, to what notice was given about him doing so at Allouche's behest and then later 'nicking off' after he had delivered it — these issues having been identified by the trial judge as representing the true significance of the appellant's evidence.

54. Similarly, the passage selectively reproduced at [59] of the AS ignores the evolution of the discussion. A full review of the discussion shows that the trial judge was concerned not with the *fact* of the hiring but with the appellant's *purpose* for hiring the van *and* Allouche's involvement. Indeed, immediately after stating that he could not find any way the Crown would have had notice, the trial judge observed that Allouche was not on the possible list of witnesses.

55. Notably, when conversing with defence counsel, the trial judge repeatedly asked what notice was given about the appellant hiring the van for Allouche and delivering it to him. For example:

> HIS HONOUR: Well, where in your defence response do you dispute he hired the car, but

[56] Judgment below, [353] (Macaulay JA) (CAB, 195–196).
[57] Transcript of legal argument, 603.22–604.01 (AFM, 50–51).

nonetheless he did hire it, and hand it over to Mr Allouche, or hired it on behalf of Mr Allouche?[58]

…

HIS HONOUR: You take issue with the fact that your client was involved in the movement of this chemical on that night. *And the basis that you take issue with it is that he wasn't there because he hired the vehicle from Mr Allouche, handed it over to him, and went home*. Now, where's that in the defence response?

DEFENCE COUNSEL: Well, it's not there.

HIS HONOUR: No. Clearly not.

DEFENCE COUNSEL: Not, it isn't. But it's - - -

HIS HONOUR: And how could the Crown possibly have notice of that?[59]

…

HIS HONOUR: *Where is there anywhere in the defence response the slightest suggestion he hired it on behalf of Mr Allouche, took it over to his place?*

DEFENCE COUNSEL: It isn't there.

HIS HONOUR: No, of course it's not.

DEFENCE COUNSEL: No, I mean I - - -

HIS HONOUR: *Which is why the Crown has been taken by surprise by this evidence and is making the application they're making*.

DEFENCE COUNSEL: Yes …[60]

…

HIS HONOUR: … Because *I want to see what the evidence about Mr Allouche is* and whether the Crown – because that's the only, it seems to me, so far, *the only argument you've got is that something has come out during the course of the prosecution case in relation to Mr Allouche that should have reasonably put them on notice that this was likely to occur*.[61]

…

HIS HONOUR: … Where is there in the evidence of Mr Moustafa any suggestion that the hiring of the van from Mini Koala Rentals was by your client *on behalf of Mr Allouche*?

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[58] Transcript of legal argument, 615.01–615.04 (emphasis added) (AFM, 62).
[59] Transcript of legal argument, 616.13–616.23 (emphasis added) (AFM, 63).
[60] Transcript of legal argument, 617.23–618.01 (emphasis added) (AFM, 64–65).
[61] Transcript of legal argument, 621.18–621.24 (emphasis added) (AFM, 68).

DEFENCE COUNSEL: Well, there isn't.

HIS HONOUR: Well, there we go. So, the Crown wasn't put on notice - - -

DEFENCE COUNSEL: No.[62]

…

HIS HONOUR: The point now is where in the evidence that has been led in this trial so far, other than in your defence case, is there evidence that would have put the Crown on notice that you were going to say that you hired the vehicle *on behalf of Mr Allouche*? …[63]

…

HIS HONOUR: What about Ms Wang? Did you put anything to Ms Wang that would put the Crown on notice that you're saying that you were hiring it *for Mr Allouche*?

DEFENCE COUNSEL: Well, that wouldn't have been useful, Your Honour; she wouldn't know.

HIS HONOUR: That's right.[64]

56. As both Macaulay JA and Niall JA recognised, the trial judge's focus remained fixed on the appellant's evidence about hiring the van *for Allouche* and later leaving it with him. Indeed, the rebuttal evidence the trial judge permitted to be adduced went only to that fact. As Niall JA noted, it is inconceivable that the trial judge would have permitted the prosecution to adduce rebuttal evidence to prove the appellant hired the van where such evidence had already been given by Wang.[65] Further, absent the evidence of the appellant, the rebuttal evidence would do nothing to bolster the Crown's position that the appellant hired the van.

57. Neither Macaulay JA nor Niall JA ignored the fact that the prosecution may have been forewarned by the evasive conduct of the defence case that the appellant might seek to 'confess' to hiring the van.[66] However, as the majority correctly appreciated, such 'forewarning' made no difference. As discussed further below at [72]–[73], knowing only that the appellant hired the van said nothing about the critical issues as to *why* and *for whom* the van was hired and *what* he did with it[67] — the former in no way gave rise to the latter. Moreover, while the appellant's evidence may not have contradicted the appellant's selective disclosure of his defence, it nonetheless directly contradicted other

[62] Transcript of legal argument, 632.24–632.31 (emphasis added) (AFM, 79).
[63] Transcript of legal argument, 635.21–635.25 (emphasis added) (AFM, 82).
[64] Transcript of legal argument, 636.27–637.01 (emphasis added) (AFM, 83–84).
[65] Judgment below, [110] (Niall JA); [333] (Macaulay JA) (CAB, 148, 191).
[66] Judgment below, [112] (Niall JA); [355]–[356] (Macaulay JA) (CAB, 148, 196).
[67] Judgment below, [356] (Macaulay JA) (CAB, 196).

unchallenged material in the depositions which, until the appellant gave his evidence, was not relevant to any fact in issue.[68]

58. Accordingly, contrary to the appellant's submission, focusing on any error or 'false flag' arising from the prosecutor's impugned statement is a distraction.[69] Given there was nothing in any pre-trial communications, filed documents or other evidence given at any trial which could have alerted the prosecution to the reasonable prospect of the appellant giving evidence about his purpose for hiring the van and what he did with it — which defence counsel repeatedly conceded was 'not there' (see [55] above) — the trial judge determined the application under s 233(2) on a correct factual basis and the majority of the Court below were correct in so finding.

Evidence regarding Allouche's connection was not reasonably foreseeable

59. The majority of the Court below also did not err in finding the trial judge was correct in determining that the prosecution could not have reasonably foreseen that the appellant would give evidence about the purpose for hiring the van, the movements in the process of hiring it, and what he did with it after hiring it.[70]

60. Fundamentally, the appellant's case went beyond a mere denial of involvement. He advanced an affirmative explanation as to what he claimed occurred, providing an alternate explanation for an otherwise damning piece of evidence. His explanation about his purpose for hiring the van, whether he did so for himself or another person, and its subsequent movements was not disclosed in any RSPO or other pre-trial communication, and was not squarely put to any relevant Crown witnesses, particularly Moustafa or Wang. Even if the appellant might have been expected to 'confess and avoid', as Niall JA explained, '*how* he would do so' was 'not foreshadowed nor easily foreseen'.[71] Nothing came close to notifying the prosecution of that affirmative defence.

61. Both Macaulay JA and Niall JA correctly determined that the array of matters relied upon by the appellant (summarised at [338] of the Judgment below) were incapable of raising any *reasonable* foresight of the appellant's intended evidence.[72]

62. Firstly, there was nothing implicit in Moustafa's conversations with Allouche which suggested that Allouche called the appellant to organise the hiring of the van. Moustafa

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[68] Judgment below, [354] (Macaulay JA) (CAB, 196).
[69] Judgment below, [113] (Niall JA); [355] (Macaulay JA) (CAB, 149, 196).
[70] Judgment below, [108] (Niall JA); [337] (Macaulay JA) (CAB, 147, 192).
[71] Judgment below, [112] (Niall JA) (emphasis added); [336]–[341] (Macaulay JA) (CAB, 148, 191–193).
[72] Judgment below, [93], [107]–[113] (Niall JA); [338], [341]–[344] (Macaulay JA) (CAB, 146, 148–149, 192–194).

accepted that, in a recorded phone call with Allouche, he said he was going to attend Allouche's home and, in response to a request to help him hire a van or truck, Allouche said he would 'try'.[73] Moustafa's evidence that Allouche later stated he could not assist — made while the appellant was in attendance — was not challenged under cross-examination.[74] There was no need for this direct evidence to be corroborated.[75] Even if it had been challenged, it would not have identified that the appellant might hire the van for Allouche.

63. Secondly, Moustafa's evidence — that he could not say whether Allouche and the appellant had any later telephone conversations about hiring a van — could establish neither that any subsequent communications between Allouche and the appellant in fact took place nor the contents of any such communications. There was also no direct puttage to that effect.

64. Thirdly, the fact that it was agreed that Moustafa, Allouche and the appellant were known to each other and met occasionally does not speak to what, if anything, occurred on 13 and 14 June 2016.

65. Fourthly, despite the appellant denying in the RSPO that he said to Wang that he needed a van to 'move boxes', Wang's evidence on this subject was not contested in cross-examination. Furthermore, this unchallenged evidence was repeated at three trials. The appellant's express denial of having made that statement only occurred when he gave evidence.

66. Fifthly, the alibi notice offered no clarity. First, the alibi notice did not state that the appellant would personally give alibi evidence; it only referred to Bassel and Saad as alibi witnesses. Second, while the notice stated the appellant had attended a 'car rental establishment' before 'returning home', the effect of Bassel's evidence (which Saad was expected to also give) was not capable of explaining the appellant's absence that night. Indeed, Bassel stated he did not know why the appellant left the house or where he was going, and could not account for the appellant's movements between 3:30 am and 6:00 am. Again, even if the appellant might be expected to say he hired the van for another, it said nothing about the hiring process, on whose behest it was done or to whom it was delivered after being hired.

67. Finally, and importantly, the appellant's evidence — that he hired the van for Allouche,

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[73] Transcript of intercepted call at 11:20 pm on 13 June 2016 (AFM, 150).
[74] Playback transcript of Khaled Moustafa evidence, 1.03–9.03 (AFM 5–17).
[75] *Evidence Act 2008* (Vic), s 164(1).

and attended his residence twice, including to deliver the van — was in direct contradiction with the surveillance evidence. That evidence was not tested at the committal hearing. Thus, as Macaulay JA observed, even if the appellant might 'predictably' say he gave the van to an associate, it would have been reasonable to presume he would *not* nominate Allouche, especially in circumstances where neither defence nor the Crown suggested that Allouche was present when the 1,4 BD was moved.[76]

68. Drawing the array of matters together, it was not the case that the appellant had clearly and unambiguously 'admitted' to hiring the van, let alone to having done so *for Allouche*. With the benefit of hindsight, the sequence of events that unfolded can be reconstructed to show a loose connection of sorts between the 'obscure trail of clues' and the appellant's intended defence.[77] However, judged reasonably and at the time of the trial, the appellant's evidence was entirely unexpected and unforeseeable. Indeed, to have foreseen this evidence and prospectively responded to it, the prosecutor would have needed to have engaged in a high degree of speculation. It follows that the 'Allouche connection' was not *reasonably* foreseeable and both the trial judge and the majority of the Court below were correct in so concluding.

Prosecution did not impermissibly split its case

69. Relatedly, it is not the case that the prosecution impermissibly split its case. Contrary to the appellant's contention at [13] and [74] of the AS, calling SO116 or SO26 before the close of the prosecution case could not have assisted the facts in issue in the trial as it stood before the evidence of the accused.

70. The prosecution adduced largely unchallenged evidence from Wang, and related documentary evidence, that the van was hired by the appellant — alone — for the purpose of 'moving boxes'. As defence counsel conceded, the surveillance evidence was unrelated to this issue.[78] Furthermore, as noted above at [62], Moustafa's evidence was to the effect that Allouche was not able to help secure a van or truck. As such, the prosecutor and trial judge were correct in their assessment that Allouche was in effect 'out of the picture',[79] particularly in circumstances where there was no puttage to any witness that Allouche was present with the van at any point.

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[76] Judgment below, [344] (Macaulay JA) (CAB, 194).
[77] Judgment below, [341], [345] (Macaulay JA) (CAB, 193–194).
[78] Transcript of legal argument, 762.02–762.20 (AFM, 101).
[79] Transcript of legal argument, 606.18–607.05 (AFM, 53–54).

71. Until the appellant gave his evidence about attending Allouche's residence, hiring the van for him and leaving the van with Allouche, the surveillance evidence about Allouche's movements that night was simply irrelevant and could not have been led by the prosecution.[80] It follows that the prosecution presented its case as fully as possible based on what was reasonably known at the time.

Appellant's evidence of hiring van and purpose for doing so not inextricably intertwined

72. Finally, as the trial judge and majority in the Court below correctly appreciated, there was an important difference between, on the one hand, any notice that the prosecution might have had concerning the appellant's hiring of the van and, on the other, the appellant's Allouche evidence.[81] The former, while related to the latter, was nonetheless distinct and only capable of proof with different evidence. Proof of the antecedent fact of the hiring in and of itself did not shed any light on whether the appellant did so for any particular purpose or for a particular person, or what occurred after that event.

73. Therefore, there was no error in the majority of the Court below, like the trial judge, in differentiating between the fact that the appellant hired the van and the novelty of the Allouche connection.[82]

Conclusion

74. Fundamentally, the trial judge appreciated the real significance of the appellant having said that he hired the van from Mini Koala *for Allouche* and later delivered it to him; he was not misguided by the prosecutor's impugned statement. There was nothing in any pre-trial communications, filed documents or other evidence which could have reasonably led the prosecution to predict the particulars of the appellant's affirmative defence. Approached on this factual basis and guided by considerations of fairness, the trial judge correctly applied s 233(2) and permitted the prosecution to reopen its case to adduce the surveillance evidence in rebuttal. That the appellant's trial took this 'unusual' course was due to the appellant giving such evidence which was not reasonably foreseeable. There was, therefore, no error or irregularity in the trial judge's ruling and the majority of the Court below were correct in so finding.

Part VI: Argument in support of notice of contention

75. The respondent does not rely on a notice of contention.

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[80] *Evidence Act 2008* (Vic), s 56(2); see Judgment below, [291] (Macaulay JA) (CAB, 180).
[81] Judgment below, [334] (Macaulay JA) (CAB, 191).
[82] Judgment below, [113] (Niall JA); [337] (Macaulay JA) (CAB, 149, 192).

Part VII: Time required for oral argument

76. The respondent estimates that one and a half hours will be required for the presentation of its oral argument.

Dated: 12 January 2023

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ANNEXURE

Pursuant to item 3 of the Practice Direction No 1 of 2019, below is a list of each of the particular constitutional provisions, statutes and statutory instruments referred to in the submissions above.

Number	Description	Version	Provision
1	*Criminal Procedure Act 2009* (Vic)	98 (current)	ss 158, 182, 183, 224, 225, 233
2	*Crimes (Criminal Trials) Act 1993* (Vic)	10 (last before repeal)	ss 8, 11 ,15
3	*Crimes (Criminal Trials) Act 1999* (Vic)	10 (last before repeal)	ss 6, 7, 15
4	*Evidence Act 2008* (Vic)	26 (current)	ss 56(2), 164(1)