

HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, GLEESON, JAGOT AND BEECH-JONES JJ

SAER OBIAN

APPELLANT

AND

THE KING

RESPONDENT

Obian v The King
[2024] HCA 18
Date of Hearing: 15 March 2024
Date of Judgment: 8 May 2024
M77/2023

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Victoria

Representation

B W Walker SC with C T Carr SC and H L Canham for the appellant
(instructed by Milides Lawyers)

E H Ruddle KC with G L Buchhorn for the respondent (instructed by Office
of Public Prosecutions (Vic))

Notice: This copy of the Court's Reasons for Judgment is subject to
formal revision prior to publication in the Commonwealth Law
Reports.

CATCHWORDS

Obian v The King

Statutes – Construction – Statutory powers – Where s 233(2) of *Criminal Procedure Act 2009* (Vic) provides that prosecution may, with leave of trial judge, call evidence in reply "[i]f, after the close of the prosecution case, the accused gives evidence which could not reasonably have been foreseen by the prosecution" having regard to accused's response to summary of prosecution opening and accused's response to notice of pre-trial admissions – Where appellant convicted on charge of trafficking in drug of dependence – Where evidence of prosecution included evidence of alleged co-conspirator that appellant hired van involved in moving drugs – Where appellant gave evidence that he hired van on behalf of friend and handed van over to friend and had nothing more to do with van – Where prosecution applied for leave to adduce evidence in reply – Where prosecutor stated appellant's evidence was first time appellant said he hired van and that appellant previously denied being at car rental place – Where statements incorrect as prosecution had been previously informed appellant admitted he hired van – Where trial judge granted leave for prosecution to adduce evidence in reply – Whether exercise of power under s 233(2) of *Criminal Procedure Act* involved substantial miscarriage of justice because of prosecutor's incorrect statements – Whether incorrect statements material to trial judge's decision – Whether evidence was not reasonably foreseeable – Whether trial judge permitted to have regard to any relevant material or only to two specified documents in s 233(2).

Words and phrases – "evidence which could not reasonably have been foreseen by the prosecution", "exceptional circumstances", "exhaustive or merely inclusive", "incorrect inference", "material error", "material misunderstanding of the relevant facts", "not reasonably have been foreseen", "reasonably foreseeable", "substantial miscarriage of justice".

Criminal Procedure Act 2009 (Vic), ss 183, 233(2).

Drugs, Poisons and Controlled Substances Act 1981 (Vic), s 71AA.

1 GAGELER CJ, GORDON, GLEESON, JAGOT AND BEECH-JONES JJ. As with many common law axioms, the rule that the prosecution may not split its case is by no means absolute. That rule has long been hedged by courts calling in aid the "imperative demands of justice".¹ Dixon, McTiernan, Webb and Kitto JJ considered it "unsafe to adopt a rigid formula in view of the almost infinite variety of difficulties that may arise at a criminal trial", it being "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 [their] defence".² Generally speaking, the circumstances will not be exceptional if the prosecution "ought reasonably to have ... foreseen" the occasion for calling the further evidence.³ As a principle of common law, the rule that the prosecution may not split its case is amenable to statutory modification or supplementation.

2 Victoria has provided a statutory power enabling the prosecution to call evidence after it has closed its case if an accused gives evidence that was not reasonably foreseeable.⁴ This appeal concerns the proper construction of that statutory power and the question whether the exercise of the power in the circumstances of this case involved a substantial miscarriage of justice because the prosecutor misinformed the trial judge about a fact relevant to the exercise of the power.

3 The appellant was convicted of three charges, including on charge 3, a charge that the appellant on 14 June 2016 trafficked in a drug of dependence of not less than the commercial quantity applicable to that drug in contravention of s 71AA of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic). The appellant sought leave to appeal against his convictions on grounds related to the prosecution being permitted to call evidence in reply after he had given evidence. By majority (Niall and Macaulay JJA) the Court of Appeal of the Supreme Court of Victoria refused leave to appeal, albeit while construing the relevant empowering provision, s 233(2) of the *Criminal Procedure Act 2009* (Vic),

1 *Shaw v The Queen* (1952) 85 CLR 365 at 379.

2 *Shaw v The Queen* (1952) 85 CLR 365 at 380.

3 See, eg, *Lawrence v The Queen* (1981) 38 ALR 1 at 3, 10, 23. See also *Killick v The Queen* (1981) 147 CLR 565 at 569, 575-576; *R v Chin* (1985) 157 CLR 671 at 676-677, 684-687; *R v Soma* (2003) 212 CLR 299 at 311 [36].

4 *Criminal Procedure Act 2009* (Vic), s 233(2).

Gageler CJ
Gordon J
Gleeson J
Jagot J
Beech-Jones J

2.

differently. In dissent, Priest JA would have granted leave to appeal and allowed the appeal on the basis that the prosecution being permitted to call such evidence in reply caused a substantial miscarriage of justice.⁵

- 4 As will be explained: (a) the trial judge's decision to exercise the power in s 233(2) of the *Criminal Procedure Act* was not founded on a material misunderstanding of the relevant facts; (b) s 233(2) is to be construed on its own terms and is not to be confined to a very special or exceptional case in accordance with the common law rule; (c) Niall JA in the Court of Appeal correctly construed s 233(2) as a provision in which the specified matters to which the court must have regard are not exclusive or exhaustive of the matters potentially relevant to determining if the accused has given evidence which the prosecution could not reasonably have foreseen; and (d) there was no error by the trial judge in exercising the power in the circumstances of this case.

The statutory provisions

- 5 The purposes of the *Criminal Procedure Act*, as identified in s 1(a) and (c), include to clarify, simplify and consolidate the laws relating to criminal procedure and also to provide for new pre-trial disclosure requirements for the prosecution.

- 6 Part 5.5 (Pre-trial procedure) of the *Criminal Procedure Act* contains provisions introduced and thereafter amended to improve the efficiency of criminal trials, including by narrowing the issues in dispute.⁶ The provisions in Pt 5.5 apply, relevantly, to trials on indictment.⁷ Under s 182, the prosecution must file and serve a summary of the prosecution opening which outlines the manner in which the prosecution will put the case against the accused and the acts, facts, matters and circumstances being relied on to support a finding of guilt, as well as a notice of pre-trial admissions. By s 183, the accused, after being so served, must file and serve a response of the accused to the summary of the prosecution opening which identifies the acts, facts, matters and circumstances with which issue is taken and the basis on which issue is taken and a response of the accused to the notice of pre-trial admissions. However, under s 183(4), the accused need not state the

5 *Criminal Procedure Act 2009* (Vic), s 276(1).

6 *Crimes (Criminal Trials) Act 1993* (Vic); *Crimes (Criminal Trials) Act 1999* (Vic); Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 4 December 2008 at 4974.

7 *Criminal Procedure Act 2009* (Vic), s 158.

3.

identity of any witness (other than an expert witness) to be called by the accused or whether the accused will give evidence. It was also common ground in this appeal that s 183 does not require an accused to assert a positive defence.

7 Section 184 provides that if a party intends to depart substantially at trial from a matter set out in a document served and filed by that party under Div 2 of Pt 5.5, the party must so inform the court and the other party in advance of the trial and, if the court so orders, must inform the court and the other party of the details of the proposed departure. Section 189 relevantly provides that if the accused intends to call a person as an expert witness at the trial, the accused must serve on the prosecution the statement of the expert witness before the trial. Section 190(1) provides that an accused must not, without leave of the court, give evidence personally or adduce evidence from another witness in support of an alibi unless the accused has given notice of alibi as required. Section 190(4)(a) provides that a notice of alibi must contain particulars as to the time and place of the alibi.

8 Sections 224 and 225 in Pt 5.7 (Trial) respectively provide for the prosecutor's opening address to the jury and the accused's response to the prosecutor's opening address. By s 224(2), the prosecutor must restrict the opening to matters set out in the documents served and filed under Pt 5.5, unless the trial judge considers that there are exceptional circumstances. A similar restriction is imposed on the accused's response to the prosecution opening by s 225(2). Hence the extent of the disclosure of the accused's defence in the documents served and filed under Pt 5.5 affects the scope of the accused's response to the prosecution case before the jury. Further, s 226 entitles the accused, after the close of the prosecution case: (a) to make a submission that there is no case for the accused to answer; (b) to answer the charge by choosing to give evidence or call other witnesses to give evidence or both; (c) not to give evidence or call any witnesses.

9 By s 230, if the accused intends to call witnesses to give evidence at the trial, the accused must indicate, when called on by the trial judge to do so: (a) the names of those witnesses (other than the accused), and (b) the order in which those witnesses are to be called. Section 231 relevantly provides that if the accused intends to give evidence, or to call other witnesses on behalf of the accused, or both, the accused is entitled to give an opening address to the jury outlining the evidence that the accused proposes to give or call. Accordingly, and overall, the provisions give to the accused considerable scope as to the extent of disclosure of their defence.

10 Section 233(1) provides that if the trial judge gives leave to do so, the prosecutor or the accused may introduce at the trial evidence which was not disclosed in accordance with Pt 5.5 (the pre-trial procedure provisions) and which

Gageler CJ
Gordon J
Gleeson J
Jagot J
Beech-Jones J

4.

represents: (a) in the case of the prosecutor, a substantial departure from the summary of the prosecution opening, if any, as served on the accused and filed in court, or (b) in the case of the accused, a substantial departure from the response of the accused to the summary of the prosecution opening or the response of the accused to the notice of pre-trial admissions, if any, as served on the prosecution and filed in court. Section 233(2) of the *Criminal Procedure Act* is in these terms:

"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
- (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."

11 Importantly, s 233(3) provides that:

"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."

12 Accordingly, s 233(2) provides a separate statutory power to permit the prosecution to adduce evidence in reply in the circumstances specified in that provision, while s 233(3) preserves the power at common law to permit the prosecution to adduce further evidence after the close of its case in accordance with the common law rule.

Construction of s 233(2) of the *Criminal Procedure Act*

13 It may be accepted that s 233(2) refers to the accused giving evidence "which could not reasonably have been foreseen ... having regard to" the two specified documents which s 183(1) requires the accused to serve and file before the start of the trial (that is, the responses of the accused to the summary of the prosecution opening and the notice of pre-trial admissions). However, the text, context, and purpose of s 233(2) speak against that sub-section meaning that, in deciding if the evidence of the accused could not have been reasonably foreseen, the trial judge may have regard only to those two documents.

5.

14 As to text, it is a commonplace that if "the statute expressly states the considerations to be taken into account, it will often be necessary for the court to decide whether those enumerated factors are exhaustive or merely inclusive".⁸ There is nothing unusual in a statute directing a court that it must have regard to certain matters without expressly or implicitly prohibiting it from considering other matters. Section 233(2) does not expressly say that the trial judge may have regard only to the two specified documents and no other documents. Accordingly, any implied prohibition on the trial judge considering other material relevant to the question to be decided (namely, whether the accused has given evidence which could not reasonably have been foreseen by the prosecution) must be found in "the subject-matter, scope and purpose" of the statutory provisions.⁹

15 No such implicit prohibition is apparent. Given the subject-matter, scope and purpose of this statutory provision, the clearest possible language would be required before s 233(2) would be construed as requiring a trial judge to determine the central question posed (has the accused given evidence which could not reasonably have been foreseen by the prosecution) by reference exclusively to the two specified documents. The specified documents are part of the pre-trial procedure provisions in Pt 5.5 of the *Criminal Procedure Act*. It may be taken that the legislature well understood that the course of a criminal trial may involve the "almost infinite variety of difficulties" that caused Dixon, McTiernan, Webb and Kitto JJ in *Shaw v The Queen* to refrain from expressing a "rigid formula" to be applied to determine when the prosecution could call further evidence after the close of its case.¹⁰ That understanding no doubt informed the enactment of the relevant statutory provisions, the object of which was to enhance the efficiency of criminal trials. The statute also adopted the language of reasonable foreseeability from the common law test, which was not confined to formal documents filed in the proceedings.¹¹ As the power in s 233(2) may only be exercised after the prosecution has closed its case and when the accused gives the evidence which the prosecution contends it could not reasonably have foreseen, circumstances may have radically changed between the filing of the pre-trial documents under Pt 5.5 and the prosecution making an application under s 233(2). It may be taken to be

8 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39.

9 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40. See also *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 348 [23].

10 (1952) 85 CLR 365 at 380.

11 See, eg, *R v Chin* (1985) 157 CLR 671.

highly unlikely that, in the context of a statutory provision that is part of a scheme intended to provide greater efficiency (but not greater potential for unfairness and injustice) in criminal trials than the common law, the legislature intended a trial judge to act on a potentially false premise as to whether the evidence of an accused either was or was not reasonably foreseeable, in a manner that might work unfairness to either the prosecution or the accused. The natural inference, absent clear language to the contrary, is that the legislature intended the trial judge to consider the two specified documents, but also to act on the basis of an accurate and up-to-date understanding of the relevant circumstances.

16 Construing s 233(2) as exhaustively stating the matters to which the trial judge must have regard in determining if the accused has given evidence which the prosecution could not reasonably have foreseen would also result in incongruity with s 233(3), which preserves the operation of the common law. At common law the trial judge would determine the question by reference to the circumstances as they in fact existed at the time the prosecution applied to call the further evidence.¹² That being so, it is again highly unlikely that the legislature intended the statutory power, which is not conditioned on the existence of very special or exceptional circumstances, to be exercised on an incomplete or inaccurate view of the relevant circumstances which might work unfairness to either the prosecution or the accused. Niall JA put the same point in these terms in the Court of Appeal, "[g]iven the fundamental nature of the power and its importance to the trial process, it is unlikely that the critical condition on which the power rests could be determined on a limited factual basis that may not represent the true position known to the parties."¹³

17 There is also a construction of s 233(2) available which accords with the statutory text, recognises the context of a criminal trial, and can fulfill the statutory objective. That construction is to require the trial judge to have regard to the two specified documents and to permit the trial judge to have regard to such other matters as may be relevant to ensure that the trial judge can determine the central question (has the accused given evidence which could not reasonably have been foreseen by the prosecution) on an accurate basis. This outcome achieves the object of encouraging an accused's compliance with the pre-trial procedure provisions and ensures that a fundamental power in a criminal trial is exercised only on a proper factual foundation, thereby avoiding a risk of unfairness to either the

12 *Shaw v The Queen* (1952) 85 CLR 365 at 384; *Lawrence v The Queen* (1981) 38 ALR 1 at 3, 7.

13 *Obian v The King* (2023) 69 VR 553 at 579 [101].

7.

accused or the prosecution. This non-exhaustive construction, moreover, avoids an unsatisfactory alternative construction to the effect that the power in s 233(2) depends exclusively on consideration of the two specified documents, but the discretionary decision whether or not to exercise that power enables consideration of all relevant circumstances. Nothing commends such a circuitous and unnecessarily complex approach to a provision which is readily able to be construed as mandating consideration of two documents, but not prohibiting consideration of any other matter relevant to the central statutory question of the reasonable foreseeability of the evidence as given by the accused.

Prosecution's and appellant's evidence

18 In the present matter, the prosecution's case on charge 3 was that the appellant participated with others in the transportation of the drugs of not less than the applicable commercial quantity by hiring the van in which the drugs were moved around Melbourne early on 14 June 2016 and being present at the time of those movements of the van.

19 The evidence for the prosecution included that of an alleged co-conspirator, Khaled Moustafa, who said that the appellant had been storing the drugs in a storage unit Mr Moustafa had available. On 13 June 2016 the appellant and another person, Omar Bchinnati, picked Mr Moustafa up and they tried to work out a location to which the drugs could be moved. Amongst other things, Mr Moustafa called Bilal Allouche asking if Mr Allouche could urgently hire a van for them. Mr Allouche could not assist. Mr Moustafa said he then drove the appellant to other premises, from which the appellant left to hire a van to move the drugs. When the appellant returned with the hired van, Mr Moustafa and the appellant, with others (not including Mr Allouche), moved the drugs.

20 The evidence for the prosecution also included that of Ms Wang, the woman at the car rental place. She said that a very fat man needed an urgent rental car just after midnight on 14 June 2016 to "move a box". Because this man only had a debit card, not a credit card, Ms Wang told him that she would require a cash bond of \$800. According to Ms Wang, the man left and returned with the bond money, produced a licence in the name of "Saer Pbian", and gave a telephone number (which was registered to the appellant). Ms Wang completed the rental and provided this man with a white Toyota HiAce van.

21 After the prosecution closed its case, the appellant gave evidence. The appellant said that on the evening of 13 June, or early morning of 14 June 2016, he received a call from a friend. The friend asked if he could borrow the appellant's van. The appellant said "no" as he needed his van. The friend later called back and

Gageler CJ
Gordon J
Gleeson J
Jagot J
Beech-Jones J

8.

asked the accused if he could rent a van for him. The appellant said "yes". The appellant then went out and rented a van for his friend. The friend was Bilal Allouche. The appellant went by taxi to a place on Bell Street and inquired about a rental. The car rental place on Bell Street was about 10 to 15 minutes away by car. The woman at the car rental place told him it would cost \$140 and a bond of \$800 was also required. The appellant went to Mr Allouche's house by taxi and told him the cost, including the required bond. The appellant returned to the car rental place with the money, a debit card, and his driver's licence. His licence had a typographical error identifying his last name as "Pbian" rather than "Obian". The appellant rented the van under the name "Pbian" and drove it back to Mr Allouche's house where he handed the van over to Mr Allouche and had nothing more to do with the van. There was also evidence in the trial from the appellant that, at this time, he was "fat" (weighing nearly 180 kg). In cross-examination the appellant said that he arrived in the van at the house of Mr Allouche at just before 12.55 am on 14 June 2016.

Prosecution's application to adduce evidence in reply

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After the appellant gave this evidence, the prosecution applied for leave to adduce evidence in reply. The reply evidence (as given) was described by Macaulay JA in the Court of Appeal in terms the appellant accepted to be accurate.¹⁴ The evidence was of a surveillance operative concerning surveillance of Mr Allouche's house in Harding Street, Coburg. The evidence was that at 12.03 am on 14 June 2016 a surveillance operative drove by Mr Allouche's house and recorded that there were no known vehicles or persons sighted. At 12.12 am, four other operatives arrived at Mr Allouche's house and "maintained surveillance" thereafter. At 12.23 am, Mr Allouche was seen to emerge from his house and speak on the telephone. Two minutes later Mr Allouche entered a Ford sedan which arrived at Harding Street and the car drove to a 7-Eleven store in Bell Street, Coburg. At that store Mr Allouche got out of the sedan and was seen talking on the telephone outside the 7-Eleven store. At 12.36 am, Mr Allouche re-entered the sedan which drove to a kebab shop on Sydney Road. After Mr Allouche entered the shop and returned to the vehicle, the vehicle returned to his home by 12.46 am where he was seen to leave the sedan and enter his house by the front door. Until 1.26 am there were no further observations of note, when all operatives ceased observations of the house and left for another area.

14 *Obian v The King* (2023) 69 VR 553 at 615 [296]-[298].

23 The surveillance evidence was therefore inconsistent with the appellant's evidence that he returned in the van to Mr Allouche's house just before 12.55 am.

24 The transcript of the argument before the trial judge about whether the prosecution should be given leave to adduce the evidence in reply extends over some 70 pages from 10 to 12 September 2019, including a number of adjournments requested by then counsel for the appellant.

Trial judge's ruling

25 The trial judge then ruled in these terms:¹⁵

"I will grant leave pursuant to s 233(2) of the [CPA], for the Crown to reopen its case and lead evidence from Surveillance Operative 116 and 26. In so far as 26 is concerned, I will grant leave to lead evidence of the general background and then the observations made at 81 Harding Street, Coburg, the home of Mr Bilal Allouche between 12.12 am and 1.26 am. And in the case of Surveillance Operative 116, general background, only so much as necessary for the jury to understand the evidence. And the observations of that operative at 81 Harding Street, Coburg from 0003 to 0126.

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) of the [CPA] does not provide any guidance on how that discretion is to be exercised other than that it can only obviously be exercised where the evidence in the defence case could not reasonably have been foreseen by the prosecution. And I note that the Bench Notes in the Criminal Procedure manual say this:

The prosecution may reopen its case if the accused gives evidence that could not reasonably have been foreseen by the prosecution having regard to the defence response to the summary of the prosecution opening and the defence response to the notice of pre-trial admissions.

15 *Obian v The King* (2023) 69 VR 553 at 611-612 [287] (emphasis added).

Gageler CJ
Gordon J
Gleeson J
Jagot J
Beech-Jones J

10.

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.

And it quotes *Chin*, *Lawrence* and *Killick*. And then this is the comment by the author of the Bench Notes:

It appears that s 233(2) of the CPA 2009 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 this evidence being led and it has available to it credible evidence which would allow a jury to find that the defence evidence was contradicted by the Crown evidence that is sought to be led in reply.

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.*"

A wrong fact

26

On 10 September 2019, when the prosecution made its application, the basis for the admission of the further evidence was said to be its relevance to the credibility of the appellant and a fact in issue. The prosecutor said (incorrectly) that the appellant's evidence was the "first time that we've heard that Mr Obian now says he did hire this van". The prosecutor, in the course of this application, confirmed this – saying, for example, that, before the appellant gave evidence, he had always denied being at the car rental place. These statements were wrong because the appellant's lawyer had previously informed the prosecution, by email on 24 July 2019, that the appellant admitted that he hired the van and, in so doing, dealt with Ms Wang as she had said, other than that he did not admit telling Ms Wang he was moving boxes with the van. Further, the appellant's (unsigned) notice of alibi dated 22 November 2018 said that he was at his parents' house at all material times except when, relevantly, "attending at a car rental establishment and returning home". In other words, the prosecutor was wrong to inform the trial judge that the first time that the prosecution knew that the appellant said he hired the van was when he gave evidence to that effect.

27 In the course of the prosecutor's submissions in support of the application, the trial judge observed that it was a fact in issue whether the appellant hired the van and with what intent he hired it, that is, intent either to give the van to Mr Allouche and not to use it for the appellant's own purposes, or to use the van for the purpose of moving the drugs from one storage facility to another. The prosecutor agreed with this description. The trial judge then refined his conception of the relevant fact in issue as being whether the appellant was simply hiring the van for Mr Allouche so that, when he handed the van over to Mr Allouche, the appellant "nicked off [and] everything that happens thereafter he knows nothing about", or the appellant hired the van to move the drugs. The trial judge said this was the fact in issue and the basis for admitting the surveillance evidence was its relevance to this fact and not the appellant's credibility (contrary to the prosecutor's argument to the effect that the evidence was admissible as relevant to the appellant's credibility).

28 Having so conceived of the fact in issue, the trial judge asked the prosecutor why the prosecution could not have foreseen the appellant giving this evidence. In answer, the prosecutor again twice referred (wrongly) to the appellant always having denied being at the car rental place, and continued saying that the first time the prosecution had heard the appellant say he did rent the van but gave it to someone else and thereafter knew nothing about the van was during the appellant's evidence. The argument then continued with the prosecutor making these points: (a) Mr Moustafa had given evidence that he tried to get Mr Allouche to hire a van and Mr Allouche said he would try but never came through; (b) there was no other evidence or suggestion that Mr Allouche was near the storage facilities at the relevant time; and (c) accordingly, as far as the prosecution was concerned, Mr Allouche was "out of the picture" until the appellant's evidence, so there was no need for the prosecution to call evidence about what Mr Allouche was doing on the early morning of 14 June 2016 and, indeed, such evidence would have been irrelevant to the facts in issue and inadmissible until the appellant gave evidence that he hired the van for and gave it to Mr Allouche.

29 It should also be noted, in fairness to the prosecutor, that in the appellant's responses to the prosecution's opening dated 8 February and 5 November 2018 the appellant, respectively, disputed that he hired the van and did not admit that he hired the van. These responses, unlike the email dated 24 July 2019, were formal

Gageler CJ
Gordon J
Gleeson J
Jagot J
Beech-Jones J

12.

documents required to be served and filed under s 225 of the *Criminal Procedure Act*.¹⁶

30 While the appellant's counsel did not correct the error about the hiring of the van, the lengthy discourse between the trial judge and the appellant's counsel about the application included the trial judge saying, amongst other things: (a) "[w]here is there anywhere in the defence response the slightest suggestion [the appellant] hired [the van] on behalf of Mr Allouche, took it over to his place"; (b) "[w]here 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?"; (c) "[t]he point now is ... 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?"; and (d) Mr Moustafa's evidence "doesn't put the Crown on notice that you're going to lead evidence through your client that he was hiring the car on behalf of Allouche. In fact that ... defence evidence flies in the face of the evidence the Crown is leading. So, quite apart from putting them on notice, it's in fact the opposite." Following this last exchange with the appellant's counsel, the matter was adjourned to enable counsel to examine the record to identify any evidence putting the prosecution on notice that the appellant had hired the van for Mr Allouche. After the adjournment the appellant's counsel informed the trial judge there was no such evidence. The trial judge then ruled as set out above.

31 The appellant's counsel then opposed the prosecution's application to call further evidence on several other grounds, including that the evidence was not true rebuttal evidence, was of little probative value, and would unfairly prejudice the appellant.¹⁷ In response to these submissions, the trial judge said, for example, "[t]his [surveillance] evidence just simply was not relevant in the Crown case; they couldn't have called it. How was it relevant? Until your client in the witness box in his evidence-in-chief raised for the first time that he had rented this vehicle on behalf of Mr Allouche, gone over to his place, got the money for it, gone back to the car rental place, picked up the vehicle, driven back to Mr Allouche and left the vehicle with him and walked home ... Until that evidence was given the evidence of the surveillance of Mr Allouche and what the operatives observed in relation to his premises simply was not relevant evidence; it couldn't have been led by the

16 Multiple versions of documents were filed as the matter had proceeded before four juries that had to be discharged before the fifth, and final, trial.

17 *Evidence Act 2008* (Vic), s 137 ("[i]n a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the accused").

Crown." The trial judge also said, "[t]he [surveillance] evidence was simply irrelevant to the Crown case until your client said what he said about the circumstances of the hiring of the vehicle". The trial judge's manifest focus is the appellant's evidence concerning his asserted purpose in hiring, and subsequent dealings with, the van – that is, that the appellant "hired [the van] on behalf of Mr Allouche [and] took it over to [Mr Allouche's] place".

32 It may be accepted that, if a trial judge determines to exercise the power in s 233(2) on an incorrect understanding of the facts material to the question whether the prosecution could have reasonably foreseen the accused's evidence, the giving of the evidence in reply may (not must) involve a substantial miscarriage of justice.¹⁸ It may do so on the basis that the admission of the further evidence involves a "serious departure from the prescribed processes for trial".¹⁹ The departure would be that, if (on a correct understanding of the material facts) the prosecution could reasonably have foreseen the evidence of the accused then, under s 233(2) (and the common law rule), such further evidence was not to be admitted. In that event, if it is possible that the admission of the further evidence of the prosecution may have affected the result of the trial, the prosecution being unable to demonstrate that the conviction of the accused was inevitable, then the threshold of a "substantial miscarriage of justice" will be satisfied.²⁰

33 In the present case, however, it must be inferred that the incorrect statements by the prosecutor were not material to the trial judge's decision. Specifically, it cannot be inferred that the trial judge gave any material weight to the prosecutor's incorrect statements that the prosecution had no notice that the appellant might give evidence that he had hired the van. The matter of significance to the trial judge was that the prosecution had no notice that the appellant might give evidence that he had hired the van for, and given the van to, Mr Allouche as the appellant described in his evidence. This is apparent not only from the terms of the argument before the trial judge, but also from the terms of the trial judge's ruling (set out above), in particular his Honour's reference to his "reasons which will become apparent from my discussion with counsel in the course of this application" which, manifestly, evolved beyond the prosecutor's incorrect statements to the true relevance of the appellant's evidence – not that the appellant

18 *Criminal Procedure Act 2009* (Vic), s 276(1).

19 *Baini v The Queen* (2012) 246 CLR 469 at 479 [26].

20 *Baini v The Queen* (2012) 246 CLR 469 at 481-482 [31]-[33].

Gageler CJ
Gordon J
Gleeson J
Jagot J
Beech-Jones J

14.

hired the van, but that he did so for Mr Allouche and, after delivering the van to Mr Allouche, had no further dealings with the van.

34 Accordingly, the submission for the appellant that the prosecutor's incorrect statements were themselves material errors cannot be accepted. It also follows that it cannot be said, as the appellant would have it, that by reason of the prosecutor's incorrect statements alone (or at all), the trial judge determined the application under s 233(2) of the *Criminal Procedure Act* in a factual matrix that was wrong in material respects and resulted in a substantial miscarriage of justice. This means that the first way in which the case for the appellant in this appeal was put, that the prosecutor's incorrect statements in and of themselves led the trial judge into material error, must be rejected.

A wrong fact leading to a wrong inference

35 The next way in which the case for the appellant was put in this appeal was that the prosecutor's incorrect statements caused the trial judge to draw an incorrect inference that the evidence the appellant had hired the van for Mr Allouche was not reasonably foreseeable. The appellant contended that the correct approach to the drawing of the required inference was that: (a) it was likely and therefore reasonably foreseeable that, if the appellant gave evidence, he would say he hired the van (see the email of 24 July 2019 and the notice of alibi dated 22 November 2018); (b) as the appellant had pleaded not guilty to charge 3 relating to events on 14 June 2016, it followed as a matter of logic that, if he admitted to hiring the van in accordance with step (a), he was also likely to say he did so on behalf of another person; and (c) the evidence naturally pointed to that other person being Mr Allouche. The appellant thereby argued that the reasonable foreseeability of the role of Mr Allouche (that the appellant hired the van for him) could not be divorced from the reasonable foreseeability of the appellant having hired the van.

36 The prosecution did not suggest in this appeal that, if the accused chose to give evidence, it was not reasonably foreseeable that he would say that he hired the van. However, steps (b) and (c) in the argument for the appellant cannot be accepted. As to step (b), it does not logically follow from the facts, that the appellant pleaded not guilty to charge 3 and was likely to admit that he hired the van if he gave evidence, that the appellant was also likely to say he hired the van on behalf of another person. Before the appellant gave the relevant evidence, that he hired the van for Mr Allouche, gave him the van, and then had nothing further to do with the van, an unknown number of possibilities were as equally possible as that evidence. Nothing made any one speculative possibility any more likely than any other speculative possibility. Contrary to the submissions for the appellant, the likelihood of the appellant confessing that he hired the van, if the

appellant gave evidence, did not make the appellant's ultimate mode of avoiding culpability (saying that he hired the van for another person and, after delivering it to that person, had nothing to do with the van) reasonably foreseeable. For example, the appellant could have hired the van on his own behalf and then allowed another person to borrow it. Or he could have hired the van on his own behalf and said it was stolen. As Macaulay JA said in the Court of Appeal, "[a]t best, the [appellant] left an ambiguous and Delphic breadcrumb trail to what his real defence was".²¹ That ambiguous trail did not make it reasonably foreseeable that, if the appellant gave evidence, he would say he hired the van on behalf of another person.

37 As to step (c), even if step (b) had been established, the evidence did not naturally point to that other person, for whom the appellant allegedly hired the van, being Mr Allouche. In fact, the evidence pointed away from that person being Mr Allouche and it was no part of the prosecution's case that Mr Allouche was involved in moving the drugs on 14 June 2016. For one thing, Mr Moustafa repeatedly gave evidence under cross-examination from the appellant's counsel to the effect that he and the appellant first asked Mr Allouche to hire the van for them and Mr Allouche: "couldn't help"; "couldn't get us a van or truck"; said "I can't help"; "told us he can't help"; "told us ... he couldn't organise a truck or van"; said "I can't find anyone that's got a van or truck"; and "said he can't help". For another, further questions of Mr Moustafa by the appellant's counsel to the effect that Mr Moustafa could not know if Mr Allouche had contacted the appellant at a later time on 14 June 2016 about hiring a van went nowhere. In response to these questions Mr Moustafa stated that, first, the appellant was with him when they went to see Mr Allouche about hiring the van and, second, when Mr Allouche said he could not help, Mr Moustafa and the appellant left, Mr Moustafa dropped the appellant back at the appellant's house, and the appellant then left to get the van.

38 Finally, and importantly, the surveillance evidence was not relevant to the fact of the appellant hiring the van. It was relevant only to the fact of the appellant having taken the hired van to Mr Allouche's place in the early hours of 14 June 2016. Further, the appellant's previous acknowledgments (made via the email on 24 July 2019) that he hired the van and attended the car rental place did not in any way raise either the purpose for hiring the van which the appellant subsequently asserted in his evidence (that he hired it on behalf of Mr Allouche) or that he took the van to Mr Allouche's place after which he did not see the van again. Moreover, the alibi notice asserted that the appellant was at home at all material times except for "explained absences taking his parents to the airport, attending at a car rental

21 *Obian v The King* (2023) 69 VR 553 at 627 [342].

Gageler CJ
Gordon J
Gleeson J
Jagot J
Beech-Jones J

16.

establishment and returning home", which is inconsistent with the appellant having attended at Mr Allouche's house.

39 For these reasons, it cannot be said that, if the appellant gave evidence, it was reasonably foreseeable that his evidence would be that he hired the van for Mr Allouche, drove the van to Mr Allouche's place, and then had no further involvement with the van.

Conclusion

40 The majority in the Court of Appeal were correct to conclude that the trial judge did not err in exercising the power in s 233(2) of the *Criminal Procedure Act* to permit the prosecution to adduce the evidence in reply in the circumstances of this case. The appeal should be dismissed.

