HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 02 Sep 2022 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	C13/2022
File Title:	Vunilagi v. The Queen & Anor
Registry:	Canberra
Document filed:	Form 27D - Respondent's submissions
Filing party:	Respondents
Date filed:	02 Sep 2022

Important Information

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

IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

No C13 of 2022

BETWEEN:

SIMON VUNILAGI
Appellant

and

THE QUEEN
First Respondent

ATTORNEY-GENERAL OF THE AUSTRALIAN CAPITAL TERRITORY
Second Respondent

FIRST RESPONDENT'S SUBMISSIONS

Part I: Certification for publication

1. These submissions are in a form suitable for publication on the internet.

Part II: Issues

2. This appeal raises a narrow issue as to whether the ACT Court of Appeal were correct to dismiss the appellant's against conviction, brought, in part, on the basis that an order requiring him to be tried by a judge alone was made pursuant to a constitutionally invalid law.

3. The first respondent filed a Notice of Contention on 8 July 2022. The first respondent no longer presses the Notice of Contention on this appeal. The first respondent did not actively make submissions on the constitutional validity arguments raised by the appellant before the Court of Appeal, which were addressed by the second respondent. Accordingly, for the purpose of this appeal, the first respondent proposes to address on the material factual issues and orders on disposition in the event that either of the appellant's grounds are successful.

Dated 2 September 2022
Filed on behalf of the **First Respondent** by:

The Director of Public Prosecutions (ACT)
Ground Floor, Reserve Bank Building
20-22 London Circuit
CANBERRA CITY ACT 2601

Reference: 201916117
Telephone: (02) 6207 5399
Facsimile: (02) 6207 5428

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

4. Notices pursuant to s 78B of the *Judiciary Act 1903* (Cth) have been given by the appellant, and the first respondent is satisfied those notices are sufficient.

Part IV: Material facts

5. The first respondent does not contest the summary of facts as set out in AWS [5] – [7]. In relation to AWS [8], the first respondent notes the appellant was tried jointly, with three other accused on indictment dated 8 September 2020 containing 17 counts.[1] In respect of the appellant, this included 10 counts of engaging in sexual intercourse without consent, contrary to s 54(1) of the *Crimes Act 1900* (ACT), and one count of committing an act of indecency without consent, contrary to s 60(1) of the *Crimes Act 1900* (ACT).[2] The offences occurred in the early hours of 3 November 2019. Each count on the indictment arose from an incident which involved a single complainant.[3]

6. The appellant was arrested on 10 December 2019 following the execution of a first instance warrant.[4] Following some time on remand, and contrary to AWS [8], he was granted bail in the Supreme Court on 23 April 2020.[5] His co-accused were remanded in custody following their arrests in November and December 2019[6] and all remained in custody prior to the trial which commenced on 8 September 2020.

7. On 9 October 2020 the appellant was found guilty by the trial judge of seven counts of sexual intercourse without consent and the single count of committing an act of indecency without consent. The appellant's bail was revoked, and he was remanded in custody. The appellant was sentenced on 13 November 2020 to a total sentence of six years, three months and 14 days' imprisonment with a non-parole period of three years and one month.[7] The appellant will be eligible to be released on parole on 25 June 2023.[8]

---

[1] This updated indictment replaced an earlier indictment filed on 31 March 2020 (Appellant's chronology).
[2] Indictment (Core Appeal Book ("CAB") 6, 65).
[3] Indictment (CAB 6).
[4] Charge sheet: CC2019/13101 (First Respondent's Book of Further Material ("FRFM") 5); *R v Vunilagi; R v Vatanitawake; R v Masivesi; R v Macanawai* (2020) 354 FLR 452 at [8] (CAB 13); *R v Vunilagi* [2020] ACTSC 303 ("sentence reasons") at [7] (CAB 132).
[5] Supreme Court application in relation to bail (FRFM 6); Affidavit of Priyanka Hana Koci (FRFM 8); Bail undertaking (FRFM 17).
[6] Court of Appeal at [221] (CAB 193).
[7] Sentence reasons at [84] (CAB 140).
[8] Ibid.

8. As noted at AWS [8], prior to the amendments made to the *Supreme Court Act 1933* (ACT) ("*SCA*") in response to the COVID-19 emergency in 2020, the nature of the charges faced by the appellant and his co-accused required that he be tried by jury pursuant to s 68A of the *SCA*. Each of the offences on the indictment being an "excluded offence" as referred to in s 68B(1).[9]

9. On 2 April 2020, the ACT Legislative Assembly enacted the *COVID-19 Emergency Response Act 2020* (ACT) which made amendments to s 68B and introduced s 68BA. Relevantly, s 68B was amended to remove the limitation in s 68B(1), whereby an accused in the appellant's position who was charged with an "excluded offence" could elect to be tried by judge alone during the emergency period: s 68B(3A) Additionally, s 68BA introduced the power for the Supreme Court to order an accused person (whether charged with an "excluded offence" or not) to be tried by judge alone, if satisfied such an order would "ensure the orderly and expeditious discharge of the business of the court" and was "otherwise in the interests of justice": s 68BA(3). Section 68BA(4) required the Supreme Court to give notice to the accused and the Crown of a proposed order under s 68BA(3) and invited submissions to be made.

10. Section 68BA was repealed on 9 July 2020. From that time, no further notices could be issued pursuant to s 68BA(4) and therefore no orders requiring an accused person to have their trial heard by a judge alone could be made. Prior to its repeal, on 18 June 2020 the Supreme Court issued a notice pursuant to s 68BA(4) in relation to the trial of the appellant and his co-accused.[10] The appellant's matter was one of six matters where an order pursuant to s 68BA(3) was made or proposed to be made.[11] Of those six matters, the appellant was the only accused whose trial proceeded by way of trial by judge alone contrary to the accused's wishes. It was also the last judge alone trial to be heard as a result of an order made pursuant to s 68BA(3), the one other judge alone trial occurring in May 2020 with the consent of both parties.[12] There was no application for reconsideration

---

[9] An "excluded offence" is defined in s 68B(4) as an offence referred to in Schedule 2, part 2.2, column 3 and includes the offences with which the appellant was charged.
[10] Section 68BA(4) notice (FRFM 19).
[11] *R v Vunilagi; R v Vatanitawake; R v Masivesi; R v Macanawai* (2020) 354 FLR 452; *R v UD* [2020] ACTSC 88; *R v UD (No 2)* (2020) 282 A Crim R 436; *R v UD (No 3)* (2020) 352 FLR 286; *R v Coleman* (2020) 351 FLR 297; *R v Ali (No 3)* (2020) 15 ACTLR 161; *R v NI* [2020] ACTSC 137; and *R v Booth; R v Fisher* [2020] ACTSC 204.
[12] *R v NI* [2020] ACTSC 137.

of the s 68BA(3) order made by the appellant prior to, or at the time of his trial, nor did he seek leave to appeal the order by way of an interlocutory appeal.[13]

Arguments before the Court of Appeal

11. The appellant's appeal against conviction was heard by the Court of Appeal pursuant to s 37E(2)(a) of the *SCA*.[14] The appellant argued that his convictions should be quashed on a number of grounds including that the verdicts of guilty were unreasonable or could not be supported, having regard to the evidence,[15] that a miscarriage of justice occurred by way of the trial judge relying upon common knowledge,[16] and that his trial miscarried as a result of the constitutional invalidity of the order made pursuant to s 68BA(3). In respect of this ground, the appellant sought, and was granted leave by the Court of Appeal to argue the point as it had not been raised before the trial judge.[17] Additionally, the appellant contended that, invalidity aside, he suffered a miscarriage of justice as a result of being tried by judge alone instead of a jury.[18] A further ground contended the trial judge's decision was infected by error by taking into account an irrelevant consideration, and that a trial by judge alone deprived him of a fair trial.[19]

12. In respect of the ground challenging the validity of s 68BA, the appellant contended, relevantly, that the specific section offended the principles in *Kable v Director of Public of Prosecutions (NSW)*[20] ("the *Kable* argument") and more generally, that trial by judge alone in the ACT was precluded by s 80 of the Constitution, distinguishing the decision of *R v Bernasconi*[21] ("the s 80 argument"). The *Kable* argument contained two limbs, that is, that s 68BA was incapable of equal application in the sense of permitting a different mode of trial in potentially identical cases,[22] and that the conditions controlling the exercise of the discretion in s 68BA(3) were incapable of judicial application.[23]

---

[13] An order, ruling or direction made pre-trial is binding unless the trial judge considers it is in the interests of justice to reconsider: *Court Procedures Act 2004* (ACT), s 76(3); *SCA* s 37E(4).
[14] See Further Amended Notice of Appeal (CAB 143 – 145).
[15] *SCA*, s 37O(2)(i).
[16] *SCA*, s 37O(2)(iii).
[17] Court of Appeal at [211] (CAB 192); *Court Procedures Rules 2006* (ACT), r 5531.
[18] Court of Appeal at [3] – [4] (CAB [151).
[19] Court of Appeal at [271] – [276] (CAB 204).
[20] (1996) 189 CLR 51 ("*Kable*").
[21] (1915) 19 CLR 629 ("*Bernasconi*").
[22] Court of Appeal at [226] – [234] (CAB 194 – 195).
[23] Court of Appeal at [235] (CAB 196).

13. The Court of Appeal unanimously rejected all grounds, and consequently dismissed the appellant's appeal. On this appeal, the appellant only challenges the ground in respect of the validity of s 68BA. However, it is noted that in respect of the *Kable* limitation (ground 1) in particular, the argument before this Court is far narrower than that which the Court of Appeal was considering.

Part V: Argument

14. The first respondent proposes to adopt and rely on the arguments submitted on behalf of the second respondent in relation to the primary arguments in respect of the constitutional validity of s 68BA.

Disposition if success on invalidity grounds

15. The consequence of s 68BA being declared invalid means that the order of 13 August 2020, requiring the appellant to be tried by judge alone, was not permitted to be made. Consequently, in the absence of the appellant having made an election pursuant to s 68B (as it existed at the time), the appellant's trial contravened the statutory requirement for the offences to be tried by jury in s 68A. As a result, the appellant's appeal against conviction would be allowed on the "ground there was a miscarriage of justice": *SCA*, s 37O(2)(a)(iii).

16. The appellant asserts that, if his appeal is allowed his convictions should be quashed: AWS [46]. The first respondent submits that if the appeal is allowed this Court should quash the convictions and exercise its discretion to order a re-trial.[24] In the present matter, the Court of Appeal assumed that the "necessary consequence of such a conclusion would be the ordering of a retrial."[25] The first respondent submits that the interests of justice favour this Court ordering a re-trial.[26] *Firstly*, whilst the appellant contended the verdict was unreasonable in the Court of Appeal, he does not challenge the Court of Appeal's rejection of that ground of appeal. In this regard, there is no challenge by the appellant to the cogency and strength of the admissible evidence against him which is capable of

---

[24] *Judiciary Act 1903* (Cth), s 39. The Court of Appeal may order a re-trial pursuant to s 37O(1)(e) of the *SCA*.
[25] Court of Appeal at [212] (CAB 192).
[26] *Director of Public Prosecutions (Nauru) v Fowler* (1984) 154 CLR 627.

supporting a verdict of guilt at a subsequent trial.[27] A new trial would not "impermissibly give the prosecution an opportunity to supplement or 'patch up' a defective case" or allow the prosecution to present a different case.[28]

17. *Secondly*, the error in the present case is a defect in the legislation which applied, akin to a technical error, rather than evidential deficiency, error by the prosecution or other defect in the conduct of the trial.[29] *Thirdly*, there is significant public interest in the due prosecution of the appellant. The nature and circumstances of the offending is extremely serious, involving repeated instances of sexual assault upon the complainant. Where the appellant's arguments on this appeal are successful, it is appropriate that the matter go back before the ACT supreme Court and the guilt or innocence of the appellant be determined by a jury. *Fourthly*, there are no circumstances which would make it unjust for the appellant to stand trial again. The length of time between the offending and any subsequent trial is not such as to occasion prejudice to the appellant, nor has a significant portion of his sentence expired.[30]

Part VI: Notice of Contention

18. The first respondent filed a Notice of Contention on 8 July 2022. As noted above, the first respondent does not press the Notice of Contention

Part VII: Estimate

7. The first respondent estimates it will require no longer than 15 minutes to present its argument, subject to such questions which may arise.

Dated: 2 September 2022

.....
Katie L McCann
Counsel for the First Respondent
Telephone: (02) 6207 5399
Facsimile: (02) 6207 5428
Email: katie.mccann@act.gov.au

---

[27] *R v Taufahema* (2007) 228 CLR 232 at 256 [53] (Gummow, Hayne, Heydon and Crennan JJ) ("*Taufahema*"); *Eastman v Director of Public Prosecutions (No 2)* (2014) 9 ACTLR 178 at 256 [270] ("*Eastman*"), citing *Gilham v R* [2012] NSWCCA 131 at [649].
[28] *Eastman* at 256 [270].
[29] *Taufahema* at 255 – 256 [51]; [53].
[30] Ibid at 257 [55]; *Jiminez v The Queen* (1992) 173 CLR 572 at 590 (McHugh J).

Annexure A

COVID-19 Emergency Response Act 2020 (ACT) as at 2 April 2020

Court Procedures Rules 2006 (ACT) as at 17 May 2021

Crimes Act 1900 (ACT) as at 9 October 2020

Judiciary Act 1903 (Cth) as at 2 September 2022

Supreme Court Act 1933 (ACT) as at 1 April 2020, 18 June 2020, 17 May 2021