HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: SAER OBIAN
Appellant

and

THE KING
Respondent

APPELLANT'S REPLY

Part I: Certification

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

Part II: Argument in reply

There is no dispute that the admission to hiring the van was reasonably foreseeable

2. The respondent argues (at RS [24]) that the stances adopted by the appellant about his involvement in hiring the HiAce van were "equivocal", that he had "resiled" from earlier admissions to hiring the van, and (at RS [68]) that the appellant had not "clearly and unambiguously 'admitted' to hiring the van". In doing so, the respondent relies primarily on statements of agreed facts which were silent with respect to the van hire (RS [17]-[19], [22]-[23]). A statement of agreed facts is a document that facilitates formal proof of aspects of the prosecution case.[1] The absence of a formally agreed fact that the appellant hired the van meant that the prosecution was put to proof on that issue. In no way did the absence of a formally agreed fact derogate from the repeated, express communications to the prosecution[2] of the reasonable foreseeability—and indeed the likelihood—that, if he chose to give evidence after the close of the prosecution case, the appellant would admit to hiring the van.

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1 See *Evidence Act 2008* (Vic), s 191.
2 In the appellant's 24 July 2019 email in response to the notice of pre-trial admissions, in his notice of alibi and by the appellant's counsel in open court: see AS [22]-[24] and RS [11], [13]-[15].

3. Importantly, there appears to be no dispute on this appeal[3] that, if the appellant chose to give evidence, it was reasonably foreseeable that he would admit to hiring the HiAce van. For the reasons argued at AS [57]-[63], [75]-[76], and below, that fact in itself establishes that the trial judge decided the application to reopen the prosecution case on a wrong basis.

The trial judge's error was material

4. The respondent submits that the "prosecutor's impugned statement[s] had no material impact on the trial judge's ruling" (RS [49]). On the other hand, the respondent concedes (properly) that: the two aspects of the appellant's evidence—that he admitted to hiring the van and that he did so for Allouche—were "related" (RS [72]); and that, once the power under s 233(2) of the CPA is enlivened, the trial judge is then called upon to make a discretionary, evaluative judgment (RS [47]). The extent of the accused's pre-trial disclosure (or lack thereof) and the extent of the prosecutor's forewarning of the accused's evidence (or lack thereof) are relevant to that evaluative assessment.[4]

5. In this case, his Honour allowed the application to reopen the prosecution case on the erroneous basis that the prosecution had no forewarning that the accused would admit to hiring the van, that there had been no response to the notice of pre-trial admissions, and that such disclosure as the accused had given contradicted his eventual evidence. The factors his Honour weighed in the balance in determining the application to reopen the prosecution case were distorted as a result.

6. The transcript of the discussion leading up to the grant of leave to reopen the prosecution case—including the specific passages selected and extracted at RS [52] and [55]—demonstrates that the trial judge was considering the foreseeability of *both* the appellant's admission to hiring the van, and his evidence that he did so at the request of Allouche. Even if it were accepted (contrary to the submissions at AS [57]-[63]) that the "focus" of the discussion was the appellant's evidence concerning the role of Allouche (RS [51]), still the trial judge necessarily misapprehended the foreseeability *of that aspect* of the appellant's evidence because the two components of the appellant's evidence were logically and necessarily interconnected (as the respondent concedes at RS [72]; despite RS [57]). Because the appellant was likely

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[3] The respondent has not filed a notice of contention seeking to challenge the conclusions of two of the judges below to this effect: VSCA [111] (Niall JA) (CAB 148); [65]-[69] (Priest JA) (CAB 137-138).

[4] As conceded at RS [47] and acknowledged by Macaulay JA: VSCA [322]-[323], [327] (CAB 189).

to admit to hiring the van, it was likely that he would "confess and avoid". The first proposition made the second more likely.[5]

The prosecution split its case

7. Despite the indicia that, if he elected to give evidence after the close of the prosecution case, the appellant would admit that he hired the van, the identity of the hirer of the van remained a fact in issue in the appellant's trial.[6] The prosecution was therefore required to prove that the appellant was the hirer.[7]

8. An obvious alternative contender for the hirer of the van was Allouche: he was the person Moustafa had called and asked to do so. The jury had the transcript of the 11:20pm call, which ended with Allouche telling Moustafa that he would try.[8] The respondent contends in response that Allouche was "out of the picture" because Moustafa gave evidence to the effect that Allouche had been unable to help him (RS [70]). Moustafa, however, was a witness with significant credibility problems.[9] His evidence on this issue—and therefore the prosecution case—would have been assisted had the Crown called the surveillance evidence to demonstrate that Allouche did not hire the van.

9. Thus, the surveillance evidence was not "simply irrelevant", nor incapable of being led by the prosecution before the close of the prosecution case (*cf* RS [71]). To the contrary, it was admissible and would have assisted the prosecution case on a fact in issue. If the prosecution wished to rely on the surveillance evidence, it was bound to lead the evidence before the appellant was called upon to decide what course he would follow in his defence. By calling surveillance operative 116 in reply, the prosecution split its case.

The foreseeability of the Allouche connection

10. The test of reasonable foreseeability: As a preliminary issue, the respondent embraces Macaulay JA's interpretation (at VSCA [320]; CAB 188) in effect that the words "having regard to" in s 233(2) of the CPA ought to be interpreted as meaning "having regard exclusively to" (RS [47]). For the reasons explained by Niall JA at VSCA [96]-[106] (CAB 146-148), that construction is incongruous. The better view

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5 See AS [75]-[76].
6 AFM 50, lines 22-24 (this concession is explained by the procedural history detailed at RS [5]-[24]).
7 *Stubley v Western Australia* (2011) 242 CLR 374 at [63], read with [55]-[56] (Gummow, Crennan, Kiefel and Bell JJ).
8 AFM 150-151.
9 See AS [32] and VSCA [372]-[373] (CAB 201).

is that the threshold question as to whether the power under s 233(2) is enlivened is not confined only to consideration of the documents filed under s 183 of the CPA, but may be approached having regard also to any other matters that may be relevant.

11. Moving past that preliminary issue, the respondent's interpretation of s 233(2) of the CPA paradoxically both denies that it operates as a sanction for non-compliance with s 183 (RS [47]), and yet maintains that it is to be approached on the basis that "non-compliance [with an accused's disclosure obligations] must be capable of meaningful remediation", and that an exceptional circumstances standard would "unnecessarily limit" s 233(2) as a "remedial mechanism" (RS [45]).

12. Regardless, the respondent concedes (properly) that an accused is *not* required to give an affirmative version of events or to make positive assertions of fact under the pre-trial disclosure regime of the CPA (at RS [39] and [47]).[10]

13. Necessarily, by calling for an assessment of what could not "reasonably have been foreseen by the prosecution having regard to" the responses of the accused to the summary of prosecution opening and notice of pre-trial admissions, s 233(2) of the CPA imports an understanding of the limited scope of what those documents require an accused to do. The respondent complains that the prosecutor would need to have "engaged in a high degree of speculation" in order to have foreseen the appellant's evidence about Allouche's role in hiring the van (RS [68]). But that complaint is ill-founded. It is an important aspect of the design and structure of an accusatorial criminal trial governed by the CPA that an accused's disclosure obligations are narrowly confined,[11] so that speculation—insofar as it means forming ideas or theories without full knowledge of what may eventuate—inheres in the task of a prosecutor preparing to prophylactically meet possible defence cases in such a trial.

14. <u>The indications pointing to Allouche</u>: The respondent does not appear to dispute the proposition in principle that, if the appellant gave evidence and admitted to hiring the van, the maintenance of his plea of guilty and his denial that he was present at

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10 Other than with respect to alibi or expert evidence under CPA ss 189 and 190.

11 The respondent's summary of Chapter 5 of the CPA refers to ss 224 and 225 (RS [40]) but tellingly omits any reference to s 231, which marks the point at which, if an accused elects to give evidence and or to call other witnesses, "the accused is entitled to give an opening address to the jury outlining the evidence that the accused proposes to give or call." Other than with respect to alibi or expert evidence, that opening necessarily outlines evidence which is not required to have been previously disclosed. See, as to the limitations of defence disclosure more generally, *Petty v The Queen* (1991) 173 CLR 95 at 99-101 (Mason CJ, Deane, Toohey and McHugh JJ) and 128-129 (Gaudron J), *X7 v Australia Crime Commission* (2013) 248 CLR 92 at [101] (Hayne and Bell JJ) and *Lee v The Queen* (2014) 253 CLR 455 at [45]-[46] (French CJ, Crennan, Kiefel, Bell and Keane JJ).

any of the locations from or to which 1,4-BD was moved on 14 June 2016 combined to mean that he could reasonably have been anticipated to say that he hired the van for someone else (see RS [66]).

15. The respondent submits that the extensive cross-examination of Moustafa about Allouche's potential involvement in the hiring of the van could not "establish" that the appellant hired the van at the request of Allouche, and nor was there "direct puttage" to Moustafa to that effect (RS [63]). There would have been no basis to put to Moustafa that Allouche had called the appellant and asked him to hire a van. On Moustafa's version of events, he would not have been present when that discussion occurred.

16. Nevertheless it *was* put to Moustafa directly that he "wouldn't know whether Mr Allouche had a telephone conversation with Mr Obian about hiring a van".[12] Moustafa was asked whether he was aware that Allouche rang the appellant that night, and it was put to Moustafa that, after he and the appellant, on Moustafa's version, parted ways, he was "not in a position to say that Mr Obian and Mr Allouche did not have a conversation".[13] Against the background of the 11:20pm call in which Allouche agreed to "try" to arrange a van for Moustafa, this questioning naturally pointed to Allouche as being involved with the appellant in the hiring of the van.

17. Even if this Court were to conclude that the conduct of the appellant's trial did *not* combine to give the prosecutor reasonable foresight of the appellant's evidence concerning Allouche's role in hiring the van, the basis on which the trial judge approached this issue, at least for the purpose of the exercise of his discretion, was wrong in material respects. Had his Honour known the true state of affairs, he might have, and indeed probably would have, decided the application differently. Had the application been decided differently, the appellant might have been acquitted. For that reason, there was an error or irregularity in the appellant's trial which resulted in a substantial miscarriage of justice.

Dated: 2 February 2024

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12 Playback T9.4-.6, 20 November 2018 (AFM 16).
13 Playback T75.12-.14, 19 November 2018 (AFM 6); Playback T9.4-.17, 20 November 2018 (AFM 16).