



HIGH COURT OF AUSTRALIA

8 August 2023

VUNILAGI v THE QUEEN & ANOR
[2023] HCA 24

Today, the High Court dismissed an appeal from the Court of Appeal of the Supreme Court of the Australian Capital Territory ("ACT"). The appeal concerned s 68BA of the *Supreme Court Act 1933* (ACT), which allowed for previously excluded indictable offences to be tried by judge alone during the COVID-19 emergency period, and whether that provision: (1) infringed the *Kable* principle, which requires the maintenance of the institutional integrity of State and Territory courts as repositories of federal jurisdiction; or (2) was inconsistent with s 80 of the *Constitution*, which provides that the trial of any indictable Commonwealth offence be by jury.

The appellant, Mr Vunilagi, was tried and convicted, along with three co-accused, of sexual offences under ss 54 and 60 of the *Crimes Act 1900* (ACT). The trial was listed to commence in September 2020. Due to the onset of the COVID-19 pandemic, in April 2020 the Supreme Court temporarily suspended jury trials. The following day, amendments to the *Supreme Court Act* commenced, which introduced s 68BA. Section 68BA empowered the Supreme Court to order a trial by judge alone during the COVID-19 emergency period, and did not require the accused's election or consent. The Court could make that order if satisfied that the 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)). Before making that order, the Court had to give written notice of the proposed order to the parties and invite those parties to make submissions about the proposed order (s 68BA(4)). The appellant was notified of such a proposed order, which was subsequently made by the trial judge despite the appellant's submissions opposing it.

Following his conviction, the appellant appealed to the Court of Appeal, alleging that his trial miscarried on the basis that s 68BA was invalid. The Court of Appeal dismissed his appeal.

The High Court held that s 68BA was not invalid by reason of the *Kable* principle. Section 68BA(3) was subject to the satisfaction of the two express conditions in that subsection and the notice requirement in s 68BA(4). Section 68BA therefore conferred a discretion that was to be exercised judicially, and accorded procedural fairness to the accused. Section 68BA(4) did not operate as a separate "gatekeeping" function, but instead as facilitative of and ancillary to s 68BA(3). The function conferred by s 68BA was more in the nature of case management, enabling the Court to manage its criminal caseload during a public health emergency whilst ensuring that the interests of justice were served.

Further, the High Court held that s 68BA did not infringe s 80 of the *Constitution*. The offences in the *Crimes Act* for which the appellant was tried and convicted were not laws of the Commonwealth, but rather were laws of the ACT. Therefore, the appellant did not need to be tried by jury.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*