HIGH COURT OF AUSTRALIA

8 May 2024

OBIAN v THE KING
[2024] HCA 18

Today, the High Court unanimously dismissed an appeal from a decision of the Court of Appeal of the Supreme Court of Victoria. The appeal concerned the proper construction of s 233(2) of the *Criminal Procedure Act 2009* (Vic), which allows the prosecution, with leave of the trial judge, to call evidence in reply "[i]f, after the close of the prosecution case, the accused gives evidence that could not reasonably have been foreseen by the prosecution". The principal issue was whether, in the circumstances, the exercise of that power involved a substantial miscarriage of justice because the prosecutor misinformed the trial judge about a fact relevant to the exercise of the power.

The appellant was convicted on three charges in the County Court of Victoria of trafficking in a drug of dependence of not less than a commercial quantity. The evidence for the prosecution for the third charge included that of an alleged co-conspirator, who said that the appellant hired a van that was subsequently used, by the appellant and others, to move drugs. After the prosecution closed its case, the appellant gave evidence that: he rented the van for a friend, Mr Allouche, and that, after he dropped the van off at Mr Allouche's house, he had nothing more to do with the van. Subsequently, the prosecution applied for leave to adduce evidence in reply of a surveillance operative which was inconsistent with the appellant's account. In making the application, the prosecutor said (incorrectly) that the appellant's evidence was "the first time we've heard that [the appellant] now says he did hire this van" and that he had previously always denied being at the car rental place. The prosecution had been informed, by email from the appellant's lawyer and an (unsigned) notice of alibi, that the appellant hired the van. The trial judge accepted that the appellant gave evidence that the prosecution could not reasonably have foreseen and granted leave for the prosecution to adduce the further evidence. The appellant sought leave to appeal his convictions but, by majority, the Court of Appeal refused leave.

In the High Court, the appellant argued that the trial judge's ruling involved a substantial miscarriage of justice because: first, the trial judge determined the application in a factual matrix that was wrong in material respects; and, second, the incorrect statements caused the trial judge to incorrectly infer that the evidence that the appellant hired the van was not reasonably foreseeable. The Court held that the trial judge did not err in exercising the power in s 233(2) of the *Criminal Procedure Act* in circumstances where it had to be inferred that the incorrect statements by the prosecutor were not material to the trial judge's decision. The appellant's second argument also could not succeed since, even if it was reasonably foreseeable that, if the appellant gave evidence, he would admit to hiring the van, it was not reasonably foreseeable that the appellant would say he hired the van on behalf of another person or that that other person would naturally be Mr Allouche.

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.

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