



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: C13/2022
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Registry: Canberra
Document filed: Form 27F - Outline of oral argument
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Important Information

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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 OUTLINE OF ORAL SUBMISSIONS

Part I: Certification for publication

- 10 1. This outline is in a form suitable for publication on the internet.

Part II: Outline of First Respondent's Propositions

As to grounds (1) and (2) in the Notice of Appeal

2. The first respondent does not propose to address the Court on the substantive arguments relating to grounds (1) and (2). The first respondent adopts and relies upon the arguments in support of the constitutional validity of s 68BA of the *Supreme Court Act 1933* (ACT) made by the second respondent and the Attorney-General of the Commonwealth (intervening): (FRS [14]).

30 Orders if appeal is allowed

3. If the appellant is successful in his appeal, and his verdicts are set aside, the first respondent submits this Court should order that there be a re-trial: (FRS [15] – [17]).
4. First: The Court of Appeal assumed a re-trial would be the necessary consequence of a successful challenge to the validity of s 68BA (CAB 192 [212]). The appellant does not contend this is incorrect.

5. Second: Applying the “two stage analysis”, the exercise of this Court’s discretion favours the ordering of a re-trial for the following reasons (*Director of Public Prosecutions (Nauru) v Fowler* (1984) 154 CLR 627 at 630 (**JBA 3, Tab 35**); *Eastman v Director of Public Prosecutions (No 2)* (2014) 9 ACTLR 178 at [265] (**JBA 4, Tab 54**)):

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a. *Sufficiency of evidence*: A review of the Court of Appeal’s reasons at [7] – [164] (**CAB 151 – 183**) and the trial judge’s reasons (**CAB 64 – 128**) demonstrates the evidence is “sufficiently cogent” to justify convictions on counts 3, 4, 6, 9, 14, 15, 16, and 17. A subsequent trial would not give the prosecution an ability to “patch up” a defective case, nor run a new case: *Fowler* at 630 (**JBA 3, Tab 35**); *R v Taufahema* (2007) 228 CLR 232 at [52] – [54] (**JBA 3, Tab 44**); *Eastman v DPP (No 2)* at [265]; [283] (**JBA 4, Tab 54**).

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b. *Nature of the error*: The error relates to the validity of the legislation under which the appellant’s trial proceeded. It is akin to a technical error or “defect in legal machinery”, rather than error by the prosecution: *Taufahema* at [49]; [51], [53] (**JBA 3, Tab 44**).

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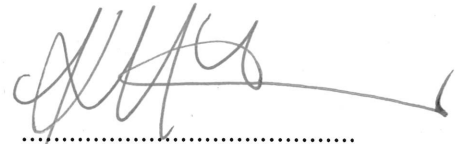
c. *Seriousness of the offences*: The nature and circumstances of the offences are extremely serious, involving repeated instances of sexual violence upon a complainant in the company of other assailants. There is a high public interest in the due prosecution of such offences: *Taufahema* at [49] (**JBA 3, Tab 44**); *Eastman v DPP (No 2)* at [270] (**JBA 4, Tab 54**).

d. *Expiration of sentence*: The appellant was sentenced to a total effective term of six years, three months and 14 days’ imprisonment with a non-parole period of three years and one month. The appellant’s non-parole period is yet to expire: *Taufahema* at [55] (**JBA 3, Tab 44**); *Jiminez v The Queen* (1992) 173 CLR 572 at 590 (**JBA 3, Tab 38**); *Eastman v DPP (No 2)* at [270] (**JBA 4, Tab 54**).

e. *Other matters*: The offences are alleged to have occurred on 3 November 2019. The length of time between the offending and any subsequent trial is not such

as to occasion prejudice to the appellant. The length and expense of a subsequent trial would not be oppressive. The interests of justice favour the appellant's guilt or innocence being finally determined by a jury: *Taufahema* at [55] (**JBA 3, Tab 44**); *Eastman v DPP (No 2)* at [270] (**JBA 4, Tab 54**).

Dated: 7 February 2023



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