HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B18 of 2020

BETWEEN:

GBF
Appellant

and

THE QUEEN
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

1. I certify that this submission is in a form suitable for publication on the internet.

Part II: Statement of the issues presented by the appeal

2. Whether a statement by the Trial Judge to the jury that has the effect of undermining the right to silence and the presumption of innocence can nonetheless be held not to amount to a miscarriage of justice because there was no redirection sought and because of other contradictory directions?

Part III: Certification regarding s 78B of the *Judiciary Act 1903*

3. No notice should be given in compliance with s 78B of the *Judiciary Act 1903*.

Part IV: Citation of earlier decisions

4. *R v GBF* [2019] QCA 4

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Part V: Relevant facts

5. The jury convicted the appellant of three counts of rape (counts 2, 3 and 7) and two counts of indecent treatment of a child under 16 (counts 1 and 5). He was acquitted of rape on count 4 and count 6 but was found guilty of indecent treatment as an alternative to count 6.[1]

6. The Queensland Court of Appeal's analysis of evidence set out at [7]-[69] of the judgment is accepted.

10 7. The complainant gave evidence of seven offences, which she said were committed against her over a number of years at different addresses by the appellant who is her step brother.[2] The complainant was first interviewed by police on 24 August 2013,[3] when she was 14 years old. She told police about an "incest relationship" and, later elaborated, "it's not incest, it just um like getting fucked by my own step brother".[4] She was 17 when she gave her pre-recorded evidence.[5]

8. The detail of each offence is set out below with the relevant paragraphs of the Court of Appeal's judgment noted:

20 a. Count 1: 1 December 2012 and 14 February 2013 – indecent treatment [the appellant woke the complainant up and asked her to lay next to him, and he kissed her] – see paragraphs [20]-[23];[6]
b. Count 2: 14 or 15 February 2013 – rape [the appellant allegedly came into the complainant's bedroom where she was sleeping along with the appellant's son who was sleeping on a mattress on the floor, and the appellant placed his penis in the complainant's vagina] – see paragraphs [23]-[28];[7]
c. Count 3: 1 January and 27 June 2013 – rape [the appellant was alleged to have penetrated the complainant's vagina with his penis, whilst they were on the back verandah] – see paragraphs [29]-[30];[8]

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[1] *R v GBF* [2019] QCA 4 at [3]; CAB: p 52.
[2] The offending allegedly occurred at Ipswich (count 1) and Townsville (counts 2-7) between 1 December 2012 and 24 August 2013. During the period of offending, the appellant was aged 33 and 34 years and the complainant was aged 13 and 14 years.
[3] Her recorded interview was admitted into evidence pursuant to section 93A of the *Evidence Act 1977*.
[4] *R v GBF* [2019] QCA 4 at [18]-[19]; CAB: p 54.
[5] Which was admitted into evidence pursuant to section 21AK of the *Evidence Act 1977*.
[6] CAB: p 54.
[7] CAB: p 54-55.
[8] CAB: p 55.

d. Count 4: 1 January 2013 and 27 June 2013 – rape [the appellant allegedly entered the complainant's bedroom and put his penis in the complainant's vagina] – see paragraph [34];[9]
e. Count 5: 1 January 2013 and 27 June 2013 – indecent treatment [this occurred immediately after count 4, when the appellant licked the complainant's vagina] – see paragraph [38];[10]
f. Count 6: 1 January 2013 and 27 June 2013 – rape [the appellant sat next to the complainant on the couch in the loungeroom and grabbed her hand and put it on his penis and asked her to suck on it] – see paragraphs [36]-[37];[11] and
g. Count 7: 25 June 2013 and 24 August 2013 – rape [the appellant followed the complainant into her sister SEB's room and put his penis in the complainant's vagina] – see paragraphs [31]-[34].[12]

9. The complainant also gave evidence of other uncharged sexual acts.[13]

10. The prosecution led 'preliminary complaint' evidence. On 24 August 2013, SNE, the complainant's older sister, spoke with the complainant because she wanted to know why the appellant was ringing the complainant all the time. The complainant did not initially reply. SNE asked again and, at that point, the complainant broke down and said the appellant "fucked her". Later that day, SNE saw the appellant, went over to him, started throwing punches at him. He looked surprised and said, he "did not know what was going on" and walked off.[14]

11. On the same day, SNE, took the complainant to speak with her mother and other sisters. SNE had another conversation with the complainant, this time in the presence of her mother, sisters and step father. During this conversation, the complainant said that the appellant had "her suck him off and went down on her, did oral sex on her and stuff like that". SNE then took the complainant to the police station.[15]

12. SBQ, the complainant's mother, gave evidence about a "family meeting". She said it occurred "a couple of weeks" before the complainant's police interview. At the meeting, the appellant and the complainant were asked if there was anything going

[9] CAB: p 56.
[10] CAB: p 56.
[11] CAB: p 56.
[12] CAB: p 55-56.
[13] *R v GBF* [2019] QCA 4 at [38]; CAB: p 56.
[14] *R v GBF* [2019] QCA 4 at [54]; CAB: p 58.
[15] *R v GBF* [2019] QCA 4 at [55]; CAB: p 58.

on between them. The complainant denied there was anything going on between her and the appellant.[16] SCB, the complainant's other sister, also gave evidence about the family meeting. She said she directly asked the complainant if there was anything going on between her and the appellant and the complainant said "no".[17]

13. SBQ also gave evidence that the appellant was never allowed to sleep in any of the girls' bedrooms.[18] She said it was always a "full house" and she would never let the appellant and complainant be alone in the house at night.[19]

14. The complainant was not medically examined, nor did investigating police forensically examine any of the sheets, clothing or other items that may have yielded forensic evidence. The investigating officer accepted that, given that the allegations were recent, there was a possibility that important evidence had been missed in the absence of such examinations.[20]

Part VI: Argument

The error at trial

15. The trial was fought solely on the question of whether the sexual acts occurred at all.[21] The appellant did not give or call evidence.[22] The case rested entirely on the capacity of jury to accept the complainant's evidence beyond reasonable doubt. What the Trial Judge said to the jury about how they were permitted to assess the complainant's credibility and reliability was therefore essential.

16. The Trial Judge gave the jury a "warning … to scrutinise [the complainant's evidence] carefully…"[23] The Court of Appeal referred to matters that called into question the reliability and accuracy of the complainant's evidence:

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[16] *R v GBF* [2019] QCA 4 at [65]; CAB: p 60.
[17] *R v GBF* [2019] QCA 4 at [68]; CAB: p 60.
[18] *R v GBF* [2019] QCA 4 at [63]; CAB: p 59.
[19] *R v GBF* [2019] QCA 4 at [64]; CAB: p 59.
[20] *R v GBF* [2019] QCA 4 at [69]; CAB: p 60.
[21] CAB: p 20 L9-11.
[22] *R v GBF* [2019] QCA 4 at [17]; CAB: p 54.
[23] CAB: p 26 L3-5.

> "… her evidence as to the fact of penetration was not shaken in cross-examination, but there were aspects of her account which could reasonably call into question the reliability and accuracy of her evidence in respect of each such occasion of intercourse".[24]

17. The warning that the Trial Judge gave contains the statement at the heart of this appeal:

> "… there is no corroboration here. In cases such as this where sexual misconduct is alleged by the complainant, you should approach her evidence with great care and with caution. You should scrutinise it carefully and you need to be satisfied of its accuracy and reliability beyond reasonable doubt before you can convict. Human experience in the Courts is that complainants in such matters sometimes, for all sorts of reasons, and sometimes for no reason, tell a false story which is very easy to fabricate and very difficult to refute. ***But in this case, bear in mind that she gave evidence and there is no evidence, no sworn evidence, by the defendant to the contrary of her account. That may make it easier***. It is a matter for you in assessing her credibility, but you have got to consider all of the matters that Defence addressed to you about in relation to her credit."[25]

18. This statement of the Trial Judge in italics was wrong at every level. It permitted the jury to place evidential weight on the appellant's decision to exercise his right to silence. It permitted the jury to use the appellant's silence to more readily accept the complainant's evidence, which was the central question in the trial. It occurred in the context of a protective direction and so undermined that direction entirely. It was a fundamental departure from the accusatorial nature of a criminal trial.

19. In *Strbak v The Queen*,[26] this Court recently confirmed, drawing on the principles now well established since *Azzopardi v The Queen*,[27] that "[u]nder the common law of Australia, on the trial of a criminal allegation (save in rare and exceptional circumstances), no adverse inference should be drawn by the jury … from the fact that the appellant did not give evidence".

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[24] *R v GBF* [2019] QCA 4 at [101]; CAB: p 65. While the observation was made in respect of a different ground, it remains relevant to this ground of appeal.
[25] CAB p 26 ll-11 (emphasis added).
[26] (2020) 374 ALR 453.
[27] (2020) 374 ALR 453 at 375-376 [1], citing *RPS v The Queen* (2000) 199 CLR 620 at 632-633 [27]-[28] per Gaudron A-CJ, Gummow, Kirby and Hayne JJ; *Azzopardi v The Queen* (2001) 205 CLR 50 at 75 [68] per Gaudron, Gummow, Kirby and Hayne JJ; *Dyers v The Queen* (2002) 210 CLR 285 at 292 [9] per Gaudron and Hayne JJ, 305-306 [52] per Kirby J, 327-328 [120]-[121] per Callinan J.

20. The "accusatorial character" of a criminal trial in which the "prosecution bears the burden of proving the allegations it makes that, as a general rule, there can be no expectation that the accused will give evidence. Absent such an expectation, no inference can be drawn from the choice not to do so".[28]

21. It follows that the impugned statement permitted the jury to do precisely what this Court has held that a jury cannot do, other than in exceptional circumstances that no-one has suggested apply here.[29]

The error on appeal

22. Justice Boddice, with whom Morrison and Philippides JJA agreed, recognised[30] that the impugned statement engaged the principles in *Azzopardi v The Queen*.[31] On that basis, His Honour concluded that:

> "The circumstances of the instant case did not warrant any such comment by the trial judge. No reference ought to have been made to the jury's task being made easier by the absence of evidence from the appellant. Such a reference implicitly suggests the jury has been deprived of something to which there was an entitlement. That suggestion is contrary to both the presumption of innocence and the right to silence."[32]

23. This conclusion should have led to the appeal being allowed and a re-trial being ordered. The impugned statement went to the core issue in the trial and permitted the jury to reason in a way that was contrary to the presumption of innocence and the right to silence.

24. However, the Court of Appeal dismissed this ground of appeal on the basis that, while the impugned statement should not have been made, it did not amount to a

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[28] *Strbak v The Queen* (2020) 376 ALR 453 at 380-381 [31], citing *Azzopardi v The Queen* (2001) 205 CLR 50 at 64 [34] per Gaudron, Gummow, Kirby and Hayne JJ.
[29] *Strbak v The Queen* (2020) 376 ALR 453 at 375-376 [1] and the cases cited therein.
[30] *R v GBF* [2019] QCA 4 at [109]; CAB: p 66.
[31] (2001) 205 CLR 50 at 75 [68] per Gaudron, Gummow, Kirby and Hayne JJ.
[32] *R v GBF* [2019] QCA 4 at [110]; CAB: p 66, citing *R v Conway* (2005) 157 A Crim R 474 at 484 [38] for the proposition in the last sentence.

miscarriage of justice under the third limb of the common form appeal provisions. By disposing of the issue in that way, the court did not need to consider the 'proviso'.

25. Justice Boddice reached that conclusion by, in effect, deciding that the impugned statement was immaterial because other directions that the Trial Judge gave meant that the jury would not have acted on the impugned statement:

> "Although those words ought not to have been uttered by the trial judge, neither the prosecutor nor defence counsel sought any redirection or correction";[33]

10 And

> "That is unsurprising, having regard to the specific directions which had been given by the trial judge…"[34]

26. Those 'specific directions' were: [35]

a. The fact the applicant was presumed innocent;[36]

b. That no adverse inference was to be drawn from the appellant not giving evidence;[37]

20 c. That the prosecution bore the onus of proof,[38] including that the appellant was not operating under a mistake of fact; and[39]

d. That any comment the trial judge may make in respect of the evidence was an observation that may be accepted or rejected by the jury.[40]

27. As a result, Boddice J concluded that:

> "Having regard to those clear directions, there was no real possibility the jury may have misunderstood the trial judge's directions and that the appellant was deprived of a real chance of an acquittal as a consequence of the trial judge's inappropriate direction. There has been no miscarriage of justice from that
30 observation".[41]

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[33] *R v GBF* [2019] QCA 4 at [111]; CAB: p 66.
[34] *R v GBF* [2019] QCA 4 at [111]; CAB: p 67.
[35] *R v GBF* [2019] QCA 4 at [111]; CAB: p 67.
[36] *R v GBF* [2019] QCA 4 at [111]; CAB: p 19 L36-37.
[37] *R v GBF* [2019] QCA 4 at [111]; CAB: p 20 L14-21. And this complied with the desirable direction outlined by the majority in *Azzopardi v The Queen* (2001) 205 CLR 50 at 70 [51] and reproduced in the relevant Bench Book.
[38] *R v GBF* [2019] QCA 4 at [111]; CAB: p 19 L37-40.
[39] *R v GBF* [2019] QCA 4 at [111]; CAB: p 50 L26 to p 52 L34.
[40] *R v GBF* [2019] QCA 4 at [111]; CAB: p 14 L23-30.
[41] *R v GBF* [2019] QCA 4 at [112]; CAB: p 67.

The Court of Appeal was wrong to conclude that "there was no real possibility the jury may have misunderstood the trial judge's directions"

28. By referring to the other direction to the jury that it was free to disregard *comments* that the Trial Judge made,[42] it seems that the Court of Appeal characterised the impugned statement as a *comment* rather than as a *direction* and gave some weight to that distinction.

29. In *Azzopardi v The Queen*,[43] this Court was also dealing with a statement by a trial judge which permitted the jury to reason from a defendant's silence. The distinction between a 'comment' and a 'direction' also assumed some significance. However, that was in large part because the relevant statutory provision in New South Wales permitted a trial judge to 'comment' on a failure of a defendant to give evidence, but the judge may not by that 'comment', suggest that the defendant failed to give evidence because he or she was guilty of the offence.[44]

30. In that case, the Trial Judge told the jury in "unexceptional terms" that "… an accused may give evidence on his or her trial, but is not under any obligation to do so because the prosecution bears the onus…" and that "you must not think that he decided not to give evidence because he is, or believes himself to be, guilty of the offence…it would completely wrong to think that…"[45]

31. The Trial Judge in *Azzopardi v The Queen* went on to say, in the impugned passage, that "… where the complainant's evidence or the witness's evidence is left undenied or uncontradicted by the accused, any doubt which may have been cast upon that witness's evidence may be more readily discounted and that witness's evidence may be more readily accepted as the truth".[46]

32. As a result, the majority of this Court held that:

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[42] *R v GBF* [2019] QCA 4 at [111]; CAB: p 14 L23-29.
[43] *Azzopardi v The Queen* (2001) 205 CLR 50.
[44] There is no equivalent provision in Queensland.
[45] *Azzopardi v The Queen* (2001) 205 CLR 50 at 76 [71] per Gaudron, Gummow, Kirby and Hayne JJ.
[46] (2001) 205 CLR 50 at 76 [72] per Gaudron, Gummow, Kirby and Hayne JJ.

> "The impugned passage invited the jury to engage in a false process of reasoning, at odds with the direction which had been given to them in the earlier part of the charge."[47]

33. The majority noted the existence of "the earlier directions given by the trial judge, which explicitly warned the jury against thinking that the accused decided not to give evidence because he was or believed to be guilty of the offence…" Nonetheless, the majority held that the impugned statement in that case was "… at best, confusing and contradictory of the earlier directions".[48]

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34. There is no basis to come to any contrary conclusion here – irrespective of the descriptor given to the impugned passage. Its effect is more important than the label given to it. Its effect was to permit the jury to reason in a way that was contrary to law.

35. The jury was initially told that the appellant's silence "does not constitute an admission by him … [that it] may not be used to fill gaps…" and "may not be used as a makeweight in assessing whether the Prosecution has proved its case…" The Trial Judge also said that the "onus of proof lies on the Prosecution and the
20 [appellant] is presumed innocent" and "[the appellant's] failure to give evidence does not strengthen the Prosecution case or supply additional proof against him or fill gaps in the evidence".[49]

36. The jury was then told that the complainant "gave evidence and there is no evidence, no sworn evidence, by the defendant to the contrary of her account. That may make it easier. It is a matter for you in assessing her credibility…".

37. This combination of instructions (however labelled) was contradictory and confusing. There can be no confidence that the jury would have ignored the impugned
30 statement and complied with the other directions. Indeed, it is plausible that the jury

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[47] (2001) 205 CLR 50 at 76-77 [73] per Gaudron, Gummow, Kirby and Hayne JJ.
[48] (2001) 205 CLR 50 at 77 [75] per Gaudron, Gummow, Kirby and Hayne JJ.
[49] That is, the "desirable" direction outlined by the majority in *Azzopardi v The Queen* (2001) 205 CLR 50 at 70 [51].

would have seen the impugned statement as an exception to the other directions in the context of the specific task of assessing the complainant's evidence.

38. While the distinction between a direction and comment will be important in some cases, that is not the position here. Regardless of how it is characterised linguistically, the impugned statement permitted something that the law prohibits (other than in exceptional circumstances which is not relevant here), namely reasoning towards guilt from the decision not to give evidence. It did so with the imprimatur of the Trial Judge.

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39. In any event, the proposition that the jury would have identified the impugned statement as a "comment", associated with the permission to disregard "comments" and then chosen to disregard it as inconsistent with other directions strains credulity.

40. It is accepted that in some cases, contrary directions can 'cure' an erroneous comment or direction in which case there will be no error or irregularity and therefore no miscarriage of justice.

41. In *The Queen v Dookheea*,[50] the Trial Judge, on one occasion, drew a distinction
20 between reasonable doubt and any doubt.[51] In that case, this Court held that:

> "[w]hen and if a judge does mention the distinction [between reasonable doubt and any doubt] the question is whether the words spoken in terms of the record of the summing up are such that the jury would have derived a false perception of the basis for deciding whether the Crown has proved its case".[52]

42. Referring to earlier authority,[53] the Court said the question is:

> "… to be decided by taking the summing up as a whole and as a jury listening
30 to it might understand, not some subtle examination of its transcript record or by undue prominence being given to any of its parts";[54]

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[50] (2017) 262 CLR 402.
[51] (2017) 262 CLR 402 at 411 [13] to 413 [16].
[52] (2017) 262 CLR 402 at 424 [37].
[53] *Green v The Queen* (1971) 126 CLR 28; *La Fontaine* (1976) 136 CLR 62.
[54] (2017) 262 CLR 402 at 424 [37].

And

> "… the reaction of defence counsel on hearing the impugned portion the summing up is a cogent consideration".[55]

43. However, *The Queen v Dookheea* and the cases cited therein,[56] dealt with very different situations. Here, the Trial Judge's statement was (a) obviously wrong, and (b) on its face permitted reasoning in a way contrary to the fundamental precepts of the accusatorial trial.

10 44. In *Lane v The Queen*[57] this Court approved McHugh J's reasoning in *Krakouer v The Queen*:[58]

> "[m]isdirections of law in a criminal trial can take many forms. Of few of them can it be said that, at all times and in all circumstances, they constitute a miscarriage of justice. Legal error must often give way to cogent evidence of guilt. *But on such matters as the standard or onus of proof or the functions of the jury, the position is different*".[59]

45. Justice McHugh continued:

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> "[t]hat is not to say that a misdirection as to one of those matters is always a miscarriage of justice. The error may be so trivial that a court of criminal appeal can properly conclude that there has been a trial according to law, notwithstanding the misdirection. *But if a direction on the standard or onus of proof or the function of the jury is substantially wrong. I cannot presently conceive of a case where the weight of the evidence against the accused could affect the conclusion that a miscarriage of justice has occurred*".[60]

46. A fundamental error of this kind[61] would – by its nature – have been sufficient to avoid the application of the proviso, it is at least incongruous to avoid the antecedent

30 finding of a miscarriage. However, this is precisely what the Court of Appeal did.

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[55] (2017) 262 CLR 402 at 424 [37].
[56] *Green v The Queen* (1971) 126 CLR 28; *La Fontaine* (1976) 136 CLR 62.
[57] (2018) 265 CLR 196 at 210 [48] per Kiefel CJ, Bell, Keane and Edelman JJ.
[58] (1998) 194 CLR 202.
[59] (1998) 194 CLR 202 at 226 [74].
[60] (1998) 194 CLR 202 at 226 [75].
[61] The trial judge's comment is potentially one of those errors about the "onus of proof" and the "function of the jury" identified by McHugh J in *Krakouer v The Queen* (1998) 194 CLR 202 at 226 [74].

47. Justice Boddice also referred to the fact that the appellant's trial counsel had not sought a correction – presumably to fortify the conclusion that the jury was not misled.[62] However, counsel's silence does not undo the obvious conflict between what the jury was directed about the appellant's silence and the impugned statement. In any event, counsel cannot concede a matter of law disadvantageous to an accused.[63] It might also be said that counsel cannot (at least by silence – but probably not at all) waive a defendant's entitlement to have the prosecution case assessed without reference to the decision not to give evidence.

10 *The Court of Appeal engaged in proviso reasoning when assessing the antecedent question of miscarriage*

48. The Court of Appeal engaged in what looks very much like proviso reasoning at the stage of assessing whether there was a miscarriage of justice *per se*.

49. The most obvious way in which proviso reasoning seems to have been deployed is in the finding that the appellant had not, by virtue of the impugned statement, lost a "real chance of acquittal". This was to deploy language traditionally used when applying the proviso.[64] Even in the context of the proviso, this Court disapproved of
20 its use in *Weiss v The Queen*[65] with such disapproval confirmed by the majority in *Kalbasi v Western Australia*.[66]

50. The long-standing tradition of the criminal law is that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed.[67]

51. Consistently with that tradition, this Court in *Weiss v The Queen*[68] unanimously held that any departure from a trial according to law will be a miscarriage of justice, regardless of the nature and importance of that departure. Where such a departure is

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[62] *R v GBF* [2019] QCA 4 at [111]; CAB: p 66.
[63] *Perara-Cathcart v The Queen* (2017) 260 CLR 595 at 638-639 [124] per Nettle J.
[64] *Azzopardi v The Queen* (2001) 205 CLR 50 at 77 [76].
[65] *Weiss v The Queen* (2005) 224 CLR 300 at 313 [32]-[34].
[66] *Kalbasi v Western Australia* (2018) 264 CLR 62 at 68 [9].
[67] *Mraz v The Queen* (1955) 93 CLR 493 at 514 per Fullagar J.
[68] (2005) 224 CLR 300 at 308 [18].

identified, an intermediate appellate court applying the common form appeal provisions[69] can only dismiss a conviction appeal by applying the proviso.

52. Such a departure will occur if, for example, the relevant law is not explained correctly to the jury, or the rules of evidence or procedure are not observed.[70]

53. A majority of this Court in *Kalbasi v Western Australia*[71] confirmed that "[c]onsistently with the long tradition of the criminal law,[72] any irregularity or failure to comply with rules of procedure and evidence is a miscarriage of justice within the third limb of the common form provision".[73]

54. Notably, Boddice J's "real chance of acquittal" language was more stringent than the way in which this Court described the test for a miscarriage of justice even before *Weiss v The Queen* and *Kalbasi v Western Australia*. For example, in *Dhanhoa v The Queen*[74] this Court identified a miscarriage of justice within the third limb of the common form provisions where there had been a misdirection and that it was "reasonably possible" the misdirection "may have affected the verdict". It is hard to see how the approach in *Dhanhoa v The Queen* could have survived *Weiss v The Queen* and *Kalbasi v Western Australia*, although it is still applied at times by the Queensland Court of Appeal.[75]

55. In this case, the Trial Judge's statement to the jury was at least an "irregularity" and a "departure from a trial according to law". There was, with respect, no legitimate basis upon which the Court of Appeal could, as it did, appreciate that the impugned statement permitted reasoning inconsistent with the right to silence and the presumption of innocence, but nonetheless find that it was not a miscarriage of justice as that phrase has been construed by this Court.

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[69] In this case, section 668E of the *Criminal Code Act 1899* (Qld).
[70] (2005) 224 CLR 300 at 308 [18], citing *Mraz v The Queen* (1955) 93 CLR 493 at 514 per Fullagar J.
[71] (2018) 92 ALJR 305.
[72] *Mraz v The Queen* (1955) 93 CLR 493 at 514 per Fullagar J.
[73] *Kalbasi v Western Australia* (2018) 264 CLR 62 at 69 [12] per Kiefel CJ, Bell, Keane and Gordon JJ.
[74] (2003) 217 CLR 1 at 13 [38] and 15 [49] per McHugh and Gummow JJ.
[75] See, for example, *R v Ridgeway* [2020] QCA 38 at [103]. The idea of materiality in that passage resonates with Gageler J's support for a materiality criterion before the application of the *Weiss* test in *Kalbasi v Western Australia* (2018) 264 CLR 62 at 87-88 [70]-[71].

56. Indeed, at the heart of the error in this case is the Court of Appeal's failure to grapple with the nature and seriousness of the reasoning that the impugned statement permitted. The task being made "easier" for the jury by the appellant's failure to give evidence was its assessment of the complainant's credibility and reliability, which were the central issues at trial. The jury were thus permitted to use the exercise of the right to silence to reason to guilt.

57. As Callinan J said in *Farrell v The Queen*:[76]

> "In a trial in which the jury's assessment of the credibility of the complainant was crucial to the Crown case, any error or misdirection affecting the way in which the jury would treat that evidence was bound to be critical".[77]

58. It follows that, even if there is a requirement for an error, irregularity or departure to be "material",[78] or for it to have been "possible" that it "may have effected the verdict",[79] the impugned statement met such a criterion.

59. Once the nature and effect of the impugned statement is properly understood, there was no further work for the Court of Appeal to do on the miscarriage question. It either allowed the appeal or applied the proviso.

60. The proviso requires an assessment of whether, notwithstanding the error, departure or irregularity, "no substantial miscarriage of justice has actually occurred". This Court in *Kalbasi v Western Australia*[80] confirmed that the method for applying the proviso was settled in *Weiss v The Queen*.[81]

61. However, this was an error of a kind that would preclude the application of the proviso.

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[76] (1998) 194 CLR 286.
[77] (1998) 194 CLR 286 at 326-327 [102].
[78] In the sense referred to by Gageler J in *Kalbasi v Western Australia* (2018) 264 CLR 62 at 87-88 at [70]-[71].
[79] To use the language of *Dhanhoa v The Queen* (2003) 217 CLR 1 at 13 [38] and 15 [49] per McHugh and Gummow JJ.
[80] (2018) 264 CLR 62 at 70 [13] and 71 [16] per Kiefel CJ, Bell, Keane & Gordon JJ.
[81] *Weiss v The Queen* (2005) 224 CLR 300 at 317 [44].

62. **First**, it was an error of the kind which McHugh J identified in *Krakouer v The Queen* that "… go to the root of a criminal trial according to law".[82] As a matter of legal policy it is hard, if not impossible, to marry that conclusion with a finding that no substantial miscarriage of justice has actually occurred.[83]

63. **Second**, the nature of the error[84] here created a risk that the jury would give weight to an improper factor when deciding whether to accept the complainant's evidence beyond reasonable doubt. As this Court held in *Collins v The Queen*, where proof of guilt is wholly dependent on the acceptance of a complainant's evidence, and the error may have affected the acceptance, an appellate court cannot accord the weight to the verdict of guilty, which it otherwise might in applying the proviso.[85]

64. **Third**, the error here meant that the jury's acceptance of the complainant was impugned. It is difficult, if not impossible, on the written record alone, to make the required assessment of credibility to allow the '*Weiss*' question to be asked and answered. This would risk a conviction being upheld where the task that is uniquely given to a jury – the assessment of credit – is done instead by an intermediate appellate court.

65. **Fourth**, even if the '*Weiss*' question was asked, this was a case relying wholly on the acceptance of the complainant's evidence with important indications of unreliability. A conclusion on the written record that guilt had been proved beyond reasonable doubt could not reasonably be reached.

Conclusion

66. The Trial Judge's statement interfered with the fundamental characteristics of a criminal trial. It permitted the jury to more readily accept the complainant's evidence as reliable because the appellant did not give evidence. Absent explicit correction

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[82] *Krakouer v The Queen* (1998) 194 CLR 202 at 226 [74] per McHugh J and cited by the plurality *Lane v The Queen* (2018) 265 CLR 196 at 210 [48] per Kiefel CJ, Bell, Keane and Edelman JJ.
[83] *Lane v The Queen* (2018) 265 CLR 196 at 210 [48] per Kiefel CJ, Bell, Keane and Edelman JJ.
[84] *Kalbasi v Western Australia* (2018) 264 CLR 62 at 71 [15] per Kiefel CJ, Bell, Keane and Gordon JJ citing *Weiss v The Queen* (2005) 224 CLR 300 at 317 [44].
[85] *Collins v The Queen* (2018) 92 ALJR 517 at 525-526 [36] per Kiefel CJ, Bell, Keane and Gordon JJ.

such an error should necessarily have been characterised as a miscarriage of justice, particularly in a case where the evidence of the complainant is, in effect, the only evidence.

67. The error went to the heart of the jury's task of deciding whether they were satisfied beyond reasonable doubt of the offences because the prosecution depended on the acceptance of the complainant's evidence beyond reasonable doubt. The permissible pathway to conviction was profoundly altered by what occurred.

10 68. A fundamental error of this kind would – by its nature – have been sufficient to avoid the application of the proviso. For the same reasons, it was necessarily a miscarriage of justice.

Part VII: Orders sought

69. Appeal allowed.

70. The orders of the Court of Appeal dated 1 February 2019 be set aside and in their place an order that the appellant's appeal to that Court be allowed and the appellant's convictions be set aside and a new trial be had.

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20 **Part VIII: Time estimate for presentation of the appellant's case**

71. One hour.

Dated: 3 June 2020

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B18 of 2020

BETWEEN:

GBF
Appellant

and

10

THE QUEEN
Respondent

ANNEXURE
LIST OF STATUTES REFERRED TO IN WRITTEN SUBMISSIONS

1. *Criminal Code Act 1899* (Qld) s 668E