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

RESPONDENT'S SUBMISSIONS

Part I:

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

Part II:

2. The unanimous decision of the Court of Appeal (Boddice J, Morrison and Philippides JJA agreeing) was that no miscarriage of justice resulted from the trial judge referring to the absence of sworn evidence from the defendant followed by the comment that "*it may make it easier*". Although it was accepted that that comment should not have been made, the fact that it was, did not compel the conclusion that a miscarriage of justice occurred. The approach of the Court of Appeal was to assess the effect of that comment on the jury, having regard to the summing-up as a whole and the failure of trial counsel to seek a re-direction or correction. That approach is supported by legal principle.

3. The Court of Appeal having found that no miscarriage of justice resulted from the words said by the trial judge did not then need to consider the application of the proviso, and did not do so.

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Part III:

4. The respondent has considered s.78B of the *Judiciary Act 1903*. Notice is not required to be given.

Part IV:

5. The facts as outlined in paragraphs 5 to 14 of the appellant's submissions are not contested. The factual summary of the evidence at trial at paragraphs [18] to [69] of the judgment of Boddice J in *R v GBF* [2019] QCA 4 is not in contention.

Part V:

This was not an '*Azzopardi*' case

6. The Court of Appeal concluded that the reference by the trial judge to the defendant not giving evidence followed by the comment, "*that may make it easier*", should not have been said to the jury, but that it did not result in a miscarriage of justice.[1] The Court drew upon *Azzopardi v The Queen; Davis v The Queen*[2] to conclude that this was not a case where there were additional facts known only by the appellant that were capable of explaining the evidence and where it would be appropriate to comment on the failure of the appellant to provide an explanation in evidence.[3] It is not now contended that this was a case warranting judicial comment of the kind envisaged in *Azzopardi,* nor that the words of the trial judge were directed to achieve that purpose. Precisely what the trial judge intended to convey to the jury by the comment is not clear. The meaning of the comment is ambiguous and it should not have been made.

The words were a comment, not a direction

7. The Court of Appeal properly characterised the words "*that may make it easier*", as a comment rather than a specific direction.[5] The words themselves, and the context in which they were said, support the conclusion that the judge was making a comment rather than giving a direction on the law. The distinction between a comment and a

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[1] CAB 67-68 at [111]-[112]
[2] (2001) 205 CLR 50
[3] CAB 67 at [109]-[110] and (2001) 205 CLR 50 at 73[62]
[5] CAB 66 at [109]

direction by a trial judge is important as it reflects the fundamental division of functions in a criminal trial between the judge and the jury.[9] As the jury would have understood that they could ignore the comment, its potential to influence is weakened.

8. Whilst it is accepted that the risk flowing from the impugned words is that the jury may have felt that it was open for them to reason impermissibly to more readily accept the complainant's evidence because of the absence of sworn evidence of the appellant, in all of the circumstances of this case, and the context of the comment in the summing up, it was not reasonably possible that the risk was realised.

The approach of the Court of Appeal to the error

9. As this was a 'miscarriage of justice' ground, it was necessary for the appellant to satisfy the Court that the words of the trial judge, *"that may make it easier'*, resulted in a miscarriage of justice. In confronting that contention by the appellant, the Court was required to determine whether a miscarriage of justice resulted from the judge having said those words. It was necessary therefore for the Court to look at the whole of the summing up and to determine whether, in the context of the summing up as a whole and the other clear directions given to the jury, particularly as to the onus and standard of proof, a miscarriage of justice resulted.[10] The absence of an application by counsel for a redirection is a cogent consideration in the assessment of the impact of the impugned words on the integrity of the trial.[11] The Court concluded that there was no miscarriage of justice as a result of the impugned words and the Court was correct to do so.

10. Simply demonstrating that there has been an error or irregularity is not sufficient.[12] The burden is on the appellant to prove that there has been a miscarriage of justice because the error or irregularity affected or may have affected the result.[13] It has been recognized that in some categories of cases the irregularity may be so material that of itself it

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[9] ***Mahmood v State of Western Australia*** (2008) 232 CLR 397 at 403[16]
[10] ***The Queen v Dookheea*** (2017) 262 CLR 402 at 424[37]
[11] Ibid
[12] ***Simic v The Queen*** (1980) 144 CLR 319 at 331-332; ***Krakouer v The Queen*** (1998) 194 CLR 202 per Gaudron, Gummow, Kirby and Hayne JJ at 212[23]-[24]; ***TKWJ v The Queen*** (2002) 212 CLR 124 per Gaudron J at 134[31]; per McHugh J at 143[63], 145-146[71], 148[75], 156[97]; per Gummow J at 157[101]; ***Dhanhoa v The Queen*** (2003) 217 CLR 1 per McHugh and Gummow JJ at 13[38] and 15[49]; ***Nudd v The Queen*** (2006) 225 ALR 161 per Gummow and Hayne JJ at 170[24]; ***Gately v The Queen*** (2007) 232 CLR 208 per Gleeson CJ at 211[4]; Hayne J at 232[76] - 233[77] and 234[82]; ***Baini v The Queen*** (2012) 246 CLR 469 per Gagelar J at 488[53] - 489[54] and 491[56]; ***Craig v The Queen*** (2018) 264 CLR 202 at 205[3]
[13] Ibid

constitutes a miscarriage of justice and, by its nature, precludes the application of the proviso to otherwise uphold the conviction.[14] This was not such a case.

11. This was not a case involving the application of the proviso. The Court of Appeal did not apply the proviso. Before consideration of the proviso would arise, the appellant was required to satisfy the Court that a miscarriage of justice resulted. The Court was not so satisfied.

12. There was no material affect in the words chosen by the Court to express its conclusion. By whatever words, the conclusion of the Court was that no miscarriage of justice resulted. Boddice J expressed his finding in terms of there being '*no real possibility*' that the jury may have misunderstood the trial judges directions, and further, that the appellant was not "*deprived of a real chance of acquittal*" as a result of the "*inappropriate observation*" made by the trial judge.[15] There was no error in this approach.[16] These alternative expressions of the same conclusion are not in conflict with this Court's decisions in *Weiss v The Queen*[17] or *Kalbasi v Western Australia*[18], which were cases involving the appropriate application of the proviso.

The application of the proviso

13. The respondent does not seek to invoke the application of the proviso in the event that this Court concludes that a miscarriage of justice did result from the impugned words.

Part VI:

Not applicable

Part VII:

It is estimated that one hour is required for presentation of the respondent's argument.

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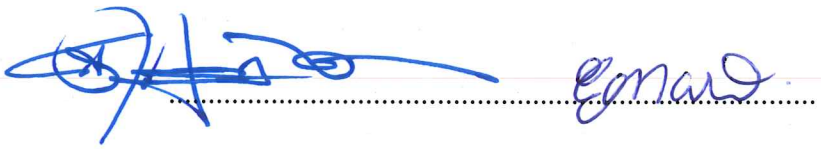
[14] ***Mraz v The Queen*** (1955) 93 CLR 493 at 514, *Simic v The Queen* at 326, 331-332; *TKWJ v The Queen* per McHugh J at 147[73]; *Nudd v The Queen* per Gleeson CJ at 163[6] - 164[7]
[15] CAB 68 [112]
[16] *Dhanhoa v The Queen* at 13[38] and 15[49]; ***Graham v The Queen*** (2016) 333 ALR 447 at 460-461[51]; ***De Silva v The Queen*** (2019) 375 ALR 1 at 13[48] per Nettle J in dissent
[17] (2005) 224 CLR 300
[18] (2018) 264 CLR 62

Dated: 1 July 2020



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