HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

BETWEEN: **IGNATIUS GEORGE**
Applicant

and

THE STATE OF WESTERN AUSTRALIA
Respondent

APPLICANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

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

Part II: Outline of Propositions

2. Although the applicant did not give evidence at trial, no directions were given to the jury in terms that were said by the majority in *Azzopardi v The Queen* [2001] HCA 25; (2001) 205 CLR 50 [51][1] to 'almost always be desirable'[2] (***Azzopardi* direction**). The directions that were given did not expressly, or by necessary implication, warn the jury that the applicant's silence in court could not be used to his detriment.[3]

3. The majority of the Court of Appeal erred in concluding that the absence of such directions did not, in all of the circumstances of the case, give rise to any miscarriage of justice.[4] The failure to give the jury any part of the *Azzopardi* direction did occasion a miscarriage of justice because there was a perceptible risk of the jury

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[1] Joint Book of Authorities, Parts C & D (and E), Volume 2 of 2 (**JBA**), page 14
[2] JBA, page 34.
[3] Core Appeal Book (**CAB**) 98, [83]. Appellant's Submissions (**AS**), [22]. Respondent's Submissions (**RS**), [22].
[4] CAB 100, [88].

impermissibly using the fact that the applicant had not given evidence to his detriment.

4. There was a perceptible risk that the jury may have impermissibly used the fact that the applicant had not given evidence because:

   a. It is 'plain' that if a trial judge says nothing about the fact that an accused has not given evidence, a jury may use the accused's silence in court to their disadvantage.[5]

   b. The trial judge told the jury, on two separate occasions, that the applicant had not given evidence.[6]

   c. To the extent that the trial judge gave any directions about the consequences of the applicant's election not to give evidence, they were confusing.[7]

   d. The trial judge's directions drew a distinction between the different types of evidence that had been adduced, reinforcing the fact that the applicant had not given evidence.[8]

   e. The similarities in the timing and form of the evidence given by the complainant, when compared to the electronic record of interview (**EROI**), highlighted the fact that the complainant's out of court statement had been adopted on oath and formed part of her sworn evidence, but the applicant's had not.

5. The majority of the Court of Appeal erred in concluding that there was no risk that the jury might have thought that it was open to use the fact that the applicant had not given evidence to fill gaps in the prosecution case.[9]

6. *Firstly*, the fact that the applicant's account was before the jury in the form of the EROI has no logical bearing on the question of whether there was a risk that the jury might use the applicant's silence to his detriment.[10] *Secondly*, the directions that are reproduced at CAB 98 and 99, [84] and [85], do not amount to warnings, express or

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[5] *Azzopardi v The Queen* [2001] HCA 25; (2001) 205 CLR 50 [51].
[6] CAB 12 (line 8) to CAB 13 (line 15); and CAB 25 (line 7).
[7] CAB 13 (line 4).
[8] CAB 11 (lines 1 to 30).
[9] CAB 99, [87]. AS [26].
[10] CAB 99, [87] (line 35). AS [28]-[29].

implied, that the jury must not use the fact that the applicant did not give evidence.[11] *Thirdly*, the directions that were given in accordance with *Liberato v The Queen* [1985] HCA 66; (1985) 159 CLR 507, 515 (Brennan J),[12] did not ameliorate the risk that the jury might use the applicant's silence in court adversely to him.[13] Those directions are designed to deal with different risk, namely, that a jury may wrongly conclude that an accused is guilty on the basis only of a rejection of his or her evidence. *Fourthly*, there was no consideration given to the question of whether there was any risk that the jury may have reasoned in one of the other impermissible ways identified in *Azzopardi*.[14]

10 7. The respondent's additional arguments should be rejected:

a. It is not necessary for there to have been 'features' that 'heightened a risk of miscarriage'.[15] There is no support for that proposition in *Azzopardi*. If there is a perceptible risk that the jury may have engaged in an impermissible process of reasoning then a miscarriage of justice will have occurred.

b. Unlike in *JPM v R* [2019] NSWCCA 301, the effect of the trial judge's directions was not to treat the applicant's denials in the EROI as equivalent to evidence on oath.[16] The jury were expressly told, on two occasions, that the applicant had not given evidence.

20 c. It cannot be concluded that there was a rational forensic decision not to seek an *Azzopardi* direction, in circumstances in which the trial judge had already made it very clear to the jury that the applicant had not given evidence. Further, an *Azzopardi* direction could not have detracted from the directions that were given about the EROI.[17]

Dated: 8 December 2021

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Sam Vandongen

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[11] CAB 99, [87] (line 36). AS [30]-[33]
[12] JBA, page 201 (at page 209).
[13] CAB 99, [87] (line 36). AS [34]-[37].
[14] CAB 98, [83] (line 26), [87] (line 34)
[15] RS [23] – [27].
[16] RS [33]-[34], [40]
[17] AS [42]-[44].