



HIGH COURT OF AUSTRALIA

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Details of Filing

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**IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY**

P45 of 2020

P45/2020

BETWEEN

IGNATIUS GEORGE

Applicant

AND

THE STATE OF WESTERN AUSTRALIA

Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I – Internet publication

1. I certify that these submissions are in a form suitable for publication on the internet.

Part II – Outline of propositions

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2. That it would have been desirable or preferable for the trial judge to have given an *Azzopardi* direction is not in issue.¹ It does not follow from that observation that the respondent accepts that there was a perceptible risk that the jury might have used the applicant's silence against him.²
3. An assessment of the contents of the applicant's electronic record of interview (EROI) and how the interview was treated by the trial judge and the parties is central to the respondent's submissions as to why there is not a perceptible risk of a miscarriage in this case.³
- 20 4. The EROI was a comprehensive account of events.⁴ The applicant's defence at trial did not resile from the version of events given in the EROI.⁵ The applicant's counsel treated the

¹ Respondent's submissions [22].

² Cf applicant's reply [2].

³ Respondent's submissions [13] to [19].

⁴ Respondent's submissions [13].

⁵ Respondent's submissions [15].

interview as evidence of the applicant's resilient denial of the offending in the face of what was said to be an unfair interrogation.⁶

5. There was no suggestion by the prosecution that the interview contained consciousness of guilt lies or that there was some matter which required further elaboration on the part of the applicant.⁷

6. The trial judge did not direct the jury in accordance with *Mule v The Queen* to the effect that the denials of offending contained in the EROI may be afforded less weight than either the admissions in the EROI or any other piece of evidence.⁸

7. The respondent does not suggest that the existence of a heightened risk of the jury misusing an accused's silence is a pre-condition for an *Azzopardi* direction.⁹ Rather, the intermediate appellate authorities cited by the parties contained features which heightened this risk in those cases. Those features are not present in this case. This was not a case where there was:

7.1. a contrast between one co-accused giving evidence and another failing to do so;¹⁰

7.2. a complete absence of denial from the applicant personally;¹¹

7.3. an accused who did not give evidence but called witnesses in his own defence on peripheral issues;¹² or

7.4. exculpatory facts (if they existed) which must have been within the knowledge of the accused which were not put before the jury.¹³

8. Given the importance of the interview to the defence case, it was open to defence counsel to rationally conclude that the applicant's interests were best served by directions giving false equivalence to the EROI denials and otherwise leaving the directions which repeatedly emphasised the applicant's right to silence undisturbed.

⁶ Respondent's submissions [18]-[19].

⁷ Respondent's submissions [14].

⁸ Respondent's submissions [16].

⁹ Cf applicant's reply [9].

¹⁰ Respondent's submissions [23.2], *Martinez v The Queen*.

¹¹ Respondent's submissions [23.1], *Martinez v The Queen, R v Hartfiel*.

¹² Respondent's submissions [23.3], *R v Hartfiel, JPM v The Queen, Martinez v The Queen*.

¹³ Respondent's submission [23.4], *R v Hartfiel*.

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9. The applicant submits, adopting what was said by Mazza JA below,¹⁴ that the risk was heightened because the complainant's evidence was on oath and the applicant's account was not on oath. That feature did not heighten the risk because:
- 9.1. neither the parties nor the trial judge sought to argue or direct that one type of evidence carried greater or lesser weight based upon the medium of presentation; and
- 9.2. the prosecutor did not seek to rely upon this distinction when inviting the jury to reject the applicant's account.
- 10 10. The applicant's submission that there was a risk that the jury might have more readily accepted the complainant's evidence to be true overlooks the weight to be attributed to the fact that his own comprehensive contradiction of the complainant's account was before the jury.
11. Similarly, the emphasis the applicant's counsel placed upon the resilient denials in the face of an unfair interrogation belies the submission that the applicant knew his denials were false, or believed they would not be accepted, as a reason for not giving evidence.
12. The *Liberato* direction, together with the directions concerning the right to silence and the burden of proof, focused the jury's attention on the prosecution case in a way that was sufficient to prevent the jury treating the applicant's silence at trial as a relevant consideration.¹⁵ There is no perceptible risk that the jury, having been told that even a rejection of the applicant's denials could still not be used against him, would go on to reason that the fact his denials were not repeated on oath was a matter which could influence their deliberations.

Dated: 8 December 2021

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L M Fox SC

Senior legal practitioner presenting the case in Court

¹⁴ CA judgment [226], CAB 135.

¹⁵ Respondent's submissions [40]-[42].