HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA P45 of 2020

PERTH REGISTRY

BETWEEN **IGNATIUS GEORGE**

Applicant

AND

THE STATE OF WESTERN AUSTRALIA

Respondent

RESPONDENT'S SUBMISSIONS

Part I – Internet publication

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

Part II – Concise statement of the issues presented by this appeal

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2. The issue in this application for special leave is whether there was a perceptible risk, in the particular circumstances of this case, that the jury would draw an adverse inference against the applicant in their deliberations on account of the fact that he did not give evidence at his trial.

Part III – Notice under s 78B of the *Judiciary Act 1903* (Cth)

3. It is certified that this appeal does not involve a matter arising under the Constitution or involving its interpretation. Accordingly, notice under s 78B of the *Judiciary Act 1903* (Cth)
20 is not required.

Part IV – Relevant facts

4. As to paragraph [12] of the applicant's submissions, the conversation between the applicant and the complainant's mother, and the conversation involving the complainant's father over the phone, was in part clandestinely recorded by the complainant's mother. The recording

was tendered in evidence as Exhibit B.[1] The respondent otherwise accepts as accurate the narrative of facts outlined in Part V of the applicant's submissions. No issue is taken with the chronology.

Part V – Argument

The scope of the applicant's complaint

5. It is unclear from the applicant's submissions as to whether he contends that there is a particular form of words, or a list of particular identifiable risks, which must form part of an orthodox ***Azzopardi*** direction. The draft ground of appeal contained in the application for special leave to appeal[2] complains, on its literal text, of a failure to direct the jury that the applicant's silence:

5.1. was not evidence against him;

5.2. did not constitute an admission;

5.3. could not be used to fill gaps in the evidence tendered by the prosecution; and

5.4. could not be used as a make-weight in assessing whether the prosecution has proved its case beyond reasonable doubt.

6. The scope of the applicant's complaint is significant in that the applicant criticises the majority below, in concluding that there was no perceptible risk of a miscarriage, by referring only to there being no risk of the jury using the applicant's silence to fill gaps in the prosecution case and not reaching any conclusion as to any of the other types of risk listed in ***Azzopardi***.[3]

[1] CA judgment [26]-[30], CAB 77-78.

[2] Applicant's book of further materials, p 327.

[3] Applicant's submissions [27]; ***Azzopardi v The Queen*** (2001) 205 CLR 50.

7. The majority accepted the decision of the Court of Appeal of Queensland in ***R v DAH*** that ***Azzopardi*** did not mandate any particular verbal formula, and that the term 'make-weight' has an unattractive flavour of antiquarianism about it.[4]

8. Mazza JA in dissent below, whose reasons are adopted as 'plainly correct' by the applicant,[5] agreed with the essential elements as outlined in ***R v DAH***.[6]

9. There is considerable overlap in these concepts. To say that the failure of an accused must not be used as a 'make-weight' is the same as saying that his silence cannot be used to 'fill gaps in the evidence.'[7]

10. The applicant further complains that there was a risk in this case that the jury may have formed the view that the applicant did not consider his own denials in his EROI to be credible or that he knew that his denials were not true.[8] The applicant does not cite any authority for the proposition that, as part of an orthodox ***Azzopardi*** direction, this particular mode of reasoning needs to be expressly guarded against. It is simply an example of a mode of reasoning whereby an accused's silence might be adversely used by the jury.

11. The majority did not, as the applicant contends, simply conclude that there was no risk that the jury would not use the applicant's silence to fill gaps in the prosecution case and failed to consider other types of risk identified in ***Azzopardi***. The real issue is not the risk of any of these specified modes of impermissible reasoning. The real question, as answered by the majority at the conclusion of paragraph [87] in the judgment below, is whether the fact that the interview denials were 'not repeated at trial on oath was a matter which could, *in any way*, influence their deliberations' (emphasis added).

12. For the reasons set out below, the majority was correct to conclude that there was no perceptible risk that the jury would, *in any way*, draw an adverse inference against the

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[4] CA judgment [74], citing ***R v DAH*** [2004] QCA 419 [85] – [86].

[5] Applicant's submissions [24].

[6] CA judgment [202]-[203], CAB 129.

[7] ***Norton v The State of Western Australia*** [2010] WASCA 115 [34].

[8] Applicant's submissions [29].

applicant or treat as a relevant consideration the fact that he did not give evidence on oath at trial.

The relevance of the EROI to the risk of a miscarriage of justice

13. The applicant's electronic record of interview (EROI), conducted within 12 hours of the incident,[9] contained clear denials of the offending. The EROI was comprehensive, in that the applicant gave an account of his alternate version of events, details of relevant surrounding circumstances as well as repeated emphatic denials of what was alleged against him.

14. The prosecution did not contend that the interview contained lies told out of a consciousness of guilt or otherwise suggest that there was some matter mentioned by the applicant in his EROI that required further elaboration.

15. This is also not a case where the defence at trial sought to resile from anything said by the applicant during his EROI. The denials in the EROI were the foundation of the defence case. The contents of the EROI formed the basis upon which the applicant's counsel cross-examined the witnesses other than the complainant at trial.

16. Relevantly, the trial judge could have, but did not, direct the jury in accordance with ***Mule v The Queen***[10] to the effect that such statements had not been made on oath, had not been tested by cross-examination and that the denials in the EROI may be afforded less weight on account of those factors. The applicant accordingly had the advantage of his denials in the EROI being put before the jury in an unqualified fashion. There is nothing within the trial judge's directions which in any way suggested that the applicant's denials were a lesser form of evidence than any other type of evidence given during the course of the trial.

17. Similarly, in seeking to persuade the jury to reject the applicant's denials in his EROI, the prosecutor did not make any submission to the effect that those denials were a lesser form

[9] The applicant attended at the home between 9 am and 9:30 am (ts 290, Applicant's book of further materials 153). The interview commenced at 9:11pm (CA judgment [35], CAB 80).

[10] ***Mule v The Queen*** [2005] HCA 49 [20]-[22].

of evidence in contrast to the prosecution witnesses who had given evidence on oath. The prosecutor's reference to the applicant's EROI mainly concerned statements about peripheral matters which were consistent with the accounts given by the complainant and her mother and advancing arguments as to why various statements of the applicant ought be rejected on their merits (as opposed to being rejected because of the form in which his denials were put before the jury).

18. The applicant's counsel relied heavily upon what he contended was the inappropriate manner in which the applicant's EROI was conducted. The applicant's counsel sought to make forensic advantage of the poor 'manner in which he was treated' by the police, the 'emotion that was evident in that interview' on the part of the interviewing police officer, and that 'despite all the pressure that was heaped on him' and 'difficulties personal to him' he nonetheless maintained his denial of the offending.[11]

19. The tenor of counsel's submission to the jury was that the applicant was subjected to an unfair interrogation yet nonetheless resiliently maintained his denial. This further belies the applicant's submission that the jury might have reasoned that the applicant stayed silent because he knew his account was not credible and would not be believed, given that he had already survived unfair interrogation at the hands of the police.

The law as to when an Azzopardi direction is desirable and the alleged particular risks in this case

20. While acknowledging that there have been cases where the failure to give a complete ***Azzopardi*** direction have been found not to have resulted in a miscarriage of justice, the applicant submits that 'it must be noted' that the majority in ***Azzopardi*** stated that 'it will almost always be desirable' for a judge to give such a warning.[12]

21. However, the direction is not mandatory. As the Court of Criminal Appeal of New South Wales observed in ***JPM v The Queen***, if all that were needed to make out an allegation of a miscarriage of justice is that the full direction was 'desirable', then such an approach

[11] Closing ts 22-23.

[12] Applicant's submissions [39].

would result in 'what has not hitherto been treated as a mandatory jury direction has become mandatory by default.'[13]

22. The desirability of the ***Azzopardi*** direction is not in issue in this appeal. The majority expressly stated that the omission of the full direction in this case was to be discouraged.[14] As the majority correctly noted, the question of whether the absence of a highly desirable direction gives rise to a miscarriage of justice depends on the circumstances of the case in question and particularly whether there is a perceptible risk that the jury might improperly use the accused's silence in support of the prosecution case in the absence of a complete direction.[15] The respondent does not cavil with the proposition that it would have been preferable for the omission in this case not to have occurred. However, that proposition does not inform consideration of the question of whether there was a perceptible risk of a miscarriage in this particular case.

The lack of any features which heighted a risk of miscarriage

23. This case differs from others which have dealt with imperfect or absent ***Azzopardi*** directions in that there is an absence of matters which may have heightened the risk that the jury would impermissibly use the applicant's silence at trial against him in their deliberations. This was not a case:

    23.1. where there was an absence of a denial from the applicant personally, given the contents of the EROI;[16]

    23.2. involving multiple accused such that there would be a stark contrast between one accused giving evidence and another accused remaining silent;[17]

[13] ***JPM v The Queen*** [2019] NSWCCA 301 [203].

[14] CA judgment [88], CAB 100.

[15] CA judgment [82], CAB 98.

[16] cf ***Martinez v The Queen*** [2019] NSWCCA 153.

[17] cf ***Martinez*** [114].

23.3. where the accused had elected to remain silent but had nonetheless called witnesses in his own defence to speak to peripheral issues;[18]

23.4. where there were (if they existed) exculpatory facts which must have been within the knowledge of the accused which, because of the accused's silence, were not put before the jury.[19]

24. The applicant, relying upon the dissent of Mazza JA[20] in the Court of Appeal, submits that there was a feature of this case which heightened the risk of impermissible reasoning, namely that the complainant's account was confirmed on oath whereas the applicant's account in his EROI was not.

25. However, there were at least five different species of evidence in this case. The evidence consisted of:

25.1. the complainant's interview with police officers, recorded on the day of the offence, which was played to the jury;

25.2. the pre-recording of the complainant's evidence, conducted before a different judge and involving a different prosecutor and defence counsel, which was played to the jury;

25.3. viva voce evidence at trial from the complainant's mother and the police officer responsible for the investigation of the matter;

25.4. the clandestine recording between the applicant and the complainant's mother; and

25.5. the applicant's EROI.

[18] cf ***R v Hartfiel*** [2014] QCA 132 and ***JPM***.

[19] cf ***Hartfiel*** [48].

[20] CA judgment [226], CAB 135.

26. The trial judge's directions, and counsels' closing addresses, did not draw a distinction between the different species of evidence. There was no suggestion that any particular species of evidence was weaker or should be treated differently than any other.

27. The confirmation on oath by the complainant also occurred during an earlier pre-recorded hearing which was played to the jury, rather than in the trial itself. At the beginning of the trial, the jury were told that this earlier pre-recording was a routine procedure from which no adverse inference should be drawn.[21] The argument, with respect, places undue weight on the medium of presentation of the evidence in circumstances where neither the parties nor the judge sought to distinguish one species of evidence from another.

Intermediate appellate court authority dealing with absent or deficient Azzopardi directions and why they may be distinguished from the present case

28. Of the intermediate appellate court decisions surveyed by the majority in the court below, ***R v Wilson***[22] and ***JPM*** are the two authorities where a deficient (***Wilson***) or absent (***JPM***) ***Azzopardi*** direction was found not to amount to a miscarriage of justice.[23] There is a significant common feature in those cases and the present, in that the appellants in those cases had participated in extensive interviews with police during which they denied the allegations put to them.

29. The issue in ***Wilson*** was similar to that in the present case, in that the jury were directed that the appellant was under no obligation to give evidence but were not directed that the absence of evidence could not be used to fill gaps in the prosecution case or used as a make-weight.

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[21] ts 256.

[22] ***R v Wilson*** [2005] NSWCCA 20; (2005) 62 NSWLR 346.

[23] The respondent excludes ***R v DAH*** from this comparative analysis. The real issue in ***R v DAH*** was whether ***Azzopardi*** mandated any particular form of words rather than a true defect in the direction.

30. Wilson was 'extensively interviewed'[24] by police. The jury were directed that Wilson was under no obligation to give evidence at trial and that no inference of guilt could be drawn from that.[25] The jury were also told that the defence case was 'a case partly by way of evidence and partly by way of argument.' The evidence to which the trial judge was referring were the interviews. However, unlike the present case, the jury were directed that, in substance, the interview denials were a lesser form of evidence on account of it not being 'evidence that has been given in the courtroom by witnesses who have gone into the witness box, in particular, it is not subject to cross-examination.'[26] The Court of Criminal Appeal placed weight on the fact that the jury 'were not faced with total silence on the part of the appellant' and that the absence of the missing components of the ***Azzopardi*** direction did not lead to the loss any any fairly open chance of acquittal.[27]

31. There was a heightened risk of a miscarriage of justice in ***Wilson***, compared to the present case, because of the direction which undermined the weight to be attributed to the denials in the police interviews in that case. By contrast, the applicant in this case had his denials treated in the same way as any other piece of evidence.

32. In ***JPM***, the risk of a miscarriage of justice was greater than the present case because of two circumstances which existed in that case but are absent in the present. First, the defect in ***JPM*** was that no ***Azzopardi*** direction at all had been given, as opposed to an insufficient or defective direction as in this case. Secondly, in ***JPM*** the appellant's wife gave evidence as part of the defence case. There would have been a stark contrast obvious to the jury between the appellant declining to give evidence on one hand and his wife being called to give evidence on the other hand.

33. In ***JPM***, the directions given by the trial judge as to the onus of proof and the use which could be made of the interview were sufficient to make it clear that the appellant was under no obligation to do anything more, including giving evidence. The directions in ***JPM***

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[24] ***Wilson*** [3].

[25] ***Wilson*** [7].

[26] ***Wilson*** [7].

[27] ***Wilson*** [32], [35]. See also CA judgment [75], CAB 94.

equated the status of the answers given in the interview with the other evidence adduced in the case.[28]

34. The same must be said of the present case. In circumstances where:

34.1. the jury possessed 'evidence' from the applicant in the form of his EROI; and

34.2. the directions treated, in substance, the applicant's EROI as if it was evidence no different from any other type of evidence adduced in this case

the jury could not sensibly have reasoned from the applicant's silence at trial that he was more likely to be guilty, or that he knew his account lacked credibility and would be rejected, or otherwise sought to draw an adverse inference from his silence.

35. The theoretical possibilities highlighted by the applicant in his submissions[29] fall far short of establishing a perceptible risk in the circumstances of this case.

36. The cases of ***Martinez*** and ***Hartfiel***, where miscarriages of justice were found, may be readily distinguished on their facts from the present case.[30] In ***Martinez***, there was a stark contrast,[31] which must have been obvious to the jury, between one accused giving evidence and the other remaining silent without the benefit of denials in a police interview being put before the jury. ***Hartfiel*** involved a contrast between the appellant remaining silent while calling two others to give evidence as part of the defence case, which only served to highlight the appellant's absence from the witness box.

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[28] ***JPM*** [3]-[4].

[29] Applicant's submissions [29].

[30] The respondent excludes ***Burke v The Queen*** [2013] VSCA 351 from this comparative analysis for the reasons given by the majority below – namely that the Court of Appeal of Victoria allowed the appeal on the basis of an aggregation of defects and did not consider, in isolation, where the failure to give an ***Azzopardi*** direction alone would have amounted to a miscarriage. See CA judgment [79], CAB 96-97 and ***Burke*** [75], [101].

[31] ***Martinez*** [114].

37. The risk of a miscarriage in ***Hartfiel*** was further compounded in that:

37.1. defence witnesses only gave evidence on matters which were peripheral to the prosecution's allegations;[32] and

37.2. the appellant, in the context of specific fraudulent conduct, must have knowledge of relevant matters and, in some cases, those relevant matters would have been within her knowledge alone which would have triggered a natural, if not inevitable, response on the part of the jury as to why the appellant would call witnesses on peripheral issues but not give evidence about important matters of which she must had known;[33] and

37.3. there was no interview containing denials or an exculpatory account before the jury.

38. By contrast, the jury in this case could not have wondered why the applicant did not give evidence in this case, given his denials and comprehensive account in his interview which was favourably treated the same as any other type of evidence.

The specific asserted risks of a miscarriage in this case

39. The applicant submits that the fact that the applicant's account was before the jury in the from of his EROI did not 'logically ameliorate' the risk that the jury may not have used his silence in court against him.[34] The difficulty with that submission is that it does not engage with the forensic realities of the circumstances of this particular case, including the directions which were given about how the EROI was to be used and the ***Liberato*** direction.

40. The fact that the EROI, in and of itself, was before the jury does not ameliorate the risk of a miscarriage in the manner contended for by the applicant. However, as articulated above the treatment of the denials in the EROI as equivalent to evidence on oath, the forensic use made by the defence at trial of the interview, the defence's asserted resilience of the applicant in resisting unfair interrogation by the police, and repeated directions that the

[32] ***Hartfiel*** [48].

[33] ***Hartfiel*** [48].

[34] Applicant's submissions [28].

applicant was under no obligation to either speak to the police or give evidence in court, and that the fact that he did not assume any burden by waiving that right and speaking to the police, all served to ameliorate the risk that the jury would reason in a manner contended for by the applicant.

41. Further, as part of the ***Liberato*** direction, her Honour informed the jury that even a positive rejection of the appellant's account in his interview could not be used against him; rejection of his account would require the jury to put his account to one side and to 'look again at all the evidence' and consider whether they were satisfied beyond reasonable doubt as to the offence occurring.[35]

42. In the context of this case, the ***Liberato*** direction served to reinforce upon the jury that the question always remained whether the prosecution had proven its case even if they rejected, or did not positively accept, the applicant's denials. By focusing the jury's attention on the prosecution case, and nothing else, if that eventuality were to materialise the jury could not, acting faithfully in accordance with that direction, have gone on to draw an adverse inference against the applicant from exercising his right to silence.[36] The directions were sufficient to prevent the jury from having regard to the applicant's silence at trial as a relevant consideration in their deliberations.

The asserted absence of a rational forensic reason not to seek re-direction

43. The applicant refers to a failure to seek a direction. In fact, the forensic scenario presented to the applicant's counsel, an experienced criminal lawyer, was whether to seek a re-direction on the basis that the partial direction which was given was inadequate to guard against a miscarriage of justice. Such a re-direction, if the trial judge had been persuaded to give it, would have been the last thing the jury would have heard prior to commencing their deliberations. It is in this context that the purported failure to seek re-direction falls to be assessed.

[35] ts 351-352.

[36] CA judgment [87], CAB 99-100.

44. In submitting that there was no rational forensic reason not to request a re-direction, the applicant seeks to contrast his own case with ***JPM v The Queen***,[37] asserting that in this case the trial judge had already referred to the fact that the applicant had not given evidence.[38]

45. As the impugned passage of the charge cited by the applicant reveals, her Honour reiterated, when referring to the fact that the applicant had not given evidence, that he was under no obligation to do so.[39] Unlike ***JPM***, the absence of any obligation to give evidence was made clear to the jury on several occasions by the trial judge.

46. A re-direction which highlighted the absence of evidence by the applicant carried a forensic risk. As the impugned passages of the charge make clear,[40] the trial judge's directions in effect equated the applicant's denials in his EROI with other evidence adduced at trial. Given how heavily reliant the defence case was on the denials in the EROI, it was open as a rational forensic decision not to seek a re-direction in order to:

    46.1. ensure that the re-direction did not detract, inadvertently or otherwise, from the earlier directions which elevated the applicant's denials to the status of equivalence with other evidence; and

    46.2. not to draw any <u>further</u> attention to the fact that the applicant had not given evidence at trial in circumstances where it had already been made clear that he was not obliged to do so.

47. It was thus open to defence counsel to rationally conclude that the applicant's interests were best served by the directions giving false equivalence to the EROI denials and leaving the issue otherwise undisturbed. It was open to counsel to conclude that the trial judge's directions left the applicant in a forensic position superior to that which, on balance, might otherwise have been the case and that nothing should be said which might detract from that position.

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[37] Applicant's submissions [43], citing ***JPM*** [214]-[216].

[38] Applicant's submissions [43].

[39] CA judgment [85], CAB 99.

[40] Reproduced at CA judgment [84]-[85], CAB 98-99.

Part VII – Estimate of length of oral argument

48. The respondent estimates it will require 1 hour for the presentation of the respondent's oral argument.

Dated: 20 July 2021

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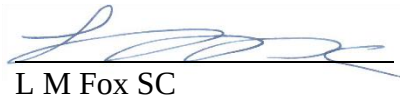

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