HIGH COURT OF AUSTRALIA

NOTICE OF FILING

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Details of Filing

File Number:	B18/2020
File Title:	GBF v. The Queen
Registry:	Brisbane
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Filing party:	Respondent
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Important Information

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: GBF
Appellant

and

THE QUEEN
Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I:

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

Part II:

The Issues on Appeal:

2. This case raises for consideration the circumstances that might amount to a miscarriage of justice giving rise to the power for appellate intervention where a trial judge makes a comment to the jury in a summing-up that should not have been made and the approach an appellate court should take to deciding that question.

3. The primary contention of the appellant is that the impugned words of the trial judge caused a miscarriage of justice and the Court of Appeal should have so concluded. It is contended that the trial judge implicitly suggested that the jury had been deprived of something to which there was an entitlement contrary to the presumption of innocence and the right to silence. That was an error and it was of such a nature that a

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miscarriage of justice resulted. No question of materiality arose for consideration. There was no occasion for the application of the proviso.

4. The alternative contention of the appellant is that if materiality must be established, then it was established in the case.

The Respondent's Contentions:

5. It is submitted that the question of whether the words of the trial judge resulted in a miscarriage of justice in this case required consideration of the effect of the words in the context of the whole of the summing-up.[1]

6. It is not contended that this is a case warranting judicial comment of the kind envisaged in *Azzopardi*[2] nor that the words of the trial judge were directed to achieve that purpose.

7. Whilst it is accepted that the words should not have been said, viewed in the context of the summing up as a whole, they did not result in a miscarriage of justice. The otherwise clear directions given to the jury on the onus and standard of proof did not give rise to the reasonable possibility that the jury would have felt that it was open to them to more readily accept the complainant's evidence because of the absence of sworn evidence from the appellant. The failure of trial counsel to raise objection supports the conclusion that the effect of the impugned words was not such as to invite the jury to reason impermissibly.

The Court of Appeal did not err in its disposition of the appeal:

8. In the circumstances of the case the Court of Appeal was correct to conclude that there was no miscarriage of justice.

9. The Court of Appeal found that the words should not have been said because the words could undermine the presumption of innocence and right to silence. Ultimately, the

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[1] *Mraz v The Queen* (1955) 93 CLR 493 at 514
[2] (2001) 205 CLR 50

Court concluded that the words did not have that consequence because of the clear directions to the jury on those matters.

10. To decide whether a miscarriage of justice occurred in the particular circumstances of this case, the Court of Appeal was required to undertake an assessment of those words in the context of the whole of the summing up and the issues in the trial. The Court of Appeal undertook that assessment and concluded that there was no real possibility the jury may have misunderstood the trial judge's directions and there was therefore no miscarriage of justice in accordance with the third criteria in s.668E of the *Criminal Code (Qld)*.

Dated: 10 September 2020

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