HIGH COURT OF AUSTRALIA

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Details of Filing

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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 REPLY

Part I: Certification

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

Part II: Reply

2. The respondent agrees that it would have been desirable or preferable if the trial judge had given an ***Azzopardi*** direction.[1] In light of what was actually said by the majority in ***Azzopardi***, a necessary consequence of the respondent's position is an acceptance that there was a risk that the jury may have used the applicant's silence in court to his detriment.

Scope of the applicant's complaint

3. Apart from giving directions that informed the jury that the applicant did not have to give evidence,[2] the trial judge did not give the jury any warning against engaging in any of the lines of prohibited reasoning the subject of an ***Azzopardi*** direction. The application for special leave to appeal is based on a contention that the majority in the Court of Appeal erred when it decided that the '[complete] absence of a direction in terms of that said in ***Azzopardi*** to 'almost always be

[1] Respondent's Submissions [22].
[2] CA Decision [84] and [85].

desirable' did not, in all the circumstances of this case, give rise to a miscarriage of justice.'[3]

4. The majority appears to have had regard only to the question of whether there was a material risk that the jury might have thought that it was open to use the applicant's silence to fill gaps in the prosecution case.[4] The applicant relies on this as one, but not a necessary, aspect of its overall complaint that the majority erred in concluding that the absence of an ***Azzopardi*** direction did not occasion a miscarriage of justice.

5. The respondent's submissions about the phrase 'make-weight' may be accepted. However, the submissions ignore the fact that the ***Azzopardi*** direction is also concerned with warning against using an accused's silence in court as evidence against the accused, or as constituting an admission.[5] The jury was not warned about engaging in either of those lines of reasoning.

The relevance of the EROI

6. The respondent refers to the use that was sought to be made of the EROI by the applicant's counsel, including by reference to the closing submissions.[6] Putting to one side the question of whether the applicant's counsel did in fact rely 'heavily' on the manner in which the applicant was interviewed, a distinction must be drawn between what was said on the applicant's behalf and what a jury might, nonetheless, have inferred from the fact that the applicant did not give evidence.

7. Further, the EROI did not just contain bare denials. Over more than 2 hours the applicant gave a detailed, albeit repetitive, account of his version of events. The effect of that account was that any contact that he made with the complainant was unintentional.[7] The prosecution case was that the applicant's version in the EROI of what he said occurred was implausible.[8] That this would be the prosecution case was inevitable. In those circumstances, there is was a real risk that the jury may conclude that the appellant stayed silent at his trial because he knew that his account was not credible and would not be believed.

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[3] CA Decision [88]. Applicant's Submissions [24].
[4] CA Decision [83]-[87].
[5] In ***R v DAH*** [2004] QCA 419, these risks were expressed as drawing adverse inferences from an accused's failure to give evidence and using s failure to give evidence to strengthen a prosecution case: CA Decision [74].
[6] Respondent's Submissions [18]-[19].
[7] CA Decision [40]-[41].
[8] Closing address ts 8-10 (Respondent's book of further materials p11-13).

The law as to when an Azzopardi direction is required

8. It is accepted that an ***Azzopardi*** direction is not mandatory. However, the essential question is whether such a direction was required in the circumstances of this case in order to avoid the risk that the jury might impermissibly use the fact that the applicant did not give evidence. The trial judge expressly drew to the jury's attention, on two separate occasions, that the applicant had not given evidence. The fact that the applicant had not given evidence would have been obvious to the jury. In all of the circumstances there was no rational forensic reason not to seek an ***Azzopardi*** direction

10 *Lack of features that heightened a risk of miscarriage*

9. The respondent contends that, when compared to other cases that have been decided by intermediate courts of appeal, there was nothing in this case that 'heightened' the risk that the jury would impermissibly use the appellant's silence against him. However, the existence of a 'heightened' risk is not a pre-condition for an ***Azzopardi*** direction. The observations of the majority in ***Azzopardi*** demonstrate that the desirability for a warning arises from the bare fact that 'if a judge said nothing to the jury about the fact that an accused had not given evidence, the jury may use the accused's silence in court to his or her detriment.'

10. In any event, Mazza JA was correct in concluding that there was, in effect, a
20 heighted risk that the jury might follow a path of reasoning in which the appellant's silence in court was used to his detriment.[9] It was because of the similarity of the means by which the complainant's evidence and the EROI were actually presented to the jury (both in the form of video recordings) which meant that it was unlikely to have been lost on the jury that while the complainant's version was confirmed by her in court (on oath), the applicant's version was not.[10] The similarity of the means of presentation would have highlighted that relevant difference. The fact that there were other 'different species of evidence', and that no express distinction was drawn between them, is beside the point.

11. A warning that no adverse inference could be drawn from the fact that the
30 complainant did not give evidence in court at the appellant's trial could not deal with the risk that the jury may have impermissibly used the fact that the appellant did not give evidence.

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[9] CA Decision [226].
[10] See also, ***JPM*** [264] and [270].

Intermediate appellate court authority.

12. The Respondent has referred to a number of decisions of intermediate courts of appeal. However, where the issue is whether the court below was correct in concluding that the absence of an ***Azzopardi*** direction did not, in the context of this particular case, give rise to a miscarriage of justice, an examination of other decisions of intermediate courts of appeal is likely to be of little assistance.

13. In ***R v Wilson*** [2005] NSWCCA 20; (2005) 62 NSWLR 346, it was held that the absence of the two missing ingredients 'would not have led to the loss of any chance fairly open to the appellant of acquittal or to any other miscarriage of justice'.[11] Unlike the position in ***Wilson***, all of the ingredients of the ***Azzopardi*** direction were missing from the trial judge's directions in this case.

14. In ***JPM v The Queen*** [2019] NSWCCA 301 the conclusion that no miscarriage of justice was occasioned by the failure to give an ***Azzopardi*** direction was reached because it was a rational choice of trial counsel not to seek a re-direction.[12] Further, the trial judge did not give any directions that drew the jury's attention the fact that the appellant did not give evidence, and left it open to the jury to treat what he had said to the police in a recorded interview as equivalent to other evidence that had been given by witnesses.[13]

15. In relation to ***Martinez v The Queen*** [2019] NSWCCA 153 and ***R v Hartfeil*** [2014] QCA 132, as Adamson J said in ***JPM*** at [259]: '[t]he cases in which it will be necessary to give the full ***Azzopardi*** direction are not to be categorised by reference to individual factors. Ultimately, the question whether such a ground is made out is to be answered by reference to the directions actually given, the circumstances of the case and the conduct of counsel at the trial.'

The specific asserted risks

16. The Applicant's Submissions at [28] were directed at the reasoning that was actually engaged in by the majority.[14] The matters that are now relied on by the respondent[15] are new, and none of them formed any part of the majority's reasoning. In any event, none of the matters that are now relied on by the respondent[16] support a conclusion that the risk that the jury impermissibly drew an inference from the fact that the appellant did not give evidence, or used the fact that he did not give evidence as something that strengthened the prosecution case

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[11] ***JPM*** [35].
[12] ***JPM*** [185]-[187], [221].
[13] ***JPM*** [188]-[190]. See also [265]-[267], and [270].
[14] CA Decision [87].
[15] Respondent's Submissions [40]-[42].
[16] Respondent's Submissions [40].

was removed. Importantly, the respondent's submissions do not grapple with the risk that the jury might have impermissibly drawn inferences from the applicant's silence in court, including as an indication that they could more readily accept the complaint's evidence,[17] or that his silence could be used in making an assessment of his denials in the EROI.

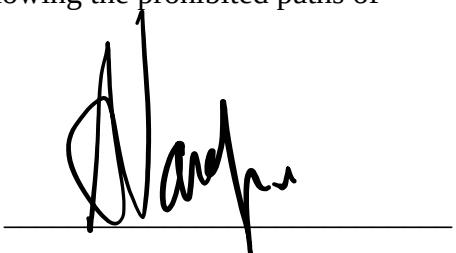
Significance of trial counsel's failure to take exception to the directions

17. The respondent now submits that there was a rational forensic basis for the appellant's counsel not to have taken exception to the directions that were given about the fact that the appellant had not given evidence.[18] In the supplementary submissions that were filed in the court below[19] it was not suggested that there was a rational forensic reason for trial counsel not to have sought a re-direction. Further, the fact that a re-direction was not sought did not form any part of the majority's reasons for concluding that no miscarriage of justice had been occasioned. Only Mazza JA considered the question of whether there was a rational forensic basis to not to seek an *Azzopardi* direction, and he expressly concluded that there was not.[20]

18. It is inevitable that a re-direction would have drawn attention to the fact that the appellant had not given evidence. However, in circumstances in which the jury had already been reminded by the trial judge that the applicant had not given evidence, there could have been no rational forensic reason to then not seek a re-direction to avoid a consequential risk of a miscarriage of justice.

19. Even if the effect of the directions was to give false equivalence to the EROI denials, which is not accepted, an ***Azzopardi*** direction could not have changed the effect of those directions. There would have been no need to refer to the EROI at all in the course of warning the jury against following the prohibited paths of reasoning.

Dated: 12 August 2021



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[17] ***JPM*** [273].
[18] Respondent's Submissions [43]-[47].
[19] Appellant's book of further materials p318-321.
[20] CA judgment [228].