HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B18 of 2020

BETWEEN:

GBF
Appellant

and

THE QUEEN
Respondent

APPELLANT'S REPLY

Part I: Certification

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

Part II: Reply

The characterisation of the Trial Judge's statement is of less significance than its effect

2. The respondent submitted at [6] that the *"meaning of the comment is ambiguous"*. The phrase "*that may make it easier*" cannot be read in isolation. The Trial Judge, relevantly, said:

> "But in this case, bear in mind that she gave evidence and there is no evidence, no sworn evidence, by the defendant to the contrary of her account. That may make it easier".

3. The meaning and effect of the 'comment' is made clear when the phrase is read as a whole. The task being made easier was the assessment of the complainant's account, which was the central issue at trial.

4. Even if the respondent's submission at [7] that the Court of Appeal correctly characterised what the Trial Judge said as a "comment" rather than a "specific direction", is accepted, it does not matter in this case. As was submitted in the appellant's submission at [38], the distinction between a 'comment' and a 'direction' will be important in some cases, but not this one. What matters is the effect of the words used given that they were spoken with the authority of judicial office.

5. The effect of the words given, when read in context, risked improper reasoning from the exercise of the right to silence. The respondent allows at [8] that a risk existed. It submits that the *"risk flowing from the impugned words is that the jury may have felt that it was open for them to reason impermissibly to more readily accept the complainant's evidence because of the absence of sworn evidence of the appellant"*.

6. According to the respondent, while the risk was *"open"* it was not *"realised"* because *"in all of the circumstances of this case, and the context of the summing up, it was not reasonably possible"*. That submission appears to be premised on the earlier submission at [7] that *"[a]s the jury would have understood that they could ignore the comment, its potential to influence is weakened"*.

7. The fundamental problem confronting the respondent's submission is that the Trial Judge's statement was contrary to other 'specific' directions. As was held by this Court in *Azzopardi v The Queen*[1] that the impugned passage in that case was *"confusing and contradictory"*[2] of the earlier directions given by the trial judge and it *"...invited [the jury] to engage in a false process of reasoning..."*[3] So too here, for the reasons outlined at [28]-[37] of the appellant's submission.

8. In any event, the appellant maintains his submission that, in the circumstances of this case, the statement was more than just "confusing and contradictory". It was, for the reasons outlined at [18] of the appellant's submission "wrong at every level" and at [37] "...plausible that the jury would have seen the impugned statement as an exception to the other directions in the context of the specific task of assessing the complainant's evidence".

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[1] (2001) 205 CLR 50.
[2] *Azzopardi v The Queen* (2001) 205 CLR 50 at 77 [75] per Gaudron, Gummow, Kirby and Hayne JJ.
[3] *Azzopardi v The Queen* (2001) 205 CLR 50 at 76-77 [73] per Gaudron, Gummow, Kirby and Hayne JJ.

The Respondent's approach to the meaning of "miscarriage of justice"

9. The respondent has submitted at [10] that the *"burden is on the appellant to prove that ... the error or irregularity affected or may have affected the verdict"*.

10. However, even the pre *Weiss v The Queen*[4] and *Kalbasi v Western Australia*.[5] authorities that the respondent relies upon do not support that proposition. In *Simic v The Queen*,[6] the proposition that it must be *"... reasonably possible that the misstatement may have affected the verdict..."*[7] was said in respect of a misdirection of
10 fact and not one about a misdirection law.

11. On the preceding page, the Court said *"... the distinction between a misdirection of law and misdirection of fact is fundamental and must always be borne in mind when evaluating the significance of a misdirection of the latter kind. In the case of the former, the jury is assumed to have observed and applied the directions that were given to them, and any mistake by the trial judge in his charge to the jury on matters of law is itself a ground for allowing an appeal, if subject to the proviso..."*[8]

12. In this case, the misstatement is better characterised as one of law rather than one of
20 fact because it permitted the jury to reason in a way that was, as both parties and the Court of Appeal agree, contrary to law.

13. The other passages cited by the respondent considered the 'proviso'[9] or were in the unique context of incompetence of trial counsel.[10]

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[4] (2005) 224 CLR 300.
[5] (2018) 264 CLR 62.
[6] (1980) 144 CLR 319.
[7] (1980) 144 CLR 319 at 331-332. That proposition was approved in the following cases cited by the respondent at fn 12: *Dhanhoa v The Queen* (2003) 217 CLR 1 at 13 [38] and 15 [49] per McHugh and Gummow JJ. It is noted in *Baini v The Queen* (2012) 246 CLR 469 at 488 [53]-[54] Gageler J cited *TKWJ v The Queen* (2002) 212 CLR 124 at 146-147 [72]-[73] and *Dhanhoa v The Queen* (2003) 217 CLR 1 at 13 [38], 15 [49], 18 [60].
[8] (1980) 144 CLR 319 at 331-332
[9] (1998) 194 CLR 20 at 212 [23]-[24].
[10] *TKWJ v The Queen* (2002) 212 CLR 124; *Nudd v The Queen* (2006) 225 ALR 161; *Craig v The Queen* (2018) 264 CLR 202; and to a lesser extent the passages in *Gately v The Queen* (2007) 232 CLR 208 at 232-233 [76]-[77] and 234 [82] because Hayne J placed great emphasis on that trial counsel consented to the jury having access to the pre-recorded evidence of the complainant, which is also a very different context.

14. As discussed in the appellant's primary submissions, it is difficult, in any event, to see how the reasoning in *Dhanhoa v The Queen*[11] *and Simic v The Queen*,[12] and related cases to have survived the reasoning in *Weiss v The Queen*[13] and *Kalbasi v Western Australia*.[14]

Regardless of the test, this was a miscarriage of justice

15. Even if it be the case that there is a materiality criterion of any degree of magnitude built into the test for a miscarriage of justice, this case meets it easily.

16. The jury were permitted to use the exercise of the right to silence to reason to guilt on the central issue at trial, the credibility and reliability of the complainant. As a result, the pathway to conviction was profoundly altered by what the Trial Judge said to the jury and there is no basis to discount the likelihood that the jury acted on the statement made. In (at best for the prosecution) a finely balanced case there is a real likelihood that the verdict was affected.

17. Therefore while the appellant maintains that it is not necessary to demonstrate materiality at the point of deciding if there was a miscarriage,[15] he nonetheless submits that the respondent's submission at [10] that *"[t]his was not such a case"* where *"the irregularity may be so material that of itself it constitutes a miscarriage of justice"*, cannot be maintained.

Dated: 17 July 2020

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[11] (2003) 217 CLR 1.
[12] (1980) 144 CLR 319.
[13] *Weiss v The Queen* (2005) 224 CLR 300.
[14] *Kalbasi v Western Australia* (2018) 264 CLR 62.
[15] See appellant's submission at [55].

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