HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	P45/2020
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Registry:	Perth
Document filed:	Form 27A - Appellant's submissions
Filing party:	Applicant
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Important Information

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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 SUBMISSIONS

Part I: Certification

1. The applicant certifies these submissions are in a form suitable for publication on the internet.

Part II: Statement of issues

2. By an application filed on 19 November 2020 the applicant applied for special leave to appeal against the whole of the judgement of the Supreme Court, Court of Appeal (**Court of Appeal**) given on 1 September 2020 in *George v The State of Western Australia* [2020] WASCA 139 (**CA Decision**).

3. On 20 May 2021, after a hearing before Gageler, Edelman and Steward JJ, the application for special leave to appeal was referred to an enlarged bench of the High Court of Australia, to be dealt with as if on appeal.

4. The issue that arises in this application for special leave is whether the Court of Appeal erred in holding (at [88] of the CA Decision) that there was no miscarriage of justice occasioned as a result of the trial judge's failure to warn the jury that no adverse inference could be drawn from the fact that the applicant did not give evidence at his trial, or that the applicant's silence in court was not evidence against him, did not

constitute an admission by the applicant, and could not be used to fill in any gaps in the prosecution case.

Part III: Notice under 78B *Judiciary Act 1903* (Cth)

5. It is certified that the applicant considers that no notice needs to be given under section 78B of the *Judiciary Act 1903*.

Part IV: Citation

6. The internet citation of the reasons for judgment of the Court of Appeal of the Supreme Court of Western Australia is *George v The State of Western Australia* [2020] WASCA 139. The decision is not otherwise reported.

Part V: Relevant facts

7. The applicant was an electrical contractor who was engaged to perform electrical work at the home of the complainant's family. On 20 April 2017, while the applicant was working, the 13 year old complainant was doing chores around the home.

8. The prosecution case was that when the complainant was in the laundry, the applicant came into the room and asked to touch her hair. The complainant allowed him to do this. After touching her hair, the applicant then moved his hand down and touched the complainant on her bottom. The complainant thought that the applicant had made a mistake, and so when he asked if he could touch her hair again, she agreed. This time the applicant touched her hair, then moved his hand and touched her on her breast and cupped her breast with his hand. The complainant became upset, and ran screaming and crying out of the laundry before telling her mother what she said had happened. (CA Decision: [6])

9. The act of touching the complainant on the bottom and the separate act of touching her breast formed the basis of two charges of indecently dealing with a child between the ages of 13 and 16 years, contrary to s321(4) of the *Criminal Code* (WA).

10. The applicant's case at trial was that the two acts that formed the basis of the charges of indecent dealing did not occur. (CA Decision: [7] and [8])

11. The complainant did not give evidence at the trial as her evidence had been pre-recorded. Her evidence in chief principally comprised her adoption of a visually recorded interview, which was admissible and constituted part of the complainant's evidence. (CA Decision: [10] to [20])

12. The prosecution also adduced evidence from the complainant's mother. She said that she saw the complainant in a distressed state shortly after emerging from the laundry, and that the complainant then told her what the applicant had done. She also gave evidence about conversations that she had with the applicant, and a conversation that took place between the applicant and the complainant's father, after the commission of the alleged offences. (CA Decision: [21] to [31])

13. The only other witness called by the prosecution was the investigating police officer. She gave evidence about the arrest of the applicant, and an electronic record of interview (**EROI**) that was conducted with the applicant was played and tendered during her evidence in chief. (CA Decision: [32] to [43])

14. In the EROI, the applicant essentially denied the offences. He accepted that he might have touched the complainant, but the effect of his account was that any contact he may have made with the complainant was unintentional. He also said that he did not appreciate that the complainant was only 13 years old, and thought she was about 20 years old. He accepted that he may have told the complainant that she had nice hair but denied asking her for permission to touch her hair.

15. The applicant agreed that the complainant ran from the laundry screaming and crying, and that he apologised to the complainant and her mother for what he said was an accident. He said that he spoke to a man he was told was the complainant's father on the telephone and apologised to him as well. The applicant said that he was paid for his work and went to his next job. On his way home later that day, he spoke to his wife by telephone and was told that the police had been at their house. The applicant decided to go back to the complainant's house to talk to her father, where he was arrested.

16. The applicant did not give or adduce any evidence at his trial. Instead, he relied on the submissions that were made by his counsel in closing. Those submissions were essentially to the effect that the prosecution had not proved beyond reasonable doubt

that the complainant's allegations that the applicant had indecently dealt with her were truthful and reliable. (CA Decision: [44] to [48])

17. The applicant was ultimately convicted of both counts.

18. Representing himself, the applicant appealed against the judgments of conviction on a number of different grounds. (CA Decision: [49] to [53])

19. None of the grounds of appeal expressly raised the issue that is raised in this application. However, in written submissions that were filed in the Court of Appeal the applicant complained that the trial judge's direction did not 'address the matters referred to in *Azzopardi v The Queen*'.[1] Although that argument strictly fell outside the grounds of appeal, the CA decided to deal with it as if it were a ground of appeal because it was raised by the applicant's submissions, and because he was self-represented: (CA Decision: [72])

Part VI: ARGUMENT

20. In *Azzopardi v The Queen* [2001] HCA 25; (2001) 205 CLR 50 at [51], Gaudron, Gummow, Kirby and Hayne JJ agreed with a submission that had been made in the course of argument that if a judge says nothing to a jury about the fact that an accused has not given evidence, the jury may use the accused's silence in court to his or her detriment. It was said that it followed from this that 'it will almost always be desirable' for the trial judge to warn the jury that an accused's silence in court is not evidence against them, does not constitute an admission, cannot be used to fill gaps in the evidence tendered by the prosecution, and/or cannot not be used as a make-weight in assessing whether the prosecution has proved its case beyond reasonable doubt (***Azzopardi* direction**).[2]

21. Since *Azzopardi* was decided there have been a number of cases determined by intermediate courts of appeal in which it was argued that a failure to give a direction in accordance with what was said by the majority either amounted to a misdirection or

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[1] *Azzopardi v The Queen* [2001] HCA 25; (2001) 205 CLR 50 [51].
[2] In *R v DAH* [2004] QCA 419; (2004) 150 A Crim R 14 [12], [85] – [86], the Queensland Court of Appeal commented on the appropriateness of using the phrase 'make-weight' in directions to a jury

that it otherwise occasioned a miscarriage of justice.[3] On many occasions, the deficiency complained of was that some of the elements of the *Azzopardi* direction were missing, rather than that no such direction had been given at all.[4]

22. In this case, on two separate occasions in the course of her directions to the jury, the trial judge expressly referred to the fact that the applicant had not given evidence at the trial. (CA Decision: [84] and [85]) However, the trial judge did not at any time give an *Azzopardi* direction, (CA Decision: [83], [220]), or any element of such a direction. Not only did the trial judge not direct the jury that the fact that the applicant did not give evidence could not be used to fill gaps in the prosecution case, as was accepted by the majority in the Court of Appeal, the jury were not warned that his silence in court was not evidence against him, did not constitute an admission, and could not be used as a 'make-weight'.

23. The majority found that it would have been preferable for the trial judge to have 'given a direction to the effect that the fact that the applicant did not give evidence could not be used to fill gaps in the State case' but concluded that for the reasons set out at [87] of the CA Decision the absence of such a direction did not give rise to any miscarriage of justice. On the other hand, Mazza JA, in dissent, concluded that the trial judge's directions left open the perceptible risk that the jury would use the applicant's silence at trial to his detriment and that, as a consequence, the applicant suffered a miscarriage of justice (CA Decision: [229]).

24. The majority in the Court of Appeal was wrong when it decided that no miscarriage of justice occurred because of the absence of a direction that warned the jury about the ways in which it was not permissible for them to use the fact that the applicant had elected not to give evidence at his trial. The decision of Mazza JA, upon which the applicant relies, is plainly correct.

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[3] See, by way of example, the various cases that were referred to at [74] to [80] of the CA Decision.

[4] For example, *R v DAH* [2004] QCA 419; (2004) 150 A Crim R 14; *R v Wilson* [2005] NSWCCA 20; (2005) 62 NSWLR 346. Compare *JPM v The Queen* [2019] NSWCCA 301.

25. Special leave to appeal should be granted because the interests of the administration of justice in this particular case require consideration by the High Court of the CA Decision. Further, the trial judge's failure to warn the jury in the manner contemplated by the majority in *Azzopardi* did occasion a miscarriage of justice and that, as a result, the appeal should be allowed.

26. The majority reasoned that the absence of an *Azzopardi* direction did not give rise to a miscarriage of justice having regard to the fact that the applicant's account was before the jury in the form of the EROI, to the directions that were given about the fact that the applicant had not given evidence, and to the fact that a '*Liberato* direction' was given (from *Liberato v The Queen* [1985] HCA 66; (1985) 159 CLR 507, 515).

27. However, it is apparent from what was said at [83] and [87] of the CA Decision that the majority reached that conclusion having regard only to the question of whether there was a material risk that the jury might have used the fact that the applicant did not give evidence to fill in gaps in the prosecution case. There is nothing to indicate that the majority ever considered whether there was a perceptible risk that the jury may have reasoned in one or more of the other impermissible ways identified by the majority in *Azzopardi* at [51]. This is in contrast to the reasoning that was correctly adopted by Mazza JA, at [189] to [229] of the CA Decision.

28. The fact that the applicant's account was before the jury 'via the EROI' did not logically ameliorate the risk that the jury may have used his silence in Court as evidence or as an admission. A juror's temptation to use an accused's silence at trial in that way will not be obviated by the fact that an EROI, in which an accused gives an account in answer to questions put by police officers, was tendered as part of the prosecution case. It is the risk that a juror may draw an adverse inference from the fact that an accused did not submit to questioning in court that is relevant.

29. In the circumstances of this case, in which the only substantive evidence of the applicant's denial of criminal responsibility was what he said in the EROI, the absence of an *Azzopardi* direction gave rise to a perceptible risk that the jury impermissibly used his silence in court as a basis on which to reject those denials. His failure to give evidence may have formed the basis of an inference that the applicant did not honestly

believe the denials he had made in the EROI, or that he thought that that they were not credible.

30. The trial judge's directions, referred to at [84] and [85] of the CA Decision, also did not remove the risk that the jury might use the fact that the applicant did not give evidence in an impermissible way. Those directions merely brought to the jury's attention that the applicant had a right not to give evidence. Critically, the jury were not then told about the consequences of the exercise of that right, and how the jury could not use the exercise of that right adversely to the applicant. As Mazza JA correctly observed at [223] of the CA Decision:

> ...it is one thing for a jury to understand that an accused has a right to silence at trial; it is another thing to understand what the consequences are of the exercise of that right. As a jury may be apt, indeed tempted, to use an accused's silence at trial to his or her detriment, a direction to obviate that perceptible risk was necessary.

31. It does not follow from an appreciation that an accused person cannot be compelled to, but may choose to give evidence, that there will be an understanding that the exercise of that choice by an accused cannot be used by a jury to the accused's detriment.

32. Quite apart from the risk that a jury might use an accused's silence in court to his or her detriment as something from which it might be inferred that he or she believed that they were guilty (despite the plea of guilty and any unsworn denials), there is a risk that silence might be used as evidence in the course of deciding whether the prosecution has discharged its onus or proving guilt beyond reasonable doubt. Those risks cannot be obviated by directions that the applicant was not required to prove anything, or that the onus of proof is borne by the prosecution.

33. To the extent that the jury were told anything about the consequences of the applicant's decision not to give evidence, the trial judge only said that '[h]e did - he doesn't, because of that - shouldn't be treated in any different way by you. He was perfectly entitled not to give evidence in this matter.' The applicant respectfully adopts what

was said by Mazza JA at [225] of the CA Decision about this aspect of the trial judge's directions, namely:

> ...the meaning of this phrase is unclear and was not elaborated upon... .I do not think that it can be reasonably assumed that the jury would have understood the phrase to be an instruction that they must not reason that the applicant's silence at trial did not (a) strengthen the prosecution case; (b) indicate the applicant believed he was guilty; (c) supply additional proof against the applicant; or (d) fill in any gaps the jury perceived in the prosecution case.

34. The trial judge did give the jury a '*Liberato* direction', and this was referred to by the majority at [63] of the CA Decision. On the assumption that the jury followed that direction they would have understood that if they positively rejected the applicant's version in the EROI then they could not have automatically convicted him, and they would have understood that they were then required to put to one side what the applicant said in the course of that EROI. They would have also appreciated that the applicant did not have to prove anything. However, the *Liberato* direction did not warn the jury against *using* the fact that he had not given evidence in any way that was adverse to him.

35. The majority reasoned that the *Liberato* direction, which it found precluded the jury from using a positive rejection of the applicant's version in the EROI against him, meant that there was no perceptible risk that the jury would reason that the fact that his EROI account was not repeated at trial on oath was a matter which could, in any way, influence their deliberations.

36. However, even if that risk might be overcome by a *Liberato* direction, it could not obviate the risk that the fact that the applicant failed to give evidence might persuade the jury to conclude that the applicant believed that he was guilty notwithstanding what he had said in the EROI, or that it was a basis on which it was open to reject what he had said in the EROI, or that it was capable in some other way of strengthening the prosecution case.

37. The *Liberato* direction and the *Azzopardi* direction are designed to avoid a perceptible risk of miscarriage of justice, but they address different risks (CA Decision: [227]).

38. In the CA the applicant submitted that it could be inferred from the guilty verdicts that the jury must have rejected the account that he gave in the police interview. The applicant submitted that, having done so, there was a perceptible risk that the jury might then have given more weight to the prosecution evidence because he exercised his right to silence. (CA Decision: [86]) If the applicant's submission was different to the way in which it is now put, it is important to note that the applicant was not represented when he appeared before the CA. In any event the applicant's submission appears to have been given in answer to a proposition that the *Liberato* direction overcame the absence of an *Azzopardi* direction.

39. Notwithstanding that there have been occasions on which intermediate courts of appeal have decided that, in the particular circumstances, the failure by a trial judge to give a warning consistent with what was said by the majority of the High Court in *Azzopardi*, did not give rise to a miscarriage of justice (see, for example, some of the cases referred to at [82] of the CA Decision), it must be noted that the majority in *Azzopardi* expressly said that 'it will almost always be desirable' for the judge to give such a warning.

40. In the circumstances of this case, it was necessary that the jury be given clear directions that they could not use the fact that the applicant had not given evidence adversely to the applicant because there was a real risk that this is what they might do otherwise because the jury were expressly reminded by the trial judge on two separate occasions that the applicant had not given evidence, but were not given any assistance in understanding how they were not to use that fact as part of their reasoning processes.

41. Further, and as was correctly noted by Mazza JA at [226] of the CA Decision, there was a particular feature of this case that required the trial judge to make it expressly clear that the jury were not permitted to use the applicant' s failure to give evidence at the trial to his detriment:

> ... the jury were presented with two video-recorded versions of what occurred; that is, the complainant's visually recorded interview and the applicant's EROI, both of which were recorded on the day the offences were alleged to have been committed. In my view, it is unlikely to have been lost on the jury that the complainant's version was confirmed by her in court on oath while the applicant's version was not so confirmed. This stark contrast

is more likely to have led the jury to adopt a path of reasoning which used the applicant's silence in court to his detriment.

42. It is accepted that the applicant's trial counsel did not object to the directions that were given about the applicant's silence at trial. However, and as Mazza J concluded at [228] of the CA Decision, there was no rational forensic reason not to seek an '*Azzopardi* direction.'

43. It would not have been a rational forensic reason not to seek such a direction on the basis that it would have only served to highlight the fact that the applicant had not given evidence.[5] This is because the trial judge had expressly reminded the jury on two separate occasions that the applicant had not given evidence at the trial. (CA Decision: [84] and [85])

44. In any event, the fact that trial counsel did not seek an *Azzopardi* direction, for rational forensic reasons, did not form part of the majority's reasoning in the court below.

45. The majority was wrong to conclude that the trial judge's failure to direct the jury about how they were not to use the fact that the applicant had not given evidence did not give rise to a miscarriage of justice. There was a perceptible risk that in the absence of a warning of the type contemplated by the majority in *Azzopardi* the jury might use the fact that the applicant did not give evidence to his detriment.

46. The applicant's appeal to the Court of Appeal should have been allowed, the judgments of conviction that were entered against the applicant based upon the verdicts of the jury should have been set aside, and a new trial should have been ordered.

Part VII: ORDERS SOUGHT

47. The applicant seeks the following orders:

47.1 Special leave to appeal be granted.

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[5] See, by comparison, *JPM v R* [2019] NSWCCA 301 [214] - [216].

47.2 The appeal be allowed.

47.3 Set aside the orders of the Court of Appeal of the Supreme Court of Western Australia made on 1 September 2020 and, in their place, order that:

47.3.1 the appeal be allowed.

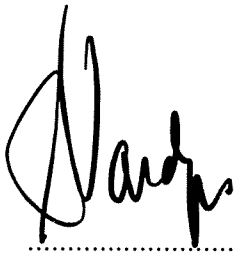
47.3.2 the applicant's judgments of conviction be set aside; and

47.3.3 there be a new trial.

Part VIII: TIME ESTIMATE

10 48. It is estimated the presentation of the applicant's oral argument will require less than one hour.

Dated: 24 June 2021



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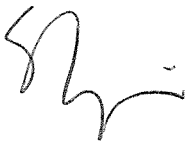

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ANNEXURE - STATUTORY PROVISIONS

No.	Legislation	Sections	In Force	Version
1.	*Criminal Code* (WA)	s 321	Yes	8 February 2017 to 30 June 2017 (As at 20 April 2017)