HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, KEANE, GORDON AND EDELMAN JJ

GBF APPELLANT

AND

THE QUEEN RESPONDENT

GBF v The Queen
[2020] HCA 40
Date of Hearing: 10 September 2020
Date of Judgment: 4 November 2020
B18/2020

ORDER

1. *Appeal allowed.*

2. *Set aside the orders of the Court of Appeal of the Supreme Court of Queensland made on 1 February 2019 and, in lieu thereof, order that the appeal to that Court be allowed and the appellant's convictions be set aside and a new trial be had.*

On appeal from the Supreme Court of Queensland

Representation

S C Holt QC with M J Jackson for the appellant (instructed by Legal Aid Queensland)

C W Heaton QC with C N Marco for the respondent (instructed by Office of the Director of Public Prosecutions (Qld))

CATCHWORDS

GBF v The Queen

Criminal practice – Trial – Directions to jury – Where appellant charged in seven counts with sexual offences allegedly committed against complainant half-sister when she was 13 and 14 years old – Where prosecution case wholly dependent on acceptance of complainant's evidence – Where appellant did not give or call evidence at trial – Where trial judge directed jury in unexceptional terms with respect to presumption of innocence and onus and standard of proof – Where trial judge later stated that failure of appellant to give sworn evidence "may make it easier" to assess complainant's credibility ("impugned statement") – Where neither prosecutor nor defence counsel applied for redirection arising from making of impugned statement – Whether impugned statement occasioned miscarriage of justice because its effect was to invite jury to reason to appellant's guilt from his exercise of right to silence – Whether influence of impugned statement weakened because it was comment not direction of law – Whether failure of either counsel to seek redirection weighed against conclusion that integrity of trial compromised – Whether impugned statement ambiguous such that there was no reasonable possibility jury would have felt it open to reason impermissibly.

Words and phrases – "absence of evidence", "contradictory instruction", "directions of law", "exercise of the right to silence", "false process of reasoning", "irregularity", "judicial observation on the facts", "miscarriage of justice", "onus of proof", "presumption of innocence", "proviso", "real chance of acquittal", "reason to guilt by an impermissible path", "redirection", "standard of proof", "sworn evidence".

Criminal Code (Qld), s 668E(1), (1A).

1 KIEFEL CJ, BELL, KEANE, GORDON AND EDELMAN JJ. The appellant appeals by grant of special leave[1] from the orders of the Court of Appeal of the Supreme Court of Queensland (Morrison and Philippides JJA and Boddice J) dismissing an appeal against his convictions for six sexual offences. All the offences were alleged to have been committed against the appellant's half-sister. The prosecution case was wholly dependent upon acceptance of her evidence. The appellant did not give or call evidence. In the course of his charge, Judge Wall QC instructed the jury to:

> "bear in mind that [the complainant] gave evidence and there is no evidence, no sworn evidence, by the defendant to the contrary of her account. That may make it easier" ("the impugned statement").

2 The appellant challenged his convictions in the Court of Appeal contending that, in effect, the impugned statement was a direction that the absence of evidence from him might make it easier to return verdicts of guilty. The Court of Appeal acknowledged that the impugned statement should not have been made[2]. Nonetheless, the Court of Appeal found there was no real possibility that the jury may have misunderstood earlier, correct directions of law that had been given, and no real possibility that the appellant had been deprived of a real chance of acquittal. Their Honours held that the impugned statement had not occasioned a miscarriage of justice. This holding took into account the fact that neither the prosecutor nor defence counsel had applied for any redirection arising from the making of the impugned statement[3].

3 The appeal in this Court is brought on a single ground which contends that the Court of Appeal was wrong to find that the impugned statement did not occasion a miscarriage of justice. The appellant submits that the impugned statement invited the jury to reason to his guilt from his exercise of the right to silence. He submits that in its effect the impugned statement is indistinguishable from the impugned comment considered in *Azzopardi v The Queen*[4]. There is no

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1 [2020] HCATrans 047 (Gageler and Keane JJ).

2 *R v GBF* [2019] QCA 4 at [110] per Boddice J (Morrison JA agreeing at [1], Philippides JA agreeing at [2]).

3 *R v GBF* [2019] QCA 4 at [111]-[112].

4 (2001) 205 CLR 50.

principled basis, he argues, for coming to a conclusion contrary to the *Azzopardi* majority's conclusion. It follows on this analysis that the Court of Appeal was bound to allow the appeal unless the prosecution established that no substantial miscarriage of justice had actually occurred[5]. And, in his submission, it was not possible for the prosecution to do so given that the impugned statement allowed the jury to reason to guilt by an impermissible path. For the reasons to be given, those submissions should be accepted, the appeal allowed, and a new trial ordered[6].

Background

4 The indictment presented in the District Court of Queensland charged the appellant in seven counts with sexual offences which were alleged to have been committed between 1 December 2012 and 24 August 2013. In this period the appellant was aged 33 and 34 years and the complainant was aged 13 and 14 years.

5 On 2 August 2016, the jury returned verdicts of guilty with respect to three counts of rape (counts 2, 3 and 7)[7] and two counts of indecent treatment of a child under the age of 16 years (counts 1 and 5)[8]. The appellant was acquitted on two counts of rape (counts 4 and 6). In relation to the sixth count, the jury returned a verdict of guilty of the alternative charge of indecent treatment of a child under the age of 16 years. On 4 August 2016, the appellant was sentenced to an effective term of imprisonment of nine years with a parole eligibility date of 3 February 2021.

6 The complainant was first interviewed by the police on 24 August 2013 ("the interview"), when she was 14 years old. The interview was recorded and the recording was in evidence[9]. The remainder of the complainant's evidence was taken at a preliminary hearing when she was 17 years old. The evidence was videorecorded, and the videorecording was presented to the Court at the trial[10].

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5 *Criminal Code* (Qld), s 668E(1A).

6 *Criminal Code*, s 669(1).

7 *Criminal Code*, s 349(1).

8 *Criminal Code*, s 210(1)(a) and (2).

9 *Evidence Act 1977* (Qld), s 93A(1)-(2A).

10 *Evidence Act*, s 21AK(1)-(2).

7 It suffices to describe the complainant's account of the offences in broad outline. The sexual abuse commenced on an occasion when she and her siblings, including the appellant, were staying in the same house. The first episode of sexual contact was an occasion when the appellant tried to kiss her as she lay beside him on a mattress (count 1). On another occasion the appellant came into the bedroom in which she was sleeping, pulled her shorts down and had sexual intercourse with her (count 2). On a further occasion the appellant had sexual intercourse with her on the back verandah of the house (count 3). She estimated that there were five more occasions of sexual contact after the incident on the back verandah. On two of these occasions the appellant had sexual intercourse with her. On one such occasion the appellant licked her vagina (count 5) and instructed her to suck his penis (count 4). On another occasion when the two of them were sitting on the couch watching television the appellant put her hand on his penis and asked her to suck it. In response to his entreaties she did as he asked (count 6). The last occasion on which sexual contact occurred was at the complainant's home in August 2013. The appellant followed her into her sister's bedroom. She told him that she was "not interested" and she threatened to report the abuse to her sister. The appellant responded saying, "just one last time" and he proceeded to have sexual intercourse with her (count 7).

8 The prosecution led evidence of "preliminary complaint". On 24 August 2013, the complainant's sister, SNE, asked the complainant why the appellant was ringing her all the time. The complainant broke down saying that the appellant had "fucked her". Later that day, SNE approached the appellant and started throwing punches at him. He looked surprised and walked away denying any knowledge of what was going on. On the same day, SNE had a further conversation with the complainant in the presence of their mother, step-father and sisters. During this conversation, the complainant said that the appellant had "had her suck him off and went down on her, did oral sex on her and stuff like that". Thereafter SNE accompanied the complainant to the police station, where she made her complaint.

9 The complainant's mother gave evidence that, at a family meeting that occurred "a couple of weeks" before the complaint, the appellant and the complainant had been asked if there was anything going on between them. The complainant had denied any involvement with the appellant. The mother said that the appellant was never allowed to sleep in any of the girls' bedrooms and that it was always a "full house". She said she would never permit the complainant to be alone with the appellant in the house at night.

10 It was the appellant's case that none of the sexual acts described by the complainant had occurred. In closing submissions, the appellant's counsel argued that the complainant's account contained inconsistencies and had features that were

inherently implausible such that it could not be acted upon to establish guilt beyond reasonable doubt.

The directions

11 The trial judge directed the jury in unexceptional terms with respect to the presumption of innocence and the onus and standard of proof and, in language drawn from the joint reasons in *Azzopardi*[11], his Honour directed:

> "Now, the accused's silence in Court is not evidence against him. It does not constitute an admission by him and may not be used to fill gaps in the evidence tendered by the Prosecution. It may not be used as a makeweight in assessing whether the Prosecution has proved its case beyond reasonable doubt. The onus of proof lies on the Prosecution and the accused is presumed to be innocent until the Prosecution adduces sufficient evidence to enable you to reach a conclusion of guilt beyond reasonable doubt. His failure to give evidence does not strengthen the Prosecution case or supply additional proof against him or fill gaps in the evidence."

12 The impugned statement was made later in the charge, after his Honour had reminded the jury of the complainant's evidence. It should be set out in its context:

> "Now, as I said before, there is no corroboration here. In cases such as this where sexual misconduct is alleged by the complainant, you should approach her evidence with great care and with caution. You should scrutinise it carefully, and you need to be satisfied of its accuracy and reliability beyond reasonable doubt before you can convict. Human experience in the Courts is that complainants in such matters sometimes, for all sorts of reasons, and sometimes for no reason, tell a false story which is very easy to fabricate and very difficult to refute. *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.* It is a matter for you in assessing her credibility, but you have got to consider all of the matters that Defence addressed to you about in relation to her credit." (emphasis added)

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11 *Azzopardi v The Queen* (2001) 205 CLR 50 at 70 [51] per Gaudron, Gummow, Kirby and Hayne JJ.

The Court of Appeal

13 Boddice J, in the leading judgment, identified the error in the impugned statement as an implicit suggestion that the jury had been deprived of something to which they had an entitlement[12]. His Honour observed that such a suggestion was contrary to both the presumption of innocence and the right to silence[13]. His Honour went on to note the absence of an application for any redirection by either counsel and to suggest that this was unsurprising having regard to the "specific directions" that the jury had been given. The specific directions to which his Honour referred were directions: (i) as to the presumption of innocence; (ii) not to draw any adverse inference from the fact that the appellant did not give evidence; (iii) that the prosecution bore the onus of proof, including the onus of negativing that the appellant was acting under a mistake of fact; and (iv) that any comment his Honour might make on the evidence was an observation that the jury could accept or reject[14].

14 Boddice J's analysis concluded[15]:

> "Having regard to those clear directions, there was no real possibility the jury may have misunderstood the trial judge's directions and that the appellant was deprived of a real chance of acquittal as a consequence of the trial judge's inappropriate observation. There has been no miscarriage of justice from that observation."

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12 *R v GBF* [2019] QCA 4 at [110].

13 *R v GBF* [2019] QCA 4 at [110], citing *R v Conway* (2005) 157 A Crim R 474 at 484 [38].

14 *R v GBF* [2019] QCA 4 at [111].

15 *R v GBF* [2019] QCA 4 at [112].

Azzopardi

15 In *Azzopardi* the impugned passage in the trial judge's charge relevantly instructed the jury that[16]:

> "[W]here the complainant's evidence or the witness's evidence is left undenied or uncontradicted by the accused, any doubt which may have been cast upon that witness's evidence may be more readily discounted and that witness's evidence may be more readily accepted as the truth."

16 The jury had earlier been instructed, correctly, that the accused bore no burden, onus or obligation to prove anything[17]. The joint reasons explained that the impugned passage invited the jury to engage in a false process of reasoning that was at odds with the earlier direction[18]. Their Honours' conclusion that the impugned passage was a misdirection[19] did not depend on the operation of s 20 of the *Evidence Act 1995* (NSW)[20]. As the impugned passage may have affected the jury's assessment of a critical witness their Honours said that the appeal could not be dismissed under the proviso[21].

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16 *Azzopardi v The Queen* (2001) 205 CLR 50 at 76 [71] per Gaudron, Gummow, Kirby and Hayne JJ.

17 *Azzopardi v The Queen* (2001) 205 CLR 50 at 76 [72] per Gaudron, Gummow, Kirby and Hayne JJ.

18 *Azzopardi v The Queen* (2001) 205 CLR 50 at 77 [73] per Gaudron, Gummow, Kirby and Hayne JJ.

19 *Azzopardi v The Queen* (2001) 205 CLR 50 at 77 [73] per Gaudron, Gummow, Kirby and Hayne JJ.

20 Section 20(2) of the *Evidence Act 1995* (NSW) relevantly provides that in a criminal proceeding for an indictable offence the judge may comment on a failure of the defendant to give evidence but the comment must not suggest that the defendant failed to give evidence because the defendant was, or believed that he or she was, guilty of the offence concerned.

21 *Azzopardi v The Queen* (2001) 205 CLR 50 at 77 [76] per Gaudron, Gummow, Kirby and Hayne JJ. The reference to the proviso is to s 6(1) of the *Criminal Appeal Act 1912* (NSW), which does not materially differ from s 668E(1) and (1A) of the *Criminal Code*.

The respondent's submissions

17 In its written submissions, the respondent acknowledged the risk that the jury may have understood from the impugned statement that it was open to more readily accept the complainant's evidence because there was no sworn evidence to the contrary given by the appellant. In the context of the charge as a whole, it was said that it was not reasonably possible that this risk was realised. In its outline of oral argument, the respondent adopted a more robust approach, submitting that the clear directions on the onus and standard of proof did not admit of the reasonable possibility that the jury would have felt that it was open to reason impermissibly.

18 The respondent developed three arguments in support of the last-mentioned contention. First, the impugned statement was a comment, not a direction of law, and at the commencement of the charge his Honour had directed the jury as follows:

> "I am, however, entitled to make such observations on the facts, on the evidence, as I think appropriate. And if I do make such observations … [i]t's entirely a matter for you. So what I say to you on matters of law, you must accept as correct. If I choose to say anything about the facts, that does not bind you at all."

The respondent took from this direction that the jury would have understood that the impugned statement was a comment which members of the jury were at liberty to ignore and thus its potential influence was weakened.

19 Secondly, in circumstances in which it was incumbent on the appellant to demonstrate that the impugned statement had occasioned a miscarriage of justice, the failure of either counsel to seek a redirection was against a conclusion that the integrity of the trial had been compromised.

20 Thirdly, unlike the comment in *Azzopardi*, the critical words in the impugned statement, "that may make it easier", were ambiguous. It was submitted that the jury may have understood that their task was easier merely because they were only required to assess one body of evidence.

A miscarriage of justice?

21 The submission that the influence of the impugned statement is to be taken to be weakened because it was a comment was maintained in the teeth of the joint reasons in *Azzopardi*, in which it was stated[22]:

> "It is to be emphasised that cases in which a judge may comment on the failure of an accused to offer an explanation will be both rare and exceptional … A comment will never be warranted merely because the accused has failed to contradict some aspect of the prosecution case."

It is not suggested that the issues in the appellant's trial brought it within the rare and exceptional category of case in which comment on the failure of the accused to offer an explanation for the prosecution's allegations may be warranted[23]. Moreover, if the jury viewed the impugned statement as a judicial observation on the facts which did not bind them, it remained that it was a judicial observation that invited members of the jury to engage in the false process of reasoning that was contrary to the directions of law earlier given.

22 The submission that the appellant's case is to be distinguished from *Azzopardi* on the ground that the impugned statement was ambiguous must be rejected. It strains credulity to interpret the instruction "[b]ut, 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 ... [t]hat may make it easier" as other than an invitation to find it easier to accept the complainant's allegations because the appellant had not given sworn evidence denying them. In truth, the impugned statement encouraged the jury to reason in this way. Notwithstanding the earlier directions, why would the jury not take up the trial judge's invitation and find that the complainant's allegations were more likely to be truthful and reliable by taking into account that the appellant had not given evidence denying them?

23 Such a process of reasoning is false because it proceeds upon a view that the accused may be expected to give evidence. And in an accusatorial system of criminal justice, which places the onus on the prosecution to prove the allegation

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22 *Azzopardi v The Queen* (2001) 205 CLR 50 at 75 [68] per Gaudron, Gummow, Kirby and Hayne JJ.

23 cf *Weissensteiner v The Queen* (1993) 178 CLR 217 at 245-246 per Gaudron and McHugh JJ.

that it brings, rare and exceptional cases apart, there can be no expectation that the accused will give evidence[24]. It is the recognition of the attractiveness of reasoning that an allegation is more likely to be true in the absence of denial that explains the need in almost all cases in which the accused does not give evidence to give a direction along the lines proposed in *Azzopardi*[25].

24 The Court of Appeal's conclusion that the appellant had not been deprived of a real chance of acquittal was expressed in terms of the test which was formerly used in deciding whether an appeal could be dismissed under the proviso[26]. The antecedent question for determination was whether the impugned statement had occasioned a miscarriage of justice. The distinction between a miscarriage of justice within the third limb of the common form criminal appeal provision[27], proof of which lies upon the appellant, and the dismissal of an appeal under the proviso[28], proof of which lies on the prosecution, is as explained in *Weiss v The Queen*[29]. Any irregularity or failure to strictly comply with the rules of procedure and evidence is a miscarriage of justice within the third limb of the provision[30].

25 This is not to suggest that the trial judge's charge is not shaped by the way in which the trial is conducted and the issues that are live for the jury's

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24 *RPS v The Queen* (2000) 199 CLR 620 at 630 [22], 632-633 [27]-[28] per Gaudron A-CJ, Gummow, Kirby and Hayne JJ; *Azzopardi v The Queen* (2001) 205 CLR 50 at 64-65 [34]-[38] per Gaudron, Gummow, Kirby and Hayne JJ; *Strbak v The Queen* (2020) 94 ALJR 374 at 375-376 [1]; 376 ALR 453 at 454-455.

25 *Azzopardi v The Queen* (2001) 205 CLR 50 at 70 [51] per Gaudron, Gummow, Kirby and Hayne JJ.

26 *Mraz v The Queen* (1955) 93 CLR 493 at 514 per Fullagar J.

27 *Criminal Code*, s 668E(1).

28 *Criminal Code*, s 668E(1A).

29 (2005) 224 CLR 300 at 308 [18].

30 *Kalbasi v Western Australia* (2018) 264 CLR 62 at 69-70 [12] per Kiefel CJ, Bell, Keane and Gordon JJ.

determination[31]. The fact that defence counsel does not seek a direction may support a conclusion that in the context of the trial the direction was not required. The fact that defence counsel does not seek a redirection may support a conclusion that in the context of the charge as a whole a challenged statement does not bear the interpretation sought to be placed upon it on appeal[32].

26 Here, the impugned statement contradicted the directions given earlier on the onus of proof and the exercise of the right to silence. Its effect was to invite the jury to engage in the same false process of reasoning as the impugned passage did in *Azzopardi*. The Court of Appeal was wrong to hold that this was not an irregularity amounting to a miscarriage of justice.

27 The respondent did not submit that, in the event that this Court determined that the impugned statement occasioned a miscarriage of justice, the appeal should be dismissed under the proviso. This was appropriate. The fact that neither counsel sought a redirection did not warrant a conclusion that the jury acted on the correct directions of law and ignored the incorrect, contradictory instruction. Whether, as the appellant argued, the impugned statement was an irregularity of a kind that is beyond the reach of the proviso[33] need not be addressed. It suffices to observe that in these circumstances, in which the impugned statement had the capacity to affect the jury's assessment of the credibility and reliability of the complainant's evidence, it was not open to find that no substantial miscarriage of justice had actually occurred[34].

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31 *Doggett v The Queen* (2001) 208 CLR 343 at 346 [2] per Gleeson CJ; *Huynh v The Queen* (2013) 87 ALJR 434 at 441 [31]; 295 ALR 624 at 631-632.

32 *R v Dookheea* (2017) 262 CLR 402 at 424 [37], citing *La Fontaine v The Queen* (1976) 136 CLR 62 at 72 per Barwick CJ (Mason J relevantly agreeing at 87), 85 per Stephen J; see also *De Silva v The Queen* (2019) 94 ALJR 100 at 108 [35] per Kiefel CJ, Bell, Gageler and Gordon JJ; 375 ALR 1 at 10.

33 See *Lane v The Queen* (2018) 265 CLR 196 at 209-210 [46]-[48] per Kiefel CJ, Bell, Keane and Edelman JJ.

34 *Collins v The Queen* (2018) 265 CLR 178 at 191-192 [36]-[37] per Kiefel CJ, Bell, Keane and Gordon JJ.

Orders

28 For these reasons there should be the following orders:

1. Appeal allowed.

2. Set aside the orders of the Court of Appeal of the Supreme Court of Queensland made on 1 February 2019 and, in lieu thereof, order that the appeal to that Court be allowed and the appellant's convictions be set aside and a new trial be had.