Adverse comment on accused's failure to give evidence

GBF v The Queen [2020] HCA 40

By Brett Hatfield

Introduction

A trial judge told a jury that the lack of sworn evidence by the accused contradicting that of a complainant 'may make it easier' to accept her account. In a unanimous decision the High Court held that the comment so undermined the otherwise standard directions that had been given on the onus of proof and the accused's silence as to occasion a miscarriage of justice.

Background

The appellant had been charged with seven sexual offences alleged to have been committed against his half-sister during the period 2012-2013. At the time the appellant was aged in his early thirties and the complainant was aged 13-14 years. At trial the jury found the appellant guilty of three counts of rape and two counts of indecent treatment of a child under the age of 16 years. He was found not guilty of two counts of rape.

The sexual conduct alleged by the complainant involved a series of episodes of unwanted sexual touching, penile-vaginal and oral sexual intercourse initiated and pursued by the appellant while he was staying in the same house as the complainant. Eventually the complainant

disclosed the sexual conduct to her sister, and subsequently police.

The appellant's case at trial was that none of the sexual acts described by the complainant had occurred. In the closing address his counsel submitted that the complainant's account contained inconsistencies and features that were inherently implausible such that her version could not be acted upon to establish guilt beyond reasonable doubt.

The directions of the trial judge

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 relation to the accused's silence in Court, adopted language from *Azzopardi v The Queen* (2001) 205 CLR 50; [2001] HCA 25 ('*Azzopardi*') that silence was not evidence against the accused; could not be used to fill gaps in the evidence; could not be used as a makeweight; the onus of proof remained on the Prosecution and the failure to give evidence did not strengthen the Prosecution case or supply additional proof against him.

The impugned statement, which came later in the charge, after the trial judge had reminded the jury of the appellant's evidence, was as follows:

> *'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).*

In the Queensland Court of Appeal, Boddice J (Morrison and Philippides JJA agreeing), held that this direction erroneously suggested to the jury that they had been deprived of something to which they had an entitlement. His Honour observed that such a suggestion was contrary to both the presumption of innocence and the right to silence. However, having regard to the other orthodox directions the jury had been given on the onus of proof and the accused's silence in Court, and the lack of any request for a redirection by trial counsel, his Honour held that there was '*no real possibility*' that the jury may have misunderstood the trial judge's directions and that there had been no miscarriage of justice.

The joint reasons

In a joint judgment, Kiefel CJ, Bell, Keane, Gordon and Edelman JJ upheld the appeal. Their Honours rejected what was described as the '*robust approach*' of the respondent Crown, which had argued that the trial judge's 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.

Their Honours appear to have been somewhat underwhelmed by the respondent's arguments, meeting the suggestion that the influence of the impugned statement was weakened because it was merely a comment (which members of the jury were free to ignore) with the dry observation that the argument had been maintained '*in the teeth*' of the joint reasons in *Azzopardi* which had held that:

> *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.*

The respondent's further submission that the appellant's case could be distinguished from *Azzopardi* because the impugned statement was ambiguous was also rejected, the Court observing that it '*strains credulity*' to interpret the impugned statement other than as 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 this way and it was the attractiveness of such reasoning that explains the need to give an *Azzopardi* direction in almost all cases in which the accused does not give evidence.

Miscarriage of justice

The Court also found that 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 formerly used in applying the proviso and confirmed that the proviso test must be distinguished from the antecedent question of whether there had been a miscarriage of justice within the third limb of the common form criminal appeal provision. The Court confirmed that the distinction between the test for the application of the proviso and whether there has been a miscarriage of justice remains as explained in *Weiss v The Queen* [2005] HCA 81; 224 CLR 300 and concluded:

> *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.*

The apparent breadth of this concluding sentence was qualified by the subsequent observations that it was not being suggested that a trial judge's charge would not be shaped by the way the trial was conducted and the issues which were live for the jury's determination. Further, the Court confirmed that the conduct of defence counsel may support a conclusion either that a particular direction was not required or that a challenged statement does not bear the interpretation placed on it upon appeal.

Conclusion

The Court concluded that the impugned statement contradicted the directions given on the onus of proof and right to silence and the Court of Appeal was wrong to hold that it was not an irregularity amounting to a miscarriage of justice. The respondent did not argue that the appeal should be dismissed under the proviso, so the question of whether the irregularity was of a kind which was beyond the reach of the proviso did not need to be addressed. BN