SUPREME COURT OF QUEENSLAND

CITATION:	*R v AS* [2002] QCA 521
PARTIES:	**R** **v** **AS** (appellant)
FILE NO/S:	CA No 306 of 2002 DC No 196 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Ipswich
DELIVERED ON:	29 November 2002
DELIVERED AT:	Brisbane
HEARING DATE:	25 November 2002
JUDGES:	McPherson and Jerrard JJA and Philippides J Separate reasons for judgment of each member of the court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed** **2. Verdict and conviction set aside** **3. Verdict and judgment of acquittal entered on each count of the indictment**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – WHERE EVIDENCE CIRCUMSTANTIAL – where evidence as to identification of accused given by the complainant was surrounded by circumstances which weakened safe reliance on its accuracy – where other circumstances making reliance on the identification safe, do not exist – whether verdict unsafe or unsatisfactory CRIMINAL LAW – EVIDENCE – EVIDENTIARY MATTERS RELATING TO WITNESSES AND ACCUSED PERSONS – UNSWORN STATEMENTS AND COMMENT ON FAILURE TO GIVE SWORN EVIDENCE – COMMENT – GENERALLY – where accused did not give or call evidence – where it was not submitted at trial nor on appeal that the circumstances entitled the prosecution to a *Weissenstiener* or *Azzopardi* direction as to the inferences the jury could draw from the accused's silence – whether in the

absence of such a direction, the evidence established beyond reasonable doubt that the accused was the complainant's attacker

Criminal Code (Qld), s 668E

Azzopardi v R (2001) 179 ALR 349, discussed
Jones v R (1997) 191 CLR 439, followed
M v R (1994) 181 CLR 487, followed
Weissensteiner v R (1993) 178 CLR 217, discussed

COUNSEL: K M McGinness for the appellant
D L Meredith for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McPHERSON JA:** I have read and agree with the reasons for judgment of Jerrard JA on this appeal. The appeal should be allowed and the verdict and conviction set aside. Instead, verdict and judgment of acquittal should be entered.

[2] **JERRARD JA:** On 16 September 2002 the appellant AS was convicted by a jury of breaking and entering the dwelling of W on 10 November 2001 at Lowood, and of having both attempted to rape her, and of unlawfully assaulting her and doing her bodily harm. He has appealed those convictions, alleging that the jury's verdicts were "unsafe and unsatisfactory". That should be understood as a complaint in terms of s 668E of the Criminal Code that the verdicts are unreasonable or cannot be supported having regard to the evidence.[1]

[3] The prosecution evidence was that the then 19 year old Ms W was living in a block of flats in Lowood, a quite small township in the Brisbane Valley. Somewhere around 5.00a.m. on 10 November 2001, a male person unlawfully gained entrance to her residence, got into her bed, and attempted to have sexual intercourse without her consent. She succeeded in forcing off her attacker, and he forced open a portion of a locked screen door to make his exit. In the apparently short period of time between the attempted rape and his departure, he assaulted her by punching her left eye.

[4] Ms W's description of her attacker given in evidence was that he was tallish, with black hair shaved around the sides and back of his head but fluffy on the top. She said he was Aboriginal, and that he was wearing a "kind of T-shirt", which she thought was yellow. He also wore pants which were of heavy material like jeans.

[5] She also said that she had seen that same person "around a few times", and most of those occasions were in the driveway of the flats. He had been talking to a girl. A friend of hers, K, had told her prior to 10 November 2001 that the male person's name was "A".

[6] Ms W sought assistance after the attack on her that morning from Ms D, who lived in another of the flats. Ms D described Ms W as very upset, and Ms D put the time

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1 See *Gipp v R* (1998) 194 CLR 106 at 147-150; *Fleming v R* (1998) 197 CLR 250 at 255 – 256; and *MFA v R* [2002] HCA 53 at par 46 thereof.

Ms W banged on her door for help at 5.10a.m. Ms D knew A, who had previously visited Ms D's premises, because his girlfriend was Ms D's granddaughter. Queensland Police Sergeant Jason Crowther arrived at the flat at about 5.20a.m. that morning, and described it as an overcast morning with drizzling rain. Some two minutes prior to his arrival he saw a male person on a bicycle riding along one of the Lowood streets, at a distance of about 200 metres away from him. In the witness box he said he had identified that person as A at the time, although conceding that notes he made that day referred only to:

> "At about 5.28 I observed a male person wearing a light coloured cream shirt"

and not to AS by name.

Nor did those notes refer to the fact that the person seen was Aboriginal, as AS is.

[7] At a time that same morning not identified in the evidence, Ms W selected a photograph of the appellant from a photo board shown to her at the Ipswich Police Station, in a video taped examination of a photo board containing photographs of young Aboriginal males. At that time she said words to the effect:

> "Number seven is a boy that I am familiar with"

and she agreed when cross examined at the trial that that familiarity came from the fact that AS had walked past her flat, and she had also seen him in and about in Lowood. Ms W was described by her mother as having a minor brain disorder and she was living in a flat, close to her parent's home, to gain some confidence and living skills.

[8] Cross examination of Ms W established that she ordinarily wore glasses, and that without them she would have some difficulty making out the facial features of cross examining counsel in the court room. She was not wearing her glasses at any time that her assailant was in her flat that morning, and after the punch on her face it was too swollen for her to wear glasses. Accordingly, she was not wearing them at the time she studied the photo board. Her evidence was that it was still really quite dark at all relevant times in her flat when the male person was there, and she first worked out that the person in the room was the person she had seen around Lowood when she was at the police station and looking at the photo board. There was no evidence of her having identified the attacker as "AS", or as a person whom she had previously seen in Lowood, to anyone before she examined the photo board. (There was no evidence led by the Crown as to the basis upon which the police selected the photographs shown to her). She had also said in cross examination that she had seen only the back of the person when he was on his hands and knees going out through the gap he had made for himself in the screen door. This was the only time she saw him when there was any light coming in.

[9] In those circumstances it is not surprising that the following exchanges occurred towards the end of the cross examination.

> "You see, W, in all that darkness and because of your eyes you cannot say that it was AS that was in your room that night, can you?
> -- Not really.
> No. And when you looked at the photo board you were identifying a boy -----?-- Yes.
> -----that you knew?-- Yes.
> From about Lowood?--Yes."

[10] The learned trial judge then took a part, asking:

> "So, W, are you not sure whether it was AS or not that was in your bedroom that night?-- I'm pretty sure it is.
> Pretty sure?-- Yeah.
> How sure?-- Very sure."

[11] The difficulty with accepting Ms W's greater degree of certainty when answering questions asked by the learned judge, is that the questions asked by the appellant's counsel Mr Kissick in cross examination do not appear at all to have been overbearing ones; and at all stages Ms W appears to have followed the logic of the questions and agreed quite fairly, and in her own terms, with what were reasonable propositions put to her. It follows that the prosecution case against AS cannot safely rest on that identification.

[12] The remainder of the evidence called really only establishes that AS was seen in and about the streets of Lowood early that morning. As well as the identification by Sergeant Crowther, there was evidence of AS being seen by others. A possible sighting of AS was by the Ambulance Driver, Peter Holzberger, who arrived at the flat at 5.37a.m., and who had seen some three minutes earlier two people walking in a nearby street in the drizzling rain. One was a young male person with the dark complexion of an Aboriginal or a Torres Strait Islander, wearing a yellow T-shirt, who was walking in a direction leading out of Lowood in company with another entirely unidentified person.

[13] An unchallenged identification of AS was made by a Yacoob Moola, who owns a Service Station in the middle of Lowood. He saw AS, who was well known to him, between 5.40a.m. and 5.50a.m. that morning, when AS and a young female came into the Service Station to buy something. Mr Moola also said that he had seen AS some 10 minutes earlier, riding a push bike up Railway Street in Lowood, on the corner of which street is the Service Station. That identification was actually challenged in cross examination, but Mr Moola was confident that it was AS on the bicycle 10 minutes earlier.

[14] Ahmed Moola also gave evidence. He is Yacoob Moola's son. He was working that morning at the Service Station (which opens at 5.00 a.m.), and he saw a young male Aboriginal person, whom he could not identify, ride by on a bicycle between 5.15a.m. and 5.30a.m.; and that same young man returned within half an hour with a female companion, and purchased something at the Service Station. The jury would be entitled to conclude that Ahmed and Yacoob Moola both saw AS at the same time, and that AS had been on a bicycle when first seen by them. This makes it quite possible that Sergeant Crowther also saw AS on the bicycle. One cannot but note that Sergeant Crowther described the cyclist, whom his evidence identified as AS, as wearing a long sleeved creamy top rather than a yellow T-shirt.

[15] Douglas and Peggy Heathcote both gave evidence. They were travelling to their work place at a time Douglas Heathcote estimated to be just before 6.00a.m. that morning, and each observed a young Aboriginal man standing at the corner of the street where the complainant resided in Lowood. That put this person at the entrance to the street where the flats were, but about one hour after the offence was committed. Both Mr and Mrs Heathcote subsequently selected AS's photograph from a differently packaged photo board shown to them, but those identifications did not occur until mid June 2002, some eight months later; and if accurate very

little can really be inferred from the fact that in that small town AS was looking down the street in which, by then, there were the police, the ambulance, and Ms W's parents in attendance.

[16] Police officer Sarah Martin of the Ipswich CIB attended early that morning, again at a time not established by evidence at the flats; and at 8.30a.m. executed a Search Warrant on the premises where AS lived with his guardian. Presumably that was after Ms W's identification. Detective Martin took possession of a pair of jeans, a yellow sleeveless T-shirt, and "beige coloured" T-shirt. The jeans were damp but the yellow T-shirt was dry. Subsequent examination did not reveal any DNA link between those clothes and the flat or Ms W, and no fingerprints at all were identified at Ms W's premises by the investigating police.

[17] The evidence revealed that AS is certainly not the only young Aboriginal male then living in Lowood. AS did not give or call evidence, and it was not submitted to the trial judge or this court that the circumstances entitled the prosecution to a *Weissensteiner* or *Azzopardi* direction as to the inference the jury could draw from AS's choice of silence.[2] Perhaps such a direction would have been justified, in that the additional facts (as to AS's whereabouts elsewhere than Ms W's flat just before 5.00a.m. that morning), which would explain or contradict the inference which the prosecution sought to have the jury draw, (that AS's established presence in and about the area so soon after the attempted rape was committed justified the inference that the identification of him by Ms W was accurate), would be facts which, if they existed, were particularly within the knowledge of AS.[3] Absent any such direction, the evidence did not establish beyond reasonable doubt that he was Ms W's attacker. It fails the test established in *M v R*[4] and confirmed in *Jones v R*[5], namely that when determining if a conviction was unreasonable, or cannot be supported having regard to the evidence, an appellate court must ask itself whether it thinks, upon an examination by it of the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.

[18] Here, the identification by Ms W is surrounded by so many circumstances weakening safe reliance on its accuracy, and there being insufficient other circumstances making reliance safe, the conclusion must be that it was not open to the jury to be satisfied beyond reasonable doubt that AS was guilty. Accordingly, his convictions should be set aside and verdicts of not guilty entered.

[19] **PHILIPPIDES J:** I agree with the reasons of Jerrard JA and with the orders proposed.

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2 See *Weissensteiner v R* (178 CLR 217); and *Azzopardi v R* (179 ALR 349).
3 *Azzopardi* at paragraph 64 of the majority.
4 (1994) 181 CLR 487.
5 (1997) 191 CLR 439.