SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hartfiel* [2014] QCA 132
PARTIES:	**R** **v** **HARTFIEL, Janelle Marie** (appellant)
FILE NO/S:	CA No 9 of 2014 DC No 398 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Ipswich
DELIVERED ON:	6 June 2014
DELIVERED AT:	Brisbane
HEARING DATE:	3 June 2014
JUDGES:	Margaret McMurdo P and Muir JA and Dalton J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal be allowed.** **2. The guilty verdicts be set aside.** **3. There be a retrial on counts 1, 2, 3, 4 and 6.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – NON-DIRECTION – where the appellant was convicted after a trial of three counts of forgery and three counts of uttering – where the appellant was found guilty on all counts except one count of forgery – where appellant contends that the primary judge erred in law in failing to direct the jury that no adverse inference could be drawn from the fact that the appellant did not give evidence – whether the primary judge erred in directing the jury in her summing up – whether the failure to direct the jury as alleged constituted a miscarriage of justice – whether s 668E(1A) of the *Criminal Code* (Qld) applies *Criminal Code* 1899 (Qld), s 668E(1), s 668E(1A) *Azzopardi v The Queen* (2001) 205 CLR 50; [2001] HCA 25, followed *Dhanhoa v The Queen* (2003) 217 CLR 1; [2003] HCA 40, cited *R v Bevin* [2008] QCA 310, applied

R v DAH (2004) 150 A Crim R 14; [2004] QCA 419, considered
R v GAJ [2011] QCA 141, considered
R v OGD (1997) 45 NSWLR 744, followed
R v Schneiders [2007] QCA 210, considered
Simic v The Queen (1980) 144 CLR 319; [1980] HCA 25, considered
Weissensteiner v The Queen (1993) 178 CLR 217; [1993] HCA 65, considered

COUNSEL: A Edwards for the appellant
V A Loury for the respondent

SOLICITORS: Bosscher Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** I agree with Muir JA that this appeal must be allowed, the guilty verdicts set aside and a retrial ordered on counts 1, 2, 3, 4 and 6.

[2] The appellant contends that the trial judge erred in failing to direct the jury in terms to the effect of those set out by the plurality in *Azzopardi v The Queen*,[1] that no adverse inference could be drawn from the appellant's failure to give evidence.

[3] The appellant called but did not give evidence. The relevant portions of the primary judge's directions to the jury are set out in Muir JA's reasons.[2] Those directions correctly guided the jury as to how to approach the fact that the appellant had called evidence in her defence. Those directions were fair and balanced and there was no application for a redirection in the terms now sought in this appeal. Nowhere in the judge's directions, however, did her Honour warn the jury against impermissibly reasoning that the fact that the appellant did not give evidence herself in some way strengthened the prosecution case. The failure in this case to give such a direction constituted a fundamental irregularity in the trial.[3] It has the result that the appellant did not receive a fair trial.[4] Despite the strengths in the prosecution case, the proviso in s 668E(1A) *Criminal Code* 1899 (Qld) cannot be invoked.

[4] **MUIR JA: Introduction** The appellant was convicted on 29 November 2013 after a trial in the District Court of three counts of forgery and three counts of uttering.

[5] She was found not guilty of one count of forgery (count 5).

[6] On the hearing of the appeal, leave was given to the appellant to amend the notice of appeal to substitute the following ground of appeal for the original ground:

> "The primary judge erred in directing the jury about the fact that the appellant had not given evidence at the trial, in particular, in failing to direct the jury that no adverse inference may be drawn from that fact and/or that the failure to give evidence did not strengthen the prosecution case or supply additional proof against the appellant or fill gaps in the evidence."

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1 (2001) 205 CLR 50, 70, [51]; Gaudron, Gummow, Kirby and Hayne JJ.
2 At [30]-[32].
3 *R v GAJ* [2011] QCA 141, [42].
4 *R v Schneiders* [2007] QCA 210, [31].

The evidence

[7] The appellant experienced difficulty in meeting the terms of a mortgage over the residence in which she and her parents resided at 1 Oak Street, One Mile. She sought the assistance of her brother, Jason Hartfiel, who permitted his property at 55 Waterworks Road to be provided as security for a $55,836 bridging loan obtained by the appellant. He and the appellant agreed that the loan would be repaid within four weeks. $30,000 was to be obtained from their father's superannuation fund and the balance from the appellant's superannuation fund.

[8] In about mid July 2009, the appellant told Mr Hartfiel that the loan had been repaid. Mr Hartfiel made enquiries at the titles office and ascertained that the mortgage over his property (the mortgage) had not been released. He telephoned the appellant, who said that she would make enquiries of a firm of solicitors.

[9] On 27 July 2009, the appellant, at her house at Oak Street, gave Mr Hartfiel a copy "current title search" which purported to show that the mortgage had been released. Suspicious of a gap on the document, Mr Hartfiel checked with the titles office and was informed that the mortgage had not been released. He and the appellant exchanged heated words. An uncle, Mr Smith, began to act as an intermediary between them.

[10] On 18 August 2009, the appellant sent Mr Smith what she had described as a "test email". There was expert evidence that it had been sent from a computer, "Janelle PC" using the Vodafone Hutchinson Three network. At 2.43 pm, another email was received by Mr Smith, which according to the expert evidence, had the same data, suggesting it was sent from the same computer. That email purported to be from "Jason Brockmuller", although signed off as "Jason Brockman". It had attached a letter from Simon Hall, one of the mortgagees of Mr Hartfiel's property, stating that the mortgage had been released and that there had been an administrative error.

[11] Mr Brockmuller, who had negotiated the bridging loan, gave evidence that he did not send the 18 August email or the other emails in evidence purporting to be from him which stated that the administrative error was being corrected.

[12] In November 2009, Mr Smith was told by the appellant that she needed $200 from Mr Hartfiel to pay for lodgement of the release of mortgage documents. Mr Smith informed Mr Hartfiel of this and he then transferred $200 to the appellant's account. At 9.03 am on 13 November 2009, a release of the mortgage was lodged in the titles office. Titles office documentation showed the lodgement to have been effected by "J Hartfiel of 1 Oak Street". It purported to be signed by the mortgagees, Simon Hall and Lee Downey, and to be witnessed by a solicitor "Ken McHaul". Mr Hartfiel swore that he did not lodge the document.

[13] The mortgage had not been released. Neither Mr Hall nor Mr Downey, the other mortgagee, had signed the release of mortgage and their loan had not been repaid.

[14] The book maintained at the appellant's workplace at Lahrs Road, Ormeau in which employees recorded the times of their arrival at and departure from work recorded the appellant having arrived for work at 7.50 am on 13 November 2009. There was no system in place to ensure the accuracy of the information written in the book. The proprietor of the business described it as "an honour system".

[15] The appellant did not give evidence at the trial.

[16] Two witnesses were called by the defence, the appellant's mother and a Mr Samuels, who was an employee of the company administering the toll system for the Logan Motorway.

[17] The appellant's mother's evidence was to the effect that she and the appellant drove in a car to the Bill Hayden Centre in Ipswich in July 2009. She remained in the car while the appellant "went up and got the deeds, come (sic) back down and handed them to [her]". She put the deeds, which were in a brown sealed envelope, in a cupboard. When Mr Hartfiel came to the house, she gave the envelope to him. He did not open the envelope whilst at the house. The appellant's computer was on the Optus, not the Vodafone Hutchinson Three, network and had largely been out of commission.

[18] The appellant had gone to collect the title deed in response to demands made by Mr Hartfiel. She overheard him threatening the appellant over the telephone, saying, "I'll make sure you go to jail, I'll send you to jail, that's where your place is".

[19] Her husband's superannuation monies and also the appellant's "came through" before the altercation which led to the collection of the title deeds.

[20] Asked if the Oak Street house had been sold because the mortgage was not paid, the appellant's mother responded, "Well, we were in big debt and they put the house up for sale, and they got 260,000 for it". She agreed that she, her husband and the appellant had been evicted from the house.

[21] Mr Samuels' evidence was to the effect that the toll road records showed the appellant heading east at 7.18 am on the Logan Motorway at Heathwood and at 7.30 am at Loganlea East on 13 November 2009. The next recording on the appellant's tag that day was at 4.10 pm. It showed her heading west at Loganlea.

[22] The defence case, in reliance on the evidence of the appellant's mother, was that the appellant had no opportunity to forge the certificate of title and that the appellant could not have sent the emails. Mr Samuels' evidence was relied on for the argument that the motorway recordings were consistent with the appellant having gone to work and returned home as recorded in the sign off book on 13 November. Accordingly, it was contended, she could not have lodged the release of mortgage on 13 November 2009.

The parties' respective contentions

[23] The appellant contends that the primary judge erred in law in failing to direct the jury to the effect that:[5]

> "… the fact that the defendant did not give evidence is not evidence against [her]. It does not constitute an admission of guilt by conduct and it may not be used to fill any gaps in the evidence led by the prosecution. It proves nothing at all, and you must not assume that because [she] did not give evidence that adds in some way to the case against [her]. It cannot be considered at all in deciding whether the prosecution has proved its case beyond reasonable doubt, and most certainly does not make the task confronting the prosecution

[5] Benchbook Pro Forma Direction No 28A.1.

> any easier. It cannot change the fact that the prosecution retains the responsibility to prove guilt of the defendant beyond reasonable doubt."

[24] The particular defects in the summing up alleged by the appellant were the failure to direct that no adverse inference could be drawn from the fact that the appellant did not give evidence and that such failure did not strengthen the prosecution case, supply additional proof against the appellant or fill in gaps in the evidence. In other words, it was contended that there should have been a direction in terms of that recommended in the joint judgment in *Azzopardi v The Queen*.[6]

[25] The appellant placed particular reliance on statements of principle in *Azzopardi*[7] and on the application of the *Azzopardi* principle in *R v DAH*,[8] *R v Bevin*[9] and *R v GAJ*.[10]

[26] The respondent's submissions may be summarised as follows. *Azzopardi* does not mandate that any particular form of words be incorporated in a direction regarding the failure of an accused to give evidence. The joint judgment states that an appropriate direction "will almost always be desirable".[11]

[27] In *DAH*, White J referred to the essential elements which must be conveyed to the jury as: no adverse inference may be drawn from an accused's failure to give evidence; the onus of proof remains on the prosecution; the presumption of innocence remains; and the failure to give evidence does not strengthen the prosecution case or supply additional proof against an accused.

[28] The primary judge's directions reflected the first three of such matters but did not specifically advert to the last. The directions, however, did focus the jury on the fact that the appellant had called evidence and the consequences that might flow from her having done so. The directions stated that the calling of evidence by the appellant did not mean that she had assumed the responsibility of proving her innocence; the burden of proof had not shifted to her; the prosecution retained the obligation to prove each element of each offence; and it was not a matter of making a choice between the prosecution's witnesses and the defence witnesses.

[29] The respondent's argument then sought to distinguish the facts in each of *Bevin*, *GAJ* and *R v Schneiders*.[12] The submissions concluded with the contention that the subject directions properly focussed the jury's attention on the significance of the defence evidence to the issues in the trial and were sufficient to guard against any reasoning by the jury that the appellant's failure to give evidence herself could be used against her.

The primary judge's summing up

[30] Early in her summing up, the primary judge directed:

> "You must reach your verdict on the evidence and only on the evidence. The evidence is what the witnesses have said from the

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6 (2001) 205 CLR 50.
7 (2001) 205 CLR 50 at 70.
8 (2004) 150 A Crim R 14 at [83] and [86].
9 [2008] QCA 310 at [29]–[34].
10 [2011] QCA 141 at [42].
11 *Azzopardi v The Queen* (2001) 205 CLR 50 at 70.
12 [2007] QCA 210.

witness box or over the phone or over the video link, the documents and other things received as exhibits. Those exhibits will be with you in the jury room."

[31] After referring to the role of motive in a circumstantial case, the primary judge said in her summing up, "Now, the burden rests on the prosecution to prove the guilt of the accused".

[32] Her Honour continued:

> "**There is no burden on [the appellant] to establish any fact let alone her innocence. She is presumed to be innocent and she can be convicted only if the prosecution establishes that she's guilty of the offence of offences charged**. For the prosecution to discharge its burden of proving the guilt of the accused, it is required to prove beyond reasonable doubt that she is guilty. This means that in order to convict, you must be satisfied beyond reasonable doubt of every element that goes to make up the offence charged and I will explain the elements to you shortly. **It's for you to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the elements of the offence.**
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> … You must approach your duty dispassionately, deciding the facts on all of the evidence…
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> It is … up to you how you assess the evidence and what weight, if any, you give to a witnesses testimony or to an exhibit. **An accused person in a criminal trial does not have to give evidence or call other people to give evidence on their behalf. That she has done so in this trial doesn't mean that she has assumed the responsibility of proving her innocence. The burden of proof has not shifted to her. The evidence called for – on behalf of [the appellant] is simply added to the evidence called for the prosecution.**
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> **The prosecution has the burden of proving each of the elements of the offence beyond reasonable doubt and it's on the whole of the evidence that you have to be satisfied beyond reasonable doubt that the prosecution has proved the case before an accused person can be convicted.** Sometimes cases are described as ones of word against word. You should understand that in a criminal trial it's not a question of you making a choice between the evidence of the prosecution's principles witnesses and the evidence of the [appellant's] witnesses. **The proper approach is to understand that the prosecution case depends upon you, the jury, accepting that the evidence of the prosecution's principles witnesses was true and accurate beyond a reasonable doubt despite the sworn evidence by the [appellant's] witnesses.**
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> So you don't have to believe that the [appellant's] witnesses are telling the truth before she's entitled to be found not guilty, whereas here there is defence evidence. There is usually one of three possibly results that follow. You might think the defence evidence is credible and reliable and provides a satisfying answer to the prosecution case.

> And if that's so, your verdict would be not guilty. Or you might think that although the defence evidence was not convincing it leaves you in a state of reasonable doubt as to what the true position is and if that's so your verdict would be not guilty. Or you might think the defence evidence should not be accepted, but if that's your view be careful not to jump from that view to an automatic conclusion of guilt.
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> **If you find the [appellant's] evidence unconvincing, set it to one side, go back to the evidence and ask yourself whether on a consideration of the evidence that you do accept you are satisfied beyond reasonable doubt that the prosecution has proved each of the elements of the offence in question**. Now, in this case in relation to count 6, the defence has produced what we call alibi evidence. So that's the uttering of the transfer document for the mortgage. Namely that they're saying that they were not at the Titles Office on the 13th of November when the document was lodged, but was instead at – effectively at work. That's the effect of what they're trying to prove. And they do that by relying on the workbook, which you've got as an exhibit, and the toll information, which you've got a copy of.
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> As it is for the prosecution to prove the [guilt] of the [appellant], it's for the prosecution to prove beyond reasonable doubt that the [appellant] was either present at the time and place when the offence was committed, or as the prosecution case is, that somebody else acted on her behalf and lodged the transfer documents on 13th of November 2009. Just while I'm on the subject of defence evidence, you will of course remember that [the appellant's mother] said, when she was giving her evidence in cross-examination, that she didn't wish to answer a question put to her by counsel because to do so might incriminate her. The fact that she successfully made that claim for privilege can't assist you in your deliberations.
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> It's not evidence of anything, nor were the questions which were asked of her evidence. And there are no answers to them which could constitute evidence. You can't infer anything either as to evidence or her credibility from the fact that a claim for privilege was made and it would be wrong for you to speculate about why that was made." (emphasis added)

Consideration

[33] The relevant factual background to the Court's decision in *Azzopardi* emerges from the following passage from the headnote:[13]

> "In each case, in the course of charging the jury, the judge referred to the accused's failure to give evidence, noted that he was not obliged to give evidence and that the accused's silence could not be treated as an admission of guilt, but said that the accused's failure to give evidence might affect the value or weight which the jury gave to the evidence of Crown witnesses."

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13 *Azzopardi v The Queen* (2001) 205 CLR 50 at 50.

[34] It was observed, in the joint majority judgment in *Azzopardi*, that the impugned passage from the summing up was "at best, confusing and contradictory"[14] of earlier directions by the trial judge which expressly warned the jury against thinking that the accused decided not to give evidence because he was or believed himself to be guilty of the offence. It was held that the prohibition in s 20(2) of the *Evidence Act* 1995 (NSW) against a trial judge suggesting that the defendant failed to give evidence because the defendant was, or believed that he or she was, guilty of the offence concerned had been contravened. In discussing the general principles informing the development of the law in relation to a trial judge's comment or on omitting to comment on a defendant's failure to give evidence, the joint judgment states:[15]

> "The fundamental proposition from which consideration of the present matters must begin is that a criminal trial is an accusatorial process, in which the prosecution bears the onus of proving the guilt of the accused beyond reasonable doubt. It is, therefore, clear beyond doubt that the fact that an accused does not give evidence at trial is not of itself evidence against the accused. It is not an admission of guilt by conduct; it cannot fill in any gaps in the prosecution case; it cannot be used as a make-weight in considering whether the prosecution has proved the accusation beyond reasonable doubt. Further, because the process is accusatorial and it is the prosecution that always bears the burden of proving the accusation made, as a general rule an accused cannot be expected to give evidence at trial. In this respect, a criminal trial differs radically from a civil proceeding. As was pointed out in the joint reasons in *RPS*:
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> > 'In a civil trial there will very often be a reasonable expectation that a party would give or call relevant evidence. It will, therefore, be open in such a case to conclude that the failure of a party (or someone in that party's camp) to give evidence leads rationally to an inference that the evidence of that party or witness would not help the party's case.'" (citations omitted)

[35] There then followed an observation that the question what may be said to the jury if an accused does not give evidence at trial "… must be answered against the background of the common law principle that an accused person should not be compelled to incriminate himself or herself".[16]

[36] The following passage contains the suggested direction which the appellant contends should have been given by the primary judge:[17]

> "In the course of argument of the present matters it was suggested that if a judge said nothing to the jury about the fact that an accused had not given evidence, the jury may use the accused's silence in court to his or her detriment. Plainly that is so. **It follows that if an accused does not give evidence at trial it will almost always be desirable for the judge to warn the jury that the accused's silence**

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14 *Azzopardi v The Queen* (2001) 205 CLR 50 at 77.
15 *Azzopardi v The Queen* (2001) 205 CLR 50 at 64–65.
16 *Azzopardi v The Queen* (2001) 205 CLR 50 at 65.
17 *Azzopardi v The Queen* (2001) 205 CLR 50 at 70.

> **in court is not evidence against the accused, does not constitute an admission by the accused, may not be used to fill gaps in the evidence tendered by the prosecution, and may not be used as a make-weight in assessing whether the prosecution has proved its case beyond reasonable doubt**. It by no means follows, however, that the judge should go on to comment on the way in which the jury might use the fact that the accused did not give evidence." (emphasis added)

[37] The majority in *Azzopardi* were concerned to ensure that the benefit of an accused's right to silence was not lost or eroded. The joint judgment accepted the existence of an obvious risk that, absent an appropriate direction, a jury may use the accused's failure to give evidence to his detriment. That understanding led to the conclusion that it would "almost always be desirable"[18] for the stated warning to be given. The language used in paragraph [51] is not directly prescriptive, although it is anticipated that the warning, which was described as "desirable" rather than "necessary", will need to be given "almost always". It is apparent from the passage quoted above, however, that the joint judgment was not purporting to prescribe the use of a particular collocation of words from which no deviation would be permitted.

[38] The relevant part of the summing up is quoted above. The jury were directed that their "inferences must be based on facts" they found "proved by the evidence".

[39] The jury were directed that their verdict had to be reached "on the evidence and only on the evidence". The evidence was defined as "what the witnesses have said from the witness box or over the phone or over the video link, the documents and other things received as exhibits". When discussing the role of motive, the primary judge further warned that the jury's verdict had to be based on the evidence they accepted.

[40] The directions emphasised that the burden of proof rested on the prosecution and that the appellant was not required to "establish any fact let alone her innocence". The jury were told that the standard of proof was beyond reasonable doubt and that each element of an offence had to be so proved.

[41] The jury were told that: an accused person did not have to give evidence or call witnesses to give evidence on her behalf; because the appellant had called witnesses in her case, it did not mean that she had assumed the responsibility of proving her innocence; the burden of proof had not shifted to her; and the evidence called on behalf of the appellant is simply added to the evidence called for the prosecution. The jury were also informed that they had to be satisfied beyond reasonable doubt of guilt on the whole of the evidence.

[42] The primary judge then identified the following approaches to consideration of the evidence open to the jury:

> "So you don't have to believe that the defendant's witnesses are telling the truth before she's entitled to be found not guilty, whereas here there is defence evidence. There is usually one of three possibly results that follow. You might think the defence evidence is credible and reliable and provides a satisfying answer to the prosecution case. And if that's so, your verdict would be not guilty. Or you might think

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18 *Azzopardi v The Queen* (2001) 205 CLR 50 at 70.

> that although the defence evidence was not convincing it leaves you in a state of reasonable doubt as to what the true position is and if that's so your verdict would be not guilty. Or you might think the defence evidence should not be accepted, but if that's your view be careful not to jump from that view to an automatic conclusion of guilt.
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> If you find the accused's evidence unconvincing, set it to one side, go back to the evidence and ask yourself whether on a consideration of the evidence that you do accept you are satisfied beyond reasonable doubt that the prosecution has proved each of the elements of the offence in question."

[43] In the next paragraphs of the summing up, the primary judge again stressed that:

> "… it's for the prosecution to prove beyond reasonable doubt that the defendant was either present at the time and place when the offence was committed, or as the prosecution case is, that somebody else acted on her behalf and lodged the transfer documents on 13th of November 2009…"

[44] The jury were directed early in the summing up that their verdict had to be reached only on the evidence. The primary judge's definition of evidence did not encompass inferences to be drawn from the appellant's failure to give evidence. The jury were directed that inferences could be drawn only from facts which they found to be established by the evidence.

[45] There was repeated emphasis on the burden of proof being on the prosecution and on the absence of any such burden on the appellant. The summing up maintained the approach of linking the jury's duties to their assessment of an acceptance or rejection of the "the evidence". There is no reason to suppose that the jury may have thought that "evidence" had a fluctuating meaning.

[46] These directions, whilst lacking the obvious virtue of a clear statement that an accused's failure to give evidence cannot be used to his or her detriment whether by giving rise to any adverse inference or otherwise, tended to concentrate the jury's attention on the evidence before them and on the absence of any burden on the appellant to prove her innocence.

[47] As the respondent submitted, the directions expressly stated that the fact that the appellant had not given evidence herself did not mean that "she had assumed the responsibility of proving her innocence" or that the burden of proof had shifted to her. The appellant did not suggest, nor was there any evidence that might have suggested, that the primary judge's directions were not followed. Accordingly, it must be assumed that they were observed and applied.[19] The directions thus acted to reduce any risk that the jury may use the appellant's silence to her detriment.

[48] Despite the foregoing considerations, and with some hesitation, I have concluded that the primary judge erred in not giving an *Azzopardi* direction or a direction which had generally the same effect. The jury could not have failed to note the appellant's absence from the witness stand. She was charged with specific fraudulent conduct. What she did or did not do at relevant times and in respect of

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19 *Simic v The Queen* (1980) 144 CLR 319 at 331.

relevant matters was within her knowledge and, in some respects, within her knowledge only. Yet she chose not to give the jury the benefit of her evidence, electing instead to call two witnesses who could testify only in respect of matters on the periphery of the prosecution's allegations. A natural, if not inevitable, response on the part of jury members would have been to wonder why the appellant had opted not to give evidence. It would also have been natural, and possibly almost inevitable, that the jurors, or at least some of them, would have drawn an adverse inference or adverse inferences from the appellant's failure.

[49] In *Weissensteiner v The Queen*,[20] Mason CJ, Deane and Dawson JJ said:

> "We have quoted rather more extensively from the cases than would otherwise be necessary in order to show that it has never really been doubted that when a party to litigation fails to accept an opportunity to place before the court evidence of facts within his or her knowledge which, if they exist at all, would explain or contradict the evidence against that party, the court may more readily accept that evidence. **It is not just because uncontradicted evidence is easier or safer to accept than contradicted evidence. That is almost a truism.** It is because doubts about the reliability of witnesses or about the inferences to be drawn from the evidence may be more readily discounted in the absence of contradictory evidence from a party who might be expected to give or call it. In particular, in a criminal trial, hypotheses consistent with innocence may cease to be rational or reasonable in the absence of evidence to support them when that evidence, if it exists at all, must be within the knowledge of the accused." (emphasis added)

[50] In *Azzopardi*, McHugh J, dissenting, referred to a number of authorities in which an accused's failure to give evidence was regarded as strengthening the prosecution case. His Honour said:[21]

> "100 In *Morgan v Babcock & Wilcox Ltd*, the defendant-company had been convicted of bribery. In this Court, Isaacs J said that 'the silence of the Company, and its failure to explain, materially weakens any attempt to suggest in its favour possible hypotheses of innocence'. In *May v O'Sullivan*, five members of this Court cited the remarks of Isaacs J in support of the proposition that 'it may in some cases be legitimate ... to take into account the fact that the defendant has not given evidence as a consideration making the inference of guilt from the evidence for the prosecution less unsafe than it might otherwise possibly appear'.
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> 101 Similarly, in *Bridge v The Queen*, Windeyer J said that 'the failure of an accused person to contradict on oath evidence that to his knowledge must be true or untrue can logically be regarded as increasing the probability that it is true'.
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> …
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> 103 Many other cases could be cited to the same effect."

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20 (1993) 178 CLR 217 at 227–228.

21 *Azzopardi v The Queen* (2001) 205 CLR 50 at 85.

[51] Jurors, untrammelled by the weight of authority, may not necessarily reason precisely, logically or in the same manner as judges when considering the effect of an accused's failure to give evidence. However, they could be expected to conclude that the accused's case would be materially weakened by the failure and the prosecution's correspondingly strengthened. Moreover, it is likely that they would not advert to the possibility that an accused person, even if in a position to contradict or explain evidence, may wish to remain silent.[22]

[52] As no redirection was sought by the defence, the primary judge did not make a "wrong decision on [a] question of law" and the appellant, in order to succeed must show that the failure to direct as alleged constituted a miscarriage of justice.[23] The prosecution case was strong but nevertheless it is not possible for this Court to conclude "on the whole of the facts and with a correct direction, the only reasonable and proper verdict would be one of guilty"[24] or that "it is a *reasonable* possibility that the failure to direct the jury 'may have affected the verdict'".[25]

[53] It is also the case, in my view, that the failure to avoid the distinct risk of impermissible reasoning denied the appellant her fundamental right of a fair trial.[26]

[54] For these reasons, this is not an appropriate case for the application of s 668E(1A) of the *Criminal Code*.

[55] I would order that:

1. The appeal be allowed.

2. The guilty verdicts be set aside.

3. There be a retrial on counts 1, 2, 3, 4 and 6.

[56] **DALTON J:** I agree with the orders proposed by Muir JA, and with his reasons.

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22 See e.g. *R v OGD* (1997) 45 NSWLR 744 at 751 per Gleeson CJ.

23 *Criminal Code* (Qld), s 668E(1) and *Dhanhoa v The Queen* (2003) 217 CLR 1 at 15.

24 C.f. *Simic v The Queen* (1980) 144 CLR 319 at 331.

25 *Dhanhoa v The Queen* (2003) 217 CLR 1 at 18.

26 C.f. *Simic v The Queen* (1980) 144 CLR 319 at 331.