SUPREME COURT OF QUEENSLAND

CITATION:	*R v Rowe* [2006] QCA 379
PARTIES:	**R** **v** **ROWE, Robert James** (appellant)
FILE NO/S:	CA No 40 of 2006 DC No 2029 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	29 September 2006
DELIVERED AT:	Brisbane
HEARING DATE:	14 August 2006
JUDGES:	McMurdo P, Holmes JA and Dutney J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal against conviction dismissed**
CATCHWORDS:	CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - OBJECTIONS AND POINTS NOT RAISED IN COURT BELOW - MISDIRECTION AND NON-DIRECTION - GENERAL PRINCIPLES - where appellant was convicted of two counts of either stealing a number plate or alternatively receiving a stolen number plate with the circumstance of aggravation that it had been obtained by a crime, one count of unlawfully using a motor vehicle to facilitate the commission of an indictable offence and one count of armed robbery in company with personal violence - where appellant contends that primary judge erred in permitting prosecution to adduce evidence of items found at his home and also in directing jury about appellant's failure to give evidence in terms outside guidelines established in *Azzopardi v The Queen* - whether primary judge did so err - whether there has been procedural unfairness resulting in a miscarriage of justice *Criminal Code* 1899 (Qld), s 668E(1A) *Azzopardi v The Queen* [2001] HCA 25; (2001) 205 CLR 50, followed

Driscoll v The Queen (1977) 137 CLR 517, cited
Festa v The Queen [2001] HCA 72; (2001) 208 CLR 593, cited
R v Swaffield (1998) 192 CLR 159, applied
Thompson and Wran v The Queen (1968) 117 CLR 313, cited
Weiss v The Queen [2005] HCA 81; (2005) 223 ALR 662, applied

COUNSEL: J D Briggs for appellant
M J Copley for respondent

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

[1] **McMURDO P:** The appellant Robert James Rowe pleaded not guilty to two counts of stealing a number plate (counts 1 and 3), alternatively receiving a stolen number plate with the circumstance of aggravation that it had been obtained by a crime (counts 2 and 4), unlawfully using a motor vehicle to facilitate the commission of an indictable offence (count 5) and armed robbery in company with personal violence (count 6). After a three day trial the jury convicted him of counts 5 and 6 and found him to be guilty of either count 1 or count 2 and either count 3 or count 4 but they were unable to say of which of the alternative counts he was guilty. He appeals against his convictions contending that the trial judge erred, first, in permitting the prosecution to adduce evidence of items found at his former Kedron home on 13 November 2002 and, second, in directing the jury about the failure of the appellant to give evidence in terms outside the guidelines established in *Azzopardi v The Queen.*[1]

The relevant evidence

[2] The offences revolved around the armed robbery by two men of the Westpac Bank, located in a small suburban shopping centre at Baroona Road, Milton, in the early afternoon of Friday 21 December 2001. Both robbers wore yellow hats and wrap-around sunglasses. The taller one was wearing a shirt with a Telstra logo and a badly-made wig and was armed with a two-toned pistol. The other was wearing overalls with a Telstra logo, a fluorescent yellow vest with a Telstra logo, zinc cream, a scraggly, badly-made ponytail wig and was also armed with a gun.

[3] A bank teller, Mr Brown, gave evidence that he struggled with the robber wearing the Telstra overalls and the ponytail wig. Mr Brown struck out at the robber and pushed him up against the glass. He then scuffled with both robbers until a blow from one with a hard object to the temple ended Mr Brown's valiant resistance. The taller robber removed money from a teller drawer. Both robbers finally left the bank pursued by the intrepid Mr Brown. They threw their wigs into a red car and drove off. He recorded the registration number of the car and provided it to police.

[4] Later that day a police officer noticed what appeared to be a spot of blood on the right chest area of Mr Brown's shirt. Mr Brown had not noticed the spot before the robbery. The shirt was one of five work shirts so that Mr Brown considered he would have washed it no earlier than the previous Monday. No blood was found at the crime scene. On the day of the robbery Mr Brown drove to work and parked his

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[1] (2001) 205 CLR 50.

car in the car park behind the bank. His normal practice was to then walk directly to the bank. Shortly before the robbery he left the bank to buy his lunch, probably at a takeaway food shop about 20 m from the bank in the shopping centre where the bank was situated. He agreed he would have come into close contact with members of the public in the shopping centre at this time. He had no particular recollection of speaking to anybody during the lunch break.

[5] Forensic scientist Ms Belzer examined the shirt on 28 December 2001. She found that the stained area gave a presumptive positive test for blood. She extracted cellular material from within the stained area which indicated that it contained human DNA. Human DNA can be extracted from blood, mucus, saliva, skin cells, hair follicles or sperm cells. She thought it highly unlikely that the stained area was something other than human blood (saliva or mucus, for example) because of the combination of two factors: the presumptive positive test for blood and the presence of human DNA in the area of the stain. The detected DNA material was consistent with the appellant's DNA sample given to her: there was a one in 300 million chance that another Queenslander had the same DNA profile as the appellant.

[6] On 4 August 2004 she examined the shirt again and took 17 samples from different areas. In the area of the stain she detected a male gender typing and seven STR loci matching the appellant's DNA but nine matching loci are required for a positive match such as she made when she conducted the 2001 test. The 2004 DNA profile from the stain did not therefore fully match the appellant's but it was consistent with it and with the DNA of one person in 509,000 in the Queensland population. In four areas of the shirt around but outside the stain she conducted further tests but was unable to find any DNA profile. An area on the left chest region of the shirt gave five STR loci and a male gender typing which did not match but was consistent with the appellant's DNA and that of approximately one in 30,000 people in the Caucasian population. Another area on the lower left side of the shirt also gave a partial DNA profile of a male gender typing with four STR loci which was also consistent with the appellant's DNA and with that of one in 1,700 people in the Queensland population. Another area on the right sleeve gave a DNA profile of a male gender typing and nine STR loci which matched Mr Brown's DNA sample.

[7] In cross-examination Ms Belzer agreed that what appeared to be a blood stain on the shirt could pre-date the robbery; it could be a stain of something other than human blood, for example a grass or rust stain; the DNA found in December 2001 which matched that of the appellant may have come from something other than blood, for example, saliva or mucus transferred by a moist sneeze or a wet cough. Usually DNA profiles detected on the shirt would pre-date the shirt's last wash but she could not say that standard washing techniques would invariably remove blood or saliva so that it was possible the DNA was placed on the shirt before the last wash.

[8] Police located the red sedan used by the robbers to leave the bank with the number plate 600BPY on the front and the number plate 352FKL on the back in a nearby undercover carpark behind some restaurants at Park Road, Milton. They also found some sunglasses, a broken off sunglass arm and a rag in the car and a hair band on the ground near the car.

[9] The appellant through his counsel at trial made admissions to the following effect. The red getaway vehicle was unlawfully taken from a car park at the Stafford Tavern, Webster Road, Stafford on the evening of 19 December 2001 between

6.30 pm and 11.55 pm. Before the robbery the registration plates were removed from that car and replaced with registration plates 600BPY and 352FKL. The registration plate 600BPY was stolen from a Ford Laser sedan belonging to Elzbieta Agaciak on a date unknown before the robbery. The registration plate 352FKL was stolen on an unknown date before the robbery from a Holden Commodore used by Paul Phillips; that car was garaged at an address in Homebush Road, Kedron. The appellant did not admit that the number plate was stolen from Mr Phillips' car when it was garaged at Kedron but the jury would have been entitled to draw that inference from the evidence and admissions. The appellant had signed a tenancy agreement for premises at 3/23 Broughton Road, Kedron between 15 December 2001 and 15 September 2002, the robbery having been committed on 21 December 2001. The appellant regularly paid rent for those premises during that period. Between 16 September 2002 (after the appellant's arrest) and 13 November 2002 rent for those premises was paid by an unknown male person.

[10] It was common ground that the appellant's flat at 3/23 Broughton Road was about a block from where Mr Phillips garaged his car.

[11] On 12 November 2002 police searched the Kedron flat rented by the appellant prior to his arrest in September 2002. His photo was on the kitchen wall. In the main bedroom of the two bedroom flat was a bedside table in a drawer of which was a photo of the appellant and a young woman, a work-related card in the appellant's name and ammunition. Other drawers contained the appellant's passport, a replica semi-automatic pistol, another semi-automatic gun in pieces and some two-way radios. Folders and purses in the flat contained cards in the appellant's name. His fingerprints were found on a kitchen cupboard, kitchen utensils, inside a bedroom door, on bedroom cupboard doors and on a tin of shoe polish found in a bedroom cupboard. A walkie-talkie, a wig and a green baseball cap were in a "Rabbit Photo" bag wedged between the bed and the bedside table in the main bedroom. Police also found tubes of superglue, moustaches or goatees made of human hair, a Telstra work bag and a ponytail tied with many hair bands. Fingernails or toenails and human hair found in the second bedroom, which did not seem to be occupied, were placed in a bag and sent to Ms Belzer for analysis. From what appeared to be a dried piece of flesh from that bag she obtained a DNA profile which matched the appellant's. None of the items found at the appellant's former flat were directly positively linked to the robbery.

[12] The appellant did not call or give evidence.

Should evidence of the items found in November 2002 have been admitted?

[13] The appellant unsuccessfully argued under s 590AA *Criminal Code* in a pre-trial hearing that the police evidence of items taken from the appellant's residence at 3/23 Broughton Road, Kedron on 12 or 13 November 2002 should be excluded. The appellant unsuccessfully sought to reopen that ruling prior to his arraignment on the first day of trial. He contends that the evidence was wrongly admitted because it did not connect the appellant with the charged offences and merely showed criminal disposition: *Thompson and Wran v The Queen*.[2]

[14] The jury would have been well entitled to infer from the evidence that the appellant resided at 3/23 Broughton Road, Kedron prior to his arrest on 16 September 2002,

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[2] (1968) 117 CLR 313, 316.

about eight weeks before the police search, and, in the absence of any competing evidence, that the items of interest found at the flat were his. The location of things such as the firearms, wigs and means of disguise were more than mere propensity evidence. Although the items were not positively linked with the commission of the robberies they were evidence of the appellant's possession of items of the same character as items used in the robbery. The items may have been used in the robbery. The evidence of their presence even 11 months after the robbery, at the appellant's flat which he rented at the time of the robbery, was admissible circumstantial evidence of the identification of the appellant as one of the robbers: *Thompson and Wran v The Queen*;[3] *Driscoll v The Queen*;[4] *Festa v The Queen*.[5] That circumstantial evidence was not significant on its own and without more should have been excluded because it was prejudicial and with only slight probative value. But it provided a piece of evidence, which in combination with the DNA evidence and the evidence that the stolen number plate on the getaway car used in the robbery came from a car which was garaged at the time of the robbery near the appellant's flat, formed a compelling case against the appellant both as to his identity as one of the robbers and as to the unlikely coincidence of the prosecution evidence in combination occurring innocently. The evidence should not have been excluded pursuant to the judicial discretion discussed in *R v Swaffield*.[6]

[15] Importantly his Honour gave the jury careful directions as to how this evidence was to be used by explaining that only if they found that those items were of the same character as items used in the commission of the robbery offence could they use the evidence of the items found at the appellant's home as evidence against him in the prosecution case. The judge specifically warned against propensity reasoning. He explained that it was wrong to reason that the finding of those items made it look as if the appellant was a bank robber and that therefore he should be convicted; the only significance of the evidence was if the jury considered that his possession of those items suggested the modus operandi of one of the bank robbers who committed the present offences. The appellant has not suggested that, accepting the evidence was admissible, his Honour's directions in this respect were flawed.

[16] This ground of appeal is without substance.

Was this an appropriate case for judicial comment on the appellant not giving evidence?

[17] The learned trial judge considered that the suggestion made by defence counsel, that the appellant's DNA could have found its way onto Mr Brown's shirt innocently rather than in the course of the robbery, involved the proof of facts exclusively within the appellant's knowledge; the jury would be entitled to find that the appellant's lack of any explanation purely within his knowledge of how his DNA could have innocently been on Mr Brown's shirt meant that the conclusion of guilt suggested by the prosecution might be more safely drawn. His Honour concluded that this was an appropriate case in which to comment to the jury on the potential significance of the appellant's failure to give evidence in accordance with the High Court's guidance in *Azzopardi*.[7]

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[3] Above.

[4] (1977) 137 CLR 517, 532 - 533.

[5] (2001) 208 CLR 593, [1], [187] - [189], [257] - [259].

[6] (1998) 192 CLR 159, [62] - [65].

[7] See fn 1.

[18] Defence counsel at trial vigorously opposed this course, arguing that the appellant was not charged until nine months after the commission of the offences and it would be unlikely that he could then recall where he may have coughed or sneezed in a crowded situation almost nine months earlier.

[19] The primary judge considered that the DNA must have been transferred to Mr Brown's shirt on the day of the robbery either in the bank or nearby during Mr Brown's lunch break. His Honour in his directions to the jury referred them to the evidence upon which the prosecution relied to establish its case against the appellant, the strongest piece of which was the evidence of the appellant's DNA on Mr Brown's shirt shortly after the robbery. The judge then gave the jury the following pertinent and detailed directions:

> "In relation to the possibility of the DNA having got there innocently as a result of some innocent contact with the accused - between the accused and Mr Brown while Mr Brown was outside the bank, there is something - some particular *direction* that I should give you. *You will recall earlier that I mentioned that the accused had and was entitled to not give evidence. The fact that the accused has chosen not to give evidence or call evidence from any other persons cannot be used by you as an admission of guilt by him. His silence does not and cannot displace or change the burden of proof which the prosecution has, namely, to prove guilt beyond a reasonable doubt. There is no obligation on any person charged to give evidence and the fact that he does not cannot be used by you to fill any gaps in the evidence of the prosecution.* What I have said is subject to this qualification. The prosecution asks you to conclude that the defendant is guilty from the circumstances which it says are established by the fact that the accused's DNA was found on Mr Brown's shirt shortly after the robbery. It claims to have proved that fact. Now, the prosecution argues that that fact is one of the ones that prove that the defendant is guilty as charged and, indeed, the prosecution particularly relies on that fact as the strongest indication of guilt. What I say now applies only if you consider the prosecution is so strong that it clearly calls for answer or explanation from the accused. If not, you should disregard what I now say.
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> If you do consider the case so strong as to call for an answer, then you may think that if there are any additional facts that would explain that evidence against the accused or contradict the conclusion of guilt which the prosecution asks you to draw, those additional facts, if they exist, would be additional facts known only to the defendant and could not be the subject of evidence from any other person or source, specifically, whether the defendant was present in the vicinity of the bank at ... about the time Mr Brown went out to have lunch on that day.
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> It is important you understand that the facts which is [sic] suggested could have been, but were not revealed by an explanation in evidence from the accused must be additional to those already given in evidence by the witnesses who were called and also important to understand that *mere contradiction would not be evidence of any additional facts. By mere contradiction I mean the defendant simply giving evidence and denying he was guilty. That mere contradiction*

> *by the defendant of evidence already given would not be evidence of any additional fact*.
>
> The consequence of the defendant electing to call no evidence is that you have no evidence of additional facts from him to explain the evidence put forward by the prosecution. The conclusion of guilt the prosecution argues for may be more safely drawn from the proven facts when a defendant elects not to give evidence of relevant additional facts which if they exist must be within his knowledge. *You are not allow [sic] to resolve doubts about the reliability of witnesses or the conclusion to be drawn from the evidence simply because the defendant has not contradicted evidence already given. Remember also that the defendant has already contradicted the general allegation against him by the plea of not guilty*. You may only ask yourselves if the prosecution case for the conclusion of guilt is strengthened by the decision of the defendant not to offer any explanation in evidence where, if there are additional facts that would explain the evidence led by the prosecution or contradict the conclusion of guilt that the prosecution asks you to draw, those additional facts, if they exist, would be peculiarly within the knowledge of the defendant, the accused, who has not given evidence of them.
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> *You should keep in mind that a person charged may have a number of reasons for not giving evidence other than that his evidence would not assist his case. Reasons might include, timidity, a concern that cross-examination might confuse him, the fact that, or a possibility [sic] memory loss, fear of retribution from other persons or a belief that weakness in the prosecution case will leave you, in any event, with a reasonable doubt as to guilt. There are just some possibilities. There is also the consideration mentioned by [defence counsel] which you must bear in mind that it was sometime after this incident, about nine months, when the accused was arrested on this charge. He was arrested on 16 September 2002 which was about nine months after the incident and there is no evidence to suggest that he would have had reason - if he was innocent [sic] the charge, he would have had reason to be concerned about where he was on 21 December 2001 prior to the 16 September 2002. You can consider whether someone in his position would have been likely to have known additional facts which would be relevant to the consideration of the accused, in those circumstances, would have been likely to have known anyway, additional facts which would have been relevant to the consideration of the question of whether his DNA might have come innocently on to Mr Brown's shirt.*
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> *So that's a matter that you should also bear in mind. It is a matter for you, then bearing these factors in mind, to make up your minds as to the significance of the DNA tests on the shirt*." (my emphasis)

[20] The appellant argues that the prosecution evidence did not exclude the possibility that he transmitted his DNA to Mr Brown's shirt through saliva during innocent contact sometime before the robbery, perhaps by sneezing or coughing. Accepting that possibility, the appellant could not be expected to recall every occasion that he may have sneezed or coughed before the robbery in the possible presence of

Mr Brown, whom he did not know. The appellant was entitled to remain silent at trial and to test the deficiencies in the prosecution case without any judicial comment of the sort discussed in *Azzopardi* and given by the trial judge.

[21] Alternatively the appellant contends that even if an *Azzopardi* comment was warranted, the terms of the comment resulted in a miscarriage of justice because his Honour introduced the comment as a "direction". The majority in *Azzopardi* said that whilst judicial "comment" with respect to the failure to offer an explanation may be warranted, it should be made plain that it is a comment which the jury are free to disregard.[8]

[22] The respondent contends that his Honour's directions were apposite and consistent with *Azzopardi*: the fact which was only within the appellant's knowledge warranting judicial comment was whether, in the five days before the robbery, he was or may have been innocently in the vicinity of Mr Brown so that, had he coughed or sneezed, his DNA from saliva could have transferred to Mr Brown's shirt.

[23] The appellant's alternative contention may be readily disposed of. Nothing turns on the form of words like "comment" or "directions"; it is their effect which matters. The judge was *commenting* on the evidence in his *directions* to the jury; he was not directing the jury what to make of the evidence. The judge's directions to the jury relevant to this ground are fully set out above. They demonstrate, especially in the emphasized sections, that the judge made it abundantly clear that it was a matter for the jury to determine what they made of the DNA evidence on the shirt. Earlier in his directions his Honour explained to the jury that if their view of the facts differed from what they considered was the judge's view they should disregard what they thought was the judge's view of the facts and give effect to their own view. The jury must be taken to have understood from the careful and detailed directions set out earlier the onus of proof and that the fact that the appellant did not give evidence was not an admission, did not fill gaps in the prosecution case and could not be used as a makeweight.[9] This contention fails.

[24] I turn now to the appellant's primary contention. In *Azzopardi* Gaudron, Gummow, Kirby, Hayne and Callinan JJ noted that the cases in which a judge may comment on the failure of an accused person to offer an explanation will be both rare and exceptional and will be justified only if the evidence is capable of explanation by disclosure of additional facts known only to the accused.[10] Was this one of those rare and exceptional cases warranting judicial comment on the failure of an accused to give evidence?

[25] The prosecution evidence in combination was certainly capable of eliminating the possibility that the appellant's DNA may have transferred to Mr Brown's shirt innocently. But other possibilities, albeit remote ones, were also open on that evidence. The shirt was probably last washed no earlier than the previous Monday. On Ms Belzer's evidence the appellant's DNA could have been placed on the shirt at any time since it was last washed or perhaps even before it was washed. There was no evidence from Mr Brown of his whereabouts or that of the shirt over the weeks or even days preceding the robbery or of how he last, or routinely, washed the shirt.

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8 See fn 1, [67].

9 *Azzopardi*, [67].

10 Above, [61], [64] - [68].

There was no evidence from Ms Belzer as to how the manner of washing may or would have affected any DNA then on the shirt. The appellant was not charged with these offences until nine months after their commission; by then, assuming as we must his innocence, it would have been difficult for him to recall his activities on an unremarkable day nine months earlier and how they may have related to Mr Brown who was unknown to him. In the light of those aspects of the prosecution evidence this was not one of the rare and exceptional cases referred to in *Azzopardi* where a trial judge may comment to the jury that an accused person's failure to explain facts raised in the prosecution case by disclosing additional facts known only to the accused person means that the jury could more readily draw the inference against the accused person suggested by the prosecution. The judge erred in including these comments in his directions to the jury.

Section 668E(1A) *Criminal Code*

[26] The respondent contends that despite this error in law the appeal should be dismissed because there has been no miscarriage of justice: s 668E(1A) *Criminal Code*.

[27] The appellant submits that the judge's error was such a serious departure from proper procedure that it amounted to a significant denial of procedural fairness and a resulting substantial miscarriage of justice so that the conviction must be overturned: *Weiss v The Queen*.[11]

[28] This Court may allow the guilty verdicts to stand despite the judicial error if satisfied the guilty verdicts have not resulted in a miscarriage of justice: s 668E(1A); *Weiss*.[12] This Court will be so satisfied if, after reviewing all the evidence, it is persuaded of the appellant's guilt beyond reasonable doubt and there has not been procedural fairness itself resulting in a miscarriage of justice.[13] The case against the appellant was overwhelming. The combination of the following evidence was damning: his DNA on Mr Brown's shirt; items which may have been used in the robbery, including wigs, means of disguise and hand guns found in November 2002 at the flat he rented from December 2001 when the robbery occurred until his arrest in September 2002; and that a stolen number plate placed on the getaway vehicle used in the robbery was taken from a vehicle which was garaged at the time of the robbery near the appellant's flat. There was no competing evidence to negative the otherwise irresistible inference from these combined facts that the appellant was one of the two robbers in the Milton branch of the Westpac Bank on 21 December 2001 and that he was also guilty of the associated offences of which he was convicted. I am satisfied of the appellant's guilt on all the counts of which he was convicted beyond reasonable doubt.

[29] The judge's directions met the careful strictures imposed by *Azzopardi*; they emphasized that the interpretation of the evidence of the appellant's DNA on Mr Brown's shirt was for the jury; the judge fairly and clearly put the defence case, carefully explained the onus of proof, reiterated that no inference of guilt was to be drawn against the appellant for his election not to call or give evidence and that this election did not itself strengthen an otherwise inadequate prosecution case. The jury must be taken to have acted on those directions. Those directions, combined with an overwhelmingly strong prosecution case, means that there was no lack of

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11 (2005) 223 ALR 662, [41], [44] and [45].

12 Above.

13 Above, [41] - [47].

procedural fairness here resulting in a miscarriage of justice. I am satisfied that the appellant's convictions should stand as the judicial error has not resulted in any miscarriage of justice. It follows that I would dismiss the appeal.

Order

[30] Appeal against conviction dismissed.

[31] **HOLMES JA:** I have read and agree with the reasons of the President, and with the order proposed.

[32] **DUTNEY J:** I have had the advantage of reading the reasons for judgment of the President with whose reasons and proposed order I agree.