Defendant Not Giving Evidence, where no adverse inference

The defendant has not given [or called] evidence. That is his right. He is not bound to give [or to call] evidence. The defendant is entitled to insist that the prosecution prove the case against him, if it can. The prosecution bears the burden of proving the guilt of the defendant beyond a reasonable doubt, and the fact that the defendant did not give evidence is not evidence against him. 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 he did not give evidence that adds in some way to the case against him. It cannot be considered at all when deciding whether the prosecution has proved its case beyond a reasonable doubt, and most certainly does not make the task confronting the prosecution any easier. It cannot change the fact that the prosecution retains the responsibility to prove guilt of the defendant beyond reasonable doubt.[1]

No specific formula is mandated.

In *R v DAH* (2004) 150 A Crim R 14; [2004] QCA 419 White J wrote at [86], in a passage approved by Cullinane J and supported by McPherson JA, that 'so long as the essential elements which must be conveyed to a jury, that is, that no adverse inference may be drawn from the defendant's failure to give evidence, that the onus of proof lies upon the prosecution, that the defendant is presumed innocent until the prosecution adduces sufficient evidence to reach a conclusion of guilt beyond reasonable doubt and that the failure to give evidence does not strengthen the prosecution case or supply additional proof against a defendant or fill gaps in the evidence, then there is no error.'

See too *R v Nicholson ex parte DPP* (Cth) [2004] QCA 393.

Where the defendant calls but does not give evidence, an Azzopardi direction is required.[2]

---

1 *Azzopardi* (2001) 205 CLR 50 at [34], [51] and [67]. The majority decision held at [51] and [67] that a direction containing most of what is here suggested will "almost always be desirable".

2 See *R v Hartfiel* [2014] QCA 132.