

**The Right to Silence, Silence as Evidence, Weissensteiner's Case
and the Rule in Jones v Dunkel**

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Introduction

The **right to silence** is a legal protection given to people undergoing police interrogation or trial. The law is recognized, explicitly or by convention, in many of the world's legal systems.

The right covers a number of issues centered around the right to refuse to answer questions. This can be the right to avoid self-incrimination or the right to not answer any questions. The right usually includes the provision that adverse comment or inferences cannot be made by the judge or jury about the refusal to answer questions before or during a trial or hearing. The right extends from the moment of suspension of freedom of movement (usually arrest) to the end of the trial.

In this paper I will focus on the right to silence at trial, rather than during police interrogation. The failure to issue a caution is a basis for determining that evidence is illegally obtained and subject to exclusion in NSW pursuant to s 138 of the Evidence Act.

The accused is a competent, but not compellable witness at his own trial. In some cases it might be thought that an accused's electing not to testify is probative of his guilt. The probative value flows from an assumption about human nature – that an innocent accused would act of a desire for self preservation and want an opportunity to declare and prove his innocence, while a guilty accused would be concerned about revealing his guilt.

The claim that the guilty are less likely to testify than the innocent appears basically sound, however, in the face of an unexpected accusation an innocent person may be shocked into silence, while a guilty person may protest his innocence. A decision to testify at trial is more

considered and usually made with the benefit of advice. Of course, testifying will carry risks for the innocent as well as the guilty.

Whether a jury may use the accused's silence in proving guilt, and the extent to which the trial judge may comment on the matter, have long been troublesome questions for lawmakers and the courts.

One source of the trouble is easy to identify. It is a struggle between “ordinary” and “legal” reasoning. Whilst judges are prepared to acknowledge that silence in the face of incriminating evidence may rationally be used to infer guilt, they are also bound to give some substance to the right to silence. These two principles pull in opposite directions. This issue exposes the conflict between two of the central goals of the criminal justice system – crime control and due process. In determining whether an adverse inference should be able to be permitted to be drawn from silence, regard must not only be had to probative value, but also to the accused's right to silence, his privilege against self incrimination and the presumption of innocence.

The threat that the adverse inference poses to due process should not be overstated. The right to silence is not totally lost. The inference does not render the accused a compellable witness. Whether he enters the witness box remains his choice, however, the choice has consequences. On the other side of the argument however, the prospect of an adverse inference must inevitably exert pressure on the accused to not exercise his right to silence and the adverse inference does use the accused as a source of self-incrimination.

Many people argue that the inference is so natural and commonsense as to be inevitable, no matter what attempts are made by the law to preclude it. But to suggest that jurors would disregard instructions to give no weight to an accused's failure to testify would cut across the very foundation of the jury system and the High Court will not countenance the suggestion that juries don't follow directions.

A more compelling argument against the repression of the adverse inference is that it would be abandoning potentially probative evidence. In the pursuit of a true verdict – factually accurate convictions and acquittals – the more evidence the better. If the accused remains silent then there is the adverse inference. If knowledge of the possibility of an adverse

inference prompts an accused who would otherwise remain silent to give evidence then there is a great deal more evidence for the jury to consider.

History

At the conclusion of the Crown case, there are two options so far as the accused's personal involvement in the presentation of the defence is concerned. In all cases, in addition to these personal options, witnesses may be called to testify to facts in issue and as to character. The two personal options are to remain silent or to give sworn evidence like any witness. In this last case the witness is liable to be cross-examined by the prosecutor or on behalf of any co-accused, but the ambit of this cross-examination is delimited by special statutory provisions which in Australia are generally modelled on the provisions of the English Criminal Evidence Act 1898. It is necessary first to consider briefly the historical background to the present law.

It is noted in *Cross on Evidence* that in Tudor times¹ (1485-1603) the criminal trial was conducted as a verbal exchange between the accused and the prosecutor. The interrogation of the accused on arraignment and the answers of the accused in the presence of the jury to evidence tendered against the accused constituted the most important part of the proceedings. The accused was not permitted counsel in most felony cases, and was not competent to give sworn evidence because of the accused's interest, but the accused participated throughout the proceedings.

In the Star Chamber (1600-1641) the accused was interrogated under oath.

Following the Revolution of 1688 the practice of questioning the prisoner died out. The oath was proscribed as being contrary to the maxim *nemo tenetur accusare seipsum* (no one is bound to accuse himself), which maxim is now taken to confer upon an accused privilege against self-incrimination. The accused was considered incompetent as a witness. But in trials for felony where the accused was, in general, not permitted legal representation the accused was still permitted and encouraged to participate in the trial, to answer damaging evidence and generally to conduct the case. In this way the trial proceeding operated in an indirect way as an interrogation before the jury. In the eighteenth century the courts

¹ The history of the accused's right to participate in the criminal trial is set out in J F Stephen, *A History of the Criminal Law of England*, Vol 1, 1883, Ch 12

permitted counsel for the accused, even in felony cases, to examine and cross-examine witnesses, but not to address the jury.

In 1836 the right of full defence, including address, was extended to all trials. Thereafter the practice of the accused making an unsworn statement continued, though defence counsel's right to participate fully in the trial was limited by an inability to call the accused as a witness.

The rule that an accused (and his wife) were incompetent to testify was said to operate cruelly against an innocent person² but generally to be of advantage to the guilty. But the rule persisted because, it is said, of the feeling that its abolition would operate unfairly against accused persons. Once given the right to give evidence, the accused would be faced with the cruel dilemma of remaining silent and facing the adverse inferences which would be drawn from this decision, or of facing the ordeal of cross-examination where even an innocent person might be placed in a bad light. The solution adopted in the legislation of 1898 was a compromise. The incompetence of the accused as a witness was removed but protection against prejudicial cross-examination was granted. The right of the accused to participate from the dock was preserved in the form of the unsworn statement (that availability of a dock statement continued in England until 1982 and in NSW until 1994).

The position in other Common Law Countries

England and Wales

The Criminal Justice and Public Order Act 1994 provide statutory rules under which adverse inferences may be drawn from silence.

Adverse inferences may be drawn in certain circumstances where before or on being charged, the accused:

- fails to mention any fact which he later relies upon and which in the circumstances at the time the accused could reasonably be expected to mention;
- fails to give evidence at trial or answer any question;

² In J F Stephen, *A History of the Criminal Law of England* (first ed 1883), Vol 1, p 144.

- fails to account on arrest for objects, substances or marks on his person, clothing or footwear, in his possession, or in the place where he is arrested; or
- fails to account on arrest for his presence at a place.

Where inferences may be drawn from silence, the court must direct the jury as to the limits to the inferences which may properly be drawn from silence. There may be no conviction based wholly on silence (s 38).

There is a Code of Practice which envisages, amongst other things, recorded police interviews taking place at a police station, where the accused has access to legal advice and after the caution in the following terms has been given:

You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence.

If there has been a breach of the Code of Practice the evidence is more likely to be excluded.

Adverse inferences may be drawn in certain circumstances where before or on being charged, the accused fails to mention a specific fact which he later relies upon and which in the circumstances at the time the accused could reasonably be expected to mention.

If this failure occurs at an authorised place of detention (e.g. a police station), no inferences can be drawn from any failure occurring before the accused is allowed an opportunity to consult a legal advisor.

A person relies on a fact if he relies upon it in his own testimony or his counsel puts forward a positive case (see *R v. Webber* [2004] 1 WLR 404, at para. [15]).

What it is reasonable for an accused to mention depends on all of the circumstances, including the accused's "age, experience, mental capacity, state of health, sobriety, tiredness, knowledge, personality and legal advice" (see *R v. Argent* [1997] 2 Cr App R 27) .

If a defendant states that he remained silent on legal advice, the question for the jury is whether silence can only be attributed to the accused having no satisfactory answer to the charge against him (see *R v. Hoare and Pierce* [2004] EWCA Crim 784).

An adverse inference is appropriate where the jury conclude that the reason the accused remained silent was that he had no proper answer to the charge put against him. The inferences that may be drawn include “some additional support” for the prosecution case.

In *Murray v United Kingdom* (1996) 22 EHRR 29 at 46, the European Court of Human Rights was asked to consider whether United Kingdom legislation which permitted the drawing of inferences from silence was in violation of Article 6. Article 4 of the *Criminal Evidence (Northern Ireland) Order* 1988 contained almost identical provisions to those now found in s 35 of the *Criminal Justice and Public Order Act* 1994. The applicant was found guilty, by a single judge, of aiding and abetting false imprisonment of a Provisional Irish Republican Army informer. The judge informed him that he had drawn inferences from the fact that he did not answer police questions and that he had not given evidence at his trial. The European Court of Human Rights declined to give an abstract analysis of the problem and confined itself to the facts of the case. It held, by 14 votes to five, that if the circumstances clearly called for an explanation the tribunal could take the accused’s silence into account in assessing the persuasiveness of the evidence adduced by the prosecution. The court noted that in European States not bound by strict rules of evidence national courts could take into account all relevant circumstances, including the manner in which the accused had conducted his defence. The United Kingdom had therefore created a system which was:

“in essence not very different from that which obtains in other [European] countries where the accused may not testify on oath and where his refusal to answer questions or to account for certain facts may be an important element in the evaluation of the evidence against him”.

The court was not prepared to accept that the drawing of reasonable inferences from silence had the effect of shifting the burden of proof from the prosecution to the defence. Provided there was no compulsion to give evidence, a statute specifically permitting the drawing of adverse inferences amounted to no more than a ‘formalised system which aims at allowing commonsense implications to play an open role in the assessment of the evidence’.

Canada

The right to silence is protected under section 7 and section 11(c) of the Canadian Charter of Rights and Freedoms. The accused may not be compelled as a witness against himself in criminal proceedings, and therefore only voluntary statements made to police are admissible as evidence. Prior to an accused being informed of their right to legal counsel, any statements they make to police are considered involuntarily compelled and are inadmissible as evidence. After being informed of the right to counsel, the accused may choose to voluntarily answer questions and those statements would be admissible.

Although an accused has the right to remain silent and may not be compelled to testify against himself, where an accused freely chooses to take the witness stand and testify, there is no further right to silence and no general restriction on what kinds of questions they may be required to answer. This may be contrasted with the US right to refuse to answer incriminating questions under the 5th Amendment even while on the witness stand. However section 13 of the Canadian Charter of Rights and Freedoms guarantees that a witness may not have any incriminating evidence they gave as testimony used against them in separate proceedings. In effect, a person can be compelled to give involuntary self-incriminating evidence but only where that evidence is to be used against a third party.

In most cases, except for certain sex offences or where the victims are children, spouses can not be compelled to testify against each other.

R. v. Hebert [1990] 2 S.C.R. 151 is the leading Supreme Court of Canada decision in an accused's right to silence under section seven of the Canadian Charter of Rights and Freedoms. The facts of the case are that in 1987, Neil Gerald Hebert was arrested for armed robbery. He was informed of his rights and taken to an RCMP detachment. Upon consulting a lawyer, he said he was not going to make any statements. Hebert was put in a cell with an undercover agent posing as another arrested suspect. The undercover agent chatted with Hebert and managed to elicit several incriminating statements from him. At trial, a voir dire was held to determine the admissibility of the conversation. The judge found that Hebert's right to counsel under s 10(b) of the Charter, and his right to remain silent under s 7 were violated. On intermediate appeal the court found that Hebert's rights were not violated and a new trial was ordered. McLachlin, writing for the majority of the supreme court, held that the evidence was inadmissible and upheld the trial judge's ruling. McLachlin found that the

right to silence was a principle of fundamental justice and as such was protected under s 7. Once in police custody, an accused's right cannot be undermined through acts of police trickery. However, if the accused were to divulge information to an informer or undercover agent of their own free will then the statements could be used against them.

R. v. Noble, [1997] 1 S.C.R. 874 is a leading decision of the Supreme Court of Canada on the right to silence under section 11(c) of the *Canadian Charter of Rights and Freedoms*. The court held that the silence of an accused cannot be given any independent weight.

A building manager found two young men, one named Sean Jeffrey Noble, in the building's parking lot. One was attempting to break into a car using a screwdriver. He asked Noble for identification, to which he provided his driver's licence. The manager held onto the licence and called the police.

At trial, the manager could not identify Noble without the driver's licence. The judge allowed the use of the picture but noted that though it provided for a tougher case to meet the accused still remained silent. The judge inferred that it was permissible to draw a negative inference from this silence that strengthened the Crown's case. Noble was convicted, but the judgment was set aside on appeal.

Justice Sopinka, with whom a majority of the Supreme Court of Canada agreed, dismissed the appeal. He held that there can be no independent weight given to an accused silence. He justified this on the basis that to adduce weight to silence would violate the right to silence and the presumption of innocence under the *Charter*. One exception to this absolute principle is in regard to “alibi”.

USA

Amendment V (the Fifth Amendment) of the United States Constitution, which is part of the Bill of Rights, specifically codifies the right to silence.

“ *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put* ”

in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

In the United States the drawing of an adverse inference is absolutely prohibited. A majority of the Supreme Court in *Griffin* 380 US 609 (1965) held that the drawing of an adverse inference from an accused's right to silence would infringe the Constitution. In *Carter* 450 US 288 (1981) the Supreme Court added that, if requested by the accused, the trial judge should instruct the jury not to draw such an inference.

The Fifth Amendment has been interpreted strictly by the US Supreme Court. Suspects in police custody must be told specifically about their rights to remain silent and to have an attorney present during police questioning otherwise an admission will be refused into evidence.

Also, an Accused who decides to give evidence has a right to refuse to answer incriminating questions under the 5th Amendment even while on the witness stand.

Miranda v. Arizona 384 U.S. 436 (1966), was a landmark 5-4 decision of the United States Supreme Court. In 1955, Ernesto Miranda was arrested for kidnapping and rape of a Jane Doe at a bus stop. He made a confession without having been told of his constitutional right to remain silent, and his right to have an attorney present during police questioning. At trial, prosecutors offered only his confession as evidence and he was convicted. The Supreme Court ruled that Miranda was intimidated by the interrogation and that he did not understand his right not to incriminate himself or his right to counsel. On this basis, they overturned his conviction. That case has withstood numerous Supreme Court challenges.

Interestingly, Miranda was later convicted in a new trial, with witnesses testifying against him and other evidence presented. He was then sentenced to eleven years. He served one-third of his sentence and was turned down for parole four times before being paroled in December 1972.

When Miranda was later killed in a knife fight, his killer received the *Miranda* warnings; he invoked his rights and declined to give a statement.

The Position in New South Wales under the Uniform Evidence Act

The Uniform Evidence Act has a number of provisions that are relevant to the right to silence in NSW - sections 20, 89, 139 and 128.

Section 89 and 139 relate to official police questioning, the failure to caution and the impermissible use of failure to answer official police questioning to draw an inference of guilt. Until the caution is changed it is quite clear that an inference should not be able to be drawn from answering police questions. Section 128 provides that a witness who objects to giving evidence on the ground that it may tend to incriminate them may in certain circumstances be granted a certificate preventing the use of that evidence in other proceedings (apart from a retrial).

I will focus on the section dealing with failure to give evidence and judicial comment.

20 Comment on failure to give evidence

- (1) This section applies only in a criminal proceeding for an indictable offence.
- (2) The judge or any party (other than the prosecutor) may comment on a failure of the defendant to give evidence. However, unless the comment is made by another defendant in the proceeding, the comment must not suggest that the defendant failed to give evidence because the defendant was, or believed that he or she was, guilty of the offence concerned.
- (3) The judge or any party (other than the prosecutor) may comment on a failure to give evidence by a person who, at the time of the failure, was:
 - (a) the defendant's spouse or de facto spouse, or
 - (b) a parent or child of the defendant.
- (4) However, unless the comment is made by another defendant in the proceeding, a comment of a kind referred to in subsection (3) must not suggest that the spouse, de facto spouse, parent or child failed to give evidence because:

- (a) the defendant was guilty of the offence concerned, or
 - (b) the spouse, de facto spouse, parent or child believed that the defendant was guilty of the offence concerned.
- (5) If:
- (a) 2 or more persons are being tried together for an indictable offence, and
 - (b) comment is made by any of those persons on the failure of any of those persons or of the spouse or de facto spouse, or a parent or child, of any of those persons to give evidence,
- the judge may, in addition to commenting on the failure to give evidence, comment on any comment of a kind referred to in paragraph (b).

Key Australian Cases on the Right to Silence

Jones v Dunkel

In broad terms the rule in *Jones v Dunkel* is that the unexplained failure by a party in a case to give evidence, call witnesses or tender documents can lead to an inference that the evidence not presented by that party would not have assisted that party's case. (*Jones v Dunkel* (1959) 101 CLR 298; [1959] ALR 367; *Brandi v Mingot* (1976) 12 ALR 551).

The onus of explaining the failure to present the evidence rests upon the party who could have been expected to present that evidence (*R v Festa* (2000) 111 A Crim R 60; *Smith v Samuels* (1976) 12 SASR 573).

The rule in *Jones v Dunkel* has been held to apply to criminal cases. However, any application of the rule against the defendant in criminal cases must be approached with considerable circumspection because the onus of proof is on the prosecution with the defendant being entitled to do nothing and see if the prosecution can prove its case.

Weissensteiner v R

In *Weissensteiner v R* (1993) 178 CLR 217; 117 ALR 545; (1993) 68 A Crim R 251, the defendant had been convicted of the murder of 2 persons, Bayerl and Zack, and of the theft of a boat, which belonged to Bayerl. Bayerl and Zack were in a sexual relationship. The defendant had worked on the boat for some time. From late 1999 neither Bayerl nor Zack were heard of again and the defendant was found in possession of Bayerl's boat on which there were still various items belonging to Bayerl and Zack. The defendant had given various inconsistent accounts of the whereabouts of Bayerl and Zack. The case against the defendant was wholly circumstantial. At his trial the defendant did not give evidence.

The defendant appealed to the High Court on the single ground that "the trial judge erred in directing the jury that they might more safely draw an inference of guilt from the evidence because the appellant did not give evidence of relevant facts which could be perceived to be within his knowledge": per Mason CJ, Deane and Dawson JJ (at CLR 223; ALJ 548; A Crim R 255).

By majority in the High Court dismissed the appeal. In their judgment, Mason CJ, Deane and Dawson JJ, who were part of the majority, stated (at CLR 227-8; ALR 552; A Crim R 258):

... 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.

Mason CJ, Deane and Dawson JJ further stated (at CLR 228-9; ALR 553; A Crim R 259):

"There is a distinction, no doubt a fine one, between drawing an inference of guilt merely from silence and drawing an inference otherwise available more safely simply

because the accused has not supported any hypothesis which is consistent with innocence from facts which the jury perceives to be within his or her knowledge”.

In broad terms, a jury could be directed that in cases where an inference of guilt was open from the whole of the prosecution case, a defendant’s failure to testify about matters peculiarly within the defendant’s knowledge could make it easier for the jury to be satisfied about the correctness of the inference of guilt.

RPS v R

In *RPS v R* (2000) 199 CLR 620; 168 ALR 729; BC200000084; [2000] HCA 3 the defendant was charged with various sexual offences against his daughter. The prosecution cases depended on the evidence of the complainant and also on the evidence of the complainant’s mother as to conversations that she had with the defendant in which it was alleged that the defendant had made statements, which could be construed as partial admissions. The defendant had denied the offences to the police, but did not give evidence at his trial. He was convicted of some of the charges and appealed successfully to the High Court on the basis that various jury directions of the trial judge were erroneous.

The majority judgment (Gaudron ACJ, Gummow, Kirby and Hayne JJ) held that the trial judge had erred in giving certain directions including those which contained the following elements:

1. That the defendant’s decision not to contradict the evidence given by the complainant’s mother of what was said to be partial admission could be taken into account by the jury in “judging the value of, the weight of” that evidence.
2. That in the absence of denial or contradiction of the evidence given of the partial admission the jury could “more readily” discount any doubts about that evidence and “more readily” accept that evidence.
3. That if it was reasonable, in the circumstances, to expect some denial or contradiction of the prosecution evidence, the jury were entitled to conclude that the defendant’s evidence would not have assisted him in the trial and that the absence of denial or contradiction was a circumstance which could lead them more readily to accept the given by the witness for the prosecution.

4. That the defendant's election not to give evidence could not fill any gaps in the prosecution case but could enable the jury to feel more confident in relying on the evidence tendered by the prosecution.

The majority ruled that these directions were erroneous. One of the reasons for so ruling was because these directions were contrary to the fundamental features of a criminal trial in Australia. In a criminal trial in Australia, the prosecution has the onus of proving its case beyond reasonable doubt; the defendant does not have to give evidence and "it will seldom, if ever, be reasonable to conclude that an accused in a criminal trial would be expected to give evidence": (at [27]).

Hence the majority stated (at [32]):

The trial judge's directions to the jury proceeded from the premise that it may be 'reasonable... to expect some denial or contradiction to be forthcoming from the [appellant] if such a denial or contradiction is available'. But for the reasons given earlier, that premise is wrong. It is contrary to fundamental features of a criminal trial.

This approach is hard to reconcile with the view taken in *Weissensteiner*. If it is seldom, if ever, reasonable to expect a defendant in a criminal trial to give evidence, the election by a defendant not to give evidence should not as a matter of principle and policy leave the defendant open to negative, forensic references.

Callinan J, who agreed that the appeal should be allowed, addressed the applicability of the rule in *Jones v Dunkel* to criminal cases. The trial judge had directed the jury in terms redolent of the rule in *Jones v Dunkel*:

... if you are satisfied that it is reasonable, in the circumstances, to expect some denial or contradiction to be forthcoming from the accused if such a denial or contradiction is available, then you are entitled to conclude, you do not have to, but you are entitled to conclude, from the accused's election not to deny or contradict that evidence that his evidence would not have assisted him in this trial: *RPS v R* (at [16]).

In addressing the question of the rule in *Jones v Dunkel*, Callinan J distinguished between prosecution and defence. He stated:

There is no doubt that a direction in accordance with *Jones v Dunkel* may be given in respect of a failure by the Crown to call a material witness without acceptable and admissible explanation. The need for such a direction will usually be heightened by the Crown's responsibility to present its case in a way which is fair to the accused. However, such a direction may not be given in relation to an accused person or an accused person's witnesses who, if the matter were a civil trial, might be expected to be called. A direction with respect to a defence case, based upon *Jones v Dunkel* would not only infringe s 20(2) [sc. Of the New South Wales Evidence Act] but would also erode the basic principle of the presumption of innocence. The principles stated in *Jones v Dunkel* by their very nature presuppose that there is a need, or an occasion, for evidence to be called by a party or an expectation that evidence could and should be called by a party. An accused person in criminal proceedings labours under no such need, occasion or expectation: *RPS v R* (at [111]).

Azzopardi v R

Azzopardi v R (2001) 205 CLR 50; 179 ALR 349; BC200102009; [2001] HCA 25 again involved what directions a trial judge could properly give to the jury "about the significance which the jury may attach to the fact that the accused did not give evidence" (at [30]).

The majority judgment (Gaudron, Gummow, Kirby and Hayne JJ), the same four judges who gave the majority judgment in *RPS*) adhered to the views that they had expressed in *RPS*.

In *Azzopardi*, the defendant had been charged with soliciting Daniel Papalia to murder Paul Gauci. The prosecution case included evidence from Daniel Papalia that he had shot Paul Gauci at the request of the defendant. The defendant did not give evidence at his trial.

In charging the jury, the trial judge said that that defendant was under no obligation to give evidence because the prosecution had the onus of proving its case beyond reasonable doubt. The trial judge also said:

However, members of the jury, when assessing the value of the evidence presented by the Crown, you are entitled to take into account the fact that the accused did not deny or contradict evidence about matters which were within his personal knowledge and of which he could have given direct evidence from his personal knowledge. This is

because, members of the jury, you may think that it is logic and common-sense that, where only two persons are involved in some particular thing – the complainant and/or a witness and the accused – so that there are only two persons able to give evidence about the particular thing, and when the complainant’s evidence or the witness’s evidence is left undenied or uncontradicted by the accused, any doubt which may have been cast upon that witness’s evidence may be more readily discounted and that witness’s evidence may be more readily accepted as the truth: (at [71]).

The majority held that this was a misdirection which ‘invited the jury to engage in a false process of reasoning’ and was contrary to the earlier direction given that the law did not require that the defendant give evidence (at [73]). The defendant’s appeal was allowed and a new trial ordered.

The decision in *RPS* (and affirmed in *Azzopardi*) are extremely hard to reconcile with the decision in *Weissensteiner*. Both Gleeson CJ (at [17]) and McHugh J (at [86]) in the course of separate, vigorous dissents in *Azzopardi* considered that the cases were at the least inconsistent.

The majority in *Azzopardi* sought to reconcile the cases by interpreting *Weissensteiner* as permitting comment by the trial judge on the defendant’s failure to give evidence where there was a basis for concluding that there were additional facts, peculiarly within the knowledge of the defendant, which the prosecution was seeking to have the jury draw from its case (at [64]). However, the majority also emphasised that such cases would be “both rare and exceptional.”: (at [68]).

In practical terms, it will in nearly every case be inappropriate for a trial judge to direct a jury in accordance with *Weissensteiner*. (See *Azzopardi* at [52]).

The decisions in *RPS* and *Azzopardi* extend beyond what a trial judge can say to a jury when the defendant does not give evidence. As Gleeson CJ at [2] said in *Azzopardi*:

The operation of the general principles have a significance which goes beyond trial by jury. In New South Wales, and other Australian jurisdictions, trials for indictable offences are not infrequently conducted by a judge sitting without a jury. Summary offences are tried by magistrates sitting without a jury. In such cases, the reasoning of

the judge, or magistrate, is constrained by the same principles as govern the deliberations of a jury. Similarly, an appellate court when entertaining an argument that a jury, acting reasonably, must have entertained a reasonable doubt as to the guilt of the appellant, or which is considering the application of the proviso in a case where there has been a misdirection, may need to form a view as to the significance of the accused's silence, either generally, or upon some particular topic.

In such cases, a reasoning process is flawed if the tribunal of fact uses the fact that the defendant did not give evidence as a matter by which "any doubt which may have been cast upon [the prosecution evidence] may be more readily discounted and [that evidence] may be more readily accepted as the truth." (at [72]).

It is also quite clear that (apart from very rare cases) the rule in *Jones v Dunkel* can have no application for the defendant in a criminal case since there is no duty or expectation that the defendant will give evidence.

Dyers v R

In *Dyers v R* (2002) 192 ALR 181, the defendant had been convicted in 1999 in New South Wales of indecently assaulting a 13-year-old girl in 1988. The complainant's evidence was that she had been indecently assaulted by the defendant in a specific room on the morning of 29 July 1988. The defendant (as he was then entitled to do) made an unsworn statement from the dock denying the complainant's allegations and stating that he had been with a Ms Wendy Tinkler at the time when the complainant said that he had assaulted her. The defendant's appointment diary was tendered. That diary showed that the defendant had appointments with various persons on the morning of the alleged assault. However, none of the persons, including Ms Tinkler, who were recorded in the diary as having appointments with the defendant on the morning of the assault were called by the defendant to give evidence.

The trial judge gave the jury a *Jones v Dunkel* direction to the effect that the unexplained failure of a party to call a witness that they (the jury) would have expected that party to call could lead to an inference that the evidence of that witness would not have assisted that party.

The defendant appealed to the High Court on various grounds, including the correctness of the *Jones v Dunkel* direction. By a majority (Gaudron, Hayne, Kirby and Callinan JJ, McHugh J dissenting) the High Court held that the *Jones v Dunkel* direction was wrong and quashed the defendant's conviction.

In their joint judgment, Gaudron and Hayne JJ (with whom Kirby J agreed on this point) stated (at [5]):

As a general rule a trial judge should not direct a jury in a criminal trial that the accused would be expected to give evidence personally or call others to give evidence. Exceptions to that general rule will be rare. They are referred to in *Azzopardi*. As a general rule, then, a trial judge should not direct the jury that they are entitled to infer that evidence which the accused could have given, or which others, called by the accused, could have given, would not assist the accused. If it is possible that the jury might think that evidence could have been, but was not, given or called by the accused, they should be instructed not to speculate about what might have been said in that evidence.

Gaudron and Hayne JJ based these propositions on a number of grounds. One was the requirement that the prosecution prove its case beyond reasonable doubt. They stated (at [9]-[10]):

As was pointed out in *RPS*, it will seldom, if ever, be reasonable to conclude that an accused in a criminal trial would be expected to give evidence. Not only is the accused not bound to give evidence, it is for the prosecution to prove its case beyond reasonable doubt. The mode of reasoning which is spoken of in *R v Burdett* and *Jones v Dunkel* ordinarily, therefore, cannot be applied to a defendant in a criminal trial. That mode of reasoning depends upon a premise that the person concerned not only *could* shed light on the subject but also would ordinarily be *expected* to do so. The conclusion that an accused *could* shed light on the subject-matter of the charge is a conclusion that would ordinarily be reached very easily. But given the accusatorial nature of a criminal trial, it cannot be said that, in such a proceeding, the accused would ordinarily be *expected* to give evidence. So to hold would be to deny that it for the prosecution to prove its case beyond reasonable doubt...

The reasoning which underpinned the decisions in *RPS* and in *Azzopardi* cannot be confined to the accused giving evidence personally. It applies with equal force to the accused calling other persons to give evidence. It cannot be said that it would be expected that the accused would call others to give evidence. To form that expectation denies that it is for the prosecution to prove its case beyond reasonable doubt. (italics in the original text, references omitted).

A second ground was related to the duty of the prosecution “to call all available material witnesses unless there is some good reason not to.”: (at [11]). If a witness was capable of giving important and credible evidence, it would be expected that the prosecution (and not the defendant) would call all witness. Gaudron and Hayne JJ also discussed the application of the rule in *Jones v Dunkel* to the prosecution. They stated (at [6]):

Further, as a general rule, a trial judge should not direct the jury in a criminal trial that the prosecution would be expected to have called persons to give evidence other than those it did call as witnesses. It follows that, as a general rule, the judge should not direct the jury that they are entitled to infer that the evidence of those who were not called would not have assisted the prosecution. A direction not to speculate about what the person might have said should be given. Again, exceptions to these general rules will be rare and will arise only in cases where it is shown that the prosecution’s failure to call the person in question was in breach of the prosecution’s duty to call all material witnesses.

Later in their judgment Gaudron and Hayne JJ expressed the view that the jury could be told that it would have been reasonable to expect that the prosecution would call a specific witness only when the judge after inquiring of the prosecution, formed the view that the prosecution’s reasons for not calling the witness were not satisfactory. Gaudron and Hayne JJ adverted to, but did not deal with, the difficulties that could arise in giving the jury information on this matter: (at [17]).

The status of the views of Gaudron and Hayne JJ on the applicability of *Jones v Dunkel* to the prosecution is unclear. None of the other three judges in the case directly addressed the issue. It should be noted that in *RPS v R Callinan J* (at [111]) had considered that the rule in *Jones v Dunkel* did apply to the prosecution. In *R v Priest; DPP v Priest* BC200207843; [2002]

VSCA 215 (19 December 2002) the Victorian Court of Appeal seems to have accepted the statement of Gaudron and Hayne JJ (at [14]).

Adverse Inferences - The Current Position

While other jurisdictions have recently achieved greater clarification and simplification, in Australia, the Uniform Evidence Law and successive decisions of the High Court have made the law increasingly confusing.

Section 20(2) of the Uniform Evidence Law permits judicial comment on an accused's failure to testify, but not so as to "suggest that the defendant failed to give evidence because the defendant was, or believed that he or she was, guilty of the offence concerned".

In *RPS* (at [20],[108]) and *Azzopardi* (at [56], [190], [193]) the majority indicated that "suggest" is a word of very wide application and that the section "should be given no narrow application".

The most straightforward interpretation of s 20(2) is, as Callinan J suggested in *RPS* at [109] that it "enables a trial judge to make comments for the protection and benefit of an accused who has not given evidence and not otherwise". However, as Callinan J conceded in *Azzopardi* at [190], the majority in *RPS* interpreted the exclusion in s20(2) very broadly but did not consider it to totally preclude adverse comment.

The four basic requirements or preconditions will have to be met before an adverse comment can be made, namely:

1. the prosecution must have established a clear prima facie case calling for a response;
2. the case must be such that the innocent accused would be expected to provide some explanation beyond a simple denial;
3. the explanation should be within the accused's peculiar knowledge so that the accused can reasonably be expected to testify to it rather than anyone else; and
4. the case must be a circumstantial case and not a direct evidence case.

Even if there is a case which raises all these features, the difficult question is then – what form may the comment take? Stephen Odgers engages in some classic understatement when he says in his commentary to section 20 that "considerable caution must be exercised by the

judge” in framing his adverse comments. Following *Azzopardi* it is arguable that the exclusion has expanded to the point that any indication that the adverse inference could be drawn, no matter how cautiously expressed, would breach s 20(2).

Despite the majority’s protestations to the contrary, *Weissensteiner* and the direction (that in cases where an inference of guilt was open from the whole of the prosecution case, a defendant’s failure to testify about matters peculiarly within the defendant’s knowledge could make it easier for the jury to be satisfied about the correctness of the inference of guilt) have effectively been overturned.

Two more recent cases have raised the question of the right to silence in the Court of Criminal Appeal. In each case the appeal was dismissed, but the Court issued a warning to trial judges to be cautious when making any reference to drawing inferences from silence.

In *Sanchez v R* 196 A Crim R 472 the appellant was convicted of importing a commercial quantity of cocaine. On his arrival at Sydney airport in October 2006 from Argentina, an estimated 2.369 kg of the drug was found in his luggage. One ground of appeal alleged that a miscarriage of justice arose from two omissions on the part of the trial judge; namely (a) to give adequate directions on the right to silence and (b) to give adequate directions on the inference that could be drawn from the appellant’s exercise of this right during official questioning (*Evidence Act 1995* (Cth), s 89). It was claimed a miscarriage of justice arose from the trial judge directing the jury that they could draw an adverse inference from the appellant’s failure to raise a defence during questioning at the airport by Customs officers and federal police. At the trial, the appellant’s evidence was that he became friendly with a couple who ultimately proposed he do a feasibility study for them on the setting up of an internet cafe in Sydney. The couple gave him funds for an airline ticket and other expenses. There were no complaints at the trial about any of the alleged errors on the part of the trial judge. Thus, the *Criminal Appeal Rules 1952* (NSW), r 4, required the appellant to obtain leave from the court to raise the grounds of appeal.

Campbell JA held (Latham and Harrison JJ agreeing) that the two paragraphs in the summing up complained about performed different functions in the structure of the summing up. When taken together, the jury could very well have considered from the paragraphs that the Crown was suggesting the appellant’s failure to tell Customs officers or federal agents the story he told in evidence was a reason his account should not be accepted. The judge said nothing

about that being an illegitimate way for the jury to reason. There was a clear contravention of the appellant's right to silence as expounded by the High Court. Despite the error leave to appeal was rejected pursuant to r 4. Campbell JA further said that it would have been open to the trial judge to tell the jury that, while they could not draw any inferences from the appellant's failure to tell Customs officers the account he gave in the witness box, they could take into consideration any inconsistencies.

In *Jiang v R* [2010] NSWCCA 277 the appellant a masseur sexually assaulted a person he was massaging. Soon after the event the complainant complained to a friend. That friend gave evidence at trial of the words used and the complainant's distressed state. During his summing up the judge said that the evidence was "uncontradicted", "not challenged in cross-examination", "no suggestion that she was not in the state she was".

[60] It was submitted on behalf of the appellant that the judge, "effectively directed the jury that the absence cross-examination made it more readily acceptable that the complaint evidence was accurate" and so, "the jury could more readily accept that the actual assaults had in fact taken place". Given the events concerning the complaint did not occur in the presence of the appellant, Mr Thangaraj asked rhetorically, "How could counsel ... have challenged the 'state she was (in)' at the time she complained?"

[61] For the Crown it was submitted that the direction was generally in conventional terms and, insofar as there was reference to the complaint evidence being uncontradicted, the direction was correct and the jury were entitled to take that state of affairs into account. It was submitted that there was nothing unfair or untoward and that direction overall was balanced and fair.

...

[64] Accordingly, the defence case embraced the fact that AD was distressed, and that she had said the things to which Mr Lann had testified. Counsel simply argued that there was an alternative explanation for the state she was in and the statements that she made.

[65] In these circumstances, there was no miscarriage arising out of the judge telling the jury that, whilst it was a matter for them to decide, they might more readily accept the evidence as to fact of the complaint because it had not been challenged or contradicted. What the judge did not purport to do was to tell the jury what conclusion they should draw from the making of the complaint and the circumstances in which it was made.

[66] There is potential for danger, however, in a judge commenting upon prosecution evidence to the effect that it was unchallenged, or uncontradicted, or both. Such a comment carries with it the implication that it was open to the defence to have done so. Where a complaint is made in a sexual assault case such as in the present, there is

usually little or no scope for defence counsel to challenge or contradict the evidence at all. Implying to the jury that this was a course available to counsel that was not taken up can involve significant unfairness.

[67] It is well to recall the remarks of Gaudron ACJ, Gummow, Kirby and Hayne JJ in *RPS v The Queen* [2000] HCA 3; 199 CLR 620. Their Honours were concerned in that case with a trial judge commenting about the election of an accused not to give evidence, but at the end of their judgment they made some general remarks about judges commenting on factual issues. While allowing that in some circumstances a comment may be appropriate, they added (at [42]):

Often, perhaps much more often than not, the safer course for a trial judge will be to make no comment on the facts beyond reminding the jury, in the course of identifying the issues before them, of the arguments of counsel.

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ANNEXURES:

139 Cautioning of persons

- (1) For the purposes of section 138 (1) (a), evidence of a statement made or an act done by a person during questioning is taken to have been obtained improperly if:
 - (a) the person was under arrest for an offence at the time, and
 - (b) the questioning was conducted by an investigating official who was at the time empowered, because of the office that he or she held, to arrest the person, and
 - (c) before starting the questioning the investigating official did not caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence.

- (2) For the purposes of section 138 (1) (a), evidence of a statement made or an act done by a person during official questioning is taken to have been obtained improperly if:
 - (a) the questioning was conducted by an investigating official who did not have the power to arrest the person, and
 - (b) the statement was made, or the act was done, after the investigating official formed a belief that there was sufficient evidence to establish that the person has committed an offence, and
 - (c) the investigating official did not, before the statement was made or the act was done, caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence.

- (3) The caution must be given in, or translated into, a language in which the person is able to communicate with reasonable fluency, but need not be given in writing unless the person cannot hear adequately.
- (4) Subsections (1), (2) and (3) do not apply so far as any Australian law requires the person to answer questions put by, or do things required by, the investigating official.
- (5) A reference in subsection (1) to a person who is under arrest includes a reference to a person who is in the company of an investigating official for the purpose of being questioned, if:
 - (a) the official believes that there is sufficient evidence to establish that the person has committed an offence that is to be the subject of the questioning, or
 - (b) the official would not allow the person to leave if the person wished to do so, or
 - (c) the official has given the person reasonable grounds for believing that the person would not be allowed to leave if he or she wished to do so.
- (6) A person is not treated as being under arrest only because of subsection (5) if:
 - (a) the official is performing functions in relation to persons or goods entering or leaving Australia and the official does not believe the person has committed an offence against a law of the Commonwealth, or
 - (b) the official is exercising a power under an Australian law to detain and search the person or to require the person to provide information or to answer questions.

89 Evidence of silence

- (1) In a criminal proceeding, an inference unfavourable to a party must not be drawn from evidence that the party or another person failed or refused:
 - (a) to answer one or more questions, or
 - (b) to respond to a representation,

put or made to the party or other person in the course of official questioning.
- (2) Evidence of that kind is not admissible if it can only be used to draw such an inference.
- (3) Subsection (1) does not prevent use of the evidence to prove that the party or other person failed or refused to answer the question or to respond to the representation if the failure or refusal is a fact in issue in the proceeding.
- (4) In this section:

inference includes:
 - (a) an inference of consciousness of guilt, or
 - (b) an inference relevant to a party's credibility.

128 Privilege in respect of self-incrimination in other proceedings

(1) This section applies if a witness objects to giving particular evidence, or evidence on a particular matter, on the ground that the evidence may tend to prove that the witness:

(a) has committed an offence against or arising under an Australian law or a law of a foreign country, or

(b) is liable to a civil penalty.

(2) The court must determine whether or not there are reasonable grounds for the objection.

(3) If the court determines that there are reasonable grounds for the objection, the court is to inform the witness:

(a) that the witness need not give the evidence unless required by the court to do so under subsection (4), and

(b) that the court will give a certificate under this section if:

(i) the witness willingly gives the evidence without being required to do so under subsection (4), or

(ii) the witness gives the evidence after being required to do so under subsection (4), and

(c) of the effect of such a certificate.

(4) The court may require the witness to give the evidence if the court is satisfied that:

(a) the evidence does not tend to prove that the witness has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country, and

(b) the interests of justice require that the witness give the evidence.

(5) If the witness either willingly gives the evidence without being required to do so under subsection (4), or gives it after being required to do so under that subsection, the court must cause the witness to be given a certificate under this section in respect of the evidence.

(6) The court is also to cause a witness to be given a certificate under this section if:

(a) the objection has been overruled, and

(b) after the evidence has been given, the court finds that there were reasonable grounds for the objection.

(7) In any proceeding in a NSW court or before any person or body authorised by a law of this State, or by consent of parties, to hear, receive and examine evidence:

(a) evidence given by a person in respect of which a certificate under this section has been given, and

(b) evidence of any information, document or thing obtained as a direct or indirect consequence of the person having given evidence,

cannot be used against the person. However, this does not apply to a criminal proceeding in respect of the falsity of the evidence.

(8) Subsection (7) has effect despite any challenge, review, quashing or calling into question on any ground of the decision to give, or the validity of, the certificate concerned.

(9) If a defendant in a criminal proceeding for an offence is given a certificate under this section, subsection (7) does not apply in a proceeding that is a retrial of the defendant for the same offence or a trial of the defendant for an offence arising out of the same facts that gave rise to that offence.

(10) In a criminal proceeding, this section does not apply in relation to the giving of evidence by a defendant, being evidence that the defendant:

(a) did an act the doing of which is a fact in issue, or

(b) had a state of mind the existence of which is a fact in issue.

(11) A reference in this section to doing an act includes a reference to failing to act.