HIGH COURT OF AUSTRALIA

GAUDRON ACJ,
McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

RPS APPELLANT

AND

THE QUEEN RESPONDENT

RPS v The Queen [2000] HCA 3
3 February 2000
S116/1998

ORDER

1. *Appeal allowed.*

2. *Set aside the order of the Court of Criminal Appeal of New South Wales made on 13 August 1997.*

3. *In place thereof, order that the appeal against convictions to the Court of Criminal Appeal of New South Wales be allowed, the convictions quashed and that there be a new trial on counts 4, 6, 7 and 8 of the indictment.*

On appeal from the Supreme Court of New South Wales

Representation:

A J Bellanto QC with B J Rigg for the appellant (instructed by Uther Webster & Evans)

M G Sexton SC, Solicitor-General for the State of New South Wales with A M Blackmore for the respondent (instructed by Solicitor for Public Prosecutions (New South Wales))

CATCHWORDS

RPS v The Queen

Criminal law – Evidence – Silence of the accused – Directions to jury – Circumstances in which jury may take account of accused's failure to give evidence.

Criminal law – Judicial instructions – Instructions about reasoning towards guilt.

Courts and judicial system – Apprehension of judicial bias – Tension between trial judge and counsel at trial – Use of trial judge's report by appeal court.

Words and phrases – "right to silence".

Criminal Appeal Act 1912 (NSW), s 11.
Evidence Act 1995 (NSW), s 20.

1 GAUDRON ACJ, GUMMOW, KIRBY AND HAYNE JJ. The appellant was charged, in the District Court of New South Wales, with two counts alleging that he had had carnal knowledge[1] of his daughter and six counts alleging that he had had sexual intercourse[2] with her. The offences were alleged to have occurred between various dates, the earliest of which was 6 February 1983 (when the complainant was four years old) and the latest of which was 31 July 1993 (by which time the complainant was 14 years old). He pleaded not guilty. The trial judge directed the jury to acquit the appellant of one of the charges of sexual intercourse; the jury returned verdicts of guilty to four of the remaining five counts of sexual intercourse and verdicts of not guilty to the other count of sexual intercourse and the counts of carnal knowledge.

2 The appellant appealed to the Court of Criminal Appeal of New South Wales against his convictions but that appeal, and his application for leave to appeal against sentence, were dismissed[3]. By special leave, he now appeals to this Court.

3 The determinative issue in this appeal is what comments or directions a trial judge can make or give to a jury when an accused person does not give evidence. In order to understand the context in which that issue arises in this matter, it is necessary to say something about the course of the appellant's trial. It is convenient, while describing what happened at the trial, to notice briefly some of the other issues that were argued in the appeal.

The trial

4 The prosecution case against the appellant depended largely on the evidence of the complainant. She gave an account of various acts of sexual misconduct by the appellant. She swore that, on a number of occasions, the appellant had had penile intercourse with her and, on other occasions, had digitally penetrated her. No other eyewitness was called; no circumstantial evidence was given; no expert evidence was adduced. Undoubtedly, then, the complainant's evidence was critical.

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1 Contrary to *Crimes Act* 1900 (NSW), s 67.

2 Contrary to *Crimes Act*, s 66A (sexual intercourse with a person under the age of 10 years) or s 66C(2) (sexual intercourse with a person of or above the age of 10 years and under the age of 16 years who is under the authority of the accused).

3 *R v RPS* unreported, Court of Criminal Appeal of New South Wales, 13 August 1997.

5 One other piece of evidence loomed large in the prosecution's case. The complainant's mother and grandmother gave evidence of conversations they had had with the appellant after the complainant first told her mother that the appellant had, as she put it, "been fingering me and … made me have intercourse with him". The complainant's mother swore that, in one of those conversations, the appellant had said to her that "I never had intercourse with her [the complainant] but everything else she said is true." According to the complainant's mother she asked the appellant, "How long has it been going on?" and he replied, "Since she was about 10."

6 There was a deal of debate at trial and on appeal (both in the Court of Criminal Appeal and in this Court) about how the appellant's statements might properly be understood if the jury accepted that they were made. In particular, given the context in which they were alleged to have been made, what was it that the appellant referred to when he said that "everything else she said is true"? Could the appellant's statements be taken by the jury as an admission by him of some sexual misconduct towards the complainant? Could they be taken as an admission of some or all of the particular acts of digital penetration that were alleged against the appellant?

7 These were all questions for the jury and in the course of his charge the trial judge identified the relevant issues for the jury. In doing so he misquoted one part of the evidence (there being no running transcript of proceedings available to him). Trial counsel did not complain that the judge had misquoted the evidence and we are not persuaded that the Court of Criminal Appeal was wrong in holding that the misquotation was not significant. The Court of Criminal Appeal was right to conclude that the trial judge made no error in directing the jury that they could (but need not) treat the statements made by the appellant as an admission of some of the acts of digital penetration that were alleged.

8 Two other features of the trial should be mentioned. First, at the close of the prosecution's case at trial, counsel for the appellant announced his intention to call a social worker. The trial judge said, in the presence of the jury, "You must call your client before you can call any other witness. … That's what the law says. It is customary, and the accused must be called first." The jury were then asked to leave the court and counsel for the appellant informed the judge (in the absence of the jury) that he did not propose to call the appellant to give evidence.

9 Although no separate ground of appeal was advanced in this Court that alleged the trial miscarried on this account, reference was made to the trial judge's statements in connection with the appellant's contention that the jury were misdirected about the significance to be attached to the appellant's not giving evidence. In the end, however, the statements made by the trial judge (which, as

the Court of Criminal Appeal rightly pointed out[4], were not well founded in law) do not affect whether the trial judge erred in his directions about the appellant's not giving evidence. This matter need not be noticed further.

10 Secondly, the appellant contended (both in the Court of Criminal Appeal and in this Court) that the trial judge had interjected in the course of the proceedings in ways, and to an extent, that would have suggested to the fair-minded observer that he was biased. Particular reliance was placed in this regard upon the trial judge's report to the Court of Criminal Appeal, provided pursuant to s 11 of the *Criminal Appeal Act* 1912 (NSW). The trial judge made very adverse comments in that report about the conduct of the appellant's trial counsel.

11 The appellant's contention was cast in terms of apparent bias but it was not clear exactly what was meant by this. In particular, it was not clear whether it was being suggested that a fair-minded observer would have concluded that the judge had predetermined some issue. And, if that was what was being suggested, it was far from clear what issue or issues that would fall for decision by the judge (as opposed to the jury) would have appeared to have been prejudged. When pressed on this aspect of the matter, counsel for the appellant suggested that the trial judge had been antagonistic to counsel who had appeared for the appellant and that the conduct of the trial generally tended to undermine the defence case and bolster that of the Crown. But these are not complaints of bias or the appearance of bias; they amount to a complaint that the conduct of the trial was unfair. That is a radically different complaint and it is wrong to seek to apply tests developed in connection with questions of apparent bias in deciding whether the trial was fair. That question will turn largely on whether the accused has had a proper opportunity to advance his or her defence to the charge.

12 It is enough to say of this aspect of the appellant's argument that the course of events at trial might be said to reveal a degree of tension between trial counsel for the appellant and the trial judge. The analysis made by Hunt CJ at CL in the Court of Criminal Appeal of the bases put forward in that Court for the contention that the trial judge was, or appeared to be, prejudiced or biased[5] shows that the appellant was not denied a fair trial.

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4 *RPS* unreported, Court of Criminal Appeal of New South Wales, 13 August 1997 at 23 per Hunt CJ at CL.

5 *RPS* unreported, Court of Criminal Appeal of New South Wales, 13 August 1997 at 26-43.

13 It is, no doubt, unfortunate if tension develops between counsel and the trial judge, and judges must do their best to avoid it. But if the conduct of counsel at trial affects the proper course of proceedings the judge may find it necessary to reprove counsel or to criticise his or her conduct. Particularly in a criminal trial it will usually be appropriate to offer any sustained reproof or detailed criticism in the absence of the jury. Doing so will avoid the risk that the jury might infer from the judge's remarks an opinion about the merits of the accused's defence. In this case the trial judge thought that it was necessary to say what he did and we are not persuaded that he was wrong to reach that view.

14 The fact that the trial judge thought it desirable to go into some detail about these matters in his report to the Court of Criminal Appeal does not lead to some different conclusion about the significance of what happened at trial. The report contemplated by s 11 of the *Criminal Appeal Act*[6] is not a document intended to give the trial judge some opportunity to defend his or her conduct of the trial[7]. The report provides, as the section says, an opportunity for the judge to state his or her "opinion upon the case, or upon any point arising in the case". In particular, it provides an opportunity for the trial judge to express a view upon matters that may not readily be apparent from the written record. But the fact that in this case the trial judge saw fit to comment adversely on the conduct of trial counsel when making a report to the Court of Criminal Appeal does not assist in deciding whether, in fact, the trial was conducted fairly. That depends upon what happened at trial, not upon what views the trial judge may have held (at or after the trial) about counsel's conduct. As we have said, however, the interventions made by the trial judge in this case did not deny the appellant a fair trial.

The appellant's election not to give evidence

15 We turn then to deal with the central issue in the appeal: the judge's directions to the jury about the significance of the appellant's not having given evidence. In his charge to the jury on this aspect of the matter, the trial judge began by telling the jury that an accused person may, but is not obliged to, give evidence and that the prosecution bears the onus of proof. He said that the jury

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6 Cf, for example, *Crimes Act* 1958 (Vic), s 573; Criminal Practice Rules 1900 (Q), O IX r 15; *Criminal Code* (WA), s 696 and Criminal Practice Rules (WA), O XVI; *Criminal Code* (Tas), s 408(3); *Criminal Code* (NT), s 418.

7 *Ahmet* (1996) 86 A Crim R 316 at 323 per Winneke P; *R v Paxton* [1983] 1 VR 178.

"must not conclude that [the appellant] has elected not to give evidence because he is guilty of the offences charged against him". He observed that there are many reasons why an accused person may not want to give evidence and told the jury that they "must not speculate as to why [the appellant] has not given evidence". No complaint is made (or could be made) about these parts of the trial judge's charge. They have long been accepted to be an important warning to the jury (in jurisdictions where judicial comment on the accused's failure to give evidence is permitted[8]) against adopting an impermissible chain of reasoning[9].

16 The appellant's complaint centres upon what the judge then said to the jury. It is as well to set it out in full, numbering the paragraphs that are quoted. The trial judge said:

> (1) "In the present case, however, the Crown asks you when judging the value of, the weight of, the evidence which has been put forward by the Crown as establishing its case against the accused, to take into account the accused's election not to deny or to contradict the matters about which he could have given direct evidence from his own personal knowledge. That is indeed a circumstance which you are entitled to consider in this case. That is, the fact that the accused has elected not to contradict the evidence given by [the complainant's mother] as to his alleged admission – if you construe it as such – and he has been content to rely upon that very brief statement in answer to the detailed allegations made by the complainant."
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> (2) "You may think that it is only common sense that in a situation where a Crown witness and the accused are directly involved in a particular incident so that they are the two persons best able to give evidence of what happened in that incident, and where the evidence of the Crown witnesses is left undenied or uncontradicted by the accused any doubts which may otherwise have been cast upon the evidence of the Crown witnesses may be more readily discounted and the evidence of the Crown witnesses may more readily be accepted as the truth. That is the approach which the Crown asks you to adopt in this case, in particular with regard to the statement made by him to [the complainant's mother], according to her evidence, in which he

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8 Cf *Crimes Act* 1958 (Vic), s 399(3); *Evidence Act* (NT), s 9(3).

9 See, for example, *Petty v The Queen* (1991) 173 CLR 95 at 99 per Mason CJ, Deane, Toohey and McHugh JJ; *R v Bathurst* [1968] 2 QB 99 at 107-108 per Lord Parker CJ.

denied sexual intercourse but said that everything else that [the complainant] had said was true."

(3) "The accused, however, has met the complainant's allegations. He has not traversed the detail of them, but in his statement which he gave to the police (but not here by evidence) he has denied committing any of these offences. Clearly, it is upon that earlier denial that he now relies. If you are satisfied that the accused could have given evidence from his own knowledge of the events about which [the complainant's mother and the complainant] have given evidence for the Crown, *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.*" (Emphasis added)

(4) "*You may use the election of the accused not to put forward any such denial or contradiction as a circumstance which leads you more readily to accept the evidence given by the witnesses for the Crown the accused was in a position to contradict of his own knowledge.*" (Emphasis added)

(5) "Of course, there were a number of witnesses for the Crown and parts of the evidence which he was not in a position to contradict, things that did not take place in his presence or in which he was not engaged. But he certainly was in a position, you might think, to contradict what it was that [the complainant] said happened between him and her and also what it is [the complainant's mother] said had been said on that occasion in August of 1993 in the telephone conversation."

(6) "You cannot however use that election by the accused not to put forward any denial or contradiction in order to fill in any gaps which you think may otherwise be in the evidence upon which the Crown relies. Its relevance relates only to the value or the weight which you can give to the evidence which the Crown witnesses have given. In other words, you may feel more confident in relying upon evidence which is uncontradicted than evidence which is. I do remind you that the accused has made in that statement to the police, (although not in evidence here in Court – he did not give evidence here in Court I should say) which amounts to a general denial of all offences."

(7) "The absence of any evidence from the accused as to the circumstances and details of the incidents also means that there is no

> evidence to support the particular version which was put to the Crown witnesses in cross-examination by counsel for the accused. All that has been said by the accused is a flat general denial. That version, insofar as it was suggested to [the complainant] that these things had not been done or to [the complainant's mother] that what she said was said had not been said, was denied by each of them when the question was put and the accused has led no evidence to establish that it happened, that his version was correct."

17 Five particular elements of this part of the charge ("the impugned directions") should be noted.

First, the trial judge told the jury that the appellant's election not to contradict the evidence given by the complainant's mother of what was said to be a partial admission, could be taken into account by the jury in "judging the value of, the weight of" the prosecution's evidence about it (par (1)).

Secondly, he told the jury that in the absence of denial or contradiction of the evidence given of the partial admission they could "more readily" discount any doubts about that evidence and "more readily" accept the evidence (par (2)).

Thirdly, he told the jury that if it was reasonable, in the circumstances, to expect some denial or contradiction of the prosecution evidence, they were entitled to conclude that the appellant'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 evidence given by the witnesses for the prosecution (pars (3) and (4)).

Fourthly, he said that the appellant's election not to give evidence could not fill any gaps in the prosecution case but could enable them to feel more confident in relying on the evidence tendered by the prosecution (par (6)).

Finally, he said that the absence of evidence from the accused meant that the version of events put in cross-examination of the witnesses for the prosecution was not supported by evidence (par (7)).

The relevant statutory provisions

18 Consideration of the trial judge's charge about the absence of evidence from the accused must begin with s 20 of the *Evidence Act* 1995 (NSW). That section

applies (and applies only) in a criminal proceeding for an indictable offence[10] and provides[11]:

> "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."

The respondent submitted that the trial judge's charge was no more than a "comment" on the failure of the appellant to give evidence and was a comment which did not suggest that the appellant failed to give evidence because he was, or believed that he was, guilty of the offences of which he was charged. We do not accept that the charge should be understood in that way.

19 The respondent's submission seeks to distinguish between a suggestion that the appellant did not give evidence because he was, or believed that he was, guilty and the trial judge's suggestion (in par (3) of the impugned directions) that the evidence the appellant might have given "would not have assisted him in this trial". The suggested distinction is not tenable. Any belief which the appellant held, that his evidence would not have assisted him in his trial, could proceed only from a belief that he was guilty; that is, it could proceed only from a belief that he could not deny or contradict at least some of what had been said against him. No other construction of what was said by the trial judge in that part of his charge was reasonably open to the jury.

20 Section 20(2) should be given no narrow construction inviting the drawing of fine distinctions. In particular, the prohibition contained in the second sentence (forbidding the judge making a comment that *suggests* the accused failed to give evidence because he or she was, or believed that he or she was, guilty) must be given full operation. In that respect this prohibition should not be treated differently from the prohibition (still operative in some Australian jurisdictions[12]) against a judge making *any* comment on the failure of the accused to give evidence. To adopt and adapt what was said by Isaacs J in *Bataillard v*

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10 s 20(1).

11 s 20(2).

12 *Crimes Act* 1958 (Vic), s 399(3); *Evidence Act* (NT), s 9(3).

The King[13], if comment is made about the accused not having given evidence it must not make any "reference, direct or indirect, and either by express words or the most subtle allusion" suggesting that the accused did not give evidence because he or she was, or believed that he or she was, guilty[14]. It has been said that the line between what is permissible and what is not, under provisions which prohibit *any* comment on a failure to give evidence, may be a fine one[15]. Whether or not that is so, s 20(2) requires a line to be drawn and it should be drawn in a way that gives the prohibition against suggesting particular reasons for not giving evidence its full operation.

21 The directions given by the trial judge in par (3) of the impugned directions contravened s 20(2) of the *Evidence Act* because they suggested that the appellant failed to give evidence because he believed that he was guilty of at least some of the offences concerned.

Directions contrary to fundamental features of criminal trial

22 There are other fundamental reasons why none of the five elements we have identified in the impugned directions should have formed part of the directions given in this case: reasons that do not depend upon the particular provisions of s 20 of the *Evidence Act*. At the level of principle, those reasons centre on what is usually described as the "right to silence"[16]. That expression is a useful shorthand description of a number of different rules that apply in the criminal law[17]. But referring, without more, to the "right to silence" is not always a safe basis for reasoning to a conclusion in a particular case; the use of the expression "right to silence" may obscure the particular rule or principle that is being applied. What is presently significant 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. In a trial of that kind, what significance can be attached to the fact that the accused does not give evidence?

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13 (1907) 4 CLR 1282 at 1291.

14 See also *Bridge v The Queen* (1964) 118 CLR 600.

15 *Bridge* (1964) 118 CLR 600 at 605 per Barwick CJ.

16 *Petty* (1991) 173 CLR 95 at 99 per Mason CJ, Deane, Toohey and McHugh JJ.

17 *R v Director of Serious Fraud Office; Ex parte Smith* [1993] AC 1 at 30-31 per Lord Mustill.

23 It is useful to start by referring to the well-known cases of *R v Burdett*[18] and *Jones v Dunkel*[19]. *Burdett* arose from a prosecution for criminal libel. Abbott CJ said[20]:

> "A presumption of any fact is, properly, an inferring of that fact from other facts that are known; it is an act of reasoning; and much of human knowledge on all subjects is derived from this source. A fact must not be inferred without premises that will warrant the inference; but if no fact could thus be ascertained, by inference in a Court of Law, very few offenders could be brought to punishment. In a great portion of trials, as they occur in practice, no direct proof that the party accused actually committed the crime, is or can be given; the man who is charged with theft, is rarely seen to break the house or take the goods; and, in cases of murder, it rarely happens that the eye of any witness sees the fatal blow struck or the poisonous ingredients poured into the cup. In drawing an inference or conclusion from facts proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded, either of explanation or contradiction. No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction; can human reason do otherwise than adopt the conclusion to which the proof tends? The premises may lead more or less strongly to the conclusion, and care must be taken not to draw the conclusion hastily; but in matters that regard the conduct of men, the certainty of mathematical demonstration cannot be required or expected; and it is one of the peculiar advantages of our jurisprudence, that the conclusion is to be drawn by the unanimous judgment and conscience of twelve men, conversant with the affairs and business of life, and who know, that, where reasonable doubt is entertained, it is their duty to acquit; and not of one or more lawyers, whose habits might be suspected of leading them to the indulgence of too much subtilty and refinement."

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18 (1820) 4 B & Ald 95 [106 ER 873].

19 (1959) 101 CLR 298.

20 (1820) 4 B & Ald 95 at 161-162 [106 ER 873 at 898].

This mode of reasoning was described by Windeyer J in *Jones v Dunkel*[21] as "plain commonsense", and so it is. But it is essential to note its limits. It relates to the drawing of inferences or conclusions from other facts. It is not a mode of reasoning that is concerned, for example, with whether the direct evidence of an eyewitness should be accepted.

24 It will be seen that Abbott CJ spoke of a "presumption" of fact. But when the passage is read as a whole, it is clear that his Lordship was using the expression to refer to those inferences that would usually be drawn from proved facts rather than in any narrower or more technical sense in which the word "presumption" is sometimes now used. It may, therefore, be doubted that analysing the problem by reference to the "presumption of innocence" or any other legal presumption is useful[22].

25 It is necessary to keep at the forefront of consideration that the mode of reasoning which is described proceeds from the premise that the person who has not given evidence not only *could* shed light on the subject but also *would* ordinarily be expected to do so. That premise reflects a view of the kind held by Bentham that "between delinquency on the one hand, and silence under inquiry on the other, there is a manifest connexion; a connexion too natural not to be constant and inseparable"[23]. This view may now be open to some doubt or challenge, for example, in cases where someone of little confidence or experience is suddenly confronted by an accusation made by a person in authority[24]. It is, however, not necessary to examine in this case whether the premise is an accurate reflection of human behaviour in some or all circumstances.

26 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

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21 (1959) 101 CLR 298 at 321.

22 Cf the analysis made in *Best on Evidence*, 12th ed (1922) at 266 and following in the chapter entitled "Presumptive Evidence, Presumptions and Fictions of Law". Analysis of this kind appears to stem from Bentham's work *A Treatise on Judicial Evidence*, (1825), bk 5 and its treatment of circumstantial evidence.

23 Bowring, *The Works of Jeremy Bentham*, (1838-1843), vol 7 at 446.

24 Bagaric, "The Diminishing 'Right' of Silence", (1997) 19 *Sydney Law Review* 366 at 381-382.

evidence leads rationally to an inference that the evidence of that party or witness would not help the party's case[25] and that[26]:

> "where an inference is open from facts proved by direct evidence and the question is whether it should be drawn, the circumstance that the defendant disputing it might have proved the contrary had he chosen to give evidence is properly to be taken into account as a circumstance in favour of drawing the inference."

27 By contrast, however, it will seldom, if ever, be reasonable to conclude that an accused in a criminal trial would be expected to give evidence. The most that can be said in criminal matters is that there are some cases in which evidence (or an explanation) contradicting an apparently damning inference to be drawn from proven facts could come only from the accused. In the absence of such evidence or explanation, the jury may more readily draw the conclusion which the prosecution seeks. As was said in *Weissensteiner v The Queen*[27]:

> "[I]n 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)

28 In a criminal trial, not only is an accused person not bound to give evidence, it is for the prosecution to prove its case beyond reasonable doubt. The observations by the Court in *Jones v Dunkel* must not be applied in criminal cases without taking account of those considerations.

29 If the question concerns the calling by the defence of a witness other than the accused, it will also be necessary to recall that the prosecutor "has the responsibility of ensuring that the Crown case is presented with fairness to the accused"[28] and in many cases would be expected to call the witness in question as part of the case for the prosecution. And, if the question concerns the failure of the prosecution to call a witness whom it might have been expected to call, the

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25 *Jones v Dunkel* (1959) 101 CLR 298 at 321 per Windeyer J.

26 (1959) 101 CLR 298 at 312 per Menzies J.

27 (1993) 178 CLR 217 at 227-228 per Mason CJ, Deane and Dawson JJ.

28 *Richardson v The Queen* (1974) 131 CLR 116 at 119 per Barwick CJ, McTiernan and Mason JJ. See also *R v Apostilides* (1984) 154 CLR 563.

issue is not whether the jury may properly reach conclusions about issues of fact but whether, in the circumstances, the jury should entertain a reasonable doubt about the guilt of the accused.

30 With these propositions in mind, it is necessary to say something of the decision of the Court of Criminal Appeal of New South Wales in *R v OGD*[29] which, as we understand it, has been taken to be authority for charging juries in the way in which the trial judge did in this case. It may be doubted that, properly understood, *OGD* stands for a general proposition that, in cases like the present, directions can or should be given to the effect of those that were given here. In his reasons for judgment in *OGD*, Gleeson CJ emphasised the need for caution before giving such directions[30]. But if, contrary to the view we have expressed about *OGD*, that case is to be taken as establishing, as a general proposition, that it is proper in cases similar to the present to give directions of the kind given here, it should be overruled.

The present case

31 How do the principles we have described apply in the present case? We begin by considering the absence of contradiction of the complainant's evidence.

32 In this respect the prosecution case against the appellant did not depend upon the jury's drawing inferences from proved facts. The evidence of the complainant described what it was that she said the appellant had done. If that evidence was accepted to the requisite standard of satisfaction, the case against the appellant was made out. 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: features to which the trial judge alluded earlier in his charge.

33 As the trial judge rightly said, the prosecution must prove the charges it makes and must do so beyond reasonable doubt; an accused person is not obliged to give evidence, and the jury must not conclude that an accused who elects not

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29 (1997) 45 NSWLR 744.

30 (1997) 45 NSWLR 744 at 752.

to give evidence is, for that reason, guilty of the offences charged[31]. There are, as the trial judge said, many reasons why an accused may not wish to give evidence. For present purposes, the most important among those is that the accused may consider that the evidence adduced by the prosecution does not prove the commission of each of the alleged offences beyond reasonable doubt. And although there may be many kinds of reason why that view is held, some cogent and some not, the accused is *not* bound to give evidence[32].

34 In a case where the prosecution leads direct evidence of the accused's guilt (as will usually be the case where sexual offences against a young person are alleged) it is, therefore, not right to say that it would be reasonable to expect the accused to give evidence denying or contradicting that direct evidence. Especially will that be so where more than one count is charged. In such a case, the course which the accused takes may very well be affected greatly by whether the denial or contradiction of each charge can be maintained with the same degree of force.

35 The present case (and cases of a similar kind) must be contrasted with that considered by this Court in *Weissensteiner*[33]. There the prosecution case was that the accused's guilt was to be inferred from circumstances, particularly the unexplained disappearance of those whom it was alleged he had murdered, and his possession of the boat and equipment which they owned and from which they had disappeared while on a voyage with the accused. The majority of the Court held that the trial judge in that case had made no error by directing the jury that they could more safely draw the inferences which the prosecution alleged should be drawn "when the accused elects not to give evidence of relevant facts which can be easily perceived to be in his knowledge"[34]. But as Mason CJ, Deane and Dawson JJ pointed out in *Weissensteiner*[35]:

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31 *Tumahole Bereng v The King* [1949] AC 253 at 270. See also *May v O'Sullivan* (1955) 92 CLR 654.

32 It is not necessary, in this case, to consider what significance an appellate court may properly give to the fact that the accused person did not give evidence. See, for example, *R v Neilan* [1992] 1 VR 57.

33 (1993) 178 CLR 217. See also *R v Guiren* [1962] NSWR 1105.

34 Trial judge's charge quoted in *Weissensteiner v The Queen* (1993) 178 CLR 217 at 224 per Mason CJ, Deane and Dawson JJ.

35 (1993) 178 CLR 217 at 228.

> "Not every case calls for explanation or contradiction in the form of evidence from the accused. There may be no facts peculiarly within the accused's knowledge. Even if there are facts peculiarly within the accused's knowledge the deficiencies in the prosecution case may be sufficient to account for the accused remaining silent and relying upon the burden of proof cast upon the prosecution. Much depends upon the circumstances of the particular case and a jury should not be invited to take into account the failure of the accused to give evidence unless that failure is clearly capable of assisting them in the evaluation of the evidence before them."

And as the other members of the majority in *Weissensteiner* (Brennan and Toohey JJ) said[36]:

> "The facts from which an inference of guilt may be drawn are correctly identified [in the charge to the jury] as facts which the prosecution is able to prove. The use to which the appellant's failure to give evidence may be put is correctly restricted to the strengthening of an inference of guilt from the facts proved. And the jury is told not to use the appellant's failure to give evidence unless relevant facts 'can be easily perceived to be in his knowledge'. This additional requirement, which follows a decision of the Court of Criminal Appeal of Queensland in *Reg v Whinfield*[37], ensures that the drawing of an inference of guilt will not be assisted by an accused's failure to give evidence unless it is reasonable to expect some denial, explanation or answer by the accused to the prima facie case made against him."

36 The present case depended ultimately upon acceptance of the complainant's evidence, supported, perhaps, by an acceptance of the partial admission allegedly made by the appellant. In those circumstances the trial judge was wrong to direct the jury that they were entitled to conclude from the appellant's election not to give evidence that his evidence would not have assisted him in the trial. The trial judge was also wrong to direct the jury that the election not to put forward any denial or contradiction might lead them more readily to accept the evidence given by the witnesses for the Crown which the appellant was in a position to contradict of his own knowledge.

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36 (1993) 178 CLR 217 at 237-238.

37 Unreported, 16 September 1986 at 25.

37 It is necessary, however, to say something separately about that part of the trial judge's charge which dealt with the alleged partial admission by the appellant[38]. It was suggested that, because only the appellant knew what he meant by the words "everything else she said is true", the absence of any explanation from him might be said to reinforce a conclusion otherwise reached about what he meant. In particular, it was said that it reinforced the conclusion that he meant either that he had committed some unspecified sexual misconduct towards the complainant or had committed some of the particular kinds of misconduct alleged against him (those acts of digital penetration allegedly committed after the complainant was 10 years old). It was submitted that the trial judge made no error in putting these considerations before the jury.

38 We do not accept that the circumstances of this case were such as to entitle the jury to take any account of the appellant's not giving evidence in assessing what he meant by his statement to the complainant's mother (if, of course, the jury accepted that he made it). While it is true to say that only the appellant knew what he meant by saying (if he did) that "everything else she said is true", the jury should not have been directed as they were.

39 Even if the evidence of the alleged partial admission were said to require the jury to infer what the appellant meant by his statement, this was not a case in which it was reasonable to expect some denial, explanation or answer by the accused about the alleged partial admission. It is essential to recall that the appellant was charged with eight counts and that there were, therefore, in effect eight different cases which he had to meet. The alleged admission was, at its highest, an admission to some only of the charges alleged against him. That being so, there was no basis for saying that the appellant should reasonably be expected to answer the part of the prosecution case which related to those counts by giving evidence. Once in the witness box the appellant would have been exposed to examination about *all* of the counts charged and the course which he took must be understood in that light. In particular, he was entitled to say in respect of any one of the charges that the proof by the prosecution was insufficient and, if that were so, no conclusion could safely be reached for his not giving evidence beyond the conclusion that he was content to rest on the need for the prosecution to prove, beyond reasonable doubt, each of the allegations it made.

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38 Paragraphs (1) and (2) of the impugned directions.

Conclusion

40 It follows that the instructions given in pars (1), (2) and (4) of the impugned directions should not have been given. For the reasons stated earlier, the instructions given in par (3) should not have been given and, although it was right to say (as the trial judge did in par (6)) that the appellant's election not to give evidence could not fill any gaps in the prosecution case, it was wrong to say that his election could enable the jury to feel more confident in relying on the prosecution evidence. Finally, although it was factually accurate to say that the absence of evidence from the appellant meant that what was put in cross-examination of the prosecution witnesses was not supported, to give such a direction was, at least, unwise for it took its significance largely, if not entirely, from the other directions which we have said should not have been given.

Judicial instructions in criminal trials

41 Before parting with the case, it is as well to say something more general about the difficult task trial judges have in giving juries proper instructions. The fundamental task of a trial judge is, of course, to ensure a fair trial of the accused. That will require the judge to instruct the jury about so much of the law as they need to know in order to dispose of the issues in the case[39]. No doubt that will require instructions about the elements of the offence, the burden and standard of proof and the respective functions of judge and jury. Subject to any applicable statutory provisions it will require the judge to identify the issues in the case and to relate the law to those issues[40]. It will require the judge to put fairly before the jury the case which the accused makes. In some cases it will require the judge to warn the jury about how they should *not* reason or about particular care that must be shown before accepting certain kinds of evidence[41].

42 But none of this must be permitted to obscure the division of functions between judge and jury. It is for the jury, and the jury alone, to decide the facts. As we have said, in some cases a judge must give the jury warnings about how

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39 *Alford v Magee* (1952) 85 CLR 437 at 466 per Dixon, Williams, Webb, Fullagar and Kitto JJ.

40 *Alford v Magee* (1952) 85 CLR 437 at 466 per Dixon, Williams, Webb, Fullagar and Kitto JJ.

41 For example, *Longman v The Queen* (1989) 168 CLR 79; *Domican v The Queen* (1992) 173 CLR 555.

they go about that task. And, of course, it has long been held that a trial judge may comment (and comment strongly) on factual issues[42]. But although a trial judge *may* comment on the facts, the judge is not bound to do so except to the extent that the judge's other functions require it. 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.

43 To attempt to instruct the jury about how they may reason towards a verdict of guilt (as distinct from warning the jury about impermissible forms of reasoning) leads only to difficulties of the kind that have arisen in the present case. Had the judge's instructions about the significance of the appellant not giving evidence stopped at pointing out that he was not bound to do so, that there may have been many reasons why he did not do so (and the jury should not speculate about those reasons), that it was for the prosecution to prove its case beyond reasonable doubt, and that the jury should draw no inference from the appellant not having given evidence, no complaint could be made. Because the charge in this case went beyond these matters, the jury were misdirected.

Orders

44 The appeal to this Court should be allowed; the order of the Court of Criminal Appeal should be set aside and in lieu the appeal to that Court against convictions should be allowed, the convictions quashed and there be an order for a new trial on counts 4, 6, 7 and 8 of the indictment.

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42 See, for example, *Tsigos v The Queen* (1965) 39 ALJR 76 (note).

45 McHUGH J. The principal question in this appeal is whether the trial judge in a criminal trial in New South Wales erred in instructing the jury:

> "If you are satisfied that the accused could have given evidence from his own knowledge of the events about which [the complainant's mother and the complainant] have given evidence for the Crown, 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.*
>
> You may use the election of the accused not to put forward any such denial or contradiction as a circumstance which leads you more readily to accept the evidence given by the witnesses for the Crown the accused was in a position to contradict of his own knowledge." (emphasis added)

46 The question has to be answered in the light of s 20(2) of the *Evidence Act* 1995 (NSW) ("the Act") which provides that in a criminal proceeding for an indictable offence:

> "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."

47 The most obvious breach of s 20 will occur when the judge expresses an opinion which suggests that he or she thinks that the accused has not given evidence because that person is guilty of the offence. However, s 20 of the Act is also breached whenever the judge's summing up contains any direct or indirect reference or any allusion to the "fact" that the accused did not give evidence[43] because he or she was or believed himself or herself to be guilty of the offence. The comment to which the section refers is not limited to the personal opinions of the judge. If the section is to fulfil its evident purpose, "comment" must include the judge's instructions to the jury. For the purpose of the section there is no difference between the judge saying "It is plain that ...", "You may think that ..." and "You are entitled to conclude that ...".

48 It follows that a judge may comment in breach of the section when he or she expresses no personal opinion about the accused's failure to give evidence

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43 cf *Bataillard v The King* (1907) 4 CLR 1282 at 1291 per Isaacs J.

but leaves a train of reasoning to the jury which invites the jurors to conclude that the accused did not give evidence because he or she was guilty. Thus, the section is breached whenever the summing up, directly or indirectly, encourages or permits the jury to conclude that the accused did not give evidence because that person was or believed himself or herself to be guilty.

49 In my opinion, the learned judge erred in instructing the jury in the general terms in which he did. If the jurors concluded that the appellant did not give evidence as to events within "his own knowledge" because his evidence "would not have assisted him in this trial", they would almost certainly have also concluded that a possible, indeed the most probable, explanation of his failure to testify was that he could say nothing in answer to the charges because he was guilty of the offence. The learned judge's direction, therefore, left to the jury a train of reasoning which implicitly suggested, contrary to s 20 of the Act, that the accused was guilty of the offences concerned. To my mind, it was the use of the words "would not have assisted him in this trial" which tilts the balance in favour of finding a breach of s 20 of the Act. If the passage in the summing up which I have emphasised had been omitted, I do not think that any breach of the section would have occurred.

50 I see no reason why a trial judge cannot direct a jury that, in weighing the evidence, it is entitled to take into account that the accused has given no evidence in respect of any fact which is "easily perceived to be in his knowledge"[44] and in respect of which it is reasonable to expect a denial or explanation from the accused. In my opinion, a jury is entitled, but not bound, to take into consideration that the accused has given no evidence denying or explaining a fact which is within his or her knowledge and which reasonably calls for an answer. That is because the lack of a denial or explanation is a circumstance which indicates that evidence tending to prove that fact is reliable[45]. Furthermore, the failure of the accused to give evidence denying an adverse inference from such a proven fact is a circumstance which entitles the jury to draw that inference more readily[46].

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44 *Weissensteiner v The Queen* (1993) 178 CLR 217 at 237 citing *R v Whinfield* unreported, Court of Criminal Appeal of Queensland, 16 September 1986.

45 *R v Guiren* (1962) 79 WN (NSW) 811 at 813.

46 *Weissensteiner v The Queen* (1993) 178 CLR 217 at 228-229 per Mason CJ, Deane and Dawson JJ.

51 In *Adamson v California*[47], Frankfurter J explained why the silence of the accused is a matter which the jury is entitled to take into account in determining his or her guilt. His Honour said:

> "Sensible and just-minded men, in important affairs of life, deem it significant that a man remains silent when confronted with serious and responsible evidence against himself which it is within his power to contradict. The notion that to allow jurors to do that which sensible and right-minded men do every day violates the 'immutable principles of justice' as conceived by a civilized society is to trivialize the importance of 'due process.' Nor does it make any difference in drawing significance from silence under such circumstances that an accused may deem it more advantageous to remain silent than to speak, on the nice calculation that by taking the witness stand he may expose himself to having his credibility impugned by reason of his criminal record. Silence under such circumstances is still significant."

52 That explanation is just as applicable in New South Wales as it was in California, notwithstanding that *Adamson* is no longer an authority on the application of the Bill of Rights to State matters arising under State laws and that there are differences in the laws of criminal evidence and procedure in California and New South Wales.

53 Thus, in *Weissensteiner v The Queen*[48] Mason CJ, Deane and Dawson JJ said that:

> "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 determining whether the prosecution has satisfied the standard of proof to the requisite degree, it is relevant to assess the prosecution case on the footing that the accused has not offered evidence of any hypothesis or explanation which is consistent with innocence."

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47 332 US 46 at 60-61 (1947).

48 (1993) 178 CLR 217 at 228-229.

54 Their Honours also said that[49]:

> "[I]t 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."

55 Once accused persons were given the right to give evidence in criminal trials, it was inevitable that in some cases the failure to give evidence might lead to the drawing of conclusions adverse to the accused, a situation fully recognised by that great advocate, Sir Edward Carson, in his speech on the *Criminal Evidence Act* 1898 (UK). He pointed out that, although the Attorney-General in presenting the Bill had said that no accused need give evidence, as a matter of fact, they would have to do so[50].

56 If the jury thinks that there is a good reason for the accused not giving evidence, however, it would be wrong to place any significance on the failure of the accused to deny or explain a particular fact. If a good reason exists, it would also be wrong to draw any inference adverse to the accused from his or her failure to give evidence. Any direction concerning the accused's failure to give evidence must be qualified, therefore, by reference to the possible or actual existence of a good reason why he or she has not given evidence. Whether or not such a reason exists is a matter for the jury to determine.

57 No doubt an accused person will often have one or more reasons of self-interest for not giving evidence denying or explaining facts within his or her knowledge. An accused person often has to face the dilemma that, although he

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49 (1993) 178 CLR 217 at 227-228.

50 See Hostettler, *Sir Edward Carson – A Dream Too Far* (1997) at 94-95. See also A J Ashton KC, *As I Went On My Way* (1924) at 255, cited in Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 3rd ed (1940), vol 8 at 422: "[I]t is now practically imperative for a prisoner charged with a serious offence to go into the box."

or she is able to answer one or more aspects of the evidence which reasonably calls for an answer, his or her case could be significantly damaged, perhaps disproportionately so, by cross-examination as to other aspects of the case. But tactical reasons of this sort do not constitute a good reason for not denying or explaining facts within the accused's knowledge which reasonably call for an answer. Tactical reasons do not authorise a judge to direct a jury that their existence negatives the significance of the accused's silence.

58 In the ordinary course of criminal trials, good reasons for not giving evidence about facts "easily perceived to be in his knowledge" and reasonably calling for an answer are likely to be few. They may include loss of memory, illness, age, low intelligence and similar matters. But jurors should not be prevented from using the silence of the accused where the facts are within his or her knowledge *merely* because it is a criminal trial or there are several counts in the indictment or because the accused is not required to give evidence or *thinks* that the case against him or her is weak. No doubt, as this Court pointed out in *Weissensteiner*[51], there are cases where the deficiencies in the prosecution case are so great that the silence of the accused is not material even if many of the facts are within the accused's knowledge. In *Weissensteiner*, Mason CJ, Deane and Dawson JJ thought that if such a deficiency exists, it may also be a good reason for not taking into account the accused's silence. But if such cases exist, they must be rare. Subject to the effect of s 20 of the Act and its counterparts, the silence of the accused may be taken into account whenever it assists the jury in evaluating evidence concerning facts within the knowledge of the accused. It is not easy to think of examples where, although there is a case to go to the jury and there is evidence concerning facts within the accused's knowledge which reasonably call for an answer, the lack of a denial or explanation from the accused could not assist the jury in evaluating that evidence.

59 In the circumstances of the present case – where the appellant was in a position to give evidence denying or explaining all the important allegations against him – his failure to give evidence made it likely that the jurors would reason that the lack of a sworn denial or explanation from him made it more likely that the evidence of the complainant and her mother was reliable. I see nothing intrinsically wrong with such a reasoning process. The silence of the accused was a factor which strengthened the Crown case[52] and which might induce the jury to find that the Crown had proven the guilt of the accused beyond reasonable doubt.

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51 (1993) 178 CLR 217 at 228 per Mason CJ, Deane and Dawson JJ.

52 "[I]t seems to me that a party not denying a fact which it is in his power to deny, gives a colour to the other evidence against him": *Boyle v Wiseman* (1855) 10 Ex 647 at 651 per Alderson B [156 ER 598 at 600].

60 As long as the jury is instructed that the accused is under no obligation to give evidence, that the Crown must prove his or her guilt beyond reasonable doubt on the evidence adduced and that the accused bears no onus of proof, I find it difficult to see how the so-called "right to silence" is infringed if the jury takes into account the silence of the accused in respect of any facts "easily perceived to be in his knowledge" and which call for an answer. As Windeyer J pointed out in *Bridge v The Queen*[53]:

> "But 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. That is to say a failure to deny or explain may make evidence more convincing, but it does not supply its deficiencies." (emphasis added)

61 The "right to silence" derives from the privilege against self-incrimination. That privilege is one of the bulwarks of liberty. History, and not only the history of totalitarian societies, shows that all too frequently those who have a right to obtain an answer soon believe that they have a right to the answer that they believe should be forthcoming. Because they hold that belief, often they do not hesitate to use physical and psychological means to obtain the answer they want. The privilege against self-incrimination helps to avoid this socially undesirable consequence. Nevertheless, as Professor Wigmore has pointed out[54]:

> "In preserving the privilege ... we must resolve not to give it more than its due significance. We are to respect it rationally for its merits, not worship it blindly as a fetish."

62 The privilege exists to protect the citizen against official oppression. We should not use it to bar ordinary processes of reasoning where they are applicable. The judgment of Windeyer J in *Bridge v The Queen*[55] is authority for the proposition that the jury can consider the failure of the accused "to contradict on oath evidence that to his knowledge must be true or untrue" because it "can logically be regarded as increasing the probability that it is true." *Weissensteiner* supports the same proposition. It is true that the issue in *Weissensteiner* was "whether it is permissible for the trial judge to instruct the jury that inferences available to be drawn from facts proved by the Crown case can be drawn more safely when the accused elects not to give evidence on relevant facts which the

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53 (1964) 118 CLR 600 at 615.

54 *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 3rd ed (1940), vol 8 at 317.

55 (1964) 118 CLR 600 at 615.

jury perceives to be within his or her knowledge."[56] But I can see no difference in logic or legal principle between more readily drawing an inference from silence and more readily treating evidence as reliable because of silence. But that said, I think it better to deal with the problem as Gaudron J and I suggested in *Weissensteiner* where we said[57]:

> "In the context of the right to silence, it is important to bear in mind that it is the failure to provide an 'explanation or answer ... as might be expected if the truth were consistent with innocence' ... which is of evidentiary significance and not the failure to give evidence as such. In many cases, an explanation can be offered without the giving of evidence ... Accordingly, directions should be given in terms of the unexplained facts, rather than in terms of the failure to give evidence or to meet the prosecution case generally or the failure to answer questions from investigating police ... And to avoid any possibility of the jury giving significance to the accused's silence with respect to other matters, a direction, if one is to be given, should be precisely framed in terms of the particular facts which call for explanation in the sense indicated."

63 Our judgment in that case was a dissenting one. What we said must be read in the light of the majority holding. But, subject to that qualification, I think that the above passage provides the most satisfactory reconciliation of the right to silence and legitimate processes of reasoning based on the lack of any denial or explanation from the accused in respect of facts which are not consistent with innocence and which are within his or her knowledge.

64 However, the learned judge's directions to the jury in the present case went further than inviting the jury to use a legitimate form of reasoning with respect to the lack of denial or explanation of facts within the appellant's knowledge. The judge's directions invited the jurors to use a train of reasoning from which they might conclude that the appellant had not given evidence because he was guilty of the offences charged, a course which s 20 of the Act forbids. As I have already indicated, it was the use of the words "would not have assisted him in this trial", in the context of the passage in the summing up which I have emphasised, that resulted in the directions infringing s 20 of the Act. Because that is so, the convictions must be quashed. The misdirection was too significant to hold that there has been no miscarriage of justice.

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56 (1993) 178 CLR 217 at 228.

57 (1993) 178 CLR 217 at 245-246.

Order

65 The appeal should be allowed. The convictions should be quashed, and a new trial ordered on counts 4, 6, 7 and 8 of the indictment.

66 CALLINAN J. In this appeal the Court has to decide two questions: whether the conduct of the trial judge, either as a result of apprehended bias or otherwise, denied the appellant a fair trial; and whether his Honour's directions offended against s 20(2) of the *Evidence Act* 1995 (NSW).

Facts and Earlier Proceedings

67 The appellant was charged in 1996 with eight counts (two of carnally knowing his daughter and six of sexual intercourse with her), over a period of 10 years, beginning in February 1983 when the complainant was four years old. Counts one to five involved penile penetration and counts six to eight involved digital penetration.

68 Part of the Crown case in relation to counts six to eight was that the appellant made an admission in responding to accusations by the complainant's grandmother and mother. The accusations and responses were as follows:

> Grandmother: "Are you saying that you've never touched her with your hands or fondled her or put your penis inside her?"
>
> Appellant: "That's right."

69 In the week after this exchange took place, there was a conversation between the appellant and the complainant's mother:

> Mother: "Can't you just admit what you've done, or are you really calling your daughter a liar?"
>
> Appellant: "I never had intercourse with her but everything else she said is true."
>
> Mother: "How long has it been going on?"
>
> Appellant: "Since she was about ten."

70 In cross-examination the complainant agreed that the effect of her evidence was that the appellant had had sexual intercourse with her on hundreds of occasions, from the age of four years: she had never sought any medical treatment, and was never medically examined. She rejected a medical examination for forensic purposes when the police started to investigate her allegations. She made no complaint until after the event which led to the fourth count (which involved penile intercourse). There was evidence of a complaint to a school friend, and finally to her mother when she was 14 years old.

71 At trial it was suggested by counsel for the appellant that the complainant may only have complained in the hope of obtaining money from the Victims

Compensation Tribunal. The trial judge directed the jury regarding this supposed motivation as follows:

> "It has been suggested to you by the Crown that you will discount any suggestion that she was motivated by any desire for compensation. … She had no reason to ever make false allegations against him because he had been very generous to her".

72 During the trial the trial judge on numerous occasions interrupted defence counsel's cross-examination.

73 At the conclusion of the Crown case the trial judge directed a verdict of acquittal on the fifth count. Counsel for the appellant then announced that he was calling a social worker. In the presence of the jury, the trial judge said:

> "You must call your client before you can call any other witness. … That's what the law says. It is customary, and the accused must be called first."

74 Counsel for the appellant informed his Honour that he wished to make some submissions in the absence of the jury. The trial judge arranged for the jury to leave the courtroom and counsel for the appellant told his Honour that the appellant would not be giving evidence. Some discussion then ensued about the judge's right to comment, under the recently enacted *Evidence Act*, upon the fact that there had been no denial by the appellant of what was said to be the partial admission made by the appellant to the complainant's mother. Counsel was afforded an opportunity to obtain further instructions from the appellant whether he wished to maintain his election not to give evidence. The instructions were that the appellant adhered to this position and the jury were then brought back into the courtroom.

75 In his directions to the jury, the trial judge referred in detail to the appellant's election not to give evidence. The relevant parts of his Honour's directions are as follows:

> "The accused has not given evidence. There are a number of important directions which I must give you in relation to that fact. An accused person may always give evidence in his trial, but he is under no obligation to do so. As I have already pointed out, the Crown bears the onus of satisfying you, beyond reasonable doubt, that he is guilty of the offences with which he has been charged. The accused bears no onus, he is presumed to be innocent until you have been satisfied by the Crown that he is guilty. The accused is entitled to say nothing and to make the Crown prove his guilt. …
>
> Because the accused has merely exercised the right, here in Court, not to give evidence – which belongs to every citizen – you must not conclude that he has elected not to give evidence because he is guilty of the offences

charged against him. Such a conclusion from the exercise by the accused of that right to remain silent would be completely wrong. His silence must not be viewed by you as an admission of guilt on his part. There are many reasons why an accused person may not want to give evidence. He may fear that he will be confused by cross-examination or he may simply be content to rely upon any weaknesses which exist in the Crown case or upon the denials that he may have earlier made. … There are no doubt other valid reasons that he may have for not wishing to give evidence and you must not speculate as to why he has not given evidence.

In the present case, however, the Crown asks you when judging the value of, the weight of, the evidence which has been put forward by the Crown as establishing its case against the accused, to take into account the accused's election not to deny or to contradict the matters about which he could have given direct evidence from his own personal knowledge. That is indeed a circumstance which you are entitled to consider in this case. That is, the fact that the accused has elected not to contradict the evidence given by [the complainant's mother] as to his alleged admission – if you construe it as such – and he has been content to rely upon that very brief statement in answer to the detailed allegations made by the complainant.

You may think that it is only common sense that in a situation where a Crown witness and the accused are directly involved in a particular incident so that they are the two persons best able to give evidence of what happened in that incident, and where the evidence of the Crown witnesses is left undenied or uncontradicted by the accused any doubts which may otherwise have been cast upon the evidence of the Crown witnesses may be more readily discounted and the evidence of the Crown witnesses may more readily be accepted as the truth. That is the approach which the Crown asks you to adopt in this case …

The accused, however, has met the complainant's allegations. He has not traversed the detail of them, but in his statement which he gave to the police (but not here by evidence) he has denied committing any of these offences. Clearly, it is upon that earlier denial that he now relies. If you are satisfied that the accused could have given evidence from his own knowledge of the events about which [the complainant's mother] and [the complainant] have given evidence for the Crown, 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."

76 Counsel for the appellant objected to this direction, but on the somewhat limited basis that it may have led the jury to think that there was no evidence that the accused denied the allegations in the indictment.

77 After retiring to consider their verdict for about two and a half hours, the jury asked what would happen if they could not reach a unanimous verdict. The trial judge gave further directions and after a short retirement the jury returned. The foreman then informed the judge that they had reached verdicts on four counts. The trial judge released the jury until the next day. The jury brought in verdicts on all of the remaining counts on the morning of that day.

78 The jury convicted on counts four, six, seven and eight and acquitted on counts one to three.

79 The appellant filed a notice of appeal against those convictions in the Court of Criminal Appeal. Before the appeal was heard, the trial judge made a report to that Court pursuant to s 11 of the *Criminal Appeal Act* 1912 (NSW), which provides as follows:

> "The judge of the court of trial may, and, if requested to do so by the Chief Justice, shall, in case of any appeal or application for leave to appeal, furnish to the registrar the judge's notes of the trial, and also a report, giving the judge's opinion upon the case, or upon any point arising in the case:
>
> Provided that where shorthand notes have been taken in accordance with this Act, a transcript of such notes may be furnished in lieu of such judge's notes."

80 The report is expressed in strong language and included two paragraphs which were the subject of submissions by the appellant in this Court. Those two paragraphs are:

> "3. Mr [B] has appeared as defence counsel before me twice, I think, the second occasion being in this trial. I regret to say that in both trials I had repeatedly to interfere to correct Mr [B's] serious misquotations of evidence. Whilst reluctant to draw the conclusion against any member of the bar that the misquotation of evidence has been deliberate, I have found it hard to reach any other view concerning Mr [B's] constant misquotations. On many occasions in both trials I asked Mr [B], who appears to have a sharp and intelligent mind, to take care in this respect but he continued to transgress. In my view, it would have greatly disrupted the trial to have sent the jury out on every occasion evidence was misquoted. I saw it as my duty to ensure that the witnesses were not unfairly treated and the jury not misled by these misquotations.
>
> …

> 13. … I, of course, accept that it is for the Court of Criminal Appeal to decide if my direction was erroneous; but I totally reject the suggestion that this was linked to my 'prejudicial approach to the defence'. There was no prejudicial approach. From my discussions with other judges and my own experience, it has become an increasingly regular practice of many practitioners, who have had an unfavourable ruling made against them, to immediately assume and often allege bias on the part of the trial judge. Likewise, if they feel that the summing up or any part of it is unfavourable, they claim, not that it was unduly favourable to the other side or unfair to their own client, but that the judge was biased. This of course is a serious accusation and one calculated to undermine respect for the court and confidence in the criminal law. Barristers are rarely totally objective about such matters."

81 In the Court of Criminal Appeal Gleeson CJ and Hidden J agreed with the reasons for judgment of Hunt CJ at CL for dismissing the appeal. Seven grounds of appeal were argued there but not all of them were taken in this Court.

82 The fifth of the grounds in this Court was that the direction given by the trial judge relating to the appellant's election not to give evidence and which I have quoted at some length was contrary to s 20(2) of the *Evidence Act*. Section 20(2) provides as follows:

> "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."

83 It was also part of the appellant's case that the trial judge additionally disobeyed this statutory directive by making the comment at the conclusion of the Crown case in the presence of the jury to the effect that counsel for the appellant was obliged to call his client before he might call any other witness, and that "[t]hat's what the law says".

84 Hunt CJ at CL in the Court of Criminal Appeal stated what the true position was in these terms:

> "Before turning to the appellant's argument … it should be pointed out that the law does *not* say that the accused person must be called to give evidence before any other witnesses. It has often been said that it is desirable that he be called first, as he perforce will be present when other witnesses give evidence before him and the comment may be made that he has tailored his own evidence to fit in with theirs. The judge was correct when he said that it is customary to call the accused first (if he is to be

called at all), but he was wrong to say that he must be." (emphasis in original)

85 Hunt CJ at CL pointed out, however, that counsel made no complaint at the time about this misstatement and sought in respect of it neither an explanation nor an order that the jury be discharged on the ground of incurable prejudice. Accordingly, his Honour rejected the ground of appeal which relied upon this misstatement solely.

86 The last two grounds of appeal in the Court of Criminal Appeal were dealt with together. They asserted that the trial miscarried because of repeated interjections by the trial judge "directed towards defence counsel" and that his Honour's conduct would have given rise to an apprehension by the jury of bias on the part of his Honour the trial judge.

87 In rejecting these grounds, Hunt CJ at CL took into account the report from the trial judge, two paragraphs of which I have quoted. Hunt CJ at CL said this of it:

> "A report from the trial judge to this Court stated that, from his experience of counsel appearing for the appellant at the trial both in a previous trial and in this trial, he had reached the reluctant conclusion that his misquotations of the evidence in the present case were deliberate, and that the continued transgressions of counsel had required him to interrupt the trial in order to ensure that the witnesses were not unfairly treated and the jury not misled. The judge denied any prejudice or bias. There is authority supporting the drawing of a distinction in relation to the course which a judge may take to cure the effects of an error or misconduct on the part of counsel, depending upon whether counsel has acted deliberately or innocently. It was no doubt the conclusion which the judge had reached in relation to the conduct of counsel which led him to act in the way he did. Once again, however, these particular grounds of appeal are not concerned with the issue as to whether that conclusion was correct but rather with the issue as I have already stated it – whether what happened gave rise to a suspicion on the part of the fair minded and informed observer that the judge had a prejudice or a bias against the defence case."

88 A little later his Honour made these other observations about the report:

> "Nevertheless, the fair minded observer – that hypothetical figure whose apprehension or suspicion of prejudice or bias is the touchstone – is informed in the sense that there is attributed to him or her a broad knowledge of the material facts as ascertained by the appellate court, which include any explanation which the judge may give and which is acceptable to that appellate court. I would accept the statement of the trial judge in the present case that he had previously had problems with counsel appearing

for the appellant at the trial. This would explain why the judge unfortunately had to interrupt so soon in the cross-examination."

89 After dealing with the report in this way, Hunt CJ at CL then discussed at some length a dozen or so intrusions by the trial judge which were said by the appellant to be the most egregious of the 50 or so that were made into his counsel's cross-examinations. Hunt CJ at CL concluded that neither these nor the others with which he did not expressly deal, either taken alone or in combination, involved any unacceptable intrusions by the trial judge and could not give rise to any apprehension of bias.

90 Accordingly the appeal to the Court of Criminal Appeal against conviction was dismissed, as was an application for leave to appeal against sentence.

The Appeal to this Court

91 Initially the appellant was granted leave to appeal to this Court on four grounds and subsequently that leave was extended to a fifth ground, as follows:

"1. The Court of Criminal Appeal erred in finding appropriate the Trial Judge's direction to the jury that the Appellant's alleged statement 'I never had intercourse with her but everything else she said is true' could amount to an admission of digital penetration, where the most detailed allegation put to the Appellant at the time of the alleged admission was 'Are you saying that you've never touched her with your hands or fondled her or put your penis inside her?'. The Court of Criminal Appeal was further in error in finding that no injustice was caused by the Trial Judge's misquotation of the evidence on this point in his Summing Up; viz – 'Are you saying that you've never touched her with your hand or fondled her or *put your fingers inside her*' (emphasis added).

2. The Court of Criminal Appeal erred in accepting the reason given, by way of the Trial Judge's report, for his frequent interjections; namely, that they were due to previously encountered problems with Defence Counsel; and that partly due to such he had formed the view that Counsel's misquotations of evidence were deliberate, and that this justified a level of judicial involvement in the conduct of the trial which might otherwise have been inappropriate. These were not material facts which were within the knowledge of the 'fair minded observer'.

3. The Court of Criminal Appeal erred in failing to address the submission that allowing the question 'Why would the complainant lie?' to be left to the jury had the effect, in the circumstances, of reversing the onus of proof.

4. The Court of Criminal Appeal erred in finding that the verdicts returned in the Appellant's trial were not inconsistent.

5. The comment and direction to the jury by the Trial Judge concerning the Appellant's election not to give evidence were erroneous and prejudicial thereby giving rise to a miscarriage of justice."

92 No ground upon which the appellant relies, if upheld, could result in an order by this Court that the convictions be quashed and no retrial ordered. Because I have formed the view that the verdicts should be quashed and a retrial ordered on the ground the appellant was allowed to add, it is unnecessary to deal with the other grounds of appeal except to say something about the way in which the Court of Criminal Appeal dealt with the appellant's contentions there of apprehended bias.

93 I have considered the interruptions by the trial judge of the appellant's counsel's cross-examination at the trial. I agree with Hunt CJ at CL that, whether taken singly or in their totality, they were not such as to give rise to any apprehension of bias on the part of the trial judge. However, having said that, I would wish to make it clear that an appellate court in considering a question of apprehended bias is not entitled to treat as excusatory of, or as an answer to an allegation of, such conduct, a report of the kind which was furnished here by the trial judge. Whether the test of apprehended bias (which was correctly stated by the Court of Criminal Appeal) has been satisfied or not, is to be ascertained by having regard to what actually happened at the trial and not a judge's subsequent justification of it. Protestations by a trial judge, either in a report or otherwise, that he or she did not behave at the trial in such a way as to give rise to such an apprehension can have, with perhaps one qualification, no bearing upon this question, and should have been disregarded by the Court of Criminal Appeal. The qualification is that there may be a serious risk that if a trial judge's conduct of the trial was of a borderline kind then the making by him or her of a report, couched as this one was, in strong, indeed adversarial language, might lead an appellate court to form the view that the trial judge had in fact been guilty of conduct which could be construed as apparently biased, or perhaps actually biased. Subsequent conduct often provides a clearer insight into the real nature of earlier conduct. I emphasise that I do not think that this was so in this case because the trial judge's conduct in intervening as he did during the trial could not be characterised as even borderline conduct.

94 In any trial, a manifestation of apparent bias towards counsel may only constitute relevant, apprehended bias in respect of a party if the conduct is such as to give rise to an appearance of bias against that party. Disparaging comments, however undesirable or deserved they might be, about counsel's conduct may or may not produce that appearance. The question, in respect of a jury trial in which facts and the final decision on them are not for the judge, will be, whether the conduct gives rise to an apprehension of bias against a party, not correctable and not corrected by very clear statements by the trial judge that factual matters and the ultimate decision were matters for them and them alone, together with any other necessary statements and explanations that may be

necessary in the circumstances. Apprehended bias manifesting itself in respect of legal matters will usually constitute an error of law open to correction by an appellate court.

95 To this last proposition also however there may be a qualification. Litigants, whether the State, corporations, or natural persons are not the only ones who have an interest in an impartial, and an apparently impartial system of justice. Indeed it is also the interest of the public at large in such a system that dictates that a trial must not only be impartially conducted but also must be seen to be so. The whole rationale behind the apprehended bias rule is the need for public confidence in the judicial system: it is of "fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done"[58]. Or, as Deane J stated in *Webb v The Queen*[59]:

> "it is of fundamental importance that the parties to litigation and the general public have full confidence in the integrity, including the impartiality, of those entrusted with the administration of justice".

96 Let it be assumed that there has been, in a particular case, in absolute terms, a fair trial but during it there was conduct by the judge in relation even to legal matters only, and in the absence of the jury, strongly suggesting otherwise. If fair minded observers unconnected with the litigation, and even informed to the extent that the law presupposes, were nevertheless to be left with the impression that the trial judge was apparently biased a new trial still might have to be considered as a possibility. Justice must be seen to be done: otherwise justice will not in fact be done. As Lord Denning MR said[60]:

> "The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased.'"

97 Lord Devlin explained the principle in similar terms[61]:

> "This is why impartiality and the appearance of it are the supreme judicial virtues. It is the verdict that matters, and if it is incorrupt, it is

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58 *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259 per Lord Hewart CJ.

59 (1994) 181 CLR 41 at 68.

60 *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577 at 599.

61 Devlin, *The Judge* (1979) at 4 quoted by Deane J in *Webb v The Queen* (1994) 181 CLR 41 at 57.

> acceptable. To be incorrupt it must bear the stamp of a fair trial. The judge who does not appear impartial is as useless to the process as an umpire who allows the trial by battle to be fouled or an augurer who tampers with the entrails."

98 It is unnecessary in this case however to consider this aspect of the matter any further.

99 The appeal to this Court must be upheld on the fifth ground which raises s 20(2) of the *Evidence Act.*

100 The Australian Law Reform Commission in its report in relation to the *Evidence Act* relevantly said this[62]:

> "The New South Wales prohibition on judicial comment derived from a desire that the jury consider the accused's silence without 'the impetus against the accused which is given to the jury by the judge and the Crown Prosecutor both dwelling on the circumstance that he has not gone into the box and given evidence'[63]. There is a danger that judicial comment would draw the jury's attention to an accused person's silence, even in cases where the judge thought that silence explicable on proper grounds. Despite a judicial warning as to right and wrong inferences, the jury may choose the wrong inference. But a recent study in Singapore has indicated that permitting judicial comment has not led to an increase in the number of convictions or in the number of accused persons giving evidence[64]. Rather than making no comment and leaving the jury to draw what inferences they will, it seems preferable to permit a trial judge to instruct the jury as to the inferences they may, and may not, draw from the accused person's silence[65]."

101 Earlier the Commission had discussed the somewhat unsettled state of the law in relation to the right to silence. Although this right has been the subject of criticism, it is, and remains, certainly in the criminal trial itself (except in those

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62 Australian Law Reform Commission, *Evidence*, Report No 26 (Interim), (1985), par 557.

63 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 20 October 1898 at 1630 per Dr (later Chief Justice) W P Cullen.

64 Yeo, "Diminishing the Right to Silence: The Singapore Experience", [1983] *Criminal Law Review* 89 at 98, 100.

65 See Williams, "Silence and the Unsworn Statement: An Accused's Alternatives to Giving Sworn Evidence", (1976) 10 *Melbourne University Law Review* 481 at 492.

jurisdictions in which there has been statutory intervention to modify it), a fundamental plank of criminal jurisprudence, and one which is consistent with the even more important fundamental plank, that an accused person enjoys the presumption of innocence, and the onus of establishing his or her guilt lies firmly and immovably on the Crown.

102 In most jurisdictions for many years there were statutory prohibitions against comment by trial judges on an accused's failure to give evidence. One such prohibition was s 407 of the *Crimes Act* 1900 (NSW). That section was discussed by this Court in *Bridge v The Queen*[66]. There the trial judge had told the jury that unsworn statements from the dock were:

> "not on oath, they are made without the sanction of the oath from the dock, and under those circumstances they [the two accused] could not be asked a single question, they could not be cross-examined, they could not be asked any questions by the judge or anybody else after they had made these statements".

103 The majority (Barwick CJ, Menzies and Owen JJ) were in no doubt that those statements fell outside s 407 of the *Crimes Act*. McTiernan and Windeyer JJ doubted whether the section had been infringed. Windeyer J discussed the prohibitions against comment in a passage which, with respect, perhaps overstates the degree of public awareness of the criminal process[67]:

> "Most jurymen today probably know that an accused can give sworn evidence if he chooses: at least some members of every jury probably know this well, for it has been the law of New South Wales for more than seventy years, and there is now little recollection of the time when the accused was not allowed to testify. This does not alter the obligation to refrain from comment. It merely enhances the difficulty of performing it."

104 In Queensland, there is no statutory prohibition against comment by a trial judge. In *Weissensteiner v The Queen* [68], a Queensland case[69], the accused did not give evidence and called no witnesses. The trial judge told the jury that the Crown had the onus of establishing the accused's guilt beyond reasonable doubt, that the accused did not have to prove anything, that he was under no obligation to give evidence, and that the Crown case depended on the inference by the jury

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66 (1964) 118 CLR 600.

67 *Bridge v The Queen* (1964) 118 CLR 600 at 611.

68 (1993) 178 CLR 217.

69 The *Evidence Act* 1995 (Cth) has not been adopted in Queensland.

of guilt from a whole collection of circumstances. His Honour then said that such an inference may more safely be drawn from the proved facts when an accused elected not to give evidence on relevant facts which must be within his knowledge. In this Court, Mason CJ, Deane and Dawson JJ said that the trial judge was correct in his view that the case was an appropriate one in which to make the comments that he did[70]. Their Honours said[71]:

> "His failure to give evidence was, therefore, capable of strengthening the prosecution case by enabling the jury, in the absence of any explanation by him, to accept the inferences for which the prosecution contended as the only rational inferences from the evidence. Indeed, in the circumstances of the present case, it appears to us that a direction of the kind given by the learned trial judge essentially involved no more than a statement of the obvious."

105 Brennan and Toohey JJ said this[72]:

> "It follows that, in Queensland and in other jurisdictions where there is no statutory prohibition against judicial comment, a judge may tell the jury that where the facts which they find to be proved by the evidence can support an inference that the accused committed the offence charged and where it is reasonable to expect that, if the truth were consistent with innocence, a denial, explanation or answer would be forthcoming, the jury may take the accused's failure to give evidence into account in determining whether the inference should be drawn. The jury should be told that the onus remains on the prosecution and that the accused is under no obligation to give evidence, but that 'it is legitimate to have regard to the fact that the accused has given no evidence or explanation or satisfactory explanation of the Crown case as a consideration making the inference of guilt from the evidence for the prosecution less unsafe than it might otherwise possibly appear'[73]."

106 Gaudron and McHugh JJ dissented, although their Honours did think that in some limited circumstances a comment might be permissible.

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70 *Weissensteiner v The Queen* (1993) 178 CLR 217 at 229.

71 *Weissensteiner v The Queen* (1993) 178 CLR 217 at 230-231.

72 *Weissensteiner v The Queen* (1993) 178 CLR 217 at 236.

73 *R v Guiren* (1962) 79 WN (NSW) 811 at 813.

107 What the Court has to consider in this case, however, is the effect of s 20, particularly sub-s (2), of the *Evidence Act* which has been enacted in some jurisdictions after *Weissensteiner* was decided.

108 In my opinion the principles stated by the majority in *Weissensteiner* can have no application in a jurisdiction in which s 20(2) has been enacted. The directions which were approved in *Weissensteiner* involve suggestions of the kind which s 20(2) now makes impermissible. It is important to bear in mind that the word which the section uses is "suggest". Very little need be said of an accused with respect to the fact that he or she has not given evidence in order to give rise to a suggestion that the failure to give evidence stems from an awareness of guilt. As Isaacs J pointed out in *Bataillard v The King*[74], an implication of guilt may be conveyed, not only by a direct or indirect reference, but also by "subtle allusion". The directions which were approved in *Weissensteiner* could have conveyed no suggestion other than of guilt and may not be given in jurisdictions in which the *Evidence Act* or its analogues have been enacted.

109 In my opinion, the purpose of s 20(2) is to enable a trial judge to make comments for the protection and benefit of an accused who has not given evidence and not otherwise. This view is consistent with the Australian Law Reform Commission report, to which I have referred and gives effect to the ordinary meaning of s 20(2).

110 The possible application of *Jones v Dunkel*[75] to criminal cases requires consideration. In *R v OGD*, whilst accepting that there are obvious difficulties in some criminal cases in applying that case, and in giving directions to juries in accordance with it, the Court of Criminal Appeal said that a trial judge may nonetheless do so in an appropriate case[76].

111 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 an accused[77]. 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

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74 (1907) 4 CLR 1282 at 1291.

75 (1959) 101 CLR 298.

76 *R v OGD* (1997) 45 NSWLR 744 at 752-753.

77 See *R v Apostilides* (1984) 154 CLR 563.

defence case, based upon *Jones v Dunkel* would not only infringe s 20(2) but also would 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.

112 In this case, the directions which I have quoted were contrary to s 20(2). The directions by which the trial judge sought to give effect to the principles stated in *Jones v Dunkel* were also erroneously made. This error was compounded by the misstatement of the legal position by the trial judge at the close of the Crown case that the appellant was obliged to give evidence first.

113 I should also say that I agree with the observations of the other members of this Court with respect to judicial instructions in criminal trials, and their observations about any continued application of *OGD* in New South Wales.

114 For these reasons the appeal should be allowed, the order of the Court of Criminal Appeal set aside, the convictions quashed and a new trial ordered on counts 4, 6, 7 and 8 of the indictment.

115 There is only one other matter which I would mention. Nothing that I have said should be taken as precluding a trial judge from commenting when appropriate on inconsistencies in, or omissions from a statement, or statements made by an accused person out of court, or upon the differences (whether by way of additions, inconsistencies or omissions) between evidence given by an accused person in court and statements made out of court.