HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

JOSEPH AZZOPARDI APPELLANT

AND

THE QUEEN RESPONDENT

Azzopardi v The Queen [2001] HCA 25
3 May 2001
S105/2000

ORDER

1. *Appeal allowed.*

2. *Set aside the orders of the Court of Criminal Appeal of New South Wales dated 1 October 1998 and in lieu thereof order that:*

   a) *the appellant's appeal to that Court be allowed;*

   b) *the appellant's conviction be set aside; and*

   c) *there be a new trial.*

On appeal from the Supreme Court of New South Wales

Representation:

P Byrne SC with J W Fliece and G A Bashir for the appellant (instructed by Patricia White & Associates)

R D Ellis with R A Hulme for the respondent (instructed by S E O'Connor, Director of Public Prosecutions (New South Wales))

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

BRIAN DAVIS APPLICANT

AND

THE QUEEN RESPONDENT

Davis v The Queen
3 May 2001
S39/2000

ORDER

Application for special leave to appeal refused.

On appeal from the Supreme Court of New South Wales

Representation:

T A Game SC with S J Odgers SC for the applicant (instructed by Legal Aid Commission of New South Wales)

R D Ellis with R A Hulme for the respondent (instructed by S E O'Connor, Director of Public Prosecutions (New South Wales))

CATCHWORDS

Azzopardi v The Queen
Davis v The Queen

Criminal law – Evidence – Accused not giving evidence – Right to silence – Distinction between comment and direction by trial judge – Circumstances where comment permissible.

Criminal law – Evidence – Accused not giving evidence – Right to silence – Nature of permissible comment by trial judge – Comment that accused did not deny or contradict evidence already given about matters within his personal knowledge not permissible – Suggestion that accused did not give evidence because the accused was, or believed that he was, guilty of the offence concerned – Contravention of *Evidence Act* 1995 (NSW), s 20(2).

Evidence – Criminal trial – Right to silence of accused – Comment by judge – Contravention of *Evidence Act* 1995 (NSW), s 20(2).

Evidence Act 1995 (NSW), s 20(2).

1 GLEESON CJ. These two cases concern instructions given to juries at criminal trials in New South Wales as to the significance that may properly be attached to the failure of an accused person to deny or explain inculpatory evidence relied upon by the prosecution. It is for the jury to evaluate the evidence at a trial. But juries often require, and sometimes expressly seek, guidance as to the significance of an accused's failure to give evidence, or failure, when giving evidence, to deal with some matter[1]. In deciding what guidance is proper, a trial judge, or an appellate court reviewing a trial judge's summing-up, must have regard both to general principles and to relevant statutory provisions. Here, the general principles concern the onus of proof, the presumption of innocence, and the evaluation of evidence. The relevant statutory provision is s 20 of the *Evidence Act* 1995 (NSW) ("the Evidence Act").

2 The operation of the general principles have a significance which goes beyond trial by jury. In New South Wales, and other Australian jurisdictions, trials for indictable offences are not infrequently conducted by a judge sitting without a jury. Summary offences are tried by magistrates sitting without a jury. In such cases, the reasoning of the judge, or magistrate, is constrained by the same principles as govern the deliberations of a jury. Similarly, an appellate court when considering an argument that a jury, acting reasonably, must have entertained a reasonable doubt as to the guilt of an appellant, or which is considering the application of the proviso in a case where there has been a misdirection, may need to form a view as to the significance of an accused's silence, either generally, or upon some particular topic.

3 The general principles were addressed by this Court in *Weissensteiner v The Queen*[2]. In that case, five Justices[3] quoted with approval the following passage from the judgment of Windeyer J in *Bridge v The Queen*[4]:

> "An accused person is never required to prove his innocence: his silence can never displace the onus that is on the prosecution to prove his guilt beyond reasonable doubt. A failure to offer an explanation does not of itself prove anything. Nor does it, in any strict sense, corroborate other evidence. 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

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1 As to a failure by an accused who gives evidence, or makes a statement, to contradict or explain some evidence, see *R v Guiren* (1962) 79 WN (NSW) 811.

2 (1993) 178 CLR 217.

3 Mason CJ, Deane and Dawson JJ at 227; Brennan and Toohey JJ at 235.

4 (1964) 118 CLR 600 at 615.

> failure to deny or explain may make evidence more convincing, but it does not supply its deficiencies. A direction by the judge on such matters … might no doubt be helpful to the accused in some cases."

4 The point may be illustrated by a variation of an example given by Lamer CJ in *R v Noble*[5]. Suppose an accused is charged with robbing a bank. The prosecution case includes a video surveillance photograph of a masked man pointing a rifle at a bank teller. So far as can be seen, his appearance generally matches that of the accused. The masked man's forearms are bare, and on his left arm there is a distinctive tattoo. The prosecution calls a witness who says that the accused has such a tattoo. In the context of the case, that is a vital piece of evidence. The accused gives no evidence. Is the failure of the accused to deny that he has a tattoo a matter that can be taken into account in considering the weight to be attached to the evidence of the witness? The majority in the present case would say no, on at least two grounds. The first is that the presence or absence of the tattoo is not a matter peculiarly within the accused's knowledge. (That may be accepted as a factual proposition. A man who is the sole possessor of knowledge as to whether he has a tattoo on his arm must have led a very solitary life.) The second is that what is missing is not evidence of some additional fact which explains, or nullifies the effect of, evidence adduced by the prosecution, but testimonial contradiction. As will appear, I am unable to agree.

5 Most jurors know that an accused person has a right to testify, and they are often invited by trial judges to use their common sense. In *Bridge*[6], Windeyer J quoted what Frankfurter J said in *Adamson v California*[7]:

> "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."

6 The subject is sometimes discussed as an aspect of an accused person's right of silence. In truth, however, it arose as an incident of an accused person's right to testify; a right which did not exist in any Australian jurisdiction until 1882[8], and which did not exist in New South Wales until it was conferred by legislation in 1891[9].

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5 [1997] 1 SCR 874.

6 (1964) 118 CLR 600 at 614.

7 332 US 46 at 60 (1947).

8 The first Australian legislation on the subject was the *Accused Persons Evidence Act* 1882 (SA).

9 *Criminal Law and Evidence Amendment Act* 1891 (NSW) s 6.

7 The right of silence is not, in this country, a constitutional or legal principle of immutable content. Rather, it is a convenient description of a collection of principles and rules: some substantive, and some procedural; some of long standing, and some of recent origin. Lord Mustill said that the expression "refers to a disparate group of immunities, which differ in nature, origin, incidence and importance, and also as to the extent to which they have already been encroached upon by statute"[10]. The particular aspect of the right of silence of present concern is the immunity of an accused person undergoing trial from being compelled to give evidence. This is only one of a number of immunities which enable a person suspected or accused of crime to remain silent. But, as was pointed out in *Weissensteiner*[11], to say that a person may choose to remain silent is not to say that the exercise of that choice is necessarily free from adverse consequences. This is why a reference to the immunity as a right sometimes carries an overtone which is unwarranted, both as a matter of history and as a matter of legal principle.

8 What a person, suspected or accused of crime, says, or fails to say, at various stages of the process of investigation or trial, may have a number of consequences. What such a person says to his or her lawyer may affect the manner in which the lawyer, consistently with professional responsibilities, conducts the defence. The way in which a person responds to police questioning may have significance at a trial. Whenever an accused person makes a response to an accusation, other than a bare denial of guilt, it is likely that, at the least, the issues will narrow. An accused person who has given an account of what happened may thereby have relieved the prosecution of the need to call evidence of facts that might otherwise have been in issue, and that might otherwise have been difficult to prove. One of the most common tactical decisions that has to be made at a criminal trial is whether to rest on perceived weaknesses in the prosecution case, or to advance a positive defence case. When the latter choice is made, the weaknesses in the prosecution case may disappear, or become immaterial. When the former choice is made, there may be no opportunity to rely upon a meritorious defence. Whether the decision is to speak or remain silent, it is rarely devoid of consequences.

9 When, in the late nineteenth century, legislatures decreed that people accused of crime should have the capacity to testify in their own defence, it was well understood that this would bring some consequences that were potentially unfavourable to some accused persons. This understanding is reflected in the reasoning of the various judges in *R v Kops*[12], a case decided soon after the 1891

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10 *R v Director of Serious Fraud Office; Ex parte Smith* [1993] AC 1 at 30.

11 (1993) 178 CLR 217 at 229.

12 (1893) 14 LR(NSW) 150; affirmed [1894] AC 650.

New South Wales legislation. There was a well-founded apprehension that, when juries became aware that an accused person was entitled to testify, there would, in some cases, be a practical compulsion to do so. A practical compulsion to testify frequently arises from circumstances that have nothing to do with the problem now under consideration. It may arise from the facts of a particular case, or the nature of an accused person's defence. It may arise because of the accidental unavailability of a witness who could give evidence of some fact important to the defence case. The existence of a practical compulsion to testify is not inconsistent with the immunities which together make up the right of silence. Giving an accused the choice of making an unsworn statement, and prohibiting judicial comment on the exercise of such a choice, was not a satisfactory solution. Unsworn statements were sometimes abused, especially in sexual cases, where complainants might be publicly vilified and humiliated by statements that could not be challenged or tested in cross-examination. Juries came to know that an accused could give evidence on oath, if he or she wished to do so. Judicial silence on the topic could leave an accused person exposed to unguided reasoning that might be far more dangerous than the reasoning legitimately available.

10 The problem that arose, when accused persons were given the capacity to testify, concerned the onus of proof. The onus remained on the prosecution; and the standard remained proof beyond reasonable doubt. But there was a change in the forensic context. Lord Mansfield's maxim that "all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted"[13] always applied to criminal as well as civil trials. It is exemplified by *R v Burdett*[14], a case decided in 1820. However, it took on an altered significance when the power to contradict extended to the power to contradict by sworn testimony of the accused.

11 To express the question as one concerning the probative significance of silence may be misleading. The question concerns the significance of an accused's silence, either generally or on a particular subject, when evaluating either the whole or part of the evidence. In the context of a jury trial, the question only arises if the prosecution has established a case fit to go to the jury; that is to say, if there is evidence which, if accepted by the jury, is capable of establishing the guilt of the accused beyond reasonable doubt. If that condition is satisfied, then it is the task of the jury to evaluate the evidence for the purpose of deciding whether it proves the guilt of the accused beyond reasonable doubt. A corresponding process of evaluation must be undertaken by a magistrate dealing with a summary offence, or by a judge trying a case without a jury. The silence of the accused cannot add to the evidence. Nor can it be treated as an implied

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13 *Blatch v Archer* (1774) 1 Cowp 63 at 65 [98 ER 969 at 970].

14 (1820) 4 B & Ald 95 [106 ER 873].

admission of guilt. But there are circumstances in which it can legitimately be used in the evaluation of evidence.

12 Between 1993 and 2000, trial judges, and intermediate appellate courts, bound by decisions of this Court, looked to *Weissensteiner* for guidance as to the principles according to which, at a criminal trial, the silence of an accused legitimately may be considered in evaluating some or all of the evidence in the case. In both of the cases presently before the Court, the trial judges gave directions which were obviously based upon the majority judgments in *Weissensteiner*. Courts of Criminal Appeal, bound by *Weissensteiner*, referred to that decision in considering instructions to juries, and decisions of trial judges sitting without juries, and in their own reasoning[15].

13 In the reasons of the majority in *Weissensteiner*, the focus of attention was the failure of an accused to *explain or contradict* evidence. That expression, "explain or contradict", has been used repeatedly in this context, at least since 1820, when it was used by Abbott CJ in *R v Burdett*[16].

14 In *Weissensteiner*, Mason CJ, Deane and Dawson JJ said[17]:

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

15 It seems unlikely that, in the hypothetical case concerning the tattoo earlier considered, their Honours would have rejected the proposition that the failure of the accused to deny that he had a tattoo on his left arm could make it easier or safer to accept the evidence of the witness who testified to that effect. If

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15 eg *R v OGD* (1997) 45 NSWLR 744.

16 (1820) 4 B & Ald 95 at 161-162 [106 ER 873 at 898].

17 (1993) 178 CLR 217 at 227-228.

they would have done so, the language of the above passage is, to say the least, unguarded.

16 Brennan and Toohey JJ[18], after referring to the need for a jury to be properly instructed as to the onus of proof, said:

> "But the jury may draw inferences adverse to the accused more readily by considering that the accused, being in a position to *deny, explain or answer* the evidence against him, has failed to do so." (emphasis added)

17 In 2000, this Court decided *RPS v The Queen*[19]. The trial judge had directed the jury in terms which evidently attempted to follow the majority judgments in *Weissensteiner*. There was an added feature in that case. Section 20 of the Evidence Act applied. The applicant was given leave to raise, in this Court, a new ground of appeal, concerning instructions given by the trial judge as to the significance which the jury might properly attach to the appellant's failure to give evidence. This Court held that the instructions were erroneous, and ordered a new trial. The criticisms went well beyond a conclusion that the instructions were in some respects inconsistent with s 20. Those criticisms had potential application to trials before magistrates, and before judges sitting without juries. They are, in my view, and with respect to those of a contrary opinion, in some respects impossible to reconcile with the majority judgments in *Weissensteiner*.

18 The issue concerns the evaluation of evidence. The evidence against an accused may be direct, or circumstantial, or partly direct and partly circumstantial. The problems of evaluating the evidence might concern the reliability of particular witnesses, on the safety of drawing inferences from established facts, or the reasonableness of competing hypotheses. In relation to such problems, the maxim stated by Lord Mansfield in *Blatch v Archer* might be of significance. As the judgments in *Weissensteiner* recognised, that significance could be diminished, and might sometimes be eliminated, by considerations which flow from the circumstance that, at a criminal trial, there are reasons why it may be dangerous to treat an accused's silence in the same way as one would treat the silence of a party to civil litigation. Those considerations were taken into account in the majority judgments, and allowance was made for them. But they do not turn upon the difference between direct and circumstantial evidence, or between facts already the subject of evidence and additional facts, or between facts known only to the accused and other facts.

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18 (1993) 178 CLR 217 at 235.

19 (2000) 199 CLR 620.

19 As a matter of logic, a rigid distinction between failure to contradict and a failure to explain, (a distinction which is inconsistent with almost 200 years of authority), is difficult to sustain. Nor is it logical to distinguish between commenting upon an accused's failure to give evidence and commenting on an accused's failure to give an innocent explanation of some apparently incriminating fact or circumstance. The lack of logic is even more evident if the occasion to make a comment of the second kind only arises when the accused is the only person who would be likely to know of the innocent explanation, if it existed. If that is the case, then the difference between failing to explain and failing to give evidence is purely semantic.

20 There is, in my view, no justification for distinguishing between a failure to give or call evidence about some additional fact and a failure to give or call evidence about some fact already the subject of evidence. And there is no justification for limiting the occasion for comment to facts known only to the accused. How does a trial judge, or a jury, know whether some fact is known only to the accused? There is a large difference between saying that, if a certain fact existed, the accused would know of it, and saying that the accused is the only person who knows the fact.

21 It has long been recognised, and was recognised in *Weissensteiner*, that a problem in applying Lord Mansfield's maxim too readily to criminal cases, whether in relation to the failure of the defence to call evidence apart from the evidence of the accused, or in relation to a failure of the accused to give evidence, is that in the context of a criminal prosecution there may be any number of reasons, often unfathomable, as to why it is not reasonable to expect the defence to lead evidence. A similar problem may also exist in relation to the prosecution's failure to call a witness. In *R v Buckland*, Street CJ said[20]:

> "… In criminal proceedings, however, the making of a comment or the indication of the available inference will be attended by a marked degree of caution, inasmuch as in many cases the absence of a witness either for the Crown or the accused might well be explicable upon grounds not readily capable of proof."

22 It would be going too far, however, to say that it is never reasonable to expect an accused to give, or call, evidence. If that were the case, then *Weissensteiner* was wrongly decided. And it is difficult to understand why it is more reasonable to expect an accused to explain away circumstantial evidence than to contradict direct evidence.

23 This Court should adhere to the views expressed by the majority in *Weissensteiner*.

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20 [1977] 2 NSWLR 452 at 459.

24 There remains for consideration, however, s 20(2) of the Evidence Act. That provision is, in terms, a permission to a judge to comment on an accused's failure to give evidence, qualified by the proviso that the comment must not make a certain suggestion. The suggestion is a suggestion as to the reason why the accused did not give evidence.

25 The first thing to note about s 20(2) is that it has nothing whatever to say about a case, not of a failure by an accused to give evidence, but of a failure of an accused who gives evidence to deal with a certain topic, or a failure of the defence to call evidence other than the evidence of the accused. So that if, in the hypothetical case of the tattoo, the accused gave evidence, but did not deny that he had a tattoo, s 20 would not apply. Nor would it apply to a case such as *R v Buckland*. That means that, if s 20 was intended to exclude the application of Lord Mansfield's maxim to criminal cases, it has covered only part of the field, for no apparent reason.

26 Secondly, subject to the effect of the qualification, the permission to comment appears to include a permission to inform a jury of the way in which they legitimately may take account of a failure to give evidence. There is not much use, or fairness, in telling jurors what they may not do, and leaving them to their own devices as to what they may do. The section was enacted to meet a notorious risk: that juries, uninstructed, will attach more significance to an accused's silence than is legitimate. Juries sometimes seek, and often need, guidance on that subject, and it is not necessarily in the interests of, or favourable to, an accused that the guidance be in purely negative terms.

27 Thirdly, the qualification appears to be aimed at ensuring that juries are warned not to treat an accused's silence as an implied admission of guilt. That would explain why it is expressed in terms related to the reason for not giving evidence. The comment must not suggest that the reason the accused decided not to give evidence was a consciousness of guilt. If the qualification is intended to prohibit any comment that explains to the jury a process of reasoning, adverse to the accused, which may properly be open to them, then the prohibition is expressed in extraordinarily oblique terms. A trial judge who explains such a process of reasoning in relation to other evidence, or other aspects of the case, is not thereby suggesting that the accused is guilty. In any event, the prohibition does not refer to such a suggestion. It refers to a suggestion as to the reason why a certain course was taken. It ensures, consistently with the principles stated in *Weissensteiner*, that a comment of the kind permitted makes clear that silence is not to be taken as flowing from a consciousness of guilt, and as amounting to an implied admission of guilt. It is not a question of giving the statutory provision a broad or narrow meaning. It is a question of reading it according to its terms.

28 The facts of the two cases before the Court, and the terms of the relevant parts of the summings-up, are set out in the reasons for judgment of Callinan J. The summings-up conformed to *Weissensteiner* and to s 20 of the Evidence Act.

29 In the case of Azzopardi, I would dismiss the appeal. In the case of Davis, I would grant special leave to appeal and dismiss the appeal.

30 GAUDRON, GUMMOW, KIRBY AND HAYNE JJ. The Court is again asked to consider statements made by a trial judge in instructing a jury in a criminal trial about the significance which the jury may attach to the fact that the accused did not give evidence. Those questions were considered most recently in *RPS v The Queen*[21]. Similar questions are now raised in two matters, the trial in each of which took place before *RPS* was decided. In one, *Azzopardi v The Queen*, special leave to appeal has been granted. In the other, *Davis v The Queen*, the application for special leave to appeal has been referred for consideration by the whole Court. Both arise out of criminal proceedings for indictable offences that were conducted in the District Court of New South Wales. In both trials, therefore, s 20 of the *Evidence Act* 1995 (NSW) applied. Sub-section (2) of that section provides:

> "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."

31 In *RPS*, the Court considered the application of s 20 of the *Evidence Act*, and the more general questions which arise if an accused does not give evidence at trial. All six members of the Court who heard *RPS* referred to, and considered, the earlier decision of this Court in *Weissensteiner v The Queen*[22]. However, it was not necessary in *RPS* to consider whether and, if so, in what way s 20(2) affected the decision in *Weissensteiner*.

32 In each of the present matters, the respondent submitted that the trial judge's directions were founded on, or could be supported by reference to, *Weissensteiner*. The respondent submitted that there was a tension between the decision in *RPS* and the decision in *Weissensteiner* which should be resolved. As will be explained, s 20 requires some modification of the language used in the remarks approved in *Weissensteiner* but, properly understood, there is no tension between the two decisions.

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21 (2000) 199 CLR 620.

22 (1993) 178 CLR 217.

General principles

33 Before dealing with the particular facts and circumstances which give rise to the present matters, it is convenient to say something about the general principles which inform the development of the law in this area and the consequences that follow from those principles.

34 The fundamental proposition from which consideration of the present matters must begin is that a criminal trial is an accusatorial process, in which the prosecution bears the onus of proving the guilt of the accused beyond reasonable doubt[23]. It is, therefore, clear beyond doubt that the fact that an accused does not give evidence at trial is not of itself evidence against the accused. It is not an admission of guilt by conduct; it cannot fill in any gaps in the prosecution case; it cannot be used as a make-weight in considering whether the prosecution has proved the accusation beyond reasonable doubt[24]. Further, because the process is accusatorial and it is the prosecution that always bears the burden of proving the accusation made, as a general rule an accused cannot be expected to give evidence at trial. In this respect, a criminal trial differs radically from a civil proceeding. As was pointed out in the joint reasons in *RPS*[25]:

> "In a civil trial there will very often be a reasonable expectation that a party would give or call relevant evidence. It will, therefore, be open in such a case to conclude that the failure of a party (or someone in that party's camp) to give evidence leads rationally to an inference that the evidence of that party or witness would not help the party's case[26]".

35 The courts have, nevertheless, sometimes appeared to struggle with what may be said to the jury if an accused does not give evidence at trial. Like so many aspects of the criminal law, these are not questions that are rooted in the history of the common law. They are questions that stem most immediately from legislative provisions first made in the late nineteenth century. Nevertheless,

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23 *RPS v The Queen* (2000) 199 CLR 620 at 630 [22] per Gaudron ACJ, Gummow, Kirby and Hayne JJ.

24 *Weissensteiner v The Queen* (1993) 178 CLR 217 at 229 per Mason CJ, Deane and Dawson JJ, 235 per Brennan and Toohey JJ.

25 (2000) 199 CLR 620 at 632 [26].

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

they must be answered against the background of the common law principle that an accused person should not be compelled to incriminate himself or herself.

36 The history of the common law concerning the immunity from self-incrimination and the "right to silence" has taken a meandering course over many centuries. It has been influenced by the practices of ecclesiastical and other courts, by legal and general history, by the changing procedures of the English criminal trial and by differing statutory provisions enacted in particular jurisdictions at particular times.

37 In several jurisdictions the common law today is influenced by constitutional norms and by principles reflected in international and regional conventions of human rights. Whilst English and local legal history are undoubtedly of much interest, they do not, in our view, dictate the emerging law on the subject of this judgment as it now applies in Australia.

38 Nor would it be safe to assume that the repeal of legislative provisions prohibiting judges from commenting on the failure of an accused to testify automatically restored the common law as it stood on this subject nearly a century ago when such legislation was first enacted. In the intervening years the accusatorial character of the criminal trial has become deeply embedded in the common law of Australia, whatever that law might earlier have provided. Indeed, that character is one of the most important features of the criminal trial in contemporary Australia. Due account must be taken of that character in considering both what the common law now provides on the subject of judicial comment and legislation regulating it.

The accused as witness

39 In New South Wales, a person charged with an indictable offence was not competent to give evidence at trial until the enactment of the *Criminal Law and Evidence Amendment Act* 1891 (NSW), s 6[27]. By that section an accused was made a competent, but not compellable, witness at the trial of an indictable offence.

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27 Similar legislation was passed in other colonies at about the same time, in some cases before the passing of the *Criminal Evidence Act* 1898 (UK). See, for example, *Crimes Act* 1891 (Vic); *Accused Persons Evidence Act* 1882 (SA). After the 1898 UK Act was passed, the colonies followed the general scheme of that Act.

40 As Innes J pointed out in *R v Kops*[28], making an accused a competent, but not compellable, witness at trial presents certain problems. If an accused gives evidence, what use, if any, can be made in cross-examination of the accused's past criminal history? Does permitting an accused to give evidence on oath simply invite the accused to commit perjury? What is to be done to ensure that the choice to give evidence or stay silent at trial remains a real choice and not simply a disguised obligation to give evidence? Providing an *opportunity* to answer a charge or deny an accusation could easily become an *obligation* to give evidence if silence could be treated as an admission of guilt.

41 Early legislation making the accused a competent but not compellable witness at trial of an indictable offence dealt with some, but not all, of these problems. Particular attention was given in the early legislation to the problem of cross-examining an accused who did give evidence, and the legislation identified, with more or less specificity, some subjects about which the accused could not be asked questions. For example, s 6 of the 1891 New South Wales Act provided that the accused was not "to be questioned on cross-examination without the leave of the Judge as to his or her previous character or antecedents". Other legislation made more elaborate provision. The several paragraphs in s 1(f) of the *Criminal Evidence Act* 1898 (UK) and its Australian equivalents[29], which dealt with the cross-examination of an accused who gave evidence, led to many reported cases[30].

42 For a time, however, the question of what might be said to the jury about the fact that an accused did not give evidence was not dealt with by the New South Wales legislation. In *Kops*[31], the Supreme Court of New South Wales, sitting in banco, held that a trial judge had not erred in telling the jury: first that the law permitted an accused to give evidence on his own behalf; secondly, that he need not do so unless he wished; and thirdly, in respect of evidence that an item said to be owned by the accused was found at the scene of the crime, that if it was not his, "why does he not deny it … why does he not explain how it got

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28 (1893) 14 LR (NSW) 150 at 193-194.

29 See, for example, *Crimes Act* 1958 (Vic), s 399(5); *Evidence Act* 1929 (SA), s 18(1)VI; *Evidence Act* 1977 (Q), s 15(2); *Evidence Act* 1906 (WA), s 8(1)(e); *Evidence Act* 1910 (Tas), s 85(10).

30 See, for example, *Curwood v The King* (1944) 69 CLR 561; *Attwood v The Queen* (1960) 102 CLR 353; *Dawson v The Queen* (1961) 106 CLR 1.

31 (1893) 14 LR (NSW) 150.

there?"[32] The Privy Council refused special leave to appeal from this decision[33], saying that they saw no reason to doubt the correctness of the conclusion at which the Supreme Court of New South Wales had arrived. In the course of very short reasons for its conclusion, the Privy Council said that[34]:

> "There may no doubt be cases in which it would not be expedient, or calculated to further the ends of justice, which undoubtedly regards the interests of the prisoner as much as the interests of the Crown, to call attention to the fact that the prisoner has not tendered himself as a witness, it being open to him either to tender himself, or not, as he pleases. But on the other hand there are cases in which it appears to their Lordships that such comments may be both legitimate and necessary."

The Privy Council gave no guidance, however, about how to distinguish between the two kinds of case that were mentioned.

43 Following *Kops*, judges could, and presumably did, comment to juries if the accused did not give evidence. In New South Wales, however, the legislature intervened again, less than five years after the decision in *Kops*. By the *Accused Persons' Evidence Act* 1898 (NSW) it was provided that "[i]t shall not be lawful to comment at the trial of any person upon the fact that he has refrained from giving evidence on oath on his own behalf". Thereafter, in some other Australian jurisdictions, legislation was passed forbidding the judge or the prosecutor, and in some cases both, from commenting on the absence of sworn evidence from the accused[35]. These statutory prohibitions were seen as necessary to ensure that an accused's choice about whether to give sworn evidence was a real choice and not a disguised obligation to give evidence. Provisions of this kind fell for consideration in several decisions of this Court[36]. The provisions were construed broadly. In *Bataillard v The King*, which concerned the application of s 407(2) of the *Crimes Act* 1900 (NSW) (the legislative successor to the *Accused Persons'*

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32 (1893) 14 LR (NSW) 150 at 150-151.

33 *Kops v The Queen; Ex parte Kops* [1894] AC 650.

34 *Kops v The Queen; Ex parte Kops* [1894] AC 650 at 653.

35 See, for example, *Crimes Act* 1958 (Vic), s 399(3); *Evidence Act* 1929 (SA), s 18(1)II; *Evidence Act* 1906 (WA), s 8(1)(c); *Evidence Act* 1910 (Tas), s 85(8).

36 *Bataillard v The King* (1907) 4 CLR 1282; *R v Ellis* (1925) 37 CLR 147; *Bridge v The Queen* (1964) 118 CLR 600.

Evidence Act) Isaacs J said[37] that there would be a contravention of the prohibition against comment by any "reference, direct or indirect, and either by express words or the most subtle allusion, and however much wrapped up … to the fact that the prisoner had the power or right to give evidence on oath, and yet failed" to do so.

44 Reading the statutory prohibitions against comment on an accused's failure to give evidence in this way led to an unfortunate and unintended consequence. As jurors came to understand that it was open to an accused person to give sworn evidence at trial, the jury would sometimes ask a judge what they were to make of the fact that the accused had not given evidence in that way. Because of the prohibition on judicial comment on the subject, trial judges were left to tell the jury that they could not answer the question[38].

Judicial comment on silence at trial

45 By the 1980s, the legislative provisions in the Australian States which governed judicial comment on a failure to give evidence differed greatly[39]. In some Australian jurisdictions there was no prohibition on judicial comment and it may be assumed that judges in those jurisdictions did make comment on the fact the accused had given no sworn evidence in answer to the charge made. In others, however, the prohibition on comment remained.

46 What the jury could or should be told about the absence of sworn evidence from an accused was made no less complex by the fact that, until relatively recently, an accused could make an unsworn statement to the jury. Until the right to make such a statement was abolished, if a trial judge were to comment upon a failure to give sworn evidence it would more often than not be in a context where the accused had made an unsworn statement which a trial judge would tell the jury formed part of the evidence before them[40]. Moreover, the choices which accused persons made about the course to be taken at trial were

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37 *Bataillard* (1907) 4 CLR 1282 at 1291.

38 *R v Greciun-King* [1981] 2 NSWLR 469.

39 See Australian Law Reform Commission, *Evidence*, Report No 26, (1985), vol 2 at 104; New South Wales Law Reform Commission, *The Right to Silence*, Report No 95, (2000) at 154, 160-161; *Cross on Evidence*, 6th Aust ed (2000) at 620-625.

40 *Peacock v The King* (1911) 13 CLR 619 at 640-641 per Griffith CJ, 646-650 per Barton J, 674 per O'Connor J.

affected by many considerations other than whether the accused could give evidence that would answer the charge made. Those considerations included not only such obvious matters as how good a witness the accused would make, but also whether, because of the course the accused had taken in challenging the prosecution case, the accused would be exposed to cross-examination as to credit including, in particular, as to any prior convictions.

47 Against this background, then, it is not surprising that a frequently referred to form of judicial comment on failure to give sworn evidence was that of Lord Parker CJ in *R v Bathurst*[41], who said that in the normal case:

> "the accepted form of comment is to inform the jury that, of course, he [the accused] is not bound to give evidence, that he can sit back and see if the prosecution have proved their case, and that while the jury have been deprived of the opportunity of hearing his story tested in cross-examination, the one thing they must not do is to assume that he is guilty because he has not gone into the witness box."

It will be noticed that no reference is made in that comment to any consequences adverse to the interests of the accused which might be thought to follow from a failure to give evidence. That there was no reference of that kind reflects recognition of the many considerations which an accused, and counsel for the accused, may have had to take into account in deciding whether to give sworn evidence, to make an unsworn statement, or to stand mute. Those considerations extend well beyond whether the accused has some answer to the charge.

48 The choices available to an accused are now more limited than they were. Even so, the decision whether to give evidence or, for example, to rely on a record of interview with police which, in very serious cases, is often a video record, remains a difficult choice. It is not a choice which is affected only by an assessment of whether the accused can give a convincing account which would contradict or deny the allegations made. In any event, that assessment, referring as it does to a "*convincing* account", is complex. It would, therefore, be wrong to treat the choice as having been made by reference only to whether the accused was guilty.

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41 [1968] 2 QB 99 at 107-108.

Comment or direction?

49 It is also to be noticed that Lord Parker referred in *Bathurst* to the "accepted form of *comment*" rather than to any accepted form of judicial *direction*. This reflects the language used in relevant legislation (like the *Accused Persons' Evidence Act*) which also spoke of "comment" on a failure to give evidence. The distinction between a matter for comment and a matter for judicial direction reflects the fundamental division of functions in a criminal trial between the judge and the jury. It is for the jury to decide the facts of the case. It is for the judge to explain to the jury so much of the law as they need to know in deciding the real issue or issues in the case[42]. In the course of directing the jury, the judge must give the jury such warnings as may be called for by the particular case, not only against following impermissible paths of reasoning, but also about the care that is needed in assessing some types of evidence such as evidence of identification[43].

50 It is, however, not the province of the judge to *direct* the jury about how they may (as opposed to may *not*) reason towards a conclusion of guilt. That is the province of the jury. The judge's task in relation to the facts ends at identifying the issues for the jury and giving whatever warnings may be appropriate about impermissible or dangerous paths of reasoning. That is not to say that the judge may not comment on the evidence that has been given and comment about the facts that the jury might find to be established. But the distinction between comment and direction is important. Telling a jury that they may attach particular significance to the fact that the accused did not give evidence is a comment by the judge. Because it is a comment, the jury may ignore it and they should be told they may ignore it. By contrast, warning a jury against drawing impermissible conclusions from that fact is a direction by the judge which the jury is required to follow.

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

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42 *Alford v Magee* (1952) 85 CLR 437 at 466.

43 *Domican v The Queen* (1992) 173 CLR 555.

by the prosecution, and may not be used as a make-weight in assessing whether the prosecution has proved its case beyond reasonable doubt. It by no means follows, however, that the judge should go on to comment on the way in which the jury might use the fact that the accused did not give evidence.

52 As will later appear, there may be cases where the failure of an accused to offer an explanation by reference to some matter peculiarly within his or her knowledge will permit comment to be made as to that failure. However, as with all judicial comments on the facts in a jury trial, it will often be better (and safer) for the judge to leave the assessment of the facts to the determination of the jury in the light of the submissions of the parties. Unnecessary or extensive comments on the facts carry well-recognised risks of misstatements or other errors and of blurring the respective functions of the judge and the jury.

Evidence Act 1995

53 Section 20(2) of the *Evidence Act* falls for consideration against this background. It is a section which regulates comments by the judge and by the prosecution. The prosecution may say nothing about the fact that the accused did not give evidence. That being so, it would indeed be surprising if s 20(2) were to be given a construction which would permit the judge to point out to the jury that the failure of the accused to give evidence is an argument in favour of the conclusion for which the prosecution contends. If the prosecution is denied the argument, why should the judge be permitted to make it?

54 The effect of the sub-section is that the judge, the accused and any co-accused may comment on the fact that the accused did not give evidence, but the judge may not, by that comment, "suggest" that the accused failed to give evidence because he or she was guilty, or believed that he or she was guilty, of the offence charged. It is very improbable that the accused would ever wish to make such a suggestion. That a co-accused may do so is hardly surprising. If only one of two accused persons gives evidence at their joint trial, it is inevitable that the accused who has given evidence will want to urge the jury to contrast that with the course taken by the other accused. It is well-nigh inevitable that in urging that the evidence given by the accused demonstrates innocence, the suggestion will be made, explicitly or implicitly, that the co-accused stayed silent because, unlike the accused who did give evidence, he or she was guilty.

55 It is right to note that s 20(2) deals only with an accused not giving evidence at all and does not deal with the case of some failure by an accused who does give evidence to deal with a particular topic. That this is so is not surprising. If a topic is important, it will be explored in cross-examination of the

accused. If it is not, it may be assumed that the topic is not important to the issues at trial.

56 "Suggest" is a word of very wide application. It was held in *RPS* that the prohibition in s 20(2) should be given no narrow construction, that "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."[44] If s 20(2) is not interpreted in that way, the opportunity to exculpate has become an obligation to self-incriminate[45].

RPS and *Weissensteiner*

57 We turn then to note certain important distinctions between *RPS* and *Weissensteiner*. It was held in *RPS* that the trial judge had erred by giving directions which contained five particular elements[46]:

(1) that the accused's election not to contradict certain evidence given by a witness for the prosecution of what was said to be a partial admission of the accused could be taken into account by the jury in "judging the value of, the weight of", that evidence;

(2) that in the absence of denial or contradiction of the evidence of the partial admission the jury could "more readily" discount any doubts about that evidence and "more readily" accept it;

(3) that if it was reasonable, in the circumstances, to expect some denial or contradiction of the prosecution evidence, the jury were entitled to conclude that the accused's evidence would not have assisted him at his 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;

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44 (2000) 199 CLR 620 at 630 [20] per Gaudron ACJ, Gummow, Kirby and Hayne JJ, 655-656 [108]-[109] per Callinan J.

45 *R v Kops* (1893) 14 LR (NSW) 150 at 190 per Innes J.

46 (2000) 199 CLR 620 at 628-629 [17].

(4) that the accused's election not to give evidence could not fill any gaps in the prosecution case but could enable the jury to feel more confident in relying on the evidence tendered by the prosecution; and

(5) 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.

58 Of the last of the elements it was said that, although factually accurate, it was at least unwise to give such a direction because "it took its significance largely, if not entirely, from the other directions"[47]. The third of these elements was held to contravene s 20(2)[48]. The other elements were held to be in error as contrary to more fundamental principles, the prosecution case against the accused not depending upon the jury drawing inferences from proved facts and it not being reasonable to expect some denial or contradiction by evidence from the accused[49].

59 This may be contrasted with *Weissensteiner*, which, as Callinan J pointed out in *RPS*[50], was decided in a jurisdiction where there is no statutory prohibition against comment by the trial judge on the failure of an accused to give evidence. In that case, the prosecution alleged that the accused's guilt was to be inferred from circumstances, particularly his setting out on a voyage with those whom it was alleged he had murdered, the unexplained disappearance of those persons, and his unexplained possession of their boat and personal possessions. The accused gave no evidence in court which would explain how or when he came to be in possession of the property of those whom it was alleged he had murdered or how and when he had parted company with them.

60 The critical part of the trial judge's direction which fell for consideration in *Weissensteiner* was[51]:

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47 *RPS* (2000) 199 CLR 620 at 637 [40] per Gaudron ACJ, Gummow, Kirby and Hayne JJ.

48 *RPS* (2000) 199 CLR 620 at 630 [21] per Gaudron ACJ, Gummow, Kirby and Hayne JJ.

49 *RPS* (2000) 199 CLR 620 at 630 [22] per Gaudron ACJ, Gummow, Kirby and Hayne JJ.

50 (2000) 199 CLR 620 at 654 [104].

51 (1993) 178 CLR 217 at 224 per Mason CJ, Deane and Dawson JJ.

> "The consequence of that failure [of the accused to give evidence] is this: you have no evidence from the accused to add to, or explain, or to vary, or contradict the evidence put before you by the prosecution. Moreover, this is a case in which the truth is not easily, you might think, ascertainable by the prosecution. It asks you to infer guilt from a whole collection of circumstances. It asks you to draw inferences from such facts as it is able to prove. Such an inference may be more safely drawn from the proven facts when an accused person elects not to give evidence of relevant facts which it can easily be perceived must be within his knowledge. You might, for example, think in this case it requires no great perception that the accused would have direct knowledge of events which can be canvassed only obliquely from the point of view of seeking to have you draw an inference from the evidence which has been led by the Crown. The use that you make of the fact that there is no evidence given or called by the defendant in these proceedings is that."

61 What was important in *Weissensteiner*, and what warranted the remarks that were made to the jury in that case, was that, if there were facts which explained or contradicted the evidence against the accused, they were facts which were within the knowledge only of the accused, and thus could not be the subject of evidence from any other person or source. In other words, *Weissensteiner* was not a case in which the accused simply failed to contradict the direct evidence of other witnesses. If that were sufficient to warrant a direction of the type given in that case, there would be, in truth, no right to silence at trial.

62 The unusual circumstances of *Weissensteiner* stand in sharp contrast with the not uncommon case in which an accused is charged with a crime, such as a sexual assault, in which the prosecution case depends largely, if not entirely, upon the evidence of the alleged victim. In that kind of case, while the defence will usually contradict the account given by the victim, there is no basis for concluding that there is any *additional* fact known only to the accused, and therefore not the subject of evidence at trial if the accused remains silent, which would explain or contradict the evidence given by the victim. The central issue in such a case is whether the evidence called by the prosecution persuades the jury to the requisite standard of the elements of the offence. That will largely depend on the jury's assessment of the evidence of the alleged victim. It does not depend upon the jury inferring that any event or fact took place which was not the subject of evidence. In the words of Mason CJ, Deane and Dawson JJ in *Weissensteiner*[52], this type of case would not, therefore, be a case "call[ing] for

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52 (1993) 178 CLR 217 at 228.

explanation or contradiction in the form of evidence from the accused". Nor, adopting the language of Brennan and Toohey JJ in *Weissensteiner*[53], would it be a case "where the facts which [the jury] 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 reference by Mason CJ, Deane and Dawson JJ to "explanation or contradiction *in the form of evidence from the accused*" is important. It refers to more than bare contradiction by denial of what is alleged. The accused's plea of not guilty stands as that denial. What is important is that the accused, and only the accused, can shed light on what happened, not just by making a sworn denial of the allegation but by giving evidence of facts which, if they exist, would explain or contradict the evidence tendered by the prosecution.

63 Another important matter to be noted with respect to *Weissensteiner* is that, as mentioned above, that case was decided in a context in which there was no prohibition on judicial comment with respect to an accused's failure to give evidence. That is not the case with s 20(2) of the *Evidence Act*. That sub-section enables comment to be made but it contains a prohibition against suggesting that the accused failed to give evidence because he or she is, or believes that he or she is, guilty of the offence charged.

64 There may be cases involving circumstances such that the reasoning in *Weissensteiner* will justify some comment. However, that will be so only if there is a basis for concluding that, if there are additional facts which would explain or contradict the inference which the prosecution seeks to have the jury draw, and they are facts which (if they exist) would be peculiarly within the knowledge of the accused, that a comment on the accused's failure to provide evidence of those facts may be made. The facts which it is suggested could have been, but were not, revealed by evidence from the accused must be *additional* to those already given in evidence by the witnesses who were called. The fact that the accused could have contradicted evidence already given will not suffice. Mere contradiction would not be evidence of any *additional* fact. In an accusatorial trial, an accused is not required to explain or contradict matters which are already the subject of evidence at trial. These matters must be assessed by the jury against the requisite standard of proof, without regard to the fact that the accused did not give evidence.

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53 (1993) 178 CLR 217 at 236.

65 In *RPS*, McHugh J expressed the view that, if the circumstances of a case are such that some comment is permissible, the preferable course is for comment to be made in terms of a failure to offer an explanation, rather than a failure to give evidence[54]. That was the approach that Gaudron J and his Honour endorsed in *Weissensteiner*, saying[55]:

> "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 … or the failure to answer questions from investigating police." (footnotes omitted)

66 In *Weissensteiner*, Gaudron and McHugh JJ were in dissent. Subject to one important qualification, however, the approach taken by their Honours in that case is one that conforms to s 20(2) of the *Evidence Act*. More to the point, to refer to the failure of an accused to give evidence, rather than his or her failure to offer an explanation is to risk contravention of the prohibition in s 20(2) against suggesting that the accused failed to give evidence because he or she was guilty or believed himself or herself to be so.

67 The qualification to which reference has just been made is this: as already explained, a judge may comment on evidence, not give directions with respect to the evidence. If the circumstances are such as to permit a comment with respect to the failure to offer an explanation, it should be made plain that it is a comment which the jury are free to disregard. If made, it should be placed in its proper context. That requires identifying the facts which are said to call for an explanation and giving adequate *directions* to the jury about the onus of proof, the absence of any obligation on the accused to give evidence, and the fact that the accused does not give evidence is not an admission, does not fill gaps in the prosecution's proofs and is not to be used as a make-weight. And the comment should not go beyond that made in *Weissensteiner*, as adapted to refer to the failure to offer an explanation rather than the failure to give evidence.

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54 (2000) 199 CLR 620 at 643-644 [62].

55 (1993) 178 CLR 217 at 245-246.

68 It is to be emphasised that cases in which a judge may comment on the failure of an accused to offer an explanation will be both rare and exceptional. They will occur only if the evidence is capable of explanation by disclosure of additional facts known only to the accused. A comment will never be warranted merely because the accused has failed to contradict some aspect of the prosecution case. Once that is appreciated, the supposed tension between *Weissensteiner* and *RPS* disappears. In *Weissensteiner*, the comment related to the absence of evidence of additional facts peculiarly within the knowledge of the accused; in *RPS*, there was no question of any additional fact known only to the accused merely the failure to contradict aspects of the prosecution case.

69 Against this discussion of authority and principle it is convenient to turn now to the particular circumstances of the present matters.

Azzopardi v The Queen

70 The appellant was charged with soliciting Daniel Joseph Papalia to murder Paul Gauci. At the appellant's trial, Mr Papalia gave evidence that he had shot Paul Gauci with intent to murder him. He gave evidence that he shot Mr Gauci at the request of the appellant. Evidence was also called from a Mr Knibbs and a Miss Madigan which, if accepted, supported Mr Papalia's evidence that the appellant had given him the gun which he used to shoot Mr Gauci. The appellant did not give evidence at his trial.

71 In the course of his charge to the jury, the trial judge (Nield DCJ) told the jury, in unexceptionable terms, that an accused may give evidence on his or her trial, but is not under any obligation to do so because the prosecution bears the onus of proving beyond reasonable doubt the guilt of the accused of the offence or offences with which the accused is charged. The judge went on, again in unexceptionable terms, to remind the jury that because the appellant had decided not to give evidence, the jury

> "must not think that he decided not to give evidence because he is, or believes himself to be, guilty of the offence with which he stands charged. It would be completely wrong of you to think that. His decision not to give evidence must not be thought by you to be an admission of guilt on his part. There may be many reasons why an accused person may decide not to give evidence. I tell you, members of the jury, that you must not speculate as to why the accused decided not to give evidence."

He went on to say, in the passage of his charge which now is impugned, that:

> "However, members of the jury, when assessing the value of the evidence presented by the Crown, you are entitled to take into account the fact that the accused did not deny or contradict evidence about matters which were within his personal knowledge and of which he could have given direct evidence from his personal knowledge. This is because, members of the jury, you may think that it is logic and common-sense that, where only two persons are involved in some particular thing – the complainant and/or a witness and the accused – so that there are only two persons able to give evidence about the particular thing, and where the complainant's evidence or the witness's evidence is left undenied or uncontradicted by the accused, any doubt which may have been cast upon that witness's evidence may be more readily discounted and that witness's evidence may be more readily accepted as the truth."

72 The impugned passage of the judge's charge gave the jury instructions which cannot be reconciled with the earlier instructions given to them. The jury were told, correctly, that the appellant bore no burden, onus or obligation to prove anything. Yet, at the same time, by the impugned passage, the jury were invited to conclude, from the fact that the appellant did not give evidence, that "any doubt which may have been cast upon [the prosecution evidence] may be more readily discounted and [that evidence] may be more readily accepted as the truth". That would be so if, and only if, the circumstances were such as to require response by the appellant. Yet the judge had correctly told the jury that the law required no response from him.

73 This was not a direction of the kind contemplated by what was said in either of the joint majority judgments in *Weissensteiner*. In the present matter, the trial judge told the jury that they were entitled to take into account "the fact that the accused did not deny or contradict evidence about matters which were within his personal knowledge". As explained earlier, if this direction was based on what was said in *Weissensteiner*, it misstates the effect of that decision. All that could be said in this case is that the accused did not give evidence *contradicting* evidence which had been led. This was not a case where the accused did not take the opportunity to provide some *additional* factual material for consideration by the jury which would explain or contradict the case sought to be made by the prosecution. This was not a case in which the jury might properly use the absence of evidence of additional, exculpatory, material in considering inferences sought by the prosecution. The impugned passage invited the jury to engage in a false process of reasoning, at odds with the direction which had been given to them in the earlier part of the charge. It follows that even without regard to the operation of s 20 of the *Evidence Act* there was a misdirection.

74 If the impugned passage had stood alone, there could be no doubt that it was a comment on the failure of the appellant to give evidence which contravened the prohibition in s 20(2). Standing alone, it can be seen only as suggesting to the jury that the fact that the accused did not give evidence was a reason to accept the prosecution's contention that he was guilty. That is, standing alone, it suggested to the jury that the accused did not give evidence because he was, or believed he was, guilty of the offence charged.

75 The impugned passage, however, did not stand alone. It was given in the context of the earlier directions given by the trial judge, which explicitly warned the jury against thinking that the accused decided not to give evidence because he was or believed himself to be guilty of the offence. In that context, the passage was, at best, confusing and contradictory of the earlier directions. And given that the prohibition in s 20(2) is not to be given a narrow construction[56], it must be concluded that the passage contravened s 20(2) by suggesting that the accused did not give evidence because he was guilty of the offence charged.

76 It cannot be said in the circumstances of this case that the misdirection did not deprive the appellant of a chance of acquittal. The jury may have been affected in their assessment of the case against the appellant, which depended so much on the evidence given by the man whom he was alleged to have solicited to murder the victim. That being so this is not a case in which the proviso can be applied. Accordingly, the appeal should be allowed, the orders of the Court of Criminal Appeal of New South Wales set aside, the appeal to that Court allowed and an order made for a new trial of the appellant.

Davis v The Queen

77 In this matter, the applicant was charged with three counts alleging that he had committed sexual offences against the nine year old daughter of a friend. The offences were alleged to have occurred when the complainant came to stay the night at the applicant's house. The applicant's house was seven kilometres down a gravel road from the complainant's. The complainant gave evidence of the applicant's conduct. She said that after the applicant had assaulted her, she waited until he was asleep and then walked, at night, the seven kilometres to her own home. There, finding her own home in darkness, she climbed into the back seat of the family car, where she went to sleep. She was woken the next morning

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56 *RPS* (2000) 199 CLR 620 at 629-630 [20] per Gaudron ACJ, Gummow, Kirby and Hayne JJ.

at about 11.00 am by the applicant who, having found her to be missing from his house, had gone looking for her.

78 The complainant's mother gave evidence that her daughter seemed upset when she was found, and that she had asked the complainant why she had walked home. The complainant, after being asked several times why she had walked home, told her mother, in effect, that the applicant had interfered with her. Her mother asked her to pull down her underpants and observed that the complainant's inner thighs and vagina were swollen and red. The complainant said that she experienced pain urinating. Some days later the complainant was examined by a doctor who observed areas suggestive of tissue injury or hymenal interference, including areas of superficial abrasion, of an age consistent with the complainant's account of what had happened to her. Some of the observations made by the doctor were, in his opinion, consistent with sexual penetration of the complainant. The applicant did not give evidence at trial. He was convicted.

79 In the course of his instructions to the jury, the trial judge (Nader ADCJ) made a number of comments on the fact that the applicant had not given evidence. He said, and again no exception was or could be taken to this part of his Honour's directions:

> "Now I wanted to give you this direction, and it is a direction of law, which I am required to give you by the decided cases. The failure of the accused to give evidence is not an admission of guilt. You are not allowed to regard it as an admission of guilt. The accused's right to silence, his right to remain silent, which is a right that we all have if any allegation of crime is made against us, but his particular right to remain silent means that no inference of guilt can be drawn from his failure to say or do anything in his defence. That arises because of the presumption of innocence, I think which I told you about at the beginning of the case, and which is the reason why the burden of proof is on the Crown, because there is a presumption of innocence.
>
> The whole idea of this trial is that it is the Crown adducing evidence to show you that the presumption of innocence should, by your verdict of guilty, be set aside. But until your verdict of guilty, there is a presumption of innocence, that is if you reach such a verdict."

80 The trial judge went on, after dealing with the applicant's interview with police, to say:

> "Now the only effect that his failure to give evidence may have on you is this. His failure to give evidence here may affect the value or

> weight that you give to the evidence of some or all of the witnesses who have testified in the trial if you think the accused was in a position to himself give evidence about the matter. His failure cannot be treated as an admission. His failure to give evidence. But it may enable you to give, to help you to evaluate the weight of other evidence in the case, that he has not given evidence.
>
> I do not want to be more specific than that, because it is a matter for you, but let me give you an example that is not related to this case to show you what I mean. If the case was one of speeding, and a police officer got in the witness box and said he was doing 100 kilometres an hour in a 60 kilometre area, and the accused, although the defendant, although he pleaded not guilty, did not testify, the judge hearing the case might say, well he has not gone into the box and contradicted that. He could have. But to put it another way, to give you the converse situation, if the defendant had gone into the witness box and said, no that's not true, I've got a very good speedometer in my car and I was only doing 60, it would make it – those two different situations would make the magistrate's evaluation of the policeman's evidence either more difficult or easier. It is not an easy concept I know that. The accused has remained in the dock as is his right. You cannot treat that as an admission of guilt. But the fact that he has not given testimony may assist you when you come to evaluating the other evidence in the case."

Again, the two passages in the charge which deal with the fact that the accused did not give evidence are not capable of reconciliation. The particular example which the trial judge gave the jury reveals the confusion that the directions create.

81 The evidence adduced by the prosecution consisted not only of the direct evidence of the complainant but also other evidence, from her mother and from the doctor, of facts and circumstances which supported the account the complainant gave. If the complainant was unable to give evidence and the prosecution case had been founded only upon evidence of the otherwise unexplained departure of the complainant from the applicant's house and return to her own house, coupled with clinical observations of the complainant's physical condition consistent with her having been sexually assaulted, it might be said that the case was one in which a *Weissensteiner* comment could have been made. That would be so because facts which would explain or contradict the inference otherwise to be drawn from the facts we have described would be peculiarly within the knowledge of the applicant in whose care the complainant had been left before this otherwise unexplained journey occurred and these otherwise unexplained clinical signs were observed. But that was not the way in

which the prosecution put its case at the trial of the applicant. That case included direct evidence, from the complainant, of what the applicant was alleged to have done. That is reason enough to conclude that no *Weissensteiner* direction should have been given. If the complainant were accepted as a credible witness, the accused could not have given evidence of any *additional* fact that might have explained or contradicted her account.

82 In any event, however, not only was there no occasion to make a *Weissensteiner* comment, the use which the trial judge said that the jury might make of the accused not having given evidence went well beyond the limited use which *Weissensteiner* permits. And it went beyond that which s 20(2) would permit if a comment were appropriate. The instruction which the trial judge gave about the failure of the accused to give evidence was, therefore, a misdirection. Standing alone, we would find that the impugned direction contravened s 20(2). Again, as in the case of *Azzopardi*, the comment has to be understood in the context of other directions given by the trial judge. Even so, for the reasons given in the case of *Azzopardi*, the comment infringed s 20(2) of the *Evidence Act*.

83 The case against the applicant was overwhelming. That a nine year old child should, late at night, walk seven kilometres along a gravel road to return to her own home suggests very strongly that something untoward has occurred to her. The doctor's evidence of his observations, and the complainant's mother's evidence of her own observations, were such that the verdicts which the jury returned against the applicant were inevitable. The misdirection identified was one which, in the end, was in the unusual circumstances of this case not such as to deprive the applicant of a real chance of acquittal. In the circumstances, being not persuaded that there has been a miscarriage of justice, we would refuse special leave to appeal.

84 McHUGH J. Section 20(2) of the *Evidence Act* 1995 (NSW) enacts:

> "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."

85 Does this sub-section or the common law prevent a judge informing the jury that, in assessing the prosecution evidence, they are entitled to take into account that the accused has not denied or explained evidence about matters which are within his or her personal knowledge? That is the issue that arises in the present cases because in both cases the trial judges instructed the jury that they could take into account the failure of the accused persons to explain or contradict certain evidence tendered for the prosecution.

86 In my opinion, the directions by the judges did not contravene s 20(2) of the *Evidence Act* because they did not suggest that the accused persons failed to give evidence because they were, or believed that they were, guilty of the offences charged. Nor were the directions inconsistent with "the right to silence" that is an incident of the common law privilege against self-incrimination. Nor were they inconsistent with the immunity from compulsion to give evidence that is enjoyed by an accused person. Protection of "the right to silence" or the immunity of an accused person from giving evidence does not require any reading down of the express power conferred on the trial judge by s 20(2) to "comment on a failure of the defendant to give evidence". The sub-section contains its own limitation: the judge's comment must not suggest guilt or a belief in guilt. It imposes no other limitation. It is true that *RPS v The Queen*[57] holds that, independently of s 20, the common law prevents a judge, except in very limited circumstances, from commenting on the failure of the accused to give evidence. But in so far as that decision so holds, its reasoning is inconsistent with the Court's earlier decision in *Weissensteiner v The Queen*[58]. It is also inconsistent with many statements of principle and decisions in earlier cases in this and other jurisdictions[59] and with the intention of the legislature in

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57 (2000) 199 CLR 620.

58 (1993) 178 CLR 217.

59 *R v Kops* (1893) 14 LR (NSW) 150; affirmed [1894] AC 650; *R v Guiren* (1962) 79 WN (NSW) 811 at 813; *R v Rhodes* [1899] 1 QB 77 at 83; *Bernard* (1908) 1 Cr App R 218 at 219; *R v Sparrow* [1973] 1 WLR 488 at 495-496; [1973] 2 All ER 129 at 135-136; cf *R v Martinez-Tobon* [1994] 1 WLR 388 at 392; [1994] 2 All ER 90 at 94 (direction upheld), with petition for leave to appeal dismissed by the

(Footnote continues on next page)

enacting s 20(2). In my opinion, the reasoning in *Weissensteiner* is correct and should be followed in preference to *RPS* in so far as the two cases conflict, as in my opinion they do.

87 To follow *RPS* where it is in conflict with *Weissensteiner* would create considerable practical difficulties for trial judges and the general administration of criminal justice. Hitherto, it has been accepted that a trial judge, in discussing the evidence, can make comments that are adverse to the accused[60]. The judge is entitled to suggest to the jury any line of reasoning that the jury may use in its deliberations. The judge may even express an opinion as to the verdict that the jury should give[61]. If the judge comments on the facts, however, he or she must make it clear that the jury can disregard those comments.

88 It would seem to follow from the trial judge's right to comment on the evidence that, if the judge cannot make a particular comment, the jury cannot reason in a way that would be consistent with a comment of that nature. That seems to have the logical result that the judges in the present cases should have directed the juries that they could not reason in the manner that the judges said was open to them. On that view, the judges in both cases erred negatively as well as positively. Further, if the jury cannot reason in the manner in which judges said they could, neither can a judge or magistrate reason in that manner when hearing a criminal prosecution without a jury. On the other hand, if the jury can use the failure of the accused to contradict or explain evidence in some cases, but trial judges cannot make any comment to that effect, trial judges will be embarrassed if jurors ask whether they can reason in that way, as they probably will[62].

House of Lords: [1994] 1 WLR 753; [1994] 2 All ER 90 at 99; *Purdie v Maxwell* [1960] NZLR 599; *Trompert v Police* [1985] 1 NZLR 357 at 358.

60 *O'Donnell* (1917) 12 Cr App R 219 at 221; *Cunningham v Ryan* (1919) 27 CLR 294 at 298-299; *Mason* (1924) 18 Cr App R 131 at 132; *R v Kerr (No. 2)* [1951] VLR 239 at 247-248; *R v Umanski* [1961] VR 242; *R v Guerin* [1967] 1 NSWR 255; *R v Giffin* [1971] Qd R 12; *Mathieson* (1981) 3 A Crim R 257; *Dee* (1985) 19 A Crim R 224; *Hughes* (1989) 42 A Crim R 270 at 271.

61 *Dee* (1985) 19 A Crim R 224 at 227.

62 cf the question that the juror asked of the trial judge in *Jones v Dunkel* (1959) 101 CLR 298 at 317: "Rightly or wrongly I have it in my mind that the defendant could have come here to-day and given evidence. Am I entitled to regard that in my mind as a weakness in the case of the defendants, that he did not?"

89 Another practical difficulty of the holding in *RPS* arises from the right of the jury to consider the silence of the accused in many pre-trial situations[63]. Juries are likely to be puzzled, if not bewildered, by the difference between taking account of the pre-trial silence but not the in-trial silence of the accused. A witness may assert that out of court the accused failed to reply to a charge made in the presence of the accused. In most cases, the silence of the accused can be taken into account on the issue of guilt. Jurors will think it very strange if they cannot use the accused's silence in court to assist in determining whether those statements were made but can take the pre-trial silence into account, if they accept the evidence of the witness, in determining whether the out-of-court statement has evidentiary value.

90 With respect to those who take the contrary view, it is a misreading of common law and legislative history to hold that s 20(2) – let alone the common law – takes away the right of comment that trial judges have exercised for probably more than two centuries.

The failure of an accused to contradict or explain evidence is a factor in weighing the value of that evidence

91 Until *RPS*, Australian courts regularly directed juries that in certain situations they could take into account that the accused had failed to rebut or explain evidence as a reason for accepting that evidence. Early authority supporting that practice can be found in *R v Burdett*[64], decided nearly two hundred years ago and never doubted. More than once, Justices of this Court have referred to it as authority for the principle that the failure of the accused to contradict or explain evidence may be taken into account depending on the circumstances. *Burdett* was decided at a time when not only was an accused person not compellable to give evidence but was also not competent to give evidence. Yet the failure of the accused to call *others* to give evidence in a case where the accused might be expected to do so, if he or she had an answer to the prosecution case, was regarded as a factor to be weighed. *Burdett* realistically recognised that those associated with the accused may know about matters relevant to his or her guilt or innocence.

92 In *Burdett*, the accused had been convicted of publishing a seditious libel, being an address to the electors of Westminster. The accused had admitted that

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63 *R v Smithies* (1832) 5 C & P 332 [172 ER 999]; *R v Grills* (1910) 11 CLR 400 at 408-409; *R v Christie* [1914] AC 545 at 554; *Parkes* (1976) 64 Cr App R 25 at 27-28; *R v Chandler* [1976] 1 WLR 585; [1976] 3 All ER 105; *Petty v The Queen* (1991) 173 CLR 95 at 107.

64 (1820) 4 B & Ald 95 [106 ER 873].

he had written the document. But one of the issues at the trial was whether it had been published by the accused in the county of Leicester. The evidence was capable of proving that a Mr Brookes had received the publication in an unsealed envelope from Mr Bickersteth, a "professional friend" of the accused. There was evidence that the accused was in Leicester at or about the time of publication. But there was no evidence as to when or where Bickersteth received the letter from the accused. Best J had directed the jury that there was evidence upon which they could infer that the accused had published the libel in Leicester and that, in determining the publication issue, they could take into account that he had offered no evidence to rebut the inference. The Kings Bench (Abbott CJ, Best, Holroyd and Bayley JJ) discharged a rule nisi for a new trial.

93 Best J said[65]:

> "We are not to imagine guilt, where there is no evidence to raise the presumption. But when one or more things are proved, from which our experience enables us to ascertain that another, not proved, must have happened, we presume that it did happen, as well in criminal as in civil cases … It is enough, if its existence be highly probable, particularly if the opposite party has it in his power to rebut it by evidence, and yet offers none … "

94 Holroyd J said[66] that once evidence of a fact had been given against a defendant:

> "[I]t is a rule to be applied in considering the weight of the evidence against him, whether direct or presumptive, when it is unopposed, unrebutted, or not weakened by contrary evidence, which it would be in the defendant's power to produce, if the fact directly or presumptively proved were not true."

95 Similarly, Abbott CJ said[67]:

> "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

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65 (1820) 4 B & Ald 95 at 121-122 [106 ER 873 at 883].

66 (1820) 4 B & Ald 95 at 140 [106 ER 873 at 890].

67 (1820) 4 B & Ald 95 at 161-162 [106 ER 873 at 898].

> accused offers no explanation or contradiction; can human reason do otherwise than adopt the conclusion to which the proof tends?"

96 These remarks were made at a time when the law prevented the accused from testifying[68]. But, as the judgment of Holroyd J demonstrates, it was open to the accused to call others, particularly Bickersteth, to prove that he had not parted with the letter in Leicester. His failure to do so was a matter that could be weighed in determining whether the libel had been published in Leicester. It is a decision that fully supports the directions given by the trial judges in the present cases and its statements of principle have been approved and applied many times.

97 *Burdett* was relied on in *R v Kops*[69], decided shortly after the legislature of New South Wales made an accused person a competent but not compellable witness. In *Kops*, the accused had been convicted of attempted arson but had not given evidence or made a statement at his trial. The evidence showed that the fire had been started by using a burning candle placed in a hat. A hatbox was found in the premises. There was evidence that the accused had had a similar hatbox in his bedroom and that it was not there after the fire. The trial judge told the jury[70]:

> "If the hat, in which the candle was burning, was not the accused's, would you not expect him to deny it? Can you doubt it was his hat? … If it was his hat, why does he not explain how it got there?"

98 The Full Court of the Supreme Court of New South Wales upheld this direction by the trial judge, and the Full Court's judgment was upheld by the Judicial Committee of the Privy Council. In the Full Court, Darley CJ rejected the argument that to allow the trial judge to comment on the failure to give evidence was inconsistent with the legislation that made the accused a competent but not compellable witness. After saying that "no one can demand that the prisoner give evidence", Darley CJ said[71]:

> "It remains at his own option whether he will do so or not; but as he has this option expressly given to him then if he does not avail himself of it every reasonable inference may be drawn from the fact of his silence. His

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68 See also *R v Watson* (1817) 32 State Trials 1 at 670 where Lord Ellenborough gave a similar direction to the jury although the law at that time prevented the prisoner from giving evidence.

69 (1893) 14 LR (NSW) 150.

70 (1893) 14 LR (NSW) 150 at 150-151.

71 (1893) 14 LR (NSW) 150 at 159.

> declining to give evidence as to a matter he is in a position to explain is not to be taken as an admission that such fact has been conclusively established, but his non-explanation is a fact to be taken into consideration by the jury together with all the other facts in the case."

99 The Judicial Committee, in dismissing the appeal, said[72] that "there are cases in which it appears to their Lordships that such comments may be both legitimate and necessary."

100 In *Morgan v Babcock & Wilcox Ltd*[73], the defendant-company had been convicted of bribery. In this Court, Isaacs J said that "the silence of the Company, and its failure to explain, materially weakens any attempt to suggest in its favour possible hypotheses of innocence." In *May v O'Sullivan*[74], five members of this Court cited the remarks of Isaacs J in support of the proposition that "it may in some cases be legitimate ... to take into account the fact that the defendant has not given evidence as a consideration making the inference of guilt from the evidence for the prosecution less unsafe than it might otherwise possibly appear."

101 Similarly, in *Bridge v The Queen*[75], Windeyer J said that "the failure of an accused person to contradict on oath evidence that to his knowledge must be true or untrue can logically be regarded as increasing the probability that it is true."

102 In *Tumahole Bereng v The King*[76], the Judicial Committee again observed that the failure of the accused to give evidence "may bear against an accused and assist in his conviction if there is other material sufficient to sustain a verdict against him."

103 Many other cases could be cited to the same effect.

Weissensteiner v The Queen

104 Given this unbroken course of authority, Mason CJ, Deane and Dawson JJ were surely correct in *Weissensteiner* when they said[77]:

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72 *Kops v The Queen* [1894] AC 650 at 653.

73 (1929) 43 CLR 163 at 178.

74 (1955) 92 CLR 654 at 658-659.

75 (1964) 118 CLR 600 at 615.

76 [1949] AC 253 at 270.

77 (1993) 178 CLR 217 at 227-228.

> "[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." (emphasis added)

105 Later their Honours said[78] that "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."

106 In their Honours' view, these principles did not infringe "the right to silence", saying[79] that "it is not to deny the right; it is merely to recognize that the jury cannot, and cannot be required to, shut their eyes to the consequences of exercising the right."

107 The judgment of Brennan and Toohey JJ, who were the other members of the majority, also accepted that the failure of the accused to give evidence could be taken into account by the jury. Relying on the judgment of the Privy Council in *Kops*[80], their Honours rejected[81] counsel's submission "that any direction which takes as its starting point an accused's decision not to give evidence infringes the right of silence". Brennan and Toohey JJ cited passages from the judgments of Holroyd J in *Burdett*[82] and of Windeyer J in *Bridge v The Queen*[83] in support of the principles applicable. By doing so, their Honours made it clear that they did not intend to limit any directions concerning the accused's failure to

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78 (1993) 178 CLR 217 at 229.

79 (1993) 178 CLR 217 at 229.

80 [1894] AC 650.

81 (1993) 178 CLR 217 at 234.

82 (1820) 4 B & Ald 95 at 140 [106 ER 873 at 890].

83 (1964) 118 CLR 600 at 615.

give evidence to cases where the prosecution was relying on inferences to be drawn from the evidence. They said[84]:

> "It is important that a trial judge should ensure, especially if any comment is made on an accused's decision not to give evidence, that juries do not use impermissibly the failure to testify. At the least, the jury must be told that the accused is not bound to give evidence and that the onus remains on the prosecution to prove guilt beyond reasonable doubt[85]. The limited use which can be made of an accused's failure to testify is of special importance when the prosecution case depends upon the drawing of an inference of guilt from the facts proved directly by evidence. In such a case, the jury must not use a failure to testify as a fact, albeit in conjunction with other facts, from which they might infer the accused's guilt[86]. If there is insufficient evidence of the facts from which an inference of guilt could be drawn, a failure to testify cannot supply the deficiency. *But the jury may draw inferences adverse to the accused more readily by considering that the accused, being in a position to deny, explain or answer the evidence against him, has failed to do so*." (emphasis added)

108 I do not think that the majority in *Weissensteiner* intended to hold that the failure of the accused to give evidence is relevant only where the prosecution seeks to draw an inference from the facts. Nor would it be logical to do so. In criticising the majority judgment in *RPS*[87], Justice Davies of the Court of Appeal of Queensland[88] demonstrated by using examples that, where the accused remains silent, "logically, it should be easier to reach an adverse conclusion in the case of direct evidence than in the case of inference evidence."

109 It is true that the case against Weissensteiner was a circumstantial one. He was charged with the murder of two persons and with stealing their property. There was abundant evidence from which a jury could conclude that the two persons were dead. The most cogent evidence against the accused was his

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84 (1993) 178 CLR 217 at 235.

85 *Waugh v The King* [1950] AC 203 at 212; *R v Bathurst* [1968] 2 QB 99 at 107-108.

86 In this sense, it may be said that an accused's failure to give evidence "has no evidential value": *R v Sparrow* [1973] 1 WLR 488 at 495; [1973] 2 All ER 129 at 135.

87 (2000) 199 CLR 620.

88 Davies, "Application of Weissensteiner to direct evidence", (2000) 74 *Australian Law Journal* 371 at 371-372.

unexplained and unlikely possession of their boat and belongings. But there was more to the case than that. If prosecution witnesses were accepted, the accused had given a number of conflicting accounts "about the identity of the owner of the boat and the whereabouts"[89] of the two persons. He had also fled from custody. Moreover, the directions of the trial judge which this Court upheld were framed in terms of inferring guilt and not merely finding facts by drawing inferences from facts proven by direct evidence. The trial judge had directed the jury[90]:

> "[The accused] does not have to prove anything. For that reason he was under no obligation to give evidence. You cannot infer guilt simply from his failure to do so. The consequence of that failure is this: you have no evidence from the accused to add to, or explain, or to vary, or contradict the evidence put before you by the prosecution. Moreover, this is a case in which the truth is not easily, you might think, ascertainable by the prosecution. It asks you to infer guilt from a whole collection of circumstances. It asks you to draw inferences from such facts as it is able to prove. Such an inference may be more safely drawn from the proven facts when an accused person elects not to give evidence of relevant facts which it can easily be perceived must be within his knowledge. You might, for example, think in this case it requires no great perception that the accused would have direct knowledge of events which can be canvassed only obliquely from the point of view of seeking to have you draw an inference from the evidence which has been led by the Crown."

110 Later the trial judge directed the jury[91]:

> "You remember rather here it seeks to have you infer guilt from such facts as it is able to prove to your satisfaction. Such an inference may be more safely drawn from the proven facts when the accused elects not to give evidence of relevant facts which can be easily perceived to be in his knowledge."

111 This was a strong direction. It was not confined to drawing inferences of fact from facts directly proved. It directed the jury that they could infer guilt from the facts proved. It was for that reason that Gaudron J and I dissented in *Weissensteiner*. In my view, *Weissensteiner* was decided in accordance with the principle that, in weighing the evidence of the prosecution, the jury is entitled to take into account the failure of the accused to contradict or explain the evidence

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89 (1993) 178 CLR 217 at 222.

90 (1993) 178 CLR 217 at 223-224.

91 (1993) 178 CLR 217 at 224.

of the prosecution when evidence from him in contradiction or explanation might reasonably be expected. The majority judges in *Weissensteiner* cited too much authority in support of that proposition to accept that the directions in that case were upheld on the narrow ground that the accused's failure to give evidence could be taken into account only because he was in possession of facts *additional* to those already proven in evidence.

112 Suppose Weissensteiner had given evidence simply asserting that the missing persons had disappeared one night and that he knew nothing of what happened to them. Surely the jury could have been directed that, if they rejected his evidence, they could more readily draw inferences adverse to him by reason of the lack of evidence negativing the inference. Or suppose Weissensteiner had denied possession of the boat and other possessions and making the statements attributed to him. Why could not the jurors more safely draw inferences against him if they rejected his denials? In that case, they might also use his lies in the witness box as further evidence against him. But that additional use does not affect the validity of the principle concerning the acceptance of evidence or the drawing of inferences when there is no evidence from the accused or anyone else to contradict evidence or negative inferences adverse to the accused.

RPS v The Queen

113 In *RPS*[92], however, a majority of this Court took a much narrower view of the right of a trial judge to comment on the failure of the accused to give evidence contradicting or denying prosecution evidence. The judgment limited the right of comment to exceptional cases that depended upon the jury drawing inferences from proved facts. Apart from one particular direction, the restriction of the right to comment was based on common law principles and not on s 20(2). Two considerations led the majority to hold that the common law right to comment was more limited than the statements made in *Weissensteiner*. First, unlike a civil trial, "it will seldom, if ever, be reasonable to conclude that an accused in a criminal trial would be expected to give evidence."[93] The majority said that "[t]he 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."[94] Second, unlike a civil trial, the prosecution had to prove its case beyond reasonable doubt[95].

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92 (2000) 199 CLR 620.

93 (2000) 199 CLR 620 at 632 [27].

94 (2000) 199 CLR 620 at 632-633 [27].

95 (2000) 199 CLR 620 at 633 [28].

114 It is not easy to see any logical reason why a distinction should be made between an expectation that the defendant will give evidence in a civil case and an expectation that the defendant will give evidence in a criminal case. Nor logically does the difference in the standard of proof throw any light on the issue. In a civil case, the plaintiff must prove the case according to the balance of probabilities. The defendant is not obliged to give evidence in a civil case. Experienced trial counsel know that the defence case is often weaker at the close of the defence case in a civil trial than it was at the close of the plaintiff's case. But if the defendant is not called, that person runs the risk of the tribunal of fact more readily drawing adverse inferences or accepting the plaintiff's case. What difference can it make that, in a criminal case, the standard of proof is beyond reasonable doubt? In some civil cases, the *Briginshaw* standard will require satisfaction of proof to a standard almost as high as in a criminal case. But that does not prevent the tribunal of fact from drawing adverse inferences from silence.

115 It is not easy to accept that the difference between proof beyond reasonable doubt and proof on the balance of probabilities makes the difference in every case. That difference cannot be sufficient to deny the availability of the ordinary common sense modes of reasoning that people employ when a person fails to contradict statements or negative inferences that he or she has an opportunity to answer, if the contrary be true. If the directions of the trial judge in *RPS* and those of the judges in the present cases erred, it cannot be because of the standard of proof in criminal cases.

116 If the distinction between civil and criminal cases is valid, it must be because in a criminal case the accused cannot be compelled to give evidence. It must be because, in some way, directions about silence are inconsistent with "the right to silence" being an incident of the rule that the accused in a criminal trial cannot be compelled to testify. Indeed, this appears to be the true basis of the judgment of Gaudron ACJ, Gummow, Kirby and Hayne JJ in *RPS*. Their Honours said[96]:

> "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."

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96 (2000) 199 CLR 620 at 634 [32].

117 But as I will seek to show neither historically nor now has the law recognised a "right to silence" that prevents a trial judge from commenting in the manner that occurred in the present cases. Nor does the immunity from compulsion to give evidence prevent such comments. In addition, once it is conceded that the silence of the accused may be taken into account in some cases, as the majority in *RPS*, and in the present cases, concede, the point of principle is decided in favour of *Weissensteiner*. Once the concession is made that "the right to silence" and the immunity from compulsion do not prevent the judge from making *some* adverse comments, the debate must be about details. And it is not easy to see how or why the comment should be as limited as *RPS* suggests. If comment is justified when the accused probably knows of additional facts that could deny inferences that can be drawn from the evidence, why is comment denied when the accused fails to rebut or explain evidence about matters that the accused knows are true or false? The reasoning that justifies comment in one case seems just as applicable in those cases where *RPS* denies the right of comment.

The right to silence

118 In my opinion, there is no general common law right to silence that is infringed by the directions of the judges in the present cases. With one possible exception[97], the so-called right to silence is merely an incident of or a consequence of certain immunities enjoyed by a person accused of an offence. Those immunities are derived from the privilege against self-incrimination.

119 Until recently, most common lawyers believed that that privilege and the incidental right to silence were longstanding principles of the common law. They thought that the privilege against self-incrimination had been developed by common lawyers in the first half of the 17th century as a result of the reaction to the procedures in the Star Chamber and the ecclesiastical courts. Most common lawyers also thought that the privilege had been developed to ensure that European inquisitorial procedures would have no place in the common law adversary system of criminal justice. These beliefs were chiefly based on the writings of Professor J H Wigmore in his great work on evidence[98] and on Professor Leonard Levy's influential book, *Origins of the Fifth Amendment*[99].

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97 See *Petty v The Queen* (1991) 173 CLR 95 at 99 (right to silence when questioned by police officers).

98 Wigmore, *Evidence*, (McNaughton rev. ed 1961), vol 8, § 2250.

99 Levy, *Origins of the Fifth Amendment: The Right against Self-Incrimination* (1968).

120 It now turns out that the views of Wigmore and Levy concerning the origin and development of the self-incrimination privilege were dead wrong. In the last 25 years, research by modern scholars has demonstrated a very different – almost opposite – view of the history and origin of the principle. Modern researchers have had access to much material that was not available to Wigmore and earlier historians and scholars. In particular, they have had access to the manuscripts of proceedings in the ecclesiastical courts, the Old Bailey Sessions Papers, the records of proceedings at Assizes and numerous contemporary pamphlets which contained journalistic-type accounts of criminal trials during the 18th century.

121 The result of the modern research is summarised in a remarkable book[100], published in 1997, by a group of distinguished lawyers and historians. Much of the account of the development of the self-incrimination principle, which follows, is drawn from the research summarised in that book and in an illuminating article by Justice Davies[101]. Drawing on this research, these lawyers and historians have convincingly demonstrated that the self-incrimination principle originated from the European inquisitorial procedure and that it did not become firmly established as a principle of the criminal law until the mid-19th century or later[102]. Its entrenchment into the criminal law at that time was the consequence of counsel being increasingly permitted to appear for the accused from the late 18th century. Until the appearance of counsel, the common law system of criminal justice, at least so far as it concerned felonies, was in substance an inquisitorial system. An accused person had no right to silence in any meaningful sense.

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100 Helmholz, Gray, Langbein, Moglen, Smith and Alschuler, *The Privilege Against Self-Incrimination: Its Origins and Development* (1997). Helmholz is a Professor of Law at the University of Chicago. Gray is Professor of History at the University of Chicago. Langbein is Professor of Law and Legal History at Yale University. Moglen is Professor of Law at Columbia University. Smith, at the time of publication, was law clerk to a judge of the US Court of Appeals for the Second Circuit. Alschuler is a Professor of Law at the University of Chicago.

101 Davies, "The Prohibition Against Adverse Inferences From Silence: A Rule Without Reason? – Part I" (2000) 74 *Australian Law Journal* 26.

102 Langbein, "The Privilege and Common Law Criminal Procedure: The Sixteenth to the Eighteenth Centuries", in Helmholz et al, *The Privilege Against Self-Incrimination: Its Origins and Development* (1997) 82 at 100-101.

122 So why was a scholar of Wigmore's eminence so mistaken? In fairness to Wigmore, he lacked access to important sources[103]. And Wigmore himself expressed reservations about his conclusions. He was particularly puzzled[104] as to how on his theory the privilege should come "into full recognition under the judges of the restored Stuarts, and not under the parliamentary reformers". He pointed out that[105] the privilege was not mentioned in "all the parliamentary remonstrances and petitions and declarations that preceded the expulsion of the Stuarts". Nor did it find its way into the Bill of Rights of 1689[106]. That he should be puzzled was hardly surprising. On his view, "[t]he judges who supposedly created the privilege at common law were Scroggs, Jeffreys, and their brethren – men whose names are synonymous with subservience to the Crown and murderous unfairness to criminal defendants."[107]

123 Wigmore was not the only eminent scholar who erred in this matter. Professor Holdsworth accepted Wigmore's view as to the origins of the privilege. He said that "[i]t is not till the Commonwealth period that this privilege to refuse to answer incriminating questions is accorded to accused persons."[108] But Holdsworth was puzzled[109] by the fact that "[n]o one seems to have suggested that the privilege was inconsistent with [the committal] examinations of an accused person till the eighteenth century; and it was not until 1848-1849 that the Legislature enacted that magistrates and justices of the peace should caution prisoners that they need not say anything in answer to the charge unless they pleased." As will appear, it is not surprising that he saw the committal stage as inconsistent with the existence of the self-incrimination principle in the criminal law.

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103 He worked almost entirely from the State Trials and the nominate Reports. He did not have access, *inter alia*, to Old Bailey Sessions Papers and the series of pamphlets giving popular accounts of criminal trials: see Langbein, "The Privilege and Common Law Criminal Procedure: The Sixteenth to the Eighteenth Centuries", in Helmholz et al, *The Privilege Against Self-Incrimination: Its Origins and Development* (1997) 82 at 102 n 117.

104 Wigmore, *Evidence*, (McNaughton rev. ed 1961), vol 8, § 2250 at 290.

105 Wigmore, *Evidence*, (McNaughton rev. ed 1961), vol 8, § 2250 at 292.

106 Wigmore, *Evidence*, (McNaughton rev. ed 1961), vol 8, § 2250 at 292.

107 Langbein, "The Privilege and Common Law Criminal Procedure: The Sixteenth to the Eighteenth Centuries", in Helmholz et al, *The Privilege Against Self-Incrimination: Its Origins and Development* (1997) 82 at 106.

108 Holdsworth, *History of English Law*, 3rd ed (1944), vol 9 at 199.

109 Holdsworth, *History of English Law*, 3rd ed (1944), vol 9 at 200-201.

124 Wigmore erred, Professor Langbein argues[110], because:

> "The *Nemo tenetur* maxim did indeed gain currency during the Tudor-Stuart constitutional struggles. Wigmore in effect traced some of the history of the maxim's use.
>
> The key insight, however, is that the maxim did not make the privilege. It was rather the privilege – which developed much later – that absorbed and perpetuated the maxim. The ancestry of the privilege has been mistakenly projected backwards on the maxim, whereas the privilege against self-incrimination in common law criminal procedure was, in truth, the achievement of defense counsel in the late eighteenth and early nineteenth centuries."

Nemo tenetur prodere seipsum

125 The maxim *Nemo tenetur prodere seipsum* – which is now recognised as embodying the common law self-incrimination principle – was well known to common lawyers in the early 17th century. The *Nemo tenetur* maxim was part of the *ius commune*, the mix of Roman and canon law that applied in Continental courts where no statute or local custom applied. The *ius commune* was also the law that the ecclesiastical courts, including the English ecclesiastical courts, applied in dealing with breaches of ecclesiastical law. Those courts also had jurisdiction with respect to matters which to modern eyes have little to do with religion. They had jurisdiction, for example, over such matters as criminal defamation, usury, disorderly conduct and drunkenness.

126 Canon law declared that: "[n]o person is to be compelled to accuse himself", and canon lawyers used the *Nemo tenetur* maxim to describe this fundamental rule[111]. But it was a rule that had exceptions[112]. One of the chief

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110 Langbein, "The Privilege and Common Law Criminal Procedure: The Sixteenth to the Eighteenth Centuries", in Helmholz et al, *The Privilege Against Self-Incrimination: Its Origins and Development* (1997) 82 at 107.

111 Helmholz, "The Privilege and the *Ius Commune*: The Middle Ages to the Seventeenth Century", in Helmholz et al, *The Privilege Against Self-Incrimination: Its Origins and Development* (1997) 17 at 17.

112 Helmholz, "The Privilege and the *Ius Commune*: The Middle Ages to the Seventeenth Century", in Helmholz et al, *The Privilege Against Self-Incrimination: Its Origins and Development* (1997) 17 at 23.

exceptions was where a person accused the defendant of an offence[113]. Another important exception was where it was a matter of public notoriety that the defendant had committed a specific offence[114]. In both these cases and others the defendant could be required to answer incriminating questions. What canon law was designed to prevent was a roving commission by public officials seeking to discover unknown wrongs.

127 Unlike the early common law courts that relied on the knowledge of the jury rather than testimony to determine facts, the ecclesiastical courts relied on evidence on oath[115]. From early in the 13th century, one of the procedures for obtaining evidence "was the inquisitorial oath, with which [the ecclesiastical courts and officials] attempted to elicit a confession from the suspect and use it as the primary form of evidence."[116] The suspect was forced to take an oath *de veritate dicenda* which required him or her to answer all questions truthfully. In England, it became known as the *ex officio* oath – the judge serving *ex officio* as accuser[117].

128 Conflict between the *Nemo tenetur* maxim and the *ex officio* oath was inevitable. The legality of the *ex officio* oath soon became a matter of debate. In the ecclesiastical courts, a strenuous and often bitter debate existed as to when and in what circumstances persons could be examined under that oath or could invoke the *Nemo tenetur* maxim when so examined[118]. In the course of time, the increase in religious dissent in Tudor and Stuart England moved the debate into

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113 Helmholz, "The Privilege and the *Ius Commune*: The Middle Ages to the Seventeenth Century", in Helmholz et al, *The Privilege Against Self-Incrimination: Its Origins and Development* (1997) 17 at 21.

114 Helmholz, "The Privilege and the *Ius Commune*: The Middle Ages to the Seventeenth Century", in Helmholz et al, *The Privilege Against Self-Incrimination: Its Origins and Development* (1997) 17 at 23.

115 Helmholz, "Introduction" in Helmholz et al, *The Privilege Against Self-Incrimination: Its Origins and Development* (1997) 1 at 14-15.

116 O'Reilly, "England Limits the Right to Silence and Moves Towards an Inquisitorial System of Justice" (1994) 85 *Journal of Criminal Law and Criminology* 402 at 410.

117 Levy, *Origins of the Fifth Amendment: The Right against Self-Incrimination* (1968) at 24.

118 Helmholz, "The Privilege and the *Ius Commune*: The Middle Ages to the Seventeenth Century" in Helmholz et al, *The Privilege Against Self-Incrimination: Its Origins and Development* (1997) 17 at 20-32.

the common law courts. Defendants and persons called before the ecclesiastical courts sought writs of prohibition to restrain the jurisdiction of those courts or writs of habeas corpus to obtain their release from the custody of those courts.

129 Despite some apparent statements to the contrary, the better view of all the evidence is that the common law courts did not think that, if they intervened, they were requiring the ecclesiastical courts to comply with a rule of the common law. Rather, they were insisting that those courts comply with the rules of ecclesiastical law[119]. Wigmore thought[120] that statements by the common law judges in the 17th century were sometimes "ambiguous and shifting". But Professor Helmholz has pointed out[121]:

> "The privilege of the *ius commune* was not a defendant's unqualified right to refuse to answer any and all questions about his past conduct … Whether any particular use of the ex officio oath would have violated the rule under the *ius commune* was therefore often a close question … it is natural that early statements of the question by common law judges as well as by ecclesiastical lawyers should seem 'shifting' to modern tastes, accustomed as we are to having the privilege put in more absolute terms … "

130 And Justice Davies has pointed out that historically the self-incrimination privilege in the *ius commune* was "not ... regarded as a fundamental personal right, but as a curb on the intrusive powers of public officials"[122] – it prevented them from initiating a fishing expedition into the mind and deeds of a person.

131 Two matters in particular indicate that there was no common law principle against self-incrimination by accused persons or any policy of the common law recognising a right to silence. These matters are the more persuasive in the light of the common law rule that no confessional evidence made on oath was admissible against a prisoner in a common law court[123]. The rationale for the

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119 Helmholz, "The Privilege and the *Ius Commune*: The Middle Ages to the Seventeenth Century" in Helmholz et al, *The Privilege Against Self-Incrimination: Its Origins and Development* (1997) 17 at 43-44.

120 Wigmore, *Evidence*, (McNaughton rev. ed 1961), vol 8, § 2250 at 287.

121 Helmholz, "The Privilege and the *Ius Commune*: The Middle Ages to the Seventeenth Century" in Helmholz et al, *The Privilege Against Self-Incrimination: Its Origins and Development* (1997) 17 at 44.

122 Davies, "The Prohibition Against Adverse Inferences From Silence: A Rule Without Reason – Part I", (2000) 74 *Australian Law Journal* 26 at 31.

123 Hawkins, *A Treatise of the Pleas of the Crown*, (1721) bk 2 ch 31, § 2.

rule, known as the confession rule, was that a confession made under oath was perceived as not being voluntarily made, having been made in fear of eternal damnation. In time, the confession rule also excluded statements, not made on oath, if they were "forced from the mind by the flattery of hope, or by the torture of fear"[124].

132 The first matter is an opinion prepared in 1606 by Chief Justice Popham and Sir Edward Coke on the interrogating powers of ordinary ecclesiastical courts[125]. The opinion made four points:

- No one could be required "to swear generally to answer to such interrogatories as shall be administered".
- No one could be examined under oath if the ecclesiastical crime was also punishable at common law.
- "No man, ecclesiastical or temporal, shall be examined upon secret thoughts of his heart, or of his secret opinion: But something must be objected against him what he hath spoken or done."
- No lay person could be required to submit to examination on oath except in relation to matrimonial or testamentary causes.

133 The joint opinion of Popham CJ and Coke J accepted that the clergy generally and lay persons in two classes of matters could be examined under the *ex officio* oath if some allegation was made against them as defendant or witness. This is utterly inconsistent with a common law right to silence or privilege against self-incrimination at this stage.

134 The second matter is the decision in *Maunsell & Ladd* in 1607, a decision that is not reported in the nominate Reports[126]. Maunsell was a clergyman and Ladd, a layman. They had been imprisoned by the Court of High Commission, the principal ecclesiastical court, for refusing to answer a summary question about a conventicle. But by majority the Court refused to issue a writ of habeas

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124 *R v Warwickshall* (1783) 1 Leach 263 at 263-264 [168 ER 234 at 235].

125 12 Co Rep 26 [77 ER 1308]. See Gray, "Self-Incrimination in Interjurisdictional Law: The Sixteenth and Seventeenth Centuries", in Helmholz et al, *The Privilege Against Self-Incrimination: Its Origins and Development* (1997) 47 at 61-64.

126 See the manuscript references in Gray, "Self-Incrimination in Interjurisdictional Law: The Sixteenth and Seventeenth Centuries", in Helmholz et al, *The Privilege Against Self-Incrimination: Its Origins and Development* (1997) 47 at 70, n 47.

corpus, notwithstanding that their counsel had argued that the *ex officio* oath was illegal and that to demand self-incrimination was contrary to the law of nature, Magna Carta and ancient English statutes[127].

135 Professor Langbein summarised the early history as follows[128]:

> "… the maxim [*Nemo tenetur prodere seipsum*] influenced practice in the English ecclesiastical courts long before anybody in England started complaining about Star Chamber or the Court of High Commission. This finding undermines Leonard Levy's effort to portray the privilege against self-incrimination as an English invention intended to protect the indigenous adversarial criminal procedure against incursions of European inquisitorial procedure. The concept that underlies the English privilege against self-incrimination originated within the European tradition as a subprinciple of inquisitorial procedure centuries before the integration of lawyers into the criminal trial made possible the development of the distinctive Anglo-American adversary system of criminal procedure in the later eighteenth century."

Committal proceedings

136 The law and practice of criminal proceedings demonstrates that the common law did not recognise a general right to silence or even a general privilege against self-incrimination. Until 1848, the committal stage of criminal proceedings was plainly inquisitorial. The committal stage was inconsistent with a privilege against self-incrimination. After a person was apprehended for an offence, the Marian Committal Statute of 1555[129] required the Justice or Justice of the Peace to conduct a pre-trial examination promptly. Section 2 required the taking of "the Examination of such Prisoner, and Information of those that bring him, of the Fact and Circumstance thereof, and the same, or as much thereof as shall be material to prove the Felony". This was taken to imply an authority to put questions to the prisoner concerning the facts alleged against him or her[130].

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127 Gray, "Self-Incrimination in Interjurisdictional Law: The Sixteenth and Seventeenth Centuries", in Helmholz et al, *The Privilege Against Self-Incrimination: Its Origins and Development* (1997) 47 at 70-76.

128 Langbein, "The Privilege and Common Law Criminal Procedure: The Sixteenth to the Eighteenth Centuries", in Helmholz et al, *The Privilege Against Self-Incrimination: Its Origins and Development* (1997) 82 at 100-101.

129 (1555) 2 & 3 Phil & M c 10.

130 Smith, "The Modern Privilege: Its Nineteenth-Century Origins", in Helmholz et al, *The Privilege Against Self-Incrimination: Its Origins and Development* (1997) 145 at 154.

The Justice had to record any statements by the accused and send the record to the trial court. Professor Morgan has written[131]:

> "There was no thought of advising the accused that he need not answer or warning him that what he said might be used against him. The justice was often the chief witness at the trial of the accused and either used his record of the examination as the basis for his answers or read the record in evidence for the prosecution."

137 That the committal stage of criminal proceedings was inquisitorial was conceded by Professor Levy who said[132] that "[i]n the initial pre-trial stages of a case, inquisitorial tactics were routine". He accepted[133] that "[f]or all practical purposes, therefore, the right against self-incrimination scarcely existed in the pre-trial stages of a criminal proceeding" although, curiously, he maintained that the self-incrimination principle was part of the common law by the middle of the 17th century.

138 The Marian committal procedure continued until 1848 when *Sir John Jervis's Act*[134] required the committing magistrate or justice to warn the accused that anything he or she said could be used in evidence at the trial.

The criminal trial

139 Given the course of procedure at the committal stage, it is scarcely surprising that the criminal trial itself was also basically inquisitorial. Criminal defendants were regarded as interested parties. Like parties in civil actions and witnesses with an interest in the proceedings, defendants in criminal proceedings were not allowed to testify on oath. The rationale for this rule was that to allow persons directly interested in the proceedings to give evidence on oath was to invite perjury. Moreover, not until 1836 with the passing of the *Prisoners' Counsel Act*[135] could criminal defendants be represented by counsel in trials for felony, and until the 19th century most serious offences were felonies. This had a profound effect on the manner in which trials were conducted.

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131 Morgan, "The Privilege against Self-Incrimination" (1949) 34 *Minnesota Law Review* 1 at 14.

132 Levy, *Origins of the Fifth Amendment: The Right against Self-Incrimination* (1968) at 325.

133 Levy, *Origins of the Fifth Amendment: The Right against Self-Incrimination* (1968) at 325.

134 11 & 12 Vic c 42.

135 6 & 7 Will 4 c 114.

140 Until the late 18th century, trials were effectively dialogues between judges, witnesses and accused persons. They were short, the average at the Old Bailey being half an hour. Counsel rarely appeared for the prosecution, and the judge conducted the trial. Although the accused could not give evidence on oath, he or she was permitted – indeed virtually required – to speak, often replying to each witness after the witness gave evidence[136]. The accused's statement "covered without distinction whatever he had to say of law, of evidence, and of argument"[137]. I have not seen any cases before 1837 as to the status of the accused's statement concerning the facts of the case. But probably it was encapsulated in the *obiter dictum* of Coleridge J in *R v Beard*[138] that the accused, if unrepresented, could "tell his own story; which is to have such weight with the jury, as all circumstances considered it is entitled to". The accused did not even get a copy of the indictment.

141 The accused person's protection lay in the right to speak, not in the right to silence. In many cases, the opportunity to speak meant the difference between sentence of death and sentence of transportation. If the accused gained the sympathetic ear of the jurors, they frequently brought in verdicts that would avoid the death penalty. Research by Professor Langbein has shown[139] that, in determining "whether to return verdicts of mitigation, 'juries distinguished, first, according to the seriousness of the offense, and second, according to the conduct and character of the accused'." The accused who refused to give his account ran the risk that the jury would convict of the major offence.

142 Thus, the procedures in force and the inability to be represented by counsel compelled the accused to give his or her account – not on oath but by statements and argument. Without legal representation, no other course was

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136 Langbein, "The Privilege and Common Law Criminal Procedure: The Sixteenth to the Eighteenth Centuries", in Helmholz et al, *The Privilege Against Self-Incrimination: Its Origins and Development* (1997) 82 at 84.

137 Wigmore, *Evidence*, vol 2 (Chadbourn rev. ed 1979), § 575.

138 (1837) 8 C & P 142 at 142 [173 ER 434 at 434].

139 Langbein, "Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources", (1983) 50 *University of Chicago Law Review* 1 at 53, cited in Langbein, "The Privilege and Common Law Criminal Procedure: The Sixteenth to the Eighteenth Centuries", in Helmholz et al, *The Privilege Against Self-Incrimination: Its Origins and Development* (1997) 82 at 94.

open. Professor Langbein points out[140] that "[w]ithout counsel, the testimonial and defensive functions were inextricably merged, and refusing to speak would have amounted to a forfeiture of all defense."

143 About the middle of the 18th century, judges began to let counsel argue law, to examine and cross-examine witnesses but not to address the jury. But even in the 1770s, defence counsel were given leave in only 2.1% of trials for felony at the Old Bailey. By 1795, this figure had increased to 36.6%[141]. The records of Old Bailey trials in the last years of the 18th century show, however, that judges and defence counsel still saw the process as inquisitorial – both judges and counsel were still telling the accused to "say what you can for yourself."[142]

144 Nevertheless, the increasing use of counsel in felony trials in the late 18th and early 19th centuries – at first with leave of the judges and after 1836 by statute – changed the nature of the criminal trial, in Professor Langbein's terms, from an "accused speaks" trial to a "testing the prosecution" trial[143]. The change in the nature of the criminal trial was facilitated by the development of the exclusionary rules of evidence and the principle of proof beyond reasonable doubt[144]. These changes were also the result of counsel being briefed in trials. It was not until this time that the principle of self-incrimination became established as a general rule of the criminal law.

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140 Langbein, "The Privilege and Common Law Criminal Procedure: The Sixteenth to the Eighteenth Centuries", in Helmholz et al, *The Privilege Against Self-Incrimination: Its Origins and Development* (1997) 82 at 83.

141 Langbein, "The Privilege and Common Law Criminal Procedure: The Sixteenth to the Eighteenth Centuries" in Helmholz et al, *The Privilege Against Self-Incrimination: Its Origins and Development* (1997) 82 at 97 n 93.

142 Langbein, "The Privilege and Common Law Criminal Procedure: The Sixteenth to the Eighteenth Centuries", in Helmholz et al, *The Privilege Against Self-Incrimination: Its Origins and Development* (1997) 82 at 87-88, citing Woodcock, Old Bailey Sessions Papers, (Jan. 1789, no. 98), at 95, 107.

143 Langbein, "The Privilege and Common Law Criminal Procedure: The Sixteenth to the Eighteenth Centuries", in Helmholz et al, *The Privilege Against Self-Incrimination: Its Origins and Development* (1997) 82 at 83.

144 Langbein, "The Privilege and Common Law Criminal Procedure: The Sixteenth to the Eighteenth Centuries", in Helmholz et al, *The Privilege Against Self-Incrimination: Its Origins and Development* (1997) 82 at 89.

145 In two cases[145] decided in the year following the *Prisoners' Counsel Act*, Coleridge J, as he then was, indeed held that an accused person no longer had a right to make an unsworn statement now that counsel could appear for them. But Alderson B took a different view in *R v Malings*[146] and that decision was followed in *R v Walking*[147], although Gurney B stated in that case[148] that "I think [the decision] ought not to be drawn into a precedent." Despite the decision in these two cases, in *R v Rider*[149] Patteson J refused to permit the accused to make an unsworn statement. The division of opinion among the judges continued in England for nearly fifty years[150]. Furthermore in *R v Millhouse*[151], Lord Coleridge CJ said that an accused person could not make a statement if he or she also called witnesses as to the facts of the case[152].

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145 *R v Boucher* (1837) 8 C & P 141 [173 ER 433]; *R v Beard* (1837) 8 C & P 142 [173 ER 434].

146 (1838) 8 C & P 242 [173 ER 478].

147 (1838) 8 C & P 243 [173 ER 479].

148 (1838) 8 C & P 243 at 244 [173 ER 479 at 479].

149 (1838) 8 C & P 539 [173 ER 609].

150 *R v Dyer* (1844) 1 Cox CC 113; *R v Taylor* (1859) 1 F & F 535 [175 ER 841]; *R v Shimmin* (1882) 15 Cox CC 122; *R v Millhouse* (1885) 15 Cox CC 622 at 623; *R v Doherty* (1887) 16 Cox CC 306 at 309-310.

151 (1885) 15 Cox CC 622 at 623.

152 Debate as to the right of a prisoner to make an unsworn statement after calling evidence of the facts continued in Queensland and New Zealand after the passing of legislation permitting the accused to give sworn evidence. Cases holding that the accused could not make an unsworn statement in those circumstances are: *R v Sturdy* [1946] QWN 41, *R v Daniel* [1946] QWN 42 and *R v Toms* [1947] QWN 66. Cases holding that the accused could make an unsworn statement even though he or she had called evidence are: *R v Harrald (No 2)* [1948] QWN 36, *R v McKenna* [1951] St R Qd 299 and *Kerr v The Queen* [1953] NZLR 75.

Best's view of the criminal trial

146 In the 3rd edition of his book, *A Treatise on the Principles of the Law of Evidence*, published in 1860, Mr W M Best saw the nature of the criminal trial as still inquisitorial in substance. He wrote[153]:

> "In the English system, as in every other, the indictment, information, act of accusation, or whatever else it may be called, is a *general* interrogation of the accused to answer the matters charged; and every material piece of evidence adduced against him is a *question* to him, whereby he is required either to prove that the fact deposed to is false, or explain it consistently with his innocence. Any evidence or explanation he can give is not only receivable, but anxiously looked for by the court and jury; and, in practice, his non-explanation of apparently criminating circumstances always tells most strongly against a prisoner. What our law prohibits is the *special* interrogation of the accused – the converting him, whether willing or not, into a witness against himself; assuming his guilt before proof, and subjecting him to an interrogation conducted on that hypothesis." (original emphasis)

147 The notion that the accused could simply require the Crown to prove its case beyond reasonable doubt was foreign to the thinking of the common law judges until the increasing use of counsel transformed the nature of the criminal trial. It is now clear that the notion of a right to silence, in the modern sense, was the invention of lawyers in the 19th and 20th centuries. Certainly, it is impossible to contend that the common law recognised a general "right to silence" before the middle of the 19th century.

The self-incrimination rule becomes the basis of the incompetency of parties rule

148 The first edition of Best's book had appeared in 1849. It is apparent that he, and perhaps many other lawyers of the time, did not realise even in 1860 the difference that *Sir John Jervis's Act*, the *Prisoners' Counsel Act* and the decision in *R v Garbett*[154] had made to the nature of the criminal trial.

149 *Garbett* marked a turning point in the conception of a rule that had developed by the middle of the 17th century, vaguely on the basis of the *Nemo*

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153 Best, *A Treatise on the Principles of the Law of Evidence with Elementary Rules for Conducting the Examination and Cross-Examination of Witnesses*, 3rd ed (1860), at 680.

154 (1847) 1 Den 236 [169 ER 227].

tenetur maxim. Known as the witness privilege rule, it entitled a witness, but not a party or a defendant, to refuse to answer a question on the ground that the answer would or might tend to incriminate the witness or expose that person to a penalty or forfeiture[155]. Unlike the confession rule, discussed earlier, it was not an exclusionary rule, in the sense that its breach did not render evidence inadmissible. The witness could claim the privilege, but if the witness was ordered to answer the question, the answer was admissible in subsequent criminal proceedings even if the witness should not have been ordered to give it. A witness who answered some questions was taken to have waived the privilege and could not then refuse to answer further questions[156]. Moreover, the protection of those claiming the privilege was limited because their silence was treated as an admission of the fact in the proceedings[157].

150 Curiously, the fact that the witness had given the answer on oath did not make it inadmissible[158]. It was only when the witness was already charged or suspected of being charged[159] that the answer became inadmissible in subsequent proceedings against them. In *Garbett*[160] the accused had given evidence in earlier proceedings as a witness, in which he had objected to some questions on the ground of witness privilege, but not others. The issue for the court was whether evidence given by the accused as a witness in those proceedings was admissible. On the earlier authorities[161], the accused's answers were admissible. But the court overruled these authorities and held that a witness could claim witness privilege after answering questions and that, if the witness was compelled to answer, the answers were not admissible against him. In time, *Garbett* led to the common law recognising a general principle that a person

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155 *R v Slaney* (1832) 5 C & P 212 [172 ER 944].

156 *Dixon v Vale* (1824) 1 C & P 278 [171 ER 1195]; *East v Chapman* (1827) 2 C & P 570 [172 ER 259].

157 *Boyle v Wiseman* (1855) 10 Ex 647 at 651 [156 ER 598 at 600]; *Bartlett v Lewis* (1862) 12 CB(NS) 249 at 260 [142 ER 1139 at 1143]; *R v Kops* (1893) 14 LR (NSW) 150 at 156.

158 *R v Haworth* (1829) 4 C & P 253 [172 ER 693]; *R v Tubby* (1833) 5 C & P 530 [172 ER 1084].

159 *R v Lewis* (1833) 6 C & P 161 [172 ER 1190]; *R v Owen* (1840) 9 C & P 238 [173 ER 818].

160 (1847) 1 Den 236 [169 ER 227].

161 *Dixon v Vale* (1824) 1 C & P 278 [171 ER 1195]; *East v Chapman* (1827) 2 C & P 570 [172 ER 259].

could not be compelled to incriminate himself or herself. Its immediate effect was to give the witness privilege rule an exclusionary operation that brought it into line with the confession rule.

151 The result of these two lines of cases was that evidence that was given only because the accused was compelled to do so was inadmissible in criminal and civil proceedings. This was the way that Stephen saw the two lines of cases in 1876 in his work, *A Digest of the Law of Evidence*[162]. In 1883 Stephen went a step further, reinterpreting the rationale of the rule that prevented a defendant in a criminal case from giving evidence. Stephen saw the rationale as the maxim *Nemo tenetur*[163]. When the *Criminal Evidence Act* 1898 (UK) made the accused in a criminal case a competent witness, it also arguably recognised the self-incrimination principle as the basis of the party-disqualification rule. It provided that a defendant in a criminal proceeding, although competent to give evidence, "shall not be called as a witness in pursuance of this Act except upon his own application."[164]

152 At the end of the 19th century, lawyers had come to recognise that the common law had a general principle preventing a person from incriminating himself or herself. Despite this change, judges in England and in Australia did not see the relaxation of the competency rule and the arguably statutory recognition of the *Nemo tenetur* principle as having any effect on the right of a judge to comment on an accused's silence – whether at the trial or in a pre-trial situation. I have already referred to *Kops*[165] where the Judicial Committee of the Privy Council upheld the comment by the trial judge on the accused's failure to give evidence. In England after the enactment of the *Criminal Evidence Act*, the judges took the same view of the right to comment as the Full Court of New South Wales and the Judicial Committee had taken in *Kops*[166]. In addition, the enactment of the competency and non-compellability provisions, such as those contained in the *Criminal Evidence Act*, did not prevent judges from directing juries as to the use that could be made of an accused's pre-trial silence[167].

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162 (1876), Art 23.

163 Stephen, *A History of the Criminal Law of England*, (1883), vol 1 at 440.

164 Section 1(a).

165 [1894] AC 650.

166 *R v Rhodes* [1899] 1 QB 77 at 83-84; *Bernard* (1908) 1 Cr App R 218 at 219.

167 *R v Christie* [1914] AC 545 at 554; *Woon v The Queen* (1964) 109 CLR 529 at 541; *R v Thomas* [1970] VR 674 at 679; *R v Chandler* [1976] 1 WLR 585; [1976] 3 All ER 105; *Parkes* (1977) 64 Cr App R 25; *Petty v The Queen* (1991) 173 CLR 95.

153 Soon after *Kops* was decided, three Australian States enacted legislation that prevented the judge, as well as the prosecutor, from making any adverse comment concerning the failure of an accused person to give evidence[168]. Even then the courts construed these provisions as not preventing a judge from directing the jury that they could take into account the accused's failure to contradict or explain the prosecution evidence[169].

154 As late as 1944, a trial judge in England invited a jury to draw an adverse inference from the pre-trial silence of an accused even after he had been warned in accordance with the Judge's Rules of 1912 that he was not obliged to say anything unless he wished to do so[170]. But on appeal[171], the Court of Criminal Appeal held that, having been given a caution, an accused person was entitled to remain silent and that his refusal to say anything could not be used in evidence against him. Not without some reluctance, this principle became generally accepted in England[172]. Soon after, it was also adopted by the Supreme Court of Victoria in *R v Twist*[173] and the courts of other Australian States[174].

155 Subsequently, in *Hall v The Queen*[175], the Privy Council declared that the right to remain silent after a caution by a police officer was a principle of the common law of Jamaica and England. The Judicial Committee said that a person had a common law right to "refrain from answering a question put to him for the

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168 *Accused Persons Evidence Act* 1882 (SA); *Crimes Act* 1891 (Vic), s 34; *Accused Persons' Evidence Act* 1898 (NSW).

169 *R v Moir* (1912) 12 SR (NSW) 111; *R v Guiren* (1962) 79 WN (NSW) 811 at 813; *Bridge v The Queen* (1964) 118 CLR 600 at 616.

170 See the direction given by Singleton J in *R v Leckey* [1944] KB 80 at 81-82.

171 *R v Leckey* [1944] KB 80.

172 *Gerard* (1948) 32 Cr App R 132 at 134; *Davis* (1959) 43 Cr App R 215 at 218-219; *Sullivan* (1966) 51 Cr App R 102 at 105.

173 [1954] VLR 121 at 130-131.

174 *Ex parte Zietsch; Re Craig* (1944) 44 SR (NSW) 360 at 368-369; *R v Bouquet* [1962] SR (NSW) 563. See also *Woon v The Queen* (1964) 109 CLR 529 at 541-542; *R v Ireland* (1970) 126 CLR 321 at 331; *King v The Queen* (1986) 15 FCR 427; *Harris* (1988) 37 A Crim R 29.

175 [1971] 1 WLR 298; [1971] 1 All ER 322.

purpose of discovering whether he has committed a criminal offence"[176]. The Judicial Committee also said that the caution "merely serves to remind the accused of a right which he already possesses at common law"[177]. This was a novel proposition. The only authorities cited for the proposition were cases on the interpretation of a police caution.

156 The decision in *Hall* was criticised by the English Court of Appeal in *R v Chandler*[178]. But, in *Petty v The Queen*[179], Mason CJ, Deane and Toohey JJ and I said that it was "a fundamental rule of the common law" that a person "suspected of having been a party to an offence is entitled to remain silent when questioned or asked to supply information by any person in authority about the occurrence of an offence". We also said that an "incident of that right of silence is that no adverse inference can be drawn against an accused person by reason of his or her failure to answer such questions or to provide such information. To draw such an adverse inference would be to erode the right of silence or to render it valueless." In *Petty*, we also overruled a number of cases that had held that there was a "distinction between reliance on silence as evidence against the accused, and reliance on it by way of answer to or comment upon a defence raised for the first time ... at the trial"[180].

157 Parallel with the establishment of the principle that an accused person's silence after being given a caution was not admissible against him or her, appellate judges also began to assert that trial judges should be cautious in making comments when the accused had not given evidence. Lord Oaksey, speaking for the Judicial Committee, made a statement to that effect in *Waugh v The King*[181]. Then in *R v Bathurst*[182], Lord Parker CJ said that:

> "[T]he accepted form of comment is to inform the jury that, of course, [the accused] is not bound to give evidence, that he can sit back and see if the prosecution have proved their case, and that while the jury have been deprived of the opportunity of hearing his story tested in cross-

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176 [1971] 1 WLR 298 at 301; [1971] 1 All ER 322 at 324.

177 [1971] 1 WLR 298 at 301; [1971] 1 All ER 322 at 324.

178 [1976] 1 WLR 585; [1976] 3 All ER 105.

179 (1991) 173 CLR 95 at 99.

180 *R v Foster* [1955] NZLR 1194 at 1200.

181 [1950] AC 203 at 211.

182 [1968] 2 QB 99 at 107-108.

> examination, the one thing they must not do is to assume that he is guilty because he has not gone into the witness box."

158 This statement was an *obiter dictum*. It was made in a case where the issue was what weight could be given to statements made by the accused to doctors when he had not given evidence but had raised a plea of diminished responsibility, the onus of proof of which was on the accused. Lord Parker CJ did not purport to examine or analyse the law relating to silence. And English judges did not accept *Bathurst* as preventing them from commenting adversely on the accused's failure to give evidence[183].

159 As I have earlier pointed out, both in *Hall*[184] and in *Petty*[185], the Judicial Committee and this Court have referred to a common law right to silence in respect of police questioning. But as Gaudron ACJ, Gummow, Kirby and Hayne JJ pointed out in referring to the "right to silence" in *RPS*[186]:

> "That expression is a useful shorthand description of a number of different rules that apply in the criminal law[187]. 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."

160 As is so often the case when reference is made to a "right" in the criminal law, what is really meant is an immunity from some process. In *Dietrich v The Queen*[188], Mason CJ and I pointed out that "the accused's right to a fair trial is more accurately expressed in negative terms as a right not to be tried unfairly or *as an immunity against conviction otherwise than after a fair trial*, for no person can enforce a right to be tried by the State". (emphasis added) That "the right to silence" is in fact an immunity was recognised by Lord Mustill in *R v Director of Serious Fraud Office; Ex parte Smith*[189] where his Lordship said:

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183 *R v Sparrow* [1973] 1 WLR 488 at 495-496; [1973] 2 All ER 129 at 135-136; *R v Martinez-Tobon* [1994] 1 WLR 388 at 394; [1994] 2 All ER 90 at 96.

184 [1971] 1 WLR 298; [1971] 1 All ER 322.

185 (1991) 173 CLR 95.

186 (2000) 199 CLR 620 at 630.

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

188 (1992) 177 CLR 292 at 299.

189 [1993] AC 1 at 30-31.

"I turn from the statutes to 'the right of silence.' This expression arouses strong but unfocused feelings. In truth it does not denote any single right, but rather refers to a disparate group of immunities, which differ in nature, origin, incidence and importance, and also as to the extent to which they have already been encroached upon by statute. Amongst these may be identified:

(1) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions posed by other persons or bodies.

(2) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions the answers to which may incriminate them.

(3) A specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in similar positions of authority, from being compelled on pain of punishment to answer questions of any kind.

(4) A specific immunity, possessed by accused persons undergoing trial, from being compelled to give evidence, and from being compelled to answer questions put to them in the dock.

(5) A specific immunity, possessed by persons who have been charged with a criminal offence, from having questions material to the offence addressed to them by police officers or persons in a similar position of authority.

(6) A specific immunity (at least in certain circumstances, which it is unnecessary to explore), possessed by accused persons undergoing trial, from having adverse comment made on any failure (a) to answer questions before the trial, or (b) to give evidence at the trial.

Each of these immunities is of great importance, but the fact that they are all important and that they are all concerned with the protection of citizens against the abuse of powers by those investigating crimes makes it easy to assume that they are all different ways of expressing the same principle, whereas in fact they are not."

161 A majority of judges in the European Court of Human Rights in *Murray v The United Kingdom*[190] cited with obvious approval Lord Mustill's statement that

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190 (1996) 22 EHRR 29 at 39.

the right to silence does not denote any single right but rather refers to a disparate group of immunities.

162 Murray had been convicted by virtue of a law in force in Northern Ireland that provided that adverse inferences could be drawn from an accused person's silence. The trial judge had drawn "'very strong inferences' from the applicant's failure to give an account to the police of his presence in the house where L was imprisoned ... and also from his refusal to give evidence in his own defence when called upon by the Court to do so"[191]. A majority of the Court found that the applicant was not deprived of a fair trial contrary to the requirement of Art 6(1) of the European Convention on Human Rights. Nor had his right to the presumption of innocence been violated contrary to Art 6(2) of the Convention.

163 I do not think that in *R v Director of Serious Fraud Office; Ex parte Smith*, Lord Mustill was intending to declare that in no circumstances could any adverse inference be drawn from the failure of an accused person to contradict or explain evidence. His Lordship's judgment in *Murray v DPP*[192] would indicate the contrary. In *Murray*, his remarks were made in the context of the Northern Ireland legislation. But his remarks are in accordance with what this Court said in *Weissensteiner*[193]. Lord Mustill said[194] that "the fact-finder is entitled as a matter of common sense to draw his own conclusions if a defendant who is faced with evidence which does call for an answer fails to come forward and provide it."

Immunity from compulsion to testify is the relevant immunity in these cases

164 The relevant immunity in the present cases is the immunity from compulsion to testify in court. It is a statutory immunity. Undoubtedly the requirement that the accused could not be compelled to give evidence was intended to preserve the common law position. Possibly, the rationale for the immunity from compulsory testimony may have changed since legislation was introduced in England and in Australia making an accused person a competent but not compellable witness. Historically, the rationale for the common law position had nothing to do with the principle of self-incrimination but was designed to protect accused persons, parties to civil actions and interested witnesses from perjuring themselves. In the period shortly before the introduction of legislation making an accused person a competent but not

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191 (1996) 22 EHRR 29 at 44.

192 [1994] 1 WLR 1 at 4-5.

193 (1993) 178 CLR 217.

194 [1994] 1 WLR 1 at 5.

compellable witness, however, treatise writers were taking the view that the rationale for the common law rule was the privilege against self-incrimination. That may also have been the rationale for the legislative provisions concerning competency and non-compellability. Whatever may have been the rationale for preserving the non-compellability rule in the 1890s, it seems proper to regard the current rationale of the rule as being the principle that a person cannot be compelled to incriminate himself or herself.

165 However, the non-compellability rule is not infringed by allowing a trial judge to comment on the failure of the accused to give evidence contradicting or explaining evidence which that person is in a position to contradict or explain. The comment fastens on the consequences of the accused's failure to testify. It does not require the accused to testify. Nor does it force the accused to testify. The accused has a choice. He or she can rely on the perceived weakness of the prosecution case or run the risk that the jury will more confidently accept evidence or draw an inference in the absence of evidence from the accused denying that evidence or inference.

166 The question then is whether protection of the immunity nevertheless necessarily requires an absence of comment on the failure to contradict or explain incriminating evidence. If it does, then logically no comment at all could be made about the accused's failure to testify in any circumstances. Moreover, the jury would have to be directed that they could not take into account in any way the failure of the accused to contradict or explain the prosecution evidence. As I have pointed out, *RPS* concedes that comment can be made in some circumstances. But having conceded the principle, the debate must then be about matters of detail.

167 The comments that were accepted as proper before the decision in *RPS* were based on common sense reasoning, as is the class of comment which *RPS* itself would accept is proper to be made. But why should one form of common sense reasoning be proper but other forms of common sense reasoning not be proper? Furthermore, once it is accepted that a jury can properly take into account the accused's failure to lead evidence rebutting inferences that can be drawn from certain proved facts, it is not readily apparent why the jury cannot also take into account the failure of the accused to contradict a witness when he or she is in a position to do so. There can be no halfway house. Take the facts in *Kops*. A witness said that in the defendant's room she saw a hatbox similar to that found in the shop. It seems absurd to hold that the jury could not consider the accused's failure to deny her evidence in determining whether to accept it but could consider his silence in respect of inferences from the hatbox being on the premises which were set alight.

168 The history of the common law shows that there is no general right to silence at common law. Where the so-called right exists, it is an incident of various immunities. It describes a consequence of the immunity from

compulsory testimony that an accused person enjoys. But it is not a right enforceable at common law. There is no "right" in the sense that an action for damages or an injunction could be brought for any breach of it. It is true that *Hall* and *Petty* recognised a common law right of pre-trial silence in the face of questioning from a person in authority. *Hall* was based on authorities that did not support the proposition. In *Petty*, we took the right to silence in the face of police questioning as a given and without citing authority. But accepting that it is too late to turn the law back on this point, it would require a gigantic leap to generalise from *Hall* and *Petty* that the common law recognises a general right to silence. After all, it is well settled that there is no common law recognition of a right of pre-trial silence "when persons are speaking on even terms, and a charge is made, and the person charged says nothing, and expresses no indignation, and does nothing to repel the charge"[195].

169 Nothing in the history of the common law, therefore, gives any ground for concluding that the immunity from compulsory curial testimony carries with it an incidental right to silence which would necessarily be infringed if trial judges could comment on the accused's failure to explain or deny evidence. A jury must be warned that the failure to give evidence is not evidence of guilt or belief in guilt and it must be directed that the prosecution must prove its case beyond reasonable doubt. But if that is done, neither s 20 nor any principle of the common law precludes a trial judge from informing the jury that it can take into account the failure of the accused to explain or deny evidence which he or she is in a position to deny or explain.

170 Before the enactment of legislation prohibiting judges from commenting on the failure of an accused to testify, judges in Australia[196] – and in England[197] where there was no such prohibition – accepted that a judge could properly comment in some circumstances on the failure of the accused to give evidence. Now that the prohibition has been removed in New South Wales, it seems logical to attribute to the legislature of that State an intention to restore trial judges to the position that they were in before legislation specifically prohibited the right of comment.

171 Indeed, s 20(2) appears to strengthen the position of a trial judge in New South Wales making comments, in comparison with the position in England and in the Australian States, before legislation was introduced in some States

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195 *R v Mitchell* (1892) 17 Cox CC 503 at 508; *Parkes* (1976) 64 Crim App R 25 at 28.

196 *R v Kops* (1893) 14 LR (NSW) 150; affirmed [1894] AC 650.

197 *R v Rhodes* [1899] 1 QB 77; *Bernard* (1908) 1 Crim App R 218; *R v Sparrow* [1973] 1 WLR 488; [1973] 2 All ER 129.

prohibiting the judge from making any comment about the failure to give evidence. Section 20(2) is an express authority for the judge to comment on the evidence. It would be contrary to the principles for construing powers conferred on courts and judges to read down the power of the trial judge to comment on the accused's failure to give evidence[198]. Equally, it would be contrary to those principles to hold that the judge can only make comments favourable to or protective of the accused. The sub-section has stated its own limitation – the comment of the judge "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."

172 That the legislature intended a wide power of comment is also shown by s 20(3) of the *Evidence Act* which provides that the judge or any party (other than the prosecutor) may comment on a failure to give evidence by a person, who, at the time of the failure, was the defendant's spouse or de facto spouse, or a parent or child of the defendant. However, the comment must not suggest that that person failed to give evidence because the defendant was guilty of the offence concerned, or the person believed that the defendant was guilty of the offence concerned[199].

173 The reports of the Australian Law Reform Commission which led to the passing of the New South Wales and Commonwealth *Evidence Acts* of 1995 also indicate that the trial judge was to have a general power of comment. In its final report[200], the Commission commented:

> "The interim proposal was that the judge may comment on the failure of an accused person to give evidence but the prosecution may not. Some submissions urged that all be able to comment.[201] The law in all jurisdictions, except Queensland, is that the prosecutor is not allowed to comment. The interim proposal accorded with this. In most jurisdictions, the judge may comment and again the interim proposal accorded with this. It is necessary that the judge have the power to comment should the jury raise the question of the effect of the failure of the accused to give

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198 *Knight v F P Special Assets Ltd* (1992) 174 CLR 178; *Patton v Buchanan Borehole Collieries Pty Ltd* (1993) 178 CLR 14.

199 Section 20(4).

200 The Law Reform Commission, *Evidence*, Report No 38 (1987) at 40-41.

201 eg The Hon Justice C W Pincus, Federal Court of Australia, *Submission 1* (November 1985) 5-6; DPP (Cth) *Submission 36* (January 1986) 3. This was originally the view of the Australian Federal Police (AFP, *Submission 60* (5 March 1986) 1) but that view was later withdrawn: AFP, *Submission 86* (14 May 1986) 1.

evidence. To allow the judge to comment but not the prosecutor is a sensible compromise. Comment requires great care. A frequently cited statement is that of Lord Parker in *R v Bathurst*[202] ...

The following propositions can be derived from the decided cases in jurisdictions where judicial comment is allowed. First, the comment cited above should generally be adopted and departures from it allowed only in exceptional cases.[203] In addition, the comment must not

- invite the jury, directly or indirectly, to assume guilt from the failure to give evidence,[204]
- invite the jury to draw any inferences it likes,[205] or
- use the accused's failure to give evidence to bolster up a weak prosecution case. Adverse comment should not be made in that situation.[206] The failure to give evidence has no evidential value.[207]

The comment must inform the jury that the onus is and remains on the prosecution and that the accused is entitled to decline to give evidence. As to permissible adverse comment, it has been said that a case where such comment is permissible is that where the accused does not deny he or she was present in the incident, but his or her presence is capable of different explanations – one consistent with innocence and one consistent with guilt.[208] It may then not be improper to remind the jury that the accused could have provided an explanation, by his own evidence, but has not. It can be said to the jury – what evidence is there to support the

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202 [1968] 2 QB 99 at 107.

203 *R v Mutch* [1973] 1 All ER 178 at 181-182.

204 *R v Bathurst* [1968] 2 QB 99; *R v Sparrow* [1973] 1 WLR 488; [1973] 2 All ER 129.

205 *Tuckiar v The King* (1934) 52 CLR 335.

206 *Waugh v The King* [1950] AC 203 at 212; *R v Sparrow* [1973] 1 WLR 488; [1973] 2 All ER 129.

207 *R v Sparrow* [1973] 1 WLR 488 at 495; [1973] 2 All ER 129 at 135; *R v Power* [1940] St R (Qld) 111.

208 *R v Sparrow* [1973] 1 WLR 488; [1973] 2 All ER 129.

> theories?[209] Another approach is to say that the case of the Crown is not challenged by evidence – it is uncontradicted,[210] or that the inference of guilt is rendered less unsafe.[211] Where the legal burden of proof is on the accused, comment can be made that accused runs the risk of not being able to prove his or her case.[212]"

Conclusion

174 In my opinion, the comments of the trial judges in the present cases were in accordance with the law, as it has long been laid down in England and Australia, and with what the legislature of New South Wales intended. If anything, the terms of s 20(2) have strengthened the power of the trial judge to comment on the failure of the accused to give evidence. In so far as *RPS* suggests that the comments of the trial judges in the present case were erroneous, it should not be followed. Trial judges should regard *Weissensteiner* as correctly stating the law.

Orders

175 In the case of Azzopardi, I would dismiss the appeal. In the case of Davis, I would grant special leave to appeal and dismiss the appeal.

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209 *R v Davison* [1972] 3 All ER 1121 at 1125.

210 *R v Power* [1940] St R (Qld) 111.

211 *May v O'Sullivan* (1955) 92 CLR 654 at 658-659.

212 *R v Bathurst* [1968] 2 QB 99 at 108.

CALLINAN J.

Azzopardi v The Queen

176 This appeal requires the Court to construe and apply s 20(2) of the *Evidence Act* 1995 (NSW) ("the Act") in a case in which the trial judge referred to and expanded upon what he called "the principle of the absent witness", and commented, adversely, on the absence of sworn evidence from the appellant. Similar issues arose in the case of *Davis v The Queen* which was argued at the same time as this appeal.

Case history

177 The appellant was charged with the offence of soliciting Daniel Papalia to murder Paul Gauci. He was tried in the District Court of New South Wales by Nield DCJ with a jury in Sydney. The motive for the appellant's conduct was said to be revenge for an act of adultery committed by Mr Gauci with the appellant's wife who died before the trial of her husband. The case against the appellant was that he had acquired a pistol and given it to one Alan Knibbs who in turn passed it on to Papalia who used it to try to kill Mr Gauci for money provided by the appellant. Although that attempt failed Mr Gauci was very seriously wounded by it. The evidence against the appellant included direct evidence given by Papalia, of the act of solicitation, direct evidence given by Knibbs of the appellant's involvement in that conduct, and direct evidence of Christina Madigan, the girlfriend of Papalia, that she had seen the appellant give Knibbs a parcel which she later observed to contain a gun similar in appearance to that used by Papalia to shoot Mr Gauci. Each of the witnesses Papalia, Knibbs and Madigan was charged with a criminal offence or offences, pleaded guilty and was sentenced. A number of other people who did not give evidence were mentioned in evidence. They included Merchant, the driver of the car to and from the scene of the attempted murder, and members of the household where the gun used by Papalia was found.

178 The appellant was interviewed at length by police officers. The interview, which was introduced into evidence, provided direct evidence of his denials of the allegations made against him, including his denial of responsibility in any way for the shooting of Mr Gauci. The appellant also gave answers to questions about other aspects of the Crown case including his alleged motive for wishing for Mr Gauci's death and the alleged payment of money to Papalia. It is fair to say that from beginning to end, and in some circumstantial detail, the appellant asserted his innocence of any involvement in the attempted murder of Mr Gauci.

179 The respondent also relied at the trial on records of telephone calls made from the appellant's home to a mobile telephone service registered in the name of one of the people who lived in the house where the gun was found. There was no evidence that it was the appellant who had made those calls, or of their content.

180 The appellant did not give evidence at the trial. Two character witnesses were however called on his behalf.

181 Before summing up to the jury the trial judge provided to counsel on each side written notice of precisely what he intended to say about the appellant's abstention from giving evidence. Objection, which was overruled, was taken by counsel for the appellant, both before and after the trial judge's summing up regarding his Honour's references to this matter.

182 What his Honour relevantly said was this:

> "Members of the jury, there are only two further things I wish to say. I expect, members of the jury, that you have wondered why the accused did not give evidence. The law is that an accused person may give evidence on his or her trial but is not under any obligation to do so, and this is because, as I have told you already, the Crown bears the burden, onus or obligation – to repeat those interchangeable words – of proving beyond reasonable doubt the accused person's guilt of the offence or offences with which the accused person has been charged. An accused person is entitled to say nothing on his or her trial and to make the Crown prove beyond reasonable doubt his or her guilt. I remind you that the accused person is presumed to be innocent unless and until the tribunal of fact – in a criminal trial, the jury – is satisfied beyond reasonable doubt of that accused person's guilt, and also that that accused person does not bear any burden, onus or obligation to prove anything.
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> In this trial the accused elected to say nothing. He decided not to give evidence. He exercised his right to remain silent. Now, members of the jury, because he has decided not to give evidence, a right given by law to every member of the community, you must not think that he decided not to give evidence because he is, or believes himself to be, guilty of the offence with which he stands charged. It would be completely wrong of you to think that. His decision not to give evidence must not be thought by you to be an admission of guilt on his part. There may be many reasons why an accused person may decide not to give evidence. I tell you, members of the jury, that you must not speculate as to why the accused decided not to give evidence.
>
> However, members of the jury, when assessing the value of the evidence presented by the Crown, you are entitled to take into account the fact that the accused did not deny or contradict evidence about matters which were within his personal knowledge and of which he could have given direct evidence from his personal knowledge. This is because, members of the jury, you may think that it is logic and common-sense that, where only two persons are involved in some particular thing – the

complainant and/or a witness and the accused – so that there are only two persons able to give evidence about the particular thing, and where the complainant's evidence or the witness's evidence is left undenied or uncontradicted by the accused, any doubt which may have been cast upon that witness's evidence may be more readily discounted and that witness's evidence may be more readily accepted as the truth.

If you are satisfied that the accused could have given evidence from his knowledge of the events about which the witnesses gave evidence and if you think that it is reasonable to expect a denial or contradiction to be given by the accused, if such a denial or contradiction was available, then you are entitled to use the accused's decision not to deny or to contradict the evidence of the witnesses as a circumstance which leads you to accept more readily that evidence. However, members of the jury, you are not entitled to use the accused's decision not to give evidence in order to fill in any gaps which you may see in the evidence. As I have said, you are entitled to use the accused's decision not to give evidence when assessing the value of the evidence given by the witnesses.

The absence of any evidence from the accused in denial or contradiction of the evidence of the witnesses as to what the accused said or did means that there is nothing whatsoever to support any suggestion that was put to the witnesses in cross-examination by the accused's counsel. This means that any suggestion put by the accused's counsel to any of the witnesses and rejected by the witnesses remains a suggestion. A suggestion of something having been said or having happened becomes a fact only if it is accepted as having been said or having happened. If a suggestion is accepted, then the thing suggested is a fact and it can be taken into account. If the suggestion is rejected, the thing suggested is not a fact and it must not be taken into account.

Members of the jury, finally, the accused's counsel commented to you in his address that the accused told the truth when he was interviewed by police. I point out to you, members of the jury, that the accused had not sworn an oath to tell the truth when he answered the police questions and that whether or not he told the truth is for you to decide, not for the accused's counsel to say."

183 Earlier his Honour had given, what Sully J was to describe, in the Court of Criminal Appeal, correctly in my view, as lengthy and elaborate instructions as to the possible relevance of evidence of witnesses who might have been, but were not, called by the Crown.

184 The appellant was convicted and sentenced to a long term of imprisonment. He appealed to the Court of Criminal Appeal (Spigelman CJ, Sully and Hidden JJ) against both his conviction and sentence on a number of grounds. His appeal against the former was dismissed, and against the latter was

upheld. A shorter term of imprisonment was substituted for that imposed by the trial judge.

185 Sully J, with whom the other members of the Court agreed, was not persuaded that, in giving the directions that I have quoted, the trial judge made any appealable error. His Honour was of the opinion that the directions given by the trial judge on the topic of the absent witness may have been needlessly lengthy and over emphatic but that their separation in time from the directions with respect to the appellant's failure to give evidence, meant that the former did not taint or aggravate the latter.

The appeal to this Court

186 The only grounds of appeal to this Court are concerned with those directions: whether they complied with or infringed s 20 of the Act, or whether, in any event, the trial judge erred in the way in which he summed up with respect to the appellant's failure to give evidence personally.

187 The relevant law in New South Wales before the enactment of the Act was, as summarized by Gleeson CJ in *R v OGD*[213]:

> "As was pointed out in *Weissensteiner v The Queen*[214], although the question of the conclusions which, as a matter of law, and of logic, a tribunal of fact may draw from the failure of an accused person, at a trial, to give evidence by way of contradiction or explanation of evidence relied on by the Crown, and the question of any comment on such failure which a trial judge may legitimately make in directions to a jury are related, they are different. That difference has for a long time been important in New South Wales, where statute has excluded a trial judge's right to comment on the failure of an accused to give evidence.
>
> The history of changes in the law concerning the rights of accused persons in relation to giving evidence is set out in *Weissensteiner*[215]. The New South Wales decision of *R v Kops*[216] which was upheld by the Privy Council, and which followed 1891 legislation making an accused person a competent but not compellable witness, held that a trial judge may invite a jury to draw inferences adverse to an accused from the fact that, by not

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213 (1997) 45 NSWLR 744 at 750.

214 (1993) 178 CLR 217 at 224.

215 (1993) 178 CLR 217 at 232-233.

216 (1893) 14 LR (NSW) 150; affirmed [1894] AC 650.

giving evidence, the accused has failed to contradict or explain matters upon which incriminating evidence has been given by the prosecution, and which the accused would be in a position to contradict or explain.

That decision resulted in New South Wales legislation prohibiting judicial comment on an accused person's failure to give evidence: *Crimes Act* 1900 [(NSW)] s 407. However, the wisdom and fairness of such prohibition came to be questioned, especially as it became increasingly likely that jurors would be aware of the right of an accused person to give evidence. Jurors aware of that right, and left to their own devices without any assistance from the trial judge, might well draw inferences more adverse than those legitimately available."

188 Section 20 of the Act provides as follows:

"**20 Comment on failure to give evidence**

(1) This section applies only in a criminal proceeding for an indictable offence.

(2) The judge or any party (other than the prosecutor) may comment on a failure of the defendant to give evidence. However, unless the comment is made by another defendant in the proceeding, the comment must not suggest that the defendant failed to give evidence because the defendant was, or believed that he or she was, guilty of the offence concerned.

(3) The judge or any party (other than the prosecutor) may comment on a failure to give evidence by a person who, at the time of the failure, was:

(a) the defendant's spouse or de facto spouse, or

(b) a parent or child of the defendant.

(4) However, unless the comment is made by another defendant in the proceeding, a comment of a kind referred to in subsection (3) must not suggest that the spouse, de facto spouse, parent or child failed to give evidence because:

(a) the defendant was guilty of the offence concerned, or

(b) the spouse, de facto spouse, parent or child believed that the defendant was guilty of the offence concerned.

(5) If:

(a) 2 or more persons are being tried together for an indictable offence, and

(b) comment is made by any of those persons on the failure of any of those persons or of the spouse or de facto spouse, or a parent or child, of any of those persons to give evidence,

the judge may, in addition to commenting on the failure to give evidence, comment on any comment of a kind referred to in paragraph (b)."

189 In *RPS v The Queen* I said this[217]:

"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.

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*[218], 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.

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).

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217 (2000) 199 CLR 620 at 655-656 [107]-[111].

218 (1907) 4 CLR 1282 at 1291.

> The possible application of *Jones v Dunkel*[219] 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[220].
>
> 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[221]. However, such a direction may not be given in relation to an accused person or an accused person's witnesses who, if the matter were a civil trial, might be expected to be called. A direction with respect to a defence case, based upon *Jones v Dunkel* would not only infringe s 20(2) 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."

190 These opinions I believed to be consistent with a first principle of criminal law that a case for the prosecution should be capable of standing on its own feet without reference to witnesses who have not given evidence, including of course, the accused. I would adhere to those opinions. Their application here would result in the upholding of the appeal and an order for a new trial. However the reasoning and conclusion of the majority (Gaudron ACJ, Gummow, Kirby and Hayne JJ) in *RPS* were not to exactly the same effect as mine. Their Honours said this of s 20(2) of the Act[222]:

> "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

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219 (1959) 101 CLR 298.

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

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

222 (2000) 199 CLR 620 at 629-630 [20].

> prohibition should not be treated differently from the prohibition (still operative in some Australian jurisdictions[223]) 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 The King*[224], 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[225]. 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[226]. 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." (emphasis in original)

191 That statement should be regarded as a correct statement of the law applicable to this case. The trial judge's comments fell on the wrong side of the line which a trial judge must draw. It seems to me that the remarks made in his summing up that I have quoted were, at least a subtle allusion to the possibility, indeed even the likelihood, that the appellant did not give evidence because he believed or knew that he was guilty. That was so because his Honour's directions conveyed that the appellant's election not to give evidence could be taken into account in judging the value of, or the weight of the evidence for the prosecution; and doubts entertained about the evidence of witnesses for the prosecution might be more readily discounted because the accused had not given evidence. The trial judge also referred to the failure of the accused to give evidence as a circumstance entitling the jury to accept readily the evidence of the prosecution. Although his Honour did say that the appellant's decision not to give evidence could not be used to fill any gaps in the prosecution case, he added, erroneously, that it could be used in assessing the value of the evidence given by the prosecution witnesses. And finally, also erroneously, his Honour's remarks included that the absence of evidence from the accused meant that the version of events put in cross-examination of witnesses for the Crown was not supported by evidence.

192 It was also wrong for the trial judge to treat the appellant as being in the same position with respect to the calling of material witnesses as the prosecution.

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

224 (1907) 4 CLR 1282 at 1291.

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

226 *Bridge v The Queen* (1964) 118 CLR 600 at 605 per Barwick CJ.

His Honour did this as an aspect of his statement of a principle which he referred to as "the principle of the absent witness". He said this:

> "Now, members of the jury, there is a principle of law that applies to a witness who is absent from a trial. We lawyers call it 'the principle of the absent witness', and it is this. If a witness who could have been called, either by the Crown in the course of proving the guilt of the accused or by the accused in his or her defence against the Crown's case, and that witness is not called and a satisfactory explanation is not given for the absence of that witness, then the opposing party, be it the Crown or the accused, is entitled to comment on the failure to call that witness and to suggest to the jury, as the tribunal of fact, that the inference that can be drawn from the failure to call the witness is that nothing that the witness would say would assist the party who would have been expected to call the witness."

193 In the joint judgment in *RPS* their Honours said this[227]:

> "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."

194 The effect of what their Honours said, is, in practical terms, little different from the opinion that I expressed in *RPS* on that matter[228]. The last passage from the summing up that I have quoted was inconsistent with both formulations, the majority's and mine. Mere separation in time (which Sully J thought relevant) from the other directions with respect to the appellant's abstention from giving evidence was not enough to cure these deficiencies, particularly in light of the erroneous later directions.

195 This is a clear case with respect to the erroneous application of s 20 to it. It is not in my opinion a case in which it is appropriate to say whether, and in what circumstances and in what terms (if any) a trial judge bound to apply the Act should speak about the absence of an accused from the witness box. In many cases the prudent and best course may be to say nothing at all on the topic, particularly if the appellant has not sought comment on it. All that I need add is that I do not think that s 20 requires any different interpretation from the one that this Court gave it in *RPS* because it contemplates that another defendant may comment on a relevant failure to give evidence.

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227 *RPS v The Queen* (2000) 199 CLR 620 at 633 [28].

228 *RPS v The Queen* (2000) 199 CLR 620 at 656 [111].

196 I have given consideration to the application of the proviso. The prosecution case was certainly not a weak one. However the appellant has not had a trial according to law. I cannot say that he has not lost a real chance[229] of an acquittal by reason of the defective summing up.

197 I would therefore allow the appeal, quash the verdict, and order that there be a retrial.

Davis v The Queen

198 This is an application for special leave to appeal which has been referred to a Full Court of seven Justices.

199 The applicant was charged with three offences of serious sexual misconduct with respect to a child under 10 years on 4 May 1996. He was tried in the District Court of New South Wales (Nader ADCJ) with a jury. He was found guilty. His appeal against conviction and sentence to the Court of Criminal Appeal (Spigelman CJ, Wood CJ at CL and McInerney J) was heard on 24 February 1999 and dismissed on that date.

200 The offences were alleged to have occurred at the home of the applicant, a property near Tamworth. The complainant, a girl of nine years of age lived with her family at another property about seven kilometres from the applicant's property. The complainant's stepfather was a friend of the applicant. The applicant's five children often stayed overnight at the complainant's home and the complainant was the same age as one of the applicant's sons.

201 The undisputed facts were that the complainant was at the applicant's home during the evening of 4 May and that she returned home in darkness to her house. She was found asleep in her family car at about 11 am on 5 May. She said that she walked home in the middle of the night. The applicant told the police that she was not in her bed at his house when he checked at about 8.30 am.

202 The complainant gave evidence that, during the journey to the applicant's property on the evening of 4 May 1996, the applicant indecently assaulted her (count 1). While she was sitting on his lap turning the steering wheel, he put his hand under her shirt and touched her breast, asking her "Do you like it?". When they arrived at the applicant's home, they watched television in the applicant's bedroom. The complainant alleged that, at some point, she was lying next to the

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229 *BRS v The Queen* (1997) 191 CLR 275 at 310 per McHugh J; *Green v The Queen* (1997) 191 CLR 334 at 397 per Kirby J; *Peters v The Queen* (1997) 192 CLR 493 at 554 [142] per Kirby J.

applicant in bed while his two sons were lying on the floor on a blanket. He told the complainant to roll on to her side, and take her clothes off. She said "no" but he still removed her clothes. The complainant said that he "put his doodle in my minny" (count 2). The complainant said that the applicant asked her whether she "liked it". She said "no". The applicant asked the complainant to touch his penis. She said "no". He tried to force her hand towards it but she pulled away (count 3). He told her to put her clothes back on. She did that and went to the bedroom of one of the applicant's daughters. She waited for about ten minutes and then walked home in darkness. Because the lights of her house were not on, she got into the family car and went to sleep. She was woken by the applicant who told her not to "tell" anyone. When subsequently the complainant's mother kept asking her why she walked home the complainant said, "[I]f you really want to know, I walked home because [the applicant] put his doodle in my minny." The complainant's mother gave evidence of these statements by her daughter, all of which constituted, in the circumstances, recent complaint.

203 Both the complainant and her mother also gave evidence that the complainant's vaginal area and inner thighs were red and swollen. Later, on 5 May, the complainant, at the urging of her stepfather, withdrew the allegations and apologised to the applicant.

204 On 8 May 1996, the complainant was examined by a medical practitioner. The hymeneal orifice was in the normal range of the complainant's sexual development and age. He observed, however, that there were two areas of ulceration which "would have to have been related to a degree of force" which was "more than what would be normal in the normal routine activity of that particular area for a particular child of that age group". The ulceration could have been of one to seven days duration.

205 In his record of interview, the applicant denied the allegations made by the complainant. He stated that when he asked the complainant why she had walked home, she "said that she got scared" but he denied telling her not to "tell".

206 When it became clear that the applicant would not give evidence the trial judge indicated to counsel that he would direct the jury in accordance with *Weissensteiner v The Queen*[230]. The applicant's counsel may have been equivocal about the appropriateness of this but it is right to say that the trial judge made it clear that he would not change his mind.

207 Relevantly the trial judge said this:

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230 (1993) 178 CLR 217.

"Members of the jury while I am on the question of the evidence, I want to give you a direction about a particular matter. The accused in this case elected not to give evidence. The accused could have given evidence either on oath or affirmation in the witness box, as any other witness, and if he had, his evidence would have been taken into account along with all of the other evidence by you.

Now I wanted to give you this direction, and it is a direction of law, which I am required to give you by the decided cases. The failure of the accused to give evidence is not an admission of guilt. You are not allowed to regard it as an admission of guilt. The accused's right to silence, his right to remain silent, which is a right that we all have if any allegation of crime is made against us, but his particular right to remain silent means that no inference of guilt can be drawn from his failure to say or do anything in his defence. That arises because of the presumption of innocence, I think which I told you about at the beginning of the case, and which is the reason why the burden of proof is on the Crown, because there is a presumption of innocence.

The whole idea of this trial is that it is the Crown adducing evidence to show you that the presumption of innocence should, by your verdict of guilty, be set aside. But until your verdict of guilty, there is a presumption of innocence, that is if you reach such a verdict.

The accused has a right to remain silent, and it extends to this trial as well as other periods of time between the accusation and the trial itself. As you know he has not always exercised that right of silence and he took part in an interview with the police which you have heard and of which you have a transcript. In that case he did not exercise his right to silence. Those answers to the questions in that interview with the police you must of course keep in mind, was not on oath, and was not subject to cross-examination. So you have not seen the accused testify on oath or be subjected to cross-examination.

Now the only effect that his failure to give evidence may have on you is this. His failure to give evidence here may affect the value or weight that you give to the evidence of some or all of the witnesses who have testified in the trial if you think the accused was in a position to himself give evidence about the matter. His failure cannot be treated as an admission. His failure to give evidence. But it may enable you to give, to help you to evaluate the weight of other evidence in the case, that he has not given evidence.

I do not want to be more specific than that, because it is a matter for you, but let me give you an example that is not related to this case to show you what I mean. If the case was one of speeding, and a police officer got in the witness box and said he was doing 100 kilometres an

hour in a 60 kilometre area, and the accused, although the defendant, although he pleaded not guilty, did not testify, the judge hearing the case might say, well he has not gone into the box and contradicted that. He could have. But to put it another way, to give you the converse situation, if the defendant had gone into the witness box and said, no that's not true, I've got a very good speedometer in my car and I was only doing 60, it would make it – those two different situations would make the magistrate's evaluation of the policeman's evidence either more difficult or easier. It is not an easy concept I know that. The accused has remained in the dock as is his right. You cannot treat that as an admission of guilt. But the fact that he has not given testimony may assist you when you come to evaluating the other evidence in the case."

208 In dealing with the directions of the trial judge that I have quoted Wood CJ at CL (with whom Spigelman CJ and McInerney J agreed) said this:

"The account given by an accused to police in an ERISP is far from being the equivalent of sworn evidence in a trial. I do not consider it appropriate to add a gloss to the second general principle in *OGD*[231], to the effect that a *Weissensteiner* direction should not be given where an ERISP is before the jury, even where the ERISP is detailed.

His Honour did appropriately remind the jury, in relation to the ERISP, that it was unsworn and had not been the subject of cross-examination. To my mind that was an appropriate course. It is necessary that a trial judge place before the jury the fact that an ERISP, once admitted into evidence, is available to them as evidence of the truth of the facts asserted by the accused. To not remind the jury of that circumstance would constitute an error and would potentially be unfair to the accused. However, to elevate an ERISP to the equivalence of sworn evidence, and to refrain from an observation of the kind here made would be similarly erroneous, and, on this occasion, unfair to the Crown.

I am unpersuaded that any risk of miscarriage of justice arose in relation to this aspect of the summing-up.

There is some doubt as to whether trial counsel did flag an objection to the *Weissensteiner* direction: It is clear that the topic of a comment, as to the appellant's election not to give evidence, was the subject of discussion during the morning of the final day of evidence. The discussion is not fully recorded, but sufficient appears to make it plain that his Honour did in fact give counsel an opportunity to consider whether a direction should be given, and as to its terms.

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231 (1997) 45 NSWLR 744.

> In those circumstances, even allowing for the uncertainty which arose as to the precise submission advanced by counsel, I am unpersuaded that any of the errors identified by counsel were made good in relation to this ground."

209 As to the principles to be applied, it is unnecessary to repeat what I have said in *Azzopardi*. Applying those principles it seems to me that the directions were erroneous in a number of respects.

210 No adverse comment on the failure of the applicant to testify should have been made, because, contrary to what his Honour implied this was not a case in which evidence (or an explanation) contradicting an apparently damning inference to be drawn from proved facts could come only from the applicant. The applicant, if he was not guilty of the alleged offences, would not have been in a position to explain, at least by admissible evidence, the apparent injuries to the complainant's vaginal area. To put it another way, the injuries to the complainant's vaginal area were not matters peculiarly within the knowledge of the applicant[232].

211 This was a case in which the prosecution adduced direct evidence of the applicant's guilt from the complainant and it was not correct for the judge to imply to the jury that the weight to be given to the complainant's evidence could be increased by the fact that the applicant did not testify[233].

212 There may well have been other reasons why the applicant did not wish to give evidence. The applicant may have been concerned that evidence would emerge tending to reveal that some similar allegations had been made against him by another girl, "S" who was referred to in materials of which the trial judge was aware.

213 Alternatively, the applicant may have been concerned that he would be unable to provide admissible evidence to explain why the complainant may have walked home.

214 The applicant may also have received advice that he could safely rely upon the record of interview admitted into evidence during the trial without the need to subject himself to cross-examination. The applicant was interviewed by the police and denied all the allegations. That evidence was before the jury. Of course, it was not on oath and not subject to cross-examination and it was proper for the trial judge to point that out to the jury as he did. However, the fact is that

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232 (2000) 199 CLR 620 at 634-635 [35].

233 cf (2000) 199 CLR 620 at 634 [34].

the directions were erroneous and contrary to what s 20(2) of the Act prescribes. They were given contrary to the way in which the majority, and I, said the Act should be read and understood in *RPS*.

215 The question remains however, whether the proviso[234] should be applied. In my opinion it should be. The case against the applicant was in my opinion very compelling. The complainant was corroborated in many important respects. She walked home some kilometres in the middle of the night. She was understandably initially hesitant about telling her parents of the applicant's abuse of her by their friend but did fairly promptly nonetheless, make a convincing complaint about it. She was distressed after the events. Her mother observed injuries consistent with the complainant's account of what had happened to her. Independent medical evidence from a paediatrician established complete consistency between the complainant's injuries and violations of the kind of which she complained. There was no satisfactory hypothesis as to any other cause of the several injuries which the paediatrician found. No motive for the complainant to fabricate her generally consistent accounts of what had occurred were sought to be or able to be identified by the applicant. The only inconsistencies in the complainant's accounts were a complaint of an attempt at anal intercourse, and an allegation of removal of all of her clothes which were given in evidence at the trial for the first time. These may not have been matters of no significance but they are explicable by the complainant's age, distress and understandable shame at what happened. Nothing turns on the omission of what I take to be matters of detail only, in her statement to the police officer who interviewed her. The case was in my view an overwhelmingly strong one.

216 I would grant special leave to appeal and dismiss the appeal.

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234 s 6(1) *Criminal Appeal Act* 1912 (NSW) provides:

> "The court on any appeal under section 5(1) against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any other ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal; provided that the court may, notwithstanding that it is of opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."