The silent accused

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Introduction

Prior to the commencement of the *Evidence Act 1995 (NSW)*, judicial comment on an accused person's election not to give evidence was prohibited in New South Wales by statute.[1] The prohibition dated back to the time when accused persons were first given the right to give evidence on their own behalf in criminal trials. Making accused persons competent to testify in their own defence might prejudice the accused who elected not to exercise this new right by the drawing of adverse inferences from a failure to testify.[2] The prohibition on comment by judges and prosecutors was designed to allay these fears.

Ending the prohibition on judicial comment in New South Wales

In time, however, questions were raised about the sense of a blanket provision which prevented trial judges from making any comment to increasingly sophisticated jurors, many of whom would be well aware of the right of an accused person to testify. The prohibition meant that uninstructed jurors with that awareness in a case where an accused did not testify 'might well draw inferences more adverse than those legitimately available'.[3]

Therefore, in 1995 s407 of the *Crimes Act 1900* was repealed and replaced by s20 of the *Evidence Act 1995* which provides, in part, as follows:

> (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 charged.

The prohibition on prosecutors commenting on an accused's failure to testify remains, but judges may now comment on such a failure provided they do not suggest the failure was due to the accused being, or believing that he or she was, guilty of the offence concerned.

It was, perhaps, inevitable that a tension would develop between the perceived limits on judicial comment about the silent accused prescribed by s20(2) on the one hand and the earlier authority laid down by the High Court in its decision in *Weissensteiner v R*[4] on the other. The conflict, which concerns what inferences the judge might instruct a jury could be drawn from the accused's silence and whether the judge can give a *Jones v Dunkel* direction in that situation, has recently been at least partially resolved by the High Court in its decision in *RPS v R*.[6]

The unusual case of *Weissensteiner*

Before considering *RPS* it is useful to consider the High Court's decision in *Weissensteiner*, an appeal which concerned an extraordinary factual situation. The appellant was charged in the Supreme Court of Queensland with the murder of Bayerl and Zack and of the theft of the sailing vessel *Immanuel*, which had been owned by Bayerl. The crown case was entirely circumstantial. Bayerl and Zack met in Cairns in April 1989 and began living together. They planned to get married after cruising the Pacific on the *Immanuel*. Both had spent most of their savings on its alteration. The appellant answered an advertisement by Bayerl for casual work on the boat in August 1989. He agreed to work on the boat for no wages and Bayerl and Zack agreed to take him on their cruise. The boat was launched in late September and the last contacts Bayerl and Zack had with family, friends or acquaintances occurred in late November 1989. The boat was seen 15 nautical miles from Cairns with the three on board. Zack was about four months pregnant at this time. Bayerl and Zack were never seen again.

The *Immanuel* was seen again in Cairns harbour in late December 1989 and in January 1990 but only the appellant was observed to be on board. In dealings with the Australian Customs Service at this time the appellant said that Bayerl and Zack were in the Atherton Tablelands. The appellant left Cairns on the boat on 17 January 1989 and spent the next

eight months cruising the Pacific. During this time all contact between Bayerl, Zack and their respective families ceased, despite previous regular contact. Their bank accounts were not operated and there was no record of medical treatment of Zack or the birth of a child. The appellant during his travels told a number of inconsistent stories about the identity of the owner of the boat and the whereabouts of Bayerl and Zack. When he was arrested by Interpol in the Marshall Islands in August 1990, numerous possessions of Bayerl and Zack, including unused infant products such as nappies, were found on board the *Immanuel*.

At trial the prosecution case depended upon this abundant circumstantial evidence that Bayerl and Zack were not only missing, but dead. The appellant gave no evidence and did not call any evidence. In Queensland a trial judge was not precluded from commenting on the failure of an accused to give evidence. The trial judge directed the jury that they might more safely draw an inference of guilt from the evidence because the appellant did not give evidence of relevant facts which could be perceived to be within his knowledge. The only ground of appeal was that this was a misdirection.

In dismissing the appeal Macon CJ, Deane and Dawson JJ said:[7]

> ...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 the 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 become rational or reasonable in the absence of evidence to support them when that evidence, if it exists at all, must be with in the knowledge of the accused.

In their joint judgment Brennan and Toohey JJ, the other two members of the majority, held that:[8]

> ...in...jurisdictions where there is no statutory prohibition against judicial comment, a judge may tell the jury that where the facts which they find to be proved by the evidence can support an inference that the accused committed the offence charged and where it is reasonable to expect that, if the truth were consistent with innocence, a denial, explanation or answer would be forthcoming, the jury may take into account in determining whether the inference should be drawn...as a consideration making the inference of guilt from the evidence for the prosecution less unsafe than it might otherwise appear.

All members of the majority were careful to emphasise the limited use of a failure to testify. Such silence does not amount to an implied admission, or a fact which, together with other facts can be used to infer guilt and it cannot be used to fill gaps or strengthen weaknesses in the prosecution case.[9] Not every case would call for evidence from the accused containing explanations or contradictions. There might be a number of reasons for silence. All members of the majority held that the appellant's failure to explain his possession of the boat in the absence of Bayerl and Zack and his conflicting accounts of their whereabouts called for an explanation which was not forthcoming. His failure to give evidence therefore strengthened the prosecution case by making the inferences for which the prosecution contended more easily drawn.[10]

In dissenting, Gaudron and McHugh JJ found support in the authorities for the proposition that judicial comment where an accused remained silent at trial could only go so far as referring to the failure to provide an explanation or answer as might be expected if the truth were consistent with innocence, not the failure to give evidence as such.[12] Directions of this type:

> ...should be given in terms of the unexplained facts, rather than in terms of the failure to give evidence...and...should be precisely framed in terms of the particular facts which call for explanation in the sense indicated.[13]

To the minority, the directions given were defective because they referred to the failure to give evidence, rather than to unexplained facts, and were not confined to the appellant's unexplained possession of the *Immanuel* in the absence of Bayerl and Zack and his failure to explain the different accounts given by him of their whereabouts.[14]

Tension between *Weissensteiner, Jones v Dunkel* and s20(2) of the Evidence Act 1995

The potential for misunderstanding or conflict between the principles articulated in *Weissensteiner* and *Jones v Dunkel* on the one hand, and s20(2) on the other became apparent after the decision of the New South Wales Court of Criminal Appeal in *R v OGD*[15]. That was an appeal against convictions for a number of sexual offences. The complainant, who was a nephew of the appellant, gave direct evidence in relation to the alleged offences. There was also evidence of an admission by the appellant to the complainant's mother that he had had sex with the complainant about ten times. The appellant did not give evidence at the trial. Objection was taken on appeal to a direction given by the trial judge in the following terms:[16]

> If you are satisfied that the accused could have given evidence from his personal knowledge of the events about which the complainant and [Mrs. B] 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 decide from the accused's election, not to deny or contradict that evidence, *that nothing he could say would have assisted him in the trial*. You are entitled to use the accused's election not to deny or to contradict the evidence of the complainant and [Mrs B] to which I have referred, as a circumstance which leads you to accept more fully, that evidence. [emphasis added]

The emphasised portion of this direction will be recognised as the inference referred to in *Jones v Dunkel* in situations of failure to give evidence (in that case the failure was that of a defendant in a civil trial).

Gleeson CJ, with whom Grove and Sperling JJ agreed, held that three general principles apply:

> (1) The failure of an accused person to give evidence cannot be treated as an admission, by conduct, of guilt;
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> (2) It is commonly appropriate to instruct a jury that failure to contradict or explain incriminating evidence, in circumstances where it would be reasonable to expect it to be in the power of an accused to do so, may make it easier to accept, or draw inferences from, evidence relied upon by the crown;
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> (3) It is ordinarily necessary to warn a jury that there may be reasons, unknown to them, why an accused person, even if otherwise in a position to contradict or explain evidence, remains silent.[17]

Whilst acknowledging that as a matter of legal theory, at least until that point, the observations in *Jones v Dunkel* were not confined to civil trials, Gleeson CJ emphasised the risks and need for caution in applying them to criminal trials. He suggested the prudent course would be to raise the issue with counsel in the absence of the jury before giving any such direction so that its merits could be argued and to afford counsel the opportunity to suggest any reason for the accused's silence or failure to call a witness which may not have occurred to the judge.[18]

Importantly, Gleeson CJ expressly held that the trial judge misdirected the jury when he instructed them that they were entitled to conclude from the accused's silence that nothing he could say would have assisted him at the trial. This was not an available inference in the circumstances of the case.[19]

The High Court in *RPS v R*

Although there is no express approval in *OGD* for the proposition that a trial judge can direct a jury in a trial where the accused does not testify that nothing she or he could say would assist her or him in the trial, *OGD* was taken, for a time, to be authority for this proposition.[20] The majority in *RPS* (in which Gleeson CJ did not participate) expressed doubt that the NSW Court of Criminal Appeal in *OGD* held this, but stated that if it did, it should be overruled.[21]

The facts in *RPS* were similar to *OGD*. The appellant was convicted of a number of sexual offences. The prosecution case depended largely on the evidence of the complainant, who was the appellant's daughter. She gave evidence of a long history of sexual misconduct towards her by the appellant. The only other significant evidence was that of a conversation between the appellant and the complainant's mother, during which the appellant made an alleged admission which the prosecution sought to rely upon as an admission by him of some, but not all, of the acts alleged in the various charges. The appellant did not give evidence at the trial.

In the High Court the majority summarised five salient elements of the trial judge's summing-up to the jury as follows:

> First, the trial judge told the jury that the appellant's election not to contradict the evidence given by the complainant's mother of what was said to be a partial admission, could be taken into account by the jury in 'judging the value of, the weight of' the prosecution's evidence about it…
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> Secondly, he told the jury that in the absence of denial or contradiction of the evidence given of the partial admission they could 'more readily' discount any doubts about the evidence and 'more readily' accept the evidence…
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> Thirdly, he told the jury that if it was reasonable, in the circumstances, to expect some denial or contradiction of the prosecution evidence, they were entitled to conclude that the appellant's evidence would not have assisted him in the trial and that the absence of denial or contradiction was a circumstance which could lead them more readily to accept the evidence given by the witnesses for the prosecution…
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> Fourthly, he said that the appellant's election not to give evidence could not fill any gaps in the prosecution case but could enable them to feel more confident in relying on the evidence tendered by the prosecution…
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> Finally, he said that the absence of evidence from the accused meant that the version of events put in cross-examination of the witnesses for the prosecution was not supported by evidence…[22]

All six High Court Justices in *RPS* rejected the respondent's argument that the third direction summarised above, i.e. that the appellant's evidence would not have assisted him in the trial was not comment of the type proscribed by s20(2) of the *Evidence Act 1995*.[22] As the majority stated:

> Any belief which the appellant held, that his evidence would not have assisted him in his trial, could proceed only from a belief that he was guilty; that is, it could proceed only from a belief that he could not deny or contradict at least some of what had been said against him. No other construction of what was said by the trial judge in that part of his charge was reasonably open to the jury.[24]

The direction that the appellant's evidence would not have assisted him in the trial amounted to a suggestion that the appellant did not give evidence because he was or believed he was guilty of the offences concerned. It was, therefore, not permitted by s20(2).

Applicability of *Jones v Dunkel* and *Weissensteiner* in criminal trials since *RPS*

The strong judgments in *RPS* raise the question of whether it will ever be permissible for a trial judge to give directions along the lines of *Jones v Dunkel* or *Weissensteiner* in criminal trials where an accused does not testify, or does not call a particular witness.

In considering this matter it should be remembered that the High Court majority in *Weissensteiner* did not recommend, where an accused did not testify, directions to the effect that the accused's testimony if given would not have assisted him, i.e. a fully-expressed *Jones v Dunkel* direction against the accused personally. It is clear from *RPS* that such a direction cannot be given in New South Wales since the enactment of s20(2) of the *Evidence Act 1995* because it amounts to impermissible comment. Callinan J also held that such a direction may not be given in relation to an accused person's witness who, if the matter were a civil trial, might be expected to be called.[25] Whilst that majority did not go quite so far as this they did state:

> If the question concerns the calling by the defence of a witness other than the accused, it will also be necessary to recall that the prosecutor 'has the responsibility of ensuring that the Crown case is presented with fairness to the accused' and in many cases would be expected to call the witness in question as part of the case for the prosecution.[26]

In the light of *RPS* it would appear that it will be less likely that a trial judge will give a *Jones v Dunkel* direction in respect of an accused's failure to call a witness.

This leaves the question of the continued applicability of *Weissensteiner* since the introduction of s20(2). Only Callinan J held that the principles stated by the majority in *Weissensteiner* no longer have application in New South Wales due to s20(2). The majority expressed caution in the application of *Weissensteiner* to given sets of facts, stating that:

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

Noting comments in *Weissensteiner* that not every case calls for explanation or contradiction in the form of evidence from the accused,[28] the majority distinguished the facts in *RPS* from those in *Weissensteiner* and noted that the case against the appellant in *RPS* depended ultimately upon acceptance of the complainant's evidence, supported, perhaps, by the partial admission by the appellant. In those circumstances the trial judge was wrong not only to direct the jury that they might conclude that the appellant's evidence would not have assisted him at the trial, but also that they might more readily accept the evidence given by witnesses for the Crown which the appellant was in a position to contradict of his own knowledge. The approach articulated in *Weissensteiner* was not applicable to the facts in *RPS*.[29]

McHugh J preferred the line of reasoning he articulated in *Weissensteiner* in his joint dissenting judgment with Gaudron J. To reconcile appropriately the right to silence with legitimate processes of reasoning based on the lack of denial or explanation by the accused concerning facts consistent with guilt in his knowledge, the trial judge should give directions of the type referred to in *Weissensteiner*, but cast in terms of the unexplained facts, rather than in terms of the failure to give evidence.[30]

Conclusion

Where an accused does not testify in New South Wales, the jury should never be directed that testimony the accused might have given would not have assisted the accused. Whether directions of the type considered in *Weissensteiner* should be given will depend on a very careful assessment of the facts of the case and possible reasons for not testifying, which may include the accused's perception of the relative weakness of the prosecution case. Such directions are less likely to be appropriate in cases based upon direct, as opposed to circumstantial evidence. However, not all circumstantial cases will call for the giving of such directions but only those based upon proven facts which give rise to an apparently damning inference the contradiction of which could only come from the accused. As the facts in *Weissensteiner* itself demonstrate, such cases can be expected to be rare.

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1 Crimes Act 1900 (NSW) s407(2)
2 *Weissensteiner v R* (1993) 178 CLR 217 per Brennan & Toohey JJ at 232; *RPS v R* (2000) HCA 3 per McHugh J at para. 55
3 *R v OGD* (1997) 45 NSWLR 744 per Gleeson CJ at 750
4 (1993) 178 CLR 217
5 (1959) 101 CLR 298
6 (2000) 74 ALJR 449
7 *Weissensteiner v R* (1993) 178 CLR 217 at 227-8
8 Ibid., 236
9 Ibid per Mason CJ, Deane & Dawson JJ at 230-1; per Brennan & Toohey JJ at 238
10 Ibid per Mason CJ, Deane & Dawson JJ at 228
11 Ibid per Mason CJ, Deane & Dawson JJ at 229; per Brennan & Toohey JJ at 235
12 Ibid per Gaudron & McHugh JJ at 245
13 Ibid per Gaudron & McHugh JJ at 246
14 Ibid per Gaudron & McHugh JJ at 247
15 (1997) 45 NSWLR 744
16 Ibid., 749
17 Ibid., 750-1
18 Ibid., 752-3
19 Ibid., 753
20 *RPS v R* (supra) per Gaudron ACJ, Gummow, Kirby & Hayne JJ at 456
21 Ibid
22 Ibid., 453
23 Ibid per Gaudron ACJ, Gummow, Kirby & Hayne JJ at 454; per McHugh J at 462; per Callinan J at 469
24 Ibid per Gaudron ACJ, Gummow, Kirby & Hayne JJ at 454
25 Ibid per Callinan J at 469
26 Ibid per Gaudron ACJ, Gummow, Kirby & Hayne JJ at 456
27 Ibid per Gaudron ACJ, Gummow, Kirby & Hayne JJ at 455-6
28 *Weissensteiner* (supra) per Mason CJ, Deane & Dawson JJ at 228
29 *RPS v R* (supra) per Gaudron ACJ, Gummow, Kirby & Hayne JJ at 457
30 Ibid per McHugh J at 462