SILENCE IN COURT - THE EVIDENTIAL SIGNIFICANCE OF AN ACCUSED PERSON'S FAILURE TO TESTIFY

ANDREW PALMER*

I. INTRODUCTION

Shortly after the accused was first given the right to testify at his or her own trial, Isaacs J justified the prohibition against judicial comment on the accused's failure to exercise that right with the claim that the legislature had been "determined to prevent the enactment, if not used by the prisoner, from being employed as a means of inculpation".[1] In 1993, however, the High Court confirmed that despite this original legislative intention, the accused's failure to exercise the right to testify can now be used as a means of inculpation. The case was *Weissensteiner v R* ("*Weissensteiner*"),[2] and while it was undoubtedly consistent with a long line of authority,[3] what made it a little surprising was that the court had so recently ruled in *Petty and Maiden v R* ("*Petty and Maiden*")[4] that a fundamental incident of a suspect's right to pre-trial silence is that no adverse inference can be drawn from the fact that the accused chooses to exercise that right. As the Court acknowledged then, to allow such an inference to be drawn

---

* BA (Well), LLB (Hons) (Mon), BCL (Oxon); Lecturer, Law School, University of Melbourne.

1 *Bataillard v R* (1907) 4 CLR 1282 at 1291.

2 (1993) 178 CLR 217.

3 Including *R v Burdett* (1820) 106 ER 873; *Kops v R* [1894] AC 650; *Morgan v Babcock & Wilcox Ltd* (1929) 43 CLR 163; *Tumahole Bereng v R* [1949] AC 253; *May v O'Sullivan* (1955) 92 CLR 654; *Bridge v R* (1964) 118 CLR 600.

4 (1991) 173 CLR 95.

"would be to erode the right to silence or to render it valueless".[5] After *Petty and Maiden* it was tempting to imagine that, given an appropriate opportunity, the High Court might also rule that the accused's exercise of their right to at-trial silence could not be used against them.[6] Understanding why they did not is one of the chief purposes of this article.

A. The Facts of *Weissensteiner*

The facts of the case were as follows. The accused was charged with the murder of Hartwig Bayerl and Susan Zack and the theft of their yacht, the *Immanuel*. Bayerl and Zack had met in Cairns in April 1989 and had begun living together shortly thereafter. The two wished to marry but, on the urging of Zack's parents, had decided to delay their wedding until after they had cruised the Pacific together. In August 1989 Bayerl advertised for someone to assist them in preparing the boat for the cruise. The accused answered the advertisement and agreed to accept passage on the cruise rather than wages in return for his work on the boat.

The last traces of Bayerl and Zack were in late November 1989. In a letter postmarked 22 November, Zack told her sister her that she was four months pregnant and intended to see a doctor once a month until she gave birth, hopefully in a hospital, possibly in Cairns. Bayerl spoke to his mother in Austria on 26 November and told her that they were leaving soon. Zack used her credit card on 27 November. Bayerl and Zack were then seen aboard the *Immanuel* near Fitzroy Island, about 15 nautical miles from Cairns, but the two were never seen again, nor were there any subsequent traces of them. Although the *Immanuel* was seen in Cairns in late December 1989 and again in January 1990, only the accused was observed to be aboard.

On 3 January the accused told an officer of the Australian Customs Service in Cairns that Bayerl was in Kuranda, a town in the Atherton Tablelands near Cairns. On 4 January he told a Cairns port officer that both Bayerl and Zack were in Kuranda and would be until about 10 January. On 12 January he told an immigration officer in Cairns that he now intended to meet Bayerl in Papua New Guinea. He then spent about eight months cruising between various Pacific Islands. On 21 February he told a sailor in Kosrae that he had bought the boat from an old man in Cairns. In June 1990 he told police in Kiribati that Bayerl had lent him the boat, and that Bayerl and Zack were in Kununurra in the north-west of Australia. A week or two later he told a customs officer in Kiribati that Bayerl was staying with Zack in Cairns.

In August 1990, as a result of an Interpol search for Bayerl and Zack, the accused was taken into custody in Majuro in the Marshall Islands. He told the Majuro police that he had dropped off Bayerl and Zack in Cairns, that they were now living off the land in Kununurra, and that he was waiting for a letter from Bayerl. He told the same story to Australian police when they arrived in Majuro. When the boat was searched, however, many of Bayerl and Zack's personal

---

5 *Ibid* at 99 per Mason CJ, Deane, Toohey and McHugh JJ.

6 See for example the comments of A Ligertwood, *Australian Evidence*, Butterworths (2nd ed, 1993) p 247.

possessions were still aboard. These included nappies and other equipment which Zack had presumably bought for her pregnancy, Bayerl's German bible given to him by his father, which he always took with him and to which he regularly referred, Bayerl and Zack's camping equipment and, in a concealed place, two rifles which had been in Bayerl's possession since 1986. There was evidence that Bayerl was a well organised traveller who always ensured that he was well equipped.

After his arrest the accused told two friends in Majuro that he had dropped Bayerl and Zack off in Bougainville, where they had been engaged in arms smuggling. While in custody he told a friend who urged him to return to Australia to face charges that "they have nothing. They have no bodies. They have no proof." He told a fellow prisoner, in German, that "[t]hey cannot find those two." On
3 September he attempted to escape from custody, but was recaptured and shortly thereafter returned, with his consent, to Cairns where he was charged with the murder of Bayerl and Zack and the theft of the *Immanuel*.

At the accused's trial, the prosecution case essentially rested on the evidence of the various inconsistent explanations given by the accused as to how he had come to be in possession of the *Immanuel*, on the inference from the finding of Bayerl and Zack's personal possessions aboard the *Immanuel* (on which they had spent all their savings) that they had not left the boat voluntarily and on evidence that there had been no traces of Bayerl and Zack - in Cairns, Kununurra, or anywhere else - since late November 1989 when the *Immanuel* had been seen near Fitzroy Island. The accused called no witnesses and did not himself testify. The question for the High Court was whether the trial judge had erred in giving the following direction:

> As has already been said to you, the Crown bears the onus of satisfying you beyond reasonable doubt that the accused is guilty of the offence with which he is charged. The accused bears no onus. He 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.[7]

The approval of this direction by a majority of the High Court gives rise to three sets of questions. Firstly, how exactly can a person's silence in court be used against them? What inferences, in other words, does *Weissensteiner* permit, and when are they permitted? Secondly, is it possible to reconcile the Court's decision in *Weissensteiner* with its earlier decision in *Petty and Maiden*? Is there, in other words, a proper basis for distinguishing between pre-trial and at-trial silence? Finally, how, and in what kind of cases, is *Weissensteiner* likely to be applied?

7 Note 2 *supra* at 223-4.

II. PERMISSIBLE USES OF THE ACCUSED'S SILENCE

Three judgments were delivered. The first two judgments - those of Mason CJ, Deane and Dawson JJ, and Brennan and Toohey JJ - took the same approach and reached the same result. The third judgment - that of Gaudron and McHugh JJ - endorsed a different approach and reached a different result.

A. The Majority in *Weissensteiner*

The majority were very firmly of the view that an accused person's failure to testify is not itself a fact from which an inference of guilt can be drawn. It is not, for example, an "admission of guilt by conduct" because it is "the exercise of a right which the accused has to put the prosecution to its proof".[8] Because failure to testify is not "evidence", it cannot be used as a "make-weight".[9] This means that "if there is insufficient evidence from which an inference of guilt could be drawn, a failure to testify cannot supply the deficiency";[10] it can not "fill in any gaps in the prosecution case".[11]

The use which may be made of an accused person's failure to testify is more limited. If an inference of guilt is already open on the facts established by the prosecution, the accused's failure to testify may make it safer to draw that inference. This 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 it 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.[12]

Thus, the failure to testify may only be taken into account in determining whether or not to accept the inference of guilt contended for by the prosecution and it may only be used in this way "where it is reasonable to expect that, if the truth were consistent with innocence, a denial, explanation or answer would be forthcoming".[13] Furthermore, as Mason CJ, Deane and Dawson JJ noted:

> Not every case calls for explanation or contradiction in the form of evidence from the accused. There may be no facts peculiarly within the accused's knowledge. Even if there are facts peculiarly within the accused's knowledge the deficiencies in the prosecution case may be sufficient to account for the accused remaining silent and relying upon the burden of proof cast upon the prosecution. Much depends on the circumstances of the particular case and a jury should not be invited to take into account the failure of the accused to give evidence unless that failure is clearly capable of assisting them in the evaluation of the evidence before them.[14]

---

8 *Ibid* at 229 per Mason CJ, Deane and Dawson JJ.

9 *Ibid.*

10 *Ibid* at 235 per Brennan and Toohey JJ.

11 *Ibid* at 229 per Mason CJ, Deane and Dawson JJ.

12 *Ibid* at 227-8 per Mason CJ, Deane and Dawson JJ; see also 235-6 per Brennan and Toohey JJ.

13 *Ibid* at 236 per Brennan and Toohey JJ.

14 *Ibid* at 228.

The majority's approach therefore rests on the distinction

> between drawing an inference of guilt merely from silence and drawing an inference otherwise available more safely simply because the accused has not supported any hypothesis which is consistent with innocence from facts which the jury perceives to be within his or her knowledge.[15]

The same approach is taken in the *Evidence Act* 1995 (Cth).[16] There are ostensibly, then, three pre-conditions to the use of the accused's at-trial silence in the manner endorsed by the majority. Firstly, the prosecution case must have attained a threshold of sufficiency; that is, it must be able to support an inference of guilt. Secondly, the accused must be seen to be in possession of some knowledge of the events forming the subject of the charge which is peculiar to him or herself. Thirdly, it must be reasonable to expect that the accused would give that version of events if he or she were innocent.

It seems, however, that this third pre-condition is otiose. Thus, while the majority recognised that "an accused may have reasons not to give evidence other than that the evidence would not assist his or her case", the possibility that such reasons exist does not mean that the accused's silence can not be used to assist the jury in the evaluation of the prosecution case; it merely means that "the jury must bear this in mind" and that "it is appropriate for the trial judge to warn the jury accordingly".[17] The only situations which do, according to the majority, render unreasonable the expectation that the accused would offer an explanation are those referred to above: when there are deficiencies in the prosecution case, or when there are no facts peculiarly within the accused's knowledge. These two situations clearly correspond to the first two pre-conditions. To say, therefore, that it is reasonable to expect that the accused would testify if innocent, is really no more than a way of saying that the first two pre-conditions have been met.

Applying their approach to the facts of the case, the majority argued that:

> The appellant, if anyone, could have explained, not only his possession of the boat, but his possession of the boat in the absence of Bayerl and Zack. His failure to give evidence was, therefore, capable of strengthening the prosecution case by enabling the jury, in the absence of any explanation by him, to accept the inferences for which the prosecution contended as the only rational inferences from the evidence. Indeed, in the circumstances of the present case, it appears to us that a direction of the kind given by the learned trial judge essentially involved no more than a statement of the obvious.[18]

---

15 *Ibid* at 229 per Mason CJ, Deane and Dawson JJ.

16 The Act, which came into force on 18 April 1995, is largely based on the Australian Law Reform Commission's evidence reports (ALRC, Interim Report No 26, *Evidence* (1985); ALRC, Report No 38, *Evidence*, (1985)). Section 20(2) provides that: "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." That this is intended to give effect to the same approach taken by the majority in *Weissensteiner* is clear from the commentary on this proposal in ALRC Interim Report No 26, *Evidence* (1985) at [549]-[558]. The Act is intended to form the basis for uniform legislation in all Australian jurisdictions. Legislation has been passed in the NSW Parliament to come into effect on 1 September 1995.

17 Note 2 *supra* at 228 per Mason CJ, Deane and Dawson JJ. See note 33 *infra* for a list of some of the reasons why an innocent accused might choose to not testify.

18 Note 2 *supra* at 230-1 per Mason CJ, Deane and Dawson JJ; see also 238 per Brennan and Toohey JJ.

B. The Minority in *Weissensteiner*

Although the remaining two judges, Gaudron and McHugh JJ, agreed with the majority that an accused person's failure to testify could have evidential significance, they disagreed with the majority, both about what that significance was and about when it would arise. Firstly, however, Gaudron and McHugh JJ asserted that if anything has evidential significance, it is the failure to *explain* rather than the failure to testify *per se*. I shall return to this distinction shortly. Secondly, and in stark contrast to the approach taken by the majority and in the *Evidence Act* 1995 (Cth), they asserted that failure to explain *can* amount to "conduct which proves or tends to prove guilty knowledge on the part of the accused and is, itself, evidence".[19] In other words, the accused's failure to testify can provide a further foundation for an inference of guilt, rather than merely making it safer to draw an inference of guilt which is already open.

Finally - and this will return us to the difference between failure to explain and failure to testify - their Honours argued that the failure to testify can only have this significance in a particular case if it is "reasonable, given the circumstances of the case, to expect that an innocent person would offer an explanation of the events in question and an explanation has not been advanced in some other way, either before or during the trial".[20] So what are the circumstances in which it would be reasonable to expect that an innocent person would offer an explanation? According to Gaudron and McHugh JJ, they are neither "susceptible of definition" nor capable of "being identified with particularity", although it can be said that they are "confined by the presumption of innocence and the duty of the prosecution to prove guilt beyond reasonable doubt".[21] In general, however, the circumstances where an expectation of explanation would be reasonable fall into two broad categories.

The first category, of which the archetypal example is provided by the recent possession of stolen goods,[22] is "where the objective facts give rise to an inference (in the sense of suggesting one and only one explanation) that the accused committed or was a party to the commission of the offence charged";[23] cases where, in other words, the accused was caught "practically red-handed".[24] The second category is where the circumstances "suggest that the accused is possessed of some special knowledge in the sense that he or she, above all others, knows something of the offence charged or something bearing on it".[25] In both categories, the facts themselves must be "such as to give validity to an assumption that an innocent person would offer an explanation. Thus, it is sometimes said that the circumstances must be such that failure to explain is inconsistent with innocence."[26]

---

19 *Ibid* at 244-5.
20 *Ibid* at 242.
21 *Ibid* at 243-4.
22 See *Bruce v R* (1987) 74 ALR 219.
23 Note 2 *supra* at 244.
24 *Ibid*, quoting *R v McNamara* [1987] VR 855 at 860.
25 *Ibid* at 244.
26 *Ibid*.

The point about failure to *explain* - rather than testify - is that "[i]n many cases, an explanation can be offered without the giving of evidence: it may, for example, be advanced when the person concerned is first confronted with the facts or it may be advanced in the course of the trial without evidence from the accused".[27] This is more than just a disagreement about terminology. The majority's approach could conceivably allow the accused's failure to testify to be used against them even if the accused had offered an explanation to the police or at the committal. The minority's approach would not.

It is not, however, just the failure to offer an explanation which may be inconsistent with innocence; it is the failure to offer an explanation at the first real opportunity: "the fact that an explanation is advanced some time after a real opportunity to explain first presents itself may bear on whether it is to be accepted as a reasonable possibility".[28] This immediately raises the prospect of a clash with *Petty and Maiden*. If an explanation is not given in response to police questioning, then has not the accused failed to offer an explanation at the first real opportunity, and is not his or her conduct therefore inconsistent with innocence? In other words, under the approach of Gaudron and McHugh JJ, may not the exercise of the right to pre-trial silence sometimes amount to evidence against the accused? This clash is only avoided through careful definition: a situation in which the "accused, having been duly cautioned, declines to answer questions by the police in the exercise of his right to do so" does not, according to their Honours, provide a "real opportunity to explain".[29] Presumably, given the decision in *Petty and Maiden*, the same must also be said of committal proceedings.

C. Comparing the Minority and Majority Approaches

The majority and the minority therefore disagreed both about *what* it was that can be used - failure to testify or failure to explain - and about *how* it can be used. For the minority, failure to testify is itself an incriminating circumstance which adds weight to the prosecution case; for the majority, it merely makes it safer to draw an inference already open on the evidence. The first disagreement is actually a corollary of the second; if the question is whether the accused has, through his or her conduct, shown a consciousness of guilt, then clearly we must examine the whole of his or her conduct and not just his or her conduct at trial. If an explanation has been offered before trial, then we cannot safely infer from the accused's silence at trial that he or she is silent because conscious of his or her guilt. But if failure to testify is merely something to be used in the evaluation of the evidence, then the focus can quite properly be limited to what happens at trial.

The majority and minority were, however, in substantial agreement, at least in principle, about *when* the failure to testify or explain could be used against the accused. Under both approaches, this failure is only significant when the facts are already sufficient to give rise to an inference of guilt. For the majority, this condition must be coupled with the perception that the facts which would support

27 *Ibid* at 245.
28 *Ibid* at 246.
29 *Ibid*, quoting *Bruce v R* note 22 *supra* at 219.

innocence - if indeed there are any such facts - must be peculiarly within the knowledge of the accused. For the minority, 'peculiar knowledge' is unnecessary in cases where an inference of guilt is really the only possible inference from the facts established by the prosecution; that is, in the 'caught red-handed' cases.

But despite this substantial agreement about the conditions which allow the relevant inference to be drawn, the minority disagreed with the majority about whether or not those conditions were satisfied in the actual case before them. The minority did agree that unexplained possession of the boat could give rise to an inference of guilt in relation to that possession, but held that this inference was only relevant to the charge of theft. As far as the murder charges were concerned, the minority held that "there is nothing in the evidence to provide the basis for an assumption that the appellant had some special knowledge as to the whereabouts of Ms Zack and Mr Bayerl".[30] For this reason, the minority held that there had been a serious miscarriage of justice and would have allowed the appeal.

III. DISTINGUISHING PRE-TRIAL AND AT-TRIAL SILENCE

As already noted, the decision in *Weissensteiner* is undoubtedly consistent with a long line of authority;[31] but authority aside, why should the exercise of the right to at-trial silence have adverse consequences for the accused when the exercise of the right to pre-trial silence does not? It is, of course, important to note at the outset that we are talking about two different rights. Because both rights confer a right to silence, it is easy to assume that they are essentially just two manifestations of the same core right: the right to silence. They are not. While the right to pre-trial silence ("the right to silence") is often said to represent the common law's reaction to the oppressive procedure of Star Chamber in the 17th century, the right to not testify is simply a corollary of the fact that the statutes, which at the end of the 19th century made the accused for the first time a competent witness at his or her own trial, did not also make him or her a compellable witness. Indeed, it might be more accurate to talk of the accused having a right to testify, rather than a right to not testify. This difference in derivation does not in itself demand a difference in treatment, but it does suggest that it may be possible to identify some reasons which justify this differential treatment. Three such sets of reasons are considered below.

A. Common Sense

There is a robust Benthamite common sense underlying much of the reasoning of the judgments in *Weissensteiner*, particularly that of Gaudron and McHugh JJ.[32] The principal problem with this line of reasoning is not that it is fallacious,

---

30 *Ibid* at 247.

31 See note 3 *supra*.

32 See, in particular, Bentham's well known comment in *A Treatise on Judicial Evidence* (1825) p 241, that "innocence claims the right of speaking, as guilt invokes the privilege of silence"; for a modern re-working of this view see G Williams, "The Tactic of Silence" [1987] *New Law Journal* 1107.

although it is clearly open to question, but that it does not provide a stable basis for treating differently pre-trial and at-trial silence.[33] It is true that there are situations where common sense suggests that an innocent person would offer an explanation, or at the very least assert their innocence, but this common sense surely applies as much to silence in the face of police questioning as it does to silence in the face of the prosecution case. If this sort of common sense truly is the justification for *Weissensteiner*, then the decision threatens the stability of *Petty and Maiden*.

This is particularly true of the judgment of Gaudron and McHugh JJ. It will be remembered that their Honours held that what was evidentially significant was the failure to explain rather than the failure to testify *per se*. Furthermore, Gaudron and McHugh JJ specifically held that failure to offer an explanation at the first real opportunity could provide the basis for an inference of guilt. A direct clash with *Petty and Maiden* was only avoided through what effectively amounts to a deeming provision: police questioning does not, they held, provide a real opportunity for offering an explanation. The problem with the deeming provision is that it is always possible for another court to reverse or refine it. A subsequent court might, for example, hold that if a solicitor is present during questioning so that legal advice is available to the accused, then police questioning does provide a real opportunity for explanation. And the deeming provision simply begs the question as to *why* police questioning does not provide a real opportunity for explanation.[34] The answer cannot simply be that the accused has a *right* not to answer police questions, because he or she has just as much of a right to not testify in court.

In any case, a whole host of uses of and inferences from various forms of evidence are suggested by common sense but prohibited by law. Indeed, a convincing case could be mounted that the law of evidence largely exists to counteract common sense rather than to reflect it.[35] In other words, the argument from common sense merely shows how the failure to testify is relevant; it can not explain why its use should be permitted. Of course, the law only counteracts common sense when there are compelling reasons to do so, but it needs first to be shown that there are no such reasons before common sense can be given sway.

33 "A new opportunity had been afforded to a prisoner to establish his innocence if he could. But reasons other than a sense of guilt, such as timidity, weakness, a dread of confusion or of cross-examination, or even the knowledge of a previous conviction, certainly in a summary proceeding, and perhaps in the case of a trial for an indictable offence, might easily prevent the accused person from availing himself of the new means permitted by law": *Bataillard v R* note 1 *supra* at 1290-91 per Isaacs J. See also J Heydon, "Silence as Evidence" (1974) 1 *Melbourne University Law Review* 53 at 55.

34 The same question-begging is apparent when the matter is approached from the other end, ie via *Petty and Maiden* note 4 *supra*. Justice Gaudron states (at 127) that an adverse inference from a failure to explain will not "be drawn in circumstances involving a clear indication that there is no obligation to explain as, for example, when a police caution is administered." But nor is there any 'obligation' to explain by testifying in court: an 'obligation' only arises because of the fact that an adverse inference may be drawn against the accused if he or she chooses not to testify. If the distinction is based on this, then the argument is clearly circular.

35 See, for example, the comment of Lord Cross of Chelsea in the similar facts case of *DPP v Boardman* [1975] AC 421 at 460: "If two boys make accusations of that sort at about the same time independently of one another then no doubt the ordinary man would tend to think there was 'probably something in it'. But it is just this instinctive reaction of the ordinary man which the general rule is intended to counter."

References to common sense therefore leave unanswered the key question: why is it legitimate to draw an adverse inference from a person's silence in court, but not from their silence during official investigation? Before answering that question, however, it is necessary to deal with another of the possible justifications for differential treatment of pre-trial and at-trial silence.

B. Unavoidability

This is the argument that adverse consequences for the accused simply cannot be prevented in the case of at-trial silence. While the accused can be protected from the possible consequences of a decision to exercise the right to pre-trial silence through the simple expedient of ensuring that the jury remains ignorant of the fact that the accused has chosen to exercise this right, the jury will see for itself that the accused has not testified. If, as seems likely, the jurors are also aware that the accused had the right to testify, then they will correctly infer that the accused did not testify because he or she *chose* to not testify; knowing this, it also seems likely that the jury might use this fact against the accused. As Brennan and Toohey JJ noted:

> Once juries came to know that the accused is a competent witness in his own defence, it was inevitable that they would take account of an accused's failure to testify when his testimony might be expected to deny, explain or answer the case against him.[36]

There is, however, a difference between legitimacy and inevitability. As the majority of the United States Supreme Court commented in *Griffin v California*, "[w]hat the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnises the silence of the accused into evidence against him is quite another".[37] Rather than bowing to the inevitability of an adverse inference, the trial judge could contest it by instructing the jury that the accused is not required to testify and the fact that he or she chose not to do so should not prejudice him or her in any way. Indeed the United States Supreme Court has, as a corollary of its decision in *Griffin v California*, held that the accused is entitled to just such an instruction.[38]

It is therefore impossible to accept the claim of Mason CJ, Deane and Dawson JJ that "the jury cannot, *and cannot be required* to, shut their eyes to the consequences of exercising the right [to not testify]".[39] The likely efficacy of an instruction such as that required in the United States is almost besides the point; if it is illegitimate for the accused's silence at trial to be used adversely then the jury should be directed to that effect. The key question therefore remains the question of legitimacy.

C. Legitimacy

We can accept that a person's silence in the face of official questioning is relevant to the question of their guilt and still hold that this silence must not

36 Note 2 *supra* at 233.
37 380 US 609 at 614 (1965).
38 See *Carter v Kentucky* 450 US 288 (1981); *James v Kentucky* 466 US 341 (1984).
39 Note 2 *supra* at 229 (emphasis added).

actually be used against that person. We can do so because we believe that the right to pre-trial silence is so important that it must not be undermined in any way. We could do the same with a person's silence in court, but only if it is possible to identify a similar importance for the right to not testify. If there are no reasons why it would be illegitimate or dangerous for a jury to use a person's silence in court against them, then there is no reason why the jury should not be allowed to do so. So are there any such reasons? It may be most convenient to begin by considering what it is that makes it illegitimate or dangerous for a jury to use an accused person's exercise of their right to pre-trial silence against them and seeing whether this also applies to the use of at-trial silence.

One rationale advanced for the right to pre-trial silence is based on the allocation of the burden of proof in a criminal trial. In *Petty and Maiden*, for example, Gaudron J stated that a direction which allows the jury to use failure to advance a defence before trial as a reason for rejecting that defence, improperly "reduces the burden on the prosecution to prove guilt beyond reasonable doubt" by

> ...subjecting the accused person to the risk that, if he does not signal before trial what he is under no obligation to prove in his trial, namely, the basis of his innocence, that may be used to establish his guilt.[40]

But if the accused is under no obligation to prove her innocence at trial, then surely her failure to do so through her own testimony should no more be used to establish her guilt than should her failure to do so by disclosing her defence before trial. Surely that too would be to improperly reduce the burden of proof on the prosecution. At first sight, then, a rationale for the right to silence based on the allocation of the burden of proof provides no basis for any difference in the treatment of pre-trial and at-trial silence. But the objection to the use of a person's silence in the face of official questioning - or to any suggestion that a person should be compelled to answer such questions - is not simply based on the idea that it is for the prosecution to prove guilt; it is also based on the idea that it is for the prosecution to do so without the assistance of the accused. As Deane, Dawson and Gaudron JJ noted in *Environment Protection Authority v Caltex,* the accused's right to avoid answering incriminating questions

> ...is to be explained by the principle, fundamental in our criminal law, that the onus of proving a criminal offence lies upon the prosecution *and that in discharging that onus it cannot compel the accused to assist in any way.*[41]

In other words, the right to pre-trial silence is based on notions of what constitutes fairness in the state's methods of investigating and proving an alleged offence: "[t]o allow the Crown to prove its case by requiring the accused to convict him or herself from that person's own mouth was seen as oppressive".[42]

---

40 Note 4 *supra* at 129.

41 (1993) 118 ALR 392 at 427 (emphasis added); see also 416 per Brennan J and 431 per Deane, Dawson and Gaudron JJ: "In the end, [the privilege against self-incrimination] is based upon the deep-seated belief that those who allege the commission of a crime should prove it themselves and should not be able to compel the accused to provide proof against himself." The exact relationship between the privilege against self-incrimination and a suspect's right to silence is, of course, a matter of some debate, but it seems clear from other comments made on page 431 that their Honours did intend the above words to apply to the right to silence here under consideration.

42 *Ibid* at 440 per McHugh J.

And as the High Court emphasised in *Petty and Maiden*, the protection offered by the right to silence would be illusory if a person's silence could be used against them. So does the same rationale apply to the right to not testify? Not according to Gaudron and McHugh JJ, who argued that the privilege against self-incrimination is quite irrelevant here because

> ...in circumstances involving an assumption that an innocent person would offer an explanation, the accused is not asked to testify against himself, but in favour of himself.[43]

This argument is surely over-stated. Of course, the accused is unlikely to deliberately incriminate him or herself during his or her evidence in chief, but it will clearly be one of prosecuting counsel's objectives during cross-examination of the accused to attempt to obtain an incriminating admission. Nor can the accused decline to answer a question in cross-examination on the grounds that the answer might tend to incriminate him or herself in the crime charged because the accused has lost this aspect of the privilege against self-incrimination as a result of the various pieces of Australian legislation derived from, or equivalent to, section 1(e) of the *Criminal Evidence Act* 1898 (UK).[44] The comments of Gaudron and McHugh JJ would be true of an accused who chose to give unsworn evidence and thus avoid subjecting him or herself to cross-examination, but the right to do so has now been abolished in all Australian jurisdictions.

The decision in *Weissensteiner* therefore subjects the guilty accused to a variation on the "cruel trilemma" identified by Mason CJ and Toohey J in *Environment Protection Authority v Caltex*: the possibility of punishment resulting from the failure to testify because that failure will make it safer for the jury to accept the prosecution case, punishment resulting from truthful testimony, or perjury (and the consequential possibility of punishment).[45] The fact that *Weissensteiner* will only pose this trilemma for a guilty accused is beside the point because the whole point of the privilege against self-incrimination is that it "confers on the guilty a freedom to refrain from providing information that could establish their guilt and thereby either to avoid conviction or substantially to reduce its likelihood".[46] It does so because to do otherwise would contravene our notions of fairness. It is not immediately obvious why the accused should not have this same freedom during his or her trial as well as during pre-trial questioning.

Furthermore, an innocent accused who is likely to present poorly as a witness faces an equally cruel dilemma.[47] This will be particularly true for the accused with a criminal record, but a skilled cross-examiner may be able to make even an innocent accused with a clean record appear guilty. What *Weissensteiner* confirms, then, is that the "new opportunity...afforded to a prisoner to establish his

---

43 Note 2 *supra* at 245.

44 *Crimes Act* 1958 (Vic) s 399(4); *Evidence Act* 1929 (SA) s 18(1)V; *Evidence Act* 1906 (WA) s 8(1)(d); *Evidence Act* 1977 (Qld) s 15(1); *Evidence Act* 1910 (Tas) s 85(10); *Evidence Ordinance* 1971 (ACT) s 70(1). There are no such equivalents in New South Wales and the Northern Territory but the privilege has been taken to have been impliedly removed. See DM Byrne and JD Heydon, *Cross on Evidence*, Butterworths (4th Aust ed, 1991) vol 1 at [23200] footnote 1.

45 Note 41 *supra* at 404.

46 A Zuckerman, *Principles of Criminal Evidence*, Clarendon Press (1989) p 306.

47 For any of the reasons noted by Isaacs J, note 33 *supra*.

innocence" can be "employed as a means of inculpation".[48] The question is whether this is acceptable. There are two possible justifications. The first is based on the fact, noted by Brennan and Toohey JJ in *Weissensteiner*, that cases involving the right to pre-trial silence

> ...relate to the responses of a suspect to the performance of an executive function in circumstances where the suspect's rights are not immediately amenable to judicial protection; the present case relates to the course of proceedings directly under judicial control.[49]

This seems an inadequate answer. If it is morally wrong to compel a person to answer an incriminating question, then surely it matters not that the compulsion is provided by the judiciary rather than the executive. The distinction only seems to matter if we assume that the right to pre-trial silence is not so much fundamental as instrumental; that is, that it exists to protect a suspect from various forms of police oppression while in custody.[50] Such a view is clearly untenable. For a start, it is contrary to everything discussed above about the purpose of the right. Secondly, it is hard to see how the right to silence could in any case protect a suspect from, for example, police violence, verballing or unlawful detention.

The second justification is more promising. It is that the right to pre-trial silence and the right to not testify fall to be exercised at fundamentally different stages of criminal proceedings. The first arises during the investigative phase of the proceedings, at a time when the police are still gathering the evidence which will form the prosecution case against the accused. The second arises when that case has been presented in its entirety. During the investigative phase the police can conceal what they know from the accused in the hope of tricking him or her into telling a lie which can itself be used as evidence against him or her, or the police can simply try and tie the accused to a particular version of events which they can then attempt to unravel. In short, during the investigative phase of the proceedings almost anything the accused says or does could - absent the right to silence - form part of the case against him or her.

The situation at the close of the prosecution case is fundamentally different. There is no question of the accused being caught out in a lie through ignorance of the evidence. Nor, under the principles articulated by the majority in *Weissensteiner*, can failure to testify be used against the accused unless the prosecution have already led sufficient evidence to justify an inference of guilt. That is, a threshold of sufficiency must have been reached before the accused's

48 *Bataillard v R* note 1 *supra* at 1290-91 per Isaacs J. This is not to deny that the conferring of the right to testify may nevertheless have been more beneficial than detrimental to the accused: see R Cross, "An Attempt to Update the Law of Evidence" (1974) 9 *Israel Law Review* 1 at 8-9, where he comments that while "any provision converting a hitherto incompetent accused into a competent witness is bound to lead to the drawing of adverse inferences against someone who does not avail himself of that provision", the accused nevertheless "gained more than he lost by the Act of 1898" because the Act replaced one means of raising a reasonable doubt - the fact that the accused was prevented from giving his or her version of events - with a far more effective means of raising such a doubt - the opportunity to place his or her version of events before the jury in his or her own words.

49 Note 2 *supra* at 231-2.

50 The comment of Brennan J in *Petty and Maiden* note 4 *supra* at 107 that the right to silence is "designed to prevent oppression by the police or other authorities of the state" is arguably open to such an interpretation.

failure to testify can be given any evidential significance. The justification for *Weissensteiner* may then be this: if there is a case to answer, it must eventually be answered. It need not be answered when put by the police during questioning; it need not be answered at the committal; but it must be answered at the trial, and if it is not, then the accused and not the prosecution must run the risk of an adverse verdict.[51]

Such a rule recognises that in some cases the prosecution will be unable to positively eliminate all hypotheses consistent with innocence, *Weissensteiner* itself clearly being such a case. If the accused is the only person who seems likely to know the truth, why should the risk of failing to tell that truth not fall on the accused? A rule requiring the risk to fall the other way could effectively confer immunity from punishment on a person who managed to commit a crime the exact circumstances of which could never with certainty be known. Of course, we have to recognise that by allowing the failure to testify to be used against the accused we are subjecting the accused to the "cruel trilemma" described above. While not actually compelling the accused to testify, the rule in *Weissensteiner* does clearly impose a penalty for not doing so.[52] Our justification for overlooking the harshness of this rule must lie in a belief that the right to stand mute in the face of the prosecution case only goes so far; if the case against them is strong enough, the accused must either give their version of events or accept the consequences of not doing so.

There will no doubt be disagreement about whether or not this is an acceptable justification. To this author at least, the case against *Weissensteiner* certainly seems stronger now that the accused no longer has the option of giving unsworn evidence. The removal of this option means that there is no safe course for the accused, who must either face the perils of cross-examination, or take the risk that their silence will be construed as guilt. But whether or not one agrees with the decision, the more fruitful questions are about when the principle will be applied, and it is these questions which are addressed in the next section of the article.

IV. APPLYING WEISSENSTEINER

Chief Justice Macrossan of the Queensland Supreme Court recently commented that

> while the High Court may not have felt it necessary [in *Weissensteiner*] to determine the precise limits of the circumstances in which such directions could properly be

---

51 Cf the comment of Lee J in *Kanaveilomani v R* (1994) 72 A Crim R 492 at 504 that the *Weissensteiner* principle "ensures that an accused's silence at trial is not used to support an inference of guilt against him *whilst maintaining the Crown's right to a conviction should the circumstances otherwise justify it*" (emphasis added).

52 The majority in *Weissensteiner* do not attempt to deny this, noting only that the "fact that the accused's failure to give evidence will have this consequence is something which, no doubt, an accused should consider in determining whether to exercise the right to silence": note 2 *supra* at 229 per Mason CJ, Deane and Dawson JJ.

> given...there are already signs that in the everyday work of the courts further attention will have to be given to the problem.[53]

This section of the article is designed to do just that. It falls into three parts. The first looks at the way in which the principle in *Weissensteiner* will operate in those jurisdictions where, unlike Queensland, the trial judge is prohibited from commenting on the accused's failure to testify, and the implications this has for the continued existence of the prohibition. The second and third parts examine the way in which the *Weissensteiner* principle is likely to be applied by trial courts, focusing on the two pre-conditions to its application identified above. The second looks briefly at the question of how strong the prosecution case will need to be before the principle can be applied; in other words, at the height of the threshold of sufficiency. The third part considers the kind of case in which the principle will be applied and, in particular, the question of whether it should only be applied in cases where the prosecution case is largely circumstantial.

A. Where Comment is Prohibited

In jurisdictions where judicial comment is permitted the judge's role is fairly straightforward: he or she must direct the jury in accordance with the principles set out above. This includes warning the jury, where appropriate, that there may be reasons other than guilt which explain why the accused has chosen not to give evidence.[54] But what happens in those jurisdictions where comment is prohibited?[55] *Weissensteiner* does not create an exception to those prohibitions, which remain as absolute as they were when Isaacs J commented that if

> ...reference, direct or indirect, and either by express words or the most subtle allusion, and however much wrapped up, is made to the fact that the prisoner had the power to give evidence on oath, and yet failed to give, or in other words "refrained from giving", evidence on oath, there would be a contravention of the sub-section now under consideration.[56]

In jurisdictions where comment is prohibited, the judge may not, therefore, direct the jury in accordance with *Weissensteiner*; but, as Mason CJ, Deane and Dawson JJ noted:

> ...the right of the jury to take into account the silence of the accused does not stem from the right of the trial judge to comment upon it. Even in those jurisdictions where comment is prohibited, the jury may consider the accused's silence. The prohibition merely forbids the trial judge from reminding them that they may do so and informing them of the way in which they may properly do so.[57]

Indeed, if silence can be taken into account there is a strong case for removing the prohibition because "the jury may read more into the silence of an accused than they are entitled to do and, as a result, the accused may be at a greater

53 *Kanaveilomani v R* note 51 *supra* at 496.

54 See *Weissensteiner* note 2 *supra* at 228 per Mason CJ, Deane and Dawson J; *Kanaveilomani v R ibid* at 506 per Lee J.

55 See *Crimes Act* 1900 (NSW) s 407(2); *Crimes Act* 1958 (Vic) s 399(3); *Evidence Act* 1939 (NT) s 9(3).

56 *Bataillard v R* note 1 *supra* at 1291. For an example of how strict the prohibition is, see *R v Hallocoglu* (1991) 29 NSWLR 67.

57 Note 2 *supra* at 224.

disadvantage than if comment by the trial judge were allowed".[58] This seems plausible: if the jury are permitted to use the accused's failure to testify then they should surely be told when and how they may do so. Similarly, if they are not permitted to use the failure to testify then they should be told this as well, so long as such an instruction would be more beneficial to the accused than saying nothing at all.

Until such time as the prohibition on comment is lifted, however, then in those jurisdictions where it applies the principle in *Weissensteiner* will be most commonly applied on appeal. In determining an appeal based on, for example, a claim that the verdict was unsafe and unsatisfactory, the court will be entitled to have regard to the accused's failure to testify and consider whether that permits a more ready acceptance of the prosecution case.[59] If failure to testify makes an inference of guilt safer then it will also clearly make a conviction more difficult to successfully appeal against.

B. How High a Threshold?

It is only when the prosecution's case reaches a certain threshold of sufficiency that the *Weissensteiner* principle can be invoked. As was said in *R v Burdett*, "[n]o 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".[60] Similarly, in *May v O'Sullivan* the Court suggested that failure to explain could only be relevant "*[a]fter* the prosecution has adduced evidence sufficient to support proof of the issue".[61] And in *Weissensteiner* itself, Mason CJ, Deane and Dawson JJ observed that:

> Even if there are facts peculiarly within the accused's knowledge, the deficiencies in the prosecution case may be sufficient to account for the accused remaining silent and relying upon the burden of proof cast upon the prosecution.[62]

So exactly how high is this threshold?

At the very least, it seems clear that the prosecution case must, if accepted, be sufficient to support a finding of guilt, and to support such a finding to the standard of proof in criminal cases.[63] If the prosecution case falls below this

---

58 *Ibid* at 225 per Mason CJ, Deane and Dawson JJ; see also 234 per Brennan and Toohey JJ; *Griffin v California* note 38 *supra* at 621 per Stewart J: "How can it be said that the inferences drawn by a jury will be more detrimental to a defendant under the limiting and carefully controlling language of the instruction here involved than would result if the jury were left to roam at large with only its untutored instinct to guide it, to draw from the defendant's silence broad inferences of guilt".

59 See, for example, *R v Neilan* [1992] 1 VR 57 at 65 and the comment of Crockett, Nathan and Teague JJ in *R v Walchhofer* (unreported, Victorian Court of Criminal Appeal, 6 September 1994) at 13: "we consider that when the strength of a prosecution case is under consideration by an appellate court in this State, it is permissible for the [court] to take into account the fact that the failure to testify is a matter which [the jury] is entitled to consider when it is evaluating the evidence."

60 *R v Burdett* note 3 *supra* at 898 per Abbott CJ, quoted with approval in *Weissensteiner* note 2 *supra* at 225 per Mason CJ, Deane and Dawson JJ.

61 Note 3 *supra* at 658 (emphasis added), quoted with approval in *Weissensteiner* note 2 *supra* at 226-7 per Mason CJ, Deane and Dawson JJ and 236 per Brennan and Toohey JJ.

62 Note 2 *supra* at 228.

63 See *R v Finn* (unreported, Queensland Court of Appeal, 4 February 1994) in which McPherson JA, applying such a test, held that the threshold had clearly not been reached.

threshold, then there is a distinct risk that the jury may use the accused's failure to testify as a make-weight rather than as a means of resolving doubt. It is difficult to state the test more precisely than this; and it is also clear that there will be disagreement about whether or not the threshold has actually been reached in a particular case, as evidenced by the disagreement in *Weissensteiner* itself. There must, however, be a fear that in *Weissensteiner* the majority may have set the standard too low. As the minority pointed out, there really was nothing in the prosecution case able even to show that Bayerl and Zack were dead, let alone to implicate the accused in their death. Murder was certainly one of the hypotheses open on the evidence, but it is difficult to see that the prosecution case was so strong that the accused's failure to testify was capable of rendering all other hypotheses unreasonable.

C. What Kind of Cases?

In *Weissensteiner* the prosecution case against the accused was entirely circumstantial, but none of the judgments in that case specifically state that the principle for which the case stands is only to be applied in cases of that type. Nevertheless, it is difficult to see how the second pre-condition to the application of the principle - that there must be "facts *peculiarly* within the accused's knowledge" - could be satisfied in cases where the prosecution case is primarily based on direct evidence of guilt. It is only in cases where the truth is difficult to ascertain because of the lack of direct eye-witnesses to the crime that we can say that only the accused would know the truth. Where there is direct evidence of the crime, then knowledge of what happened is clearly not peculiar to the accused.

Despite this, *Weissensteiner* has been applied in cases where the prosecution case was based primarily on direct evidence. In *Kelly v O'Sullivan*, the Supreme Court of Tasmania relied on *Weissensteiner* to uphold a magistrate's decision that he could more readily accept the evidence of a police officer who had identified the accused (whom she knew) as the person who had assaulted her, because the accused had failed to give evidence to support his defence of alibi.[64] Justice Underwood commented that "[a]s the only person who knew with certainty where he was at the material time, the applicant was the one with the facts to contradict the evidence of the complainant".[65] Yet this knowledge can hardly count as peculiar to the accused for it was the very essence of the prosecution case that they did know where the accused was at the material time - the police witness claimed to have actually seen him!

In *R v Van Wyk ("Van Wyk")* the accused was charged with unlawful and indecent dealing with a child under 16, namely his daughter.[66] His brother Harry gave evidence of three conversations he had had with the accused, in which the accused had made incriminating admissions. The Queensland Court of Appeal held, again relying on *Weissensteiner*, that the trial judge had quite properly

---

64 (Unreported, Supreme Court of Tasmania, 18 July 1994) at 4-5.

65 *Ibid* at 5.

66 (Unreported, Queensland Court of Appeal, 16 December 1993.)

directed the jury's attention to the fact that the accused had failed to either explain or contradict Harry's evidence; the direction was proper because

> the appellant's failure to contradict Harry's evidence was capable of assisting the jury in evaluating that evidence and it bore upon the probative value of the evidence. Further, it was reasonable to expect that if Harry's evidence that the appellant had made statements incriminating himself was untrue, some denial, explanation or answer would be forthcoming from the appellant.

In doing so, the Court specifically held that *Weissensteiner* "constitutes authority relevant to a case such as this, where the Crown did not rely on circumstantial evidence to prove its case, but put forward direct evidence of the commission of the offences charged".

Certainly, some support for this view can be found both in *Weissensteiner* itself and in the cases which the High Court relied on in that case. In *Bridge v R*, for example, Windeyer J commented 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".[67] Similarly, if one is prepared to argue that an absence of contradiction is always a "circumstance bearing upon the probative value of evidence", then the following statement of Mason CJ, Deane and Dawson JJ also seems capable of extending to direct evidence of the accused's guilt:

> It is only when the failure of the accused to give evidence is a circumstance which may bear upon the probative value of the evidence which has been given and which the jury is required to consider, that they may take it into account, and they may take it into account only for the purpose of evaluating that evidence.[68]

Nevertheless, the decision in *Van Wyk* does seem subject to two fatal flaws. Firstly, the broad proposition accepted in that case ignores the very clear limitation expressed by the High Court: that the accused must be in possession of knowledge peculiar to him or herself. Indeed, if *Van Wyk* is correct, then it is difficult to see why the *Weissensteiner* principle would not apply in almost every case where the accused chose to not testify.[69] Secondly, it elevates the "truism" identified by Mason CJ, Deane and Dawson JJ - that it is easier to accept uncontradicted than contradicted evidence[70] - into a suggestion that the accused's failure to contradict prosecution evidence actually increases the probative value of that evidence.[71] It

67 Note 3 *supra* at 615, quoted with approval in *Weissensteiner* note 2 *supra* at 227 per Mason CJ, Deane and Dawson JJ and 235 per Brennan and Toohey JJ.

68 Note 2 *supra* at 229.

69 It would thus constitute a significant step towards the position advocated by Waldron CJ of the Victorian County Court to the Victorian Parliament's Crime Prevention Committee, that it should always be open to the jury to infer guilt from the accused's refusal to testify: "Let us take a sexual offences case where the complainant had many, many assertions made to her concerning the alleged lack of veracity or accuracy of her evidence. After all that there is ringing silence and the accused is not going into the witness box. I say rhetorically why should not the tribunal, in fact, infer guilt from that individual's refusal - and that is what it is - to give his side of the events. It is not just with sexual offences; it is across the spectrum in my view." See *Inquiry into Sexual Offences against Children and Adults*, Minutes of Evidence, 27 October 1994, p 38.

70 Note 2 *supra* at 227.

71 Cf the comment of Macrossan CJ in *Kanaveilomani v R* note 51 *supra* at 497: "There is a difference between these propositions: (1) the pathway to acceptance of evidence is facilitated by absence of opposing

is not surprising, therefore that the authority of *Van Wyk* has already been challenged in the very court which decided it.

In *Kanaveilomani v R* ("*Kanaveilomani*") the accused was charged with attempted rape and indecent assault.[72] The prosecution case rested almost entirely on the testimony of the complainant. The trial judge directed the jury that the accused's failure to testify supported the complainant's credibility. Justice Davies, who had formed part of the Bench which delivered the unanimous judgment in *Van Wyk*, maintained his support for the broad proposition that the *Weissensteiner* principle applies whenever "an accused fails to contradict or explain evidence adduced by the Crown which it is within the power of the accused to contradict or explain"[73] and not only when the accused's ability to do so arises from his or her possession of knowledge peculiar to him or herself. His Honour rejected any suggestion that the principle could only apply in circumstantial cases and accordingly held that the trial judge's direction had been proper.

Chief Justice Macrossan and Lee J disagreed. Chief Justice Macrossan held that the limits on the *Weissensteiner* principle are to be found

> in the category of cases there under consideration namely where inferences from circumstantial evidence have to be considered and where relevant facts can be regarded as peculiarly within the knowledge of the accused.[74]

Justice Lee, in language echoing that used by the majority of the High Court in *Weissensteiner*, argued that the reasoning endorsed in that case was as follows:

> If an hypothesis is suggested, either by the evidence adduced by the Crown or by the accused himself, which is consistent with innocence in circumstances where the facts relevant to that hypothesis are not readily ascertainable by the Crown but might reasonably be expected to be peculiarly within the knowledge of the accused in the sense that he is the only or best person to give evidence of them, then the fact that the accused does not avail himself of the opportunity to place those facts before the jury in a case where he might reasonably be expected to have done so, is a circumstance which logically renders it less likely that such an hypothesis exists.[75]

It was difficult, his Honour thought, "to conceive of a case, based substantially on direct evidence, where that line of reasoning could be applied",[76] adding that whatever the exact limits of the principle, "it does not lend itself to a case [such as the present] that can be described as nothing more than a flat denial of a prosecution case proved by direct evidence".[77] In such a case, the principal issue for the jury is simply one of credibility; it is not a question of eliminating as unreasonable any hypotheses consistent with innocence. The accused in such a case should, it is submitted, be free to choose - without penalty - whether or not to test the credibility of the prosecution witnesses through cross-examination alone. Were it otherwise, the *Weissensteiner* principle could effectively be used to

---

testimony and (2) a prosecution witness's testimony is positively supported by absence of opposition. There is difficulty in accepting the second proposition as being correct."

72 *Ibid.*

73 *Ibid* at 500.

74 *Ibid* at 497-8.

75 *Ibid* at 507.

76 *Ibid* at 507-8.

77 *Ibid* at 508.

compel an accused who wished only to contest the veracity of the prosecution witnesses to enter the witness box him or herself.[78]

It is submitted, therefore, that the majority in *Kanaveilomani* were right to restrict the operation of the *Weissensteiner* principle to cases where the prosecution case is largely circumstantial. Consistently with that limitation, it has been used to assist the jury to draw an inference that a crime had actually been committed;[79] to assist the jury in drawing an inference that the accused was relevantly in possession of a stolen vehicle from the fact that she was travelling in it and that parts from it were later used to replace damaged parts on her own vehicle;[80] and to assist the jury in drawing an inference that the accused was one of three masked men who assaulted a prominent medical practitioner, where the identification of the accused as one of the men was based entirely on circumstantial evidence.[81]

More difficult is the use of the principle to assist the jury in drawing an inference of intention. In *Kanaveilomani*, Lee J observed that "intention is something which is rarely, if ever capable of being directly proven. It invariably remains an inference to be drawn from the established facts and for that reason cannot be said to be peculiarly within the accused's knowledge".[82] In *R v Walchhofer*, on the other hand, *Weissensteiner* was invoked in a case where the issue was whether the accused had intended to shoot a man with whom he was struggling.[83] The accused's defence was that the shooting was accidental. Yet in *Walchhofer* the accused's state of mind at the time was not something upon which he would have been able to shed any particular light such that his failure to testify rendered unreasonable the hypothesis that the shooting was accidental. The circumstances were simply too equivocal. Nevertheless, there may be cases where it is appropriate to invoke *Weissensteiner* to assist the jury in drawing an inference of intention. However, the courts should only do so if the accused's failure to testify really does mean that any hypotheses consistent with innocence can be disregarded as unreasonable.

The principle should probably also not have been used to assist the jury in one of the cases referred to above to conclude that the second accused was another of the three masked men. In respect of this accused, the prosecution case was based entirely on a police officer's voice identification of the accused as one of the participants in a conversation recorded by a listening device installed in the home of the third man allegedly involved in the assault.[84] On the prosecution case, if the voice identification was correct then the accused was clearly one of the assailants. The principle should not have been invoked because this was not a case where the accused might have put forward an innocent explanation for otherwise incriminating circumstances; it was simply a matter of the accused denying that the

---

78 *Ibid* at 509 per Lee J; but cf the comments of Waldron CJ note 70 *supra*.
79 See *Weissensteiner* itself note 2 *supra*.
80 See *McCarthy and Ryan v R* (1993) 71 A Crim R 395 at 401.
81 See *Khoosal and Singh v R* (1994) 71 A Crim R 127 at 133.
82 Note 51 *supra* at 509.
83 Note 59 *supra* at 12-13. Cf *R v Finn* note 63 *supra* per McPherson JA.
84 See *Khoosal and Singh v R* note 81 *supra* at 136.

voice was his. The accused should have been free to test the police officer's evidence through cross-examination alone. Nor should the principle be invoked in cases like *Kelly v O'Sullivan*, *Van Wyk* or *Kanaveilomani* where the prosecution case is primarily based on direct evidence of the crime and the defence is essentially a denial of the prosecution case. In such cases "the Crown case should stand or fall on its own merits without any additional strength from the accused's failure to enter the witness box".[85]

V. CONCLUSION

In *Weissensteiner* the High Court attempted to define both the circumstances in which the accused's failure to testify could attain evidential significance, and the significance which that failure could have. According to the majority, there are two pre-conditions to the jury's use of the accused's silence in court. The first is that the prosecution case must have attained a threshold of sufficiency; that is, it must be able to support an inference of guilt. The second is that the accused must be seen to be in possession of some knowledge of the events forming the subject of the charge which is peculiar to him or herself. If both conditions are met, then the accused's failure to testify may be used "to comfort a jury already disposed to draw an inference" of guilt, by allowing them to eliminate as unreasonable any hypotheses consistent with innocence.[86]

Although the decision is amply justified by authority, there are nevertheless several dangers associated with it. Firstly, it must be recognised that the decision does subject the accused to the dilemma of either testifying and facing the perils of cross-examination, or taking the risk that their silence may be construed as guilt. For that reason alone, the limits placed on its use by the High Court should be strictly observed. Secondly, the High Court may have set the first of these limits - the threshold of sufficiency - too low, so that an accused may effectively be compelled to answer a prosecution case based on little more than speculation. Thirdly, there is a very real risk that the courts responsible for applying the principle may choose to simply disregard the High Court's second pre-condition and apply the principle in cases where the prosecution case is primarily based on direct, rather than circumstantial, evidence. Because of this *Weissensteiner* may eventually turn out to be a dangerous precedent, a precedent used as the basis for a more general assault on the accused's right to freely choose whether or not to testify.

85 *R v Fellowes* [1987] 2 Qd R 606 at 610.

86 *Kanaveilomani v R* note 51 *supra* at 505 per Lee J.