# Weissensteiner v R [1993] HCA 65; (1993) 178 CLR 217; (1993) 68 A Crim R 251 (17 November 1993)

## HIGH COURT OF AUSTRALIA

WEISSENSTEINER v. THE QUEEN [1993] HCA 65; (1993) 178 CLR 217

F.C. 93/051

Number of pages - 25

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Criminal Law

HIGH COURT OF AUSTRALIA

MASON CJ(1), BRENNAN(2), DEANE(1), DAWSON(1), TOOHEY(2), GAUDRON(3) AND McHUGH(3) JJ

**CATCHWORDS**

Criminal Law - Evidence - Murder - Circumstantial case against accused - Evidence from which jury might have inferred that accused caused death - No evidence adduced by accused - Direction that inference of guilt more safely drawn from proved facts when accused chooses not to give evidence of facts within his knowledge.

**HEARING**

CANBERRA, 1993, June 9, November 17. 17:11:1993

**ORDER**

Appeal dismissed.

**DECISION**

MASON CJ, DEANE AND DAWSON JJ The appellant was convicted of the murder of Hartwig Bayerl and Susan Zack and of the theft of a vessel, the "Immanuel", which had been owned by Bayerl. Bayerl and Zack had met in Cairns in April 1989 at the Cairns Cruising Yacht Squadron and commenced to live together. The "Immanuel" was a 36-foot cutter upon which Bayerl had spent most of his savings. In the following months Zack spent most of her savings on alterations to the boat. Zack's parents, who lived in England, visited her in Australia in June 1989 and Bayerl asked Zack's father whether he could marry Zack. Her parents urged her to delay the wedding as she had only known Bayerl a few months. She agreed and her parents said that if the couple still wanted to get married after cruising the Pacific together, they would fly out for the wedding.

2. The appellant answered an advertisement by Bayerl for casual labour to work on the boat in August 1989. He agreed to work for no wages and, in return, Zack and Bayerl agreed to take him on their cruise. The accused suggested to the police that there may have been more to this arrangement, but refused to elaborate. The appellant and Bayerl were both Austrian and they soon became friends. The three worked hard on the alterations to the boat, often late into the night.

3. The "Immanuel" was launched at the end of September 1989, but was put back into dry dock because it sprang a leak. It was re-launched a little over two weeks later. Bayerl and Zack wound up their affairs in Cairns late in October 1989. They sold Zack's car. They were keen to set out on their cruise because the Coral Sea is prone to cyclones between November and March. The last known contacts with Bayerl and Zack were in late November. Zack wrote a letter to her sister which was postmarked 22 November 1989. She was over four months pregnant and saw her doctor on 24 November 1989. She said that she would go to a doctor or clinic once a month and hoped to have the baby in hospital, possibly in Cairns. Zack saw a friend in Cairns late in November and said that they were intending to leave that day. She wrote a cheque dated 26 November and used her credit card at the Cairns Liquor Barn on 27 November.

4. Bayerl rang his mother in Austria on 26 November 1989 and said that he was leaving soon. There was evidence given by one witness who

claimed to have seen Bayerl early in December 1989, but this date was

not supported by any other evidence. In late November 1989 the boat

was seen near Fitzroy Island, about 15 nautical miles from Cairns,

with the appellant, Bayerl and Zack aboard. 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.

5. On 3 January 1990, the appellant asked the Australian Customs Service about a customs clearance. Because he had contravened the

conditions of his multiple journey visit visa, his visa was cancelled,

effectively requiring him to leave Australia by 25 January 1990. He

said that this would not fit in with his plans because the boat's

owner, Bayerl, was in Kuranda, a town on the edge of the Atherton

Tablelands a short distance to the north-west of Cairns.

6. A port officer in Cairns was telephoned by Zack's mother in an effort to convey to Zack the news that her aunt had died. The officer

spoke to the appellant on board the "Immanuel" on 4 January 1990 who

said that Bayerl and Zack were not on board and would be on the

Atherton Tablelands until about 10 January 1990. The appellant

promised to pass on the message from Zack's mother.

7. The "Immanuel" appears to have left Cairns harbour by 7 January 1990, but it had returned by 12 January when the appellant told an

immigration official that he was now intending to meet Bayerl in Papua

New Guinea and would leave Australia permanently in the next few days.

The appellant cleared Australian customs on 16 January 1990 and

presumably left early the next morning.

8. The appellant spent some eight months cruising between various Pacific islands. He told a number of people that he had been turned

away from Bougainville by the Papua New Guinea Navy. He arrived alone

on board the "Immanuel" in Kosrae on 21 February 1990 and stayed there for two or three days. He then sailed to Kiribati, arriving on 16 March 1990. He was due to leave by 23 March 1990. He sailed on to Majuro in the Marshall Islands and for three months between March and June worked there as a cabinet-maker. In order to comply with Marshall Islands visa requirements, he returned to Kiribati on 25 June 1990, where he remained at least until 6 July before returning to Majuro on about 11 July 1990.

9. As a result of Interpol searches for the "Immanuel" and Bayerl and Zack, the appellant was taken into custody by the Marshall Islands authorities in August 1990. Australian police arrived in Majuro late in August and conducted a series of tape-recorded interviews with the appellant on 27, 28 and 30 August and 2 September 1990. The appellant attempted to escape from custody on 3 September 1990 by swimming to a nearby island but was recaptured. On 4 September a judge made an order allowing the appellant to return to Australia and he agreed to return with the police. He was charged in Cairns on 6 September 1990 with the murder of Bayerl and Zack and the theft of the "Immanuel".

10. The prosecution case against the appellant was entirely circumstantial. There was abundant evidence from which the jury might

have concluded that Bayerl and Zack were not only missing but dead.

All contact between them and their respective families ceased

notwithstanding that they had previously kept in regular contact.

They did not attempt to operate their bank accounts. There was no

record of any medical treatment of Zack or the birth of a child.

Nappies, maternity bras and vitamin supplements which Zack had

presumably bought for her pregnancy remained on board the "Immanuel"

when it was searched by the police at Majuro in August 1990.

11. Upon the assumption that Bayerl and Zack were dead, there was evidence from which it might have been concluded that the appellant

had not only stolen the boat but had also been involved in their

deaths. They had spent a large amount of money on the "Immanuel" of

which the appellant had assumed sole possession. On board the vessel

were many of Zack's clothes, her diving watch and a gold bracelet

which she wore almost continuously. Also on board were opals which

Bayerl intended to sell around the Pacific together with an opal

pendant which Bayerl wore when selling opals. There was Bayerl's

German bible, given to him by his father, which Bayerl always took

with him, even on camping trips, and to which he referred regularly.

There was camping equipment belonging to Bayerl and Zack, and,

concealed, there were two rifles which had been in Bayerl's possession

since 1986. There was evidence that Bayerl was a well-organized

traveller who always ensured that he was well-equipped. The presence

of the various items on the boat was inconsistent with Bayerl or Zack

having left it voluntarily.

12. In his travels around the Pacific, the appellant told a series of inconsistent stories about the identity of the owner of the boat and

the whereabouts of Bayerl and Zack. His original story, told to

Australian officials in early January 1990, was that Bayerl and Zack

were in Kuranda or on the Atherton Tablelands. In the middle of

January he told a customs official that Bayerl was in Papua New Guinea

and that he would be picking him up from Port Moresby.

13. When he first landed at Kosrae on 21 February 1990, the appellant told a sailor that he had bought the boat from an old man in Cairns.

He gave a similar story to a customs official in Kosrae and again to

his employers in Majuro in about April 1990.

14. When he returned to Kiribati in late June 1990, the appellant told the police that Bayerl had given or lent him the boat for cruising and that Bayerl and Zack were in Kununurra in the north-west of Australia. A week or two later, the appellant told a customs officer in Kiribati that Bayerl owned the boat and was staying at Zack's place in Cairns.

15. On 17 August 1990, the appellant told the Majuro police that Bayerl and Zack were in Western Australia. He gave the same story to

the Australian police in Majuro, adding that he had dropped them off

in Cairns with minimal equipment and that they had intended to make

their own way to Kununurra. He said that they were now living off the

land at Kununurra and that he was waiting in Majuro for a letter from

Bayerl. Extensive inquiries made in Kununurra and the surrounding

regions revealed no trace of Bayerl or Zack, although some people

remembered Bayerl from a previous visit in 1986.

16. After his arrest, the appellant told two friends in Majuro that Bayerl and Zack had smuggled arms to Bougainville and that he had

dropped them off there. He said he was waiting in Majuro for contact

from Bayerl.

17. In Kiribati in March 1990, the appellant repainted the name of the boat as "Mani" which he said was a contraction of his own name,

Manfred, although it could also be a contraction of "Immanuel".

18. Whilst the appellant was in custody in Majuro, a friend urged him to return to Australia to face charges and the appellant said, "But

they have nothing. They have no bodies. They have no proof." While

in gaol in Australia the appellant told a fellow prisoner, "Die kan

die zwei nicht finden", which the prisoner translated as, "They'll

never find those two", although a more accurate translation is "They

cannot find those two".

19. The appellant gave no evidence at his trial, nor did he call any evidence.

20. The appellant's appeal against his conviction was dismissed by the Queensland Court of Appeal. He now appeals to this Court. The only

ground of appeal which was argued is that the trial judge erred in

directing the jury that they might more safely draw an inference of

guilt from the evidence because the appellant did not give evidence of

relevant facts which could be perceived to be within his knowledge.

21. The learned trial judge adverted in his summing-up to the use which the jury might make of the appellant's silence at his trial on

two occasions. He said:

"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 offences 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. You might, for example, think in this case it

requires no great perception that the accused would have direct knowledge of events which can be canvassed only obliquely from the point of view of seeking to have you draw an inference from the evidence which has been led by the Crown. The use that you make of the fact that there is no evidence given or called by the defendant in these proceedings is that."

> "I remind you that the onus is on the prosecution and the fact that the accused has not given or called evidence proves nothing. I remind you that the consequence of that circumstance is that you have no evidence from the accused to explain the evidence put before you by the prosecution, and that moreover, this is a case where the truth is not easily ascertainable by the prosecution. You remember rather here it seeks to have you infer guilt from such facts as it is able to prove to your satisfaction. Such an inference may be more safely drawn from the proven facts when the accused elects not to give evidence of relevant facts which can be easily perceived to be in his knowledge."

22. In Queensland a trial judge is not precluded from commenting on the failure of an accused to give evidence as judges are in other

jurisdictions ((1) cf. Crimes Act 1900 (N.S.W.), s.407(2); Crimes

Act 1958 (Vict.), s.399(3); Evidence Act 1939 (N.T.), s.9(3).).

However, 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. Where the legislature has

forbidden comment it has presumably done so because it considers that

it is more in the interests of the accused to prohibit than to allow

comment ((2) See Bridge v. The Queen [1964] HCA 73; (1964) 118 CLR 600, at

p.615.). In a modern context, however, where at least some members of

every jury will know and be conscious of the fact that an accused can

give evidence, that approach may now be mistaken. 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 disadvantage than if

comment by the trial judge were allowed.

23. The reasoning process whereby the failure of a party to give or to call evidence is taken into account in evaluating evidence which

is before the court has long been recognized by the law and is not

confined to the criminal law. In Blatch v. Archer Lord Mansfield

observed ((3) [1774] EngR 2; (1774) 1 Cowp. 63, at p.65 [1774] EngR 2; (98 ER 969, at p.970).)

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> "It is certainly a maxim that all evidence is to be weighed
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> according to the proof which it was in the power of one side
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> to have produced, and in the power of the other to have
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> contradicted."

And in R. v. Burdett, a case which was decided before an accused could

give evidence on his or her own behalf, Abbott CJ said ((4) (1820)

4 B. and Ald. 95, at pp.161-162 (106 ER 873, at p.898).):

> "In drawing an inference or conclusion from facts proved,
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> regard must always be had to the nature of the particular
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> case, and the facility that appears to be afforded, either
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> of explanation or contradiction. No person is to be
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> required to explain or contradict, until enough has been
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> proved to warrant a reasonable and just conclusion against
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> him, in the absence of explanation or contradiction; but

> when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction; can human reason do otherwise than adopt the conclusion to which the proof tends?"

R. v. Burdett was relied upon in Reg. v. Kops ((5) (1893) 14 N.S.WR 150.), a case concerning the effect of legislation in New South Wales which in 1891 ((6) Criminal Law and Evidence Amendment Act 1891 (N.S.W.), s.6 - now Crimes Act 1900 (N.S.W.), s.407.) made an accused person a competent but not compellable witness. It was held by a Full Bench with two dissentients that a trial judge may invite the jury to draw inferences adverse to the accused from the fact that, by not giving evidence, the accused has failed to contradict or explain matters upon which incriminating evidence has been given by the prosecution, and which, if untrue, it must be within the power of the accused to contradict or explain. The two judges who dissented (Innes and Stephen JJ) did so on the basis that a comment of the kind sanctioned by the majority would virtually compel the accused to go into the witness box although the statute said that the

accused was not a compellable witness. An appeal to the Privy Council was dismissed with the observation that ((7) Kops v. The Queen (1894) AC 650, at p.653.):

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

24. In Tumahole Bereng v. The King ((8) (1949) AC 253.) the Privy Council pointed out that there are limits upon the kind of comment which might properly be made. Their Lordships observed ((9) ibid., at p.270.) that an accused admits nothing by exercising his right to remain silent at his trial. Nevertheless the failure of the accused to give evidence "may bear against an accused and assist in his conviction if there is other material sufficient to sustain a verdict against him.

> But if the other material is insufficient either in its quality or extent (the accused's silence) cannot be used as a make-weight."

25. In Morgan v. Babcock and Wilcox Ltd. ((10) [1929] HCA 25; (1929) 43 CLR 163.) the defendant company was convicted of paying a bribe. At its trial it called no evidence. Upon appeal to this Court, Isaacs J referred to Blatch v. Archer and said ((11) ibid., at p.178.):

> "Here the prosecution could not possibly have produced stronger evidence, but it was in the power of the defence to have repelled the inference that arises from the evidence as it stands. ... Consequently, since the affirmative evidence in the case raises, to say the least, a strong probability that it was the Company that paid, or caused to be paid, the bribe demanded by Maling, the silence of the Company, and its failure to explain, materially weakens any attempt to suggest in its favour possible hypotheses of innocence."

26. The same approach is to be found in May v. O'Sullivan ((12) [1955] HCA 38; (1955) 92 CLR 654, at pp.658-659.). There the Court said in a well-known passage:

"Unless there is some special statutory provision on the subject, a ruling that there is a 'case to answer' has no effect whatever on the onus of proof, which rests on the prosecution from beginning to end. After the prosecution has adduced evidence sufficient to support proof of the issue, the defendant may or may not call evidence. Whether he does or not, the question to be decided in the end by the tribunal is whether, on the whole of the evidence before it, it is satisfied beyond reasonable doubt that the defendant is guilty. This is a question of fact. In deciding this question it may in some cases be legitimate ... for it to take into account the fact that the defendant has not given evidence as a consideration making the inference of guilt from the evidence for the prosecution less unsafe than it might otherwise possibly appear: cf. Morgan v. Babcock and Wilcox Ltd., per Isaacs J ((13) (1929) 43 CLR, at p.178.)

But to say this is a very different thing from saying that the onus of proof shifts. A magistrate who has decided that there is a 'case to answer' may quite consistently, if no evidence is called for the defendant, refuse to convict on the evidence for the

prosecution. The prosecution may have made 'a prima facie

case', but it does not follow that in the absence of a

'satisfactory answer' the defendant should be convicted."

27. The same principle was put in different words by Windeyer J in Bridge v. The Queen as follows ((14) (1964) 118 CLR, at p.615.):

"An accused person is never required to prove his innocence:

his silence can never displace the onus that is on the

prosecution to prove his guilt beyond reasonable doubt. A

failure to offer an explanation does not of itself prove

anything. Nor does it, in any strict sense, corroborate

other evidence. But the failure of an accused person to

contradict on oath evidence that to his knowledge must be

true or untrue can logically be regarded as increasing the

probability that it is true. That is to say a failure to

deny or explain may make evidence more convincing, but it

does not supply its deficiencies. A direction by the judge

on such matters ... might no doubt be helpful to the accused

in some cases."

28. We have quoted rather more extensively from the cases than would otherwise be necessary in order to show that it has never really been

doubted that when a party to litigation fails to accept an opportunity to place before the court evidence of facts within his or her knowledge which, if they exist at all, would explain or contradict the evidence against that party, the court may more readily accept that evidence. It is not just because uncontradicted evidence is easier or safer to accept than contradicted evidence. That is almost a truism. It is because doubts about the reliability of witnesses or about the inferences to be drawn from the evidence may be more readily discounted in the absence of contradictory evidence from a party who might be expected to give or call it. In particular, in a criminal trial, hypotheses consistent with innocence may cease to be rational or reasonable in the absence of evidence to support them when that evidence, if it exists at all, must be within the knowledge of the accused.

29. Of course, an accused may have reasons not to give evidence other than that the evidence would not assist his or her case. The jury must bear this in mind in determining whether the prosecution case is strengthened by the failure of the accused to give evidence. Ordinarily it is appropriate for the trial judge to warn the jury accordingly.

30. Not every case calls for explanation or contradiction in the form of evidence from the accused. There may be no facts peculiarly within

the accused's knowledge. Even if there are facts peculiarly within

the accused's knowledge the deficiencies in the prosecution case may

be sufficient to account for the accused remaining silent and relying

upon the burden of proof cast upon the prosecution. Much depends upon

the circumstances of the particular case and a jury should not be

invited to take into account the failure of the accused to give

evidence unless that failure is clearly capable of assisting them in

the evaluation of the evidence before them.

31. The argument in support of the appeal centred very largely on the decision of this Court in Petty v. The Queen ((15) [1991] HCA 34; (1991) 173 CLR

95.). In that case the Court decided that, at trial, it is not

permissible to suggest that an accused's exercise of the right to

silence before trial can provide a basis for inferring consciousness of

guilt or inferring that a defence raised at trial is a new invention or

is otherwise suspect because the accused previously failed to mention

it. The decision in Petty v. The Queen, therefore, does not determine

the present case where the question is whether it is permissible for

the trial judge to instruct the jury that inferences available to be

drawn from facts proved by the Crown case can be drawn more safely when

the accused elects not to give evidence on relevant facts which the

jury perceives to be within his or her knowledge.

32. However, the appellant argued that, just as it is impermissible for the trial judge to suggest that inferences adverse to the accused

may be drawn from a previous exercise of the right to silence, so it

is impermissible for the trial judge to suggest that inferences

adverse to the accused which are available to be drawn from the facts

proved by the Crown may be drawn more safely when the accused does

not give evidence of relevant facts which must be within his or her

knowledge. We do not agree. There is a distinction, no doubt a fine

one, between drawing an inference of guilt merely from silence and

drawing an inference otherwise available more safely simply because

the accused has not supported any hypothesis which is consistent with

innocence from facts which the jury perceives to be within his or her

knowledge. In determining whether the prosecution has satisfied the

standard of proof to the requisite degree, it is relevant to assess

the prosecution case on the footing that the accused has not offered

evidence of any hypothesis or explanation which is consistent with

innocence.

33. The failure of the accused to give evidence is not of itself evidence. It is not an admission of guilt by conduct. It cannot be,

because it is the exercise of a right which the accused has to put the

prosecution to its proof. In some other circumstances, silence in the

face of an accusation when an answer might reasonably be expected can

amount to an admission by conduct ((16) See, e.g., Reg. v. Mitchell

(1892) 17 Cox C.C. 503; Chandler (1976) 63 Cr.App.R. 1; and the

discussion in Young, "Silence as evidence", (1992) 66 Australian Law

Journal 675.). But when an accused elects to remain silent at trial,

the silence cannot amount to an implied admission. The accused is

entitled to take that course and it is not evidence of either guilt or

innocence. That is why silence on the part of the accused at his or

her trial cannot fill in any gaps in the prosecution case; it cannot be

used as a make-weight. 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. The fact

that the accused's failure to give evidence may have this consequence

is something which, no doubt, an accused should consider in determining

whether to exercise the right to silence. That was recognized in Reg.

v. Kops. But it is not to deny the right; it is merely to recognize

that the jury cannot, and cannot be required to, shut their eyes to the

consequences of exercising the right.

34. We think that the trial judge was correct in his view that this was an appropriate case in which to direct the jury as to the manner

in which they might take into account the failure of the accused to

give evidence. The prosecution case was that the jury should draw

from the evidence the inference, not only that Bayerl and Zack were

dead, but that they were murdered by the appellant. Clearly those

were inferences which were open upon the evidence.

35. Bayerl and Zack disappeared without trace, having last been seen together with the appellant on the boat. Soon after their

disappearance the appellant was seen, and held himself out to be, in

sole possession of the boat.

36. The circumstances were not consistent with the couple having voluntarily relinquished the boat to the appellant. They had spent a

great deal of money on it. They had well-developed plans to use the

boat for the purpose of cruising the Pacific. Their possessions,

including camping equipment and items of an intimate nature, were

still on board the boat when it was discovered in the appellant's

possession. If they had left the boat intentionally, it is unlikely

that they would have left all of those possessions behind.

37. These facts are not merely evidence calling for an explanation of possession of the "Immanuel" and its contents. A person using

property which belongs to another who recently disappeared may be

implicated not only in the theft of the property, but in the

disappearance of that other. The inference is open that involvement

in the disappearance provided the opportunity for the theft. Clearly

that inference was open to the jury in this case.

38. It is true that Bayerl had, in the words of one witness, "a unique view of what was going on in the world", a view apparently shared by

Zack. He believed that a nuclear holocaust was imminent as the result

of a conspiracy involving Catholics and Masons. Consequently the boat was elaborately fitted with equipment including power generators and a water desalinator to enable the couple to live self-sufficiently. Bayerl told friends that he intended to leave Australia without clearing customs so as to elude the conspiracy. He also said on occasions that he intended to live on a Pacific island remote from the holocaust. Whilst it was open to the defence to rely upon these matters, they did not have the result that the other evidence ceased to call for an explanation. In particular, they did not explain how the appellant came to be in possession of the missing couple's personal effects, camping equipment, power generators and water desalinator.

39. The appellant himself claimed to know where Bayerl and Zack were, although he told inconsistent stories about their whereabouts and about the manner in which he came into possession of the boat. It was significant that, notwithstanding the inconsistencies, the appellant never asserted his ignorance of the whereabouts of Bayerl and Zack or of the reason for their absence.

40. 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.

41. Given that a direction of that kind was appropriate, as we think it was, the appellant raises no objection to the form of the

direction, that being a form which was approved by the Queensland

Court of Criminal Appeal in Reg. v. Fellowes ((17) (1987) 2 Qd R. 606,

at p.610.). Nor does the appellant contend in the circumstances of

this case that, if a direction was to have been given, it should have

included an instruction that reasons may have existed for the

appellant's failure to give evidence which would preclude the jury from

using that failure in the manner directed by the trial judge.

42. For these reasons, we think that the only ground of appeal which was argued must fail and that the appeal should be dismissed.

BRENNAN AND TOOHEY JJ The mere refusal by a suspect to answer police questions relating to the commission of an offence or to advance an innocent explanation of the circumstances which throw suspicion upon him affords no basis for an inference of his guilt: Petty and Maiden v. The Queen ((18) [1991] HCA 34; (1991) 173 CLR 95.). If the suspect does not exercise his right of silence but chooses to respond selectively to questions asked or allegations made, his conduct (including his refusal to respond to particular questions or allegations) is evidence to which the jury may have regard and from which, according to the circumstances, an inference may be drawn that he has a consciousness of guilt: Woon v. The Queen ((19) (1964) 109 CLR 529.). The present case is not concerned with either of these propositions but with another proposition which, though it is classified as one of the categories of the right of silence ((20) Reg. v. Director of Serious Fraud Office; Ex parte Smith (1993) AC 1, per Lord Mustill at p.30.), has a different origin and purpose. The question is whether the jury is entitled to attribute any, and what, significance to the absence of testimony by the accused in a criminal trial. Petty and Maiden and Woon were cases relating to the responses

of a suspect to enquiries by police; the present case relates to the non-exercise by an accused of his statutory right to testify in his own defence at his trial. The former cases 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.

2. In the long history of criminal trials, the present form of the right of an accused to testify in his own defence is of comparatively recent origin. A century ago, the right did not exist in most jurisdictions. Sir James Fitzjames Stephen, writing in 1883, described the procedure of the English criminal trial at that time ((21) A History of the Criminal Law of England, (1883), vol.1, p.441.):

> "(A)s matters stand the prisoner is absolutely protected against all judicial questioning before or at the trial, and ... he and his wife are prevented from giving evidence in their own behalf. He is often permitted, however, to make any statement he pleases at the very end of the trial,

when it is difficult for any one to test the correctness of what is said."

The practice of the courts with respect to the questioning of the accused had changed over the preceding centuries. In the 18th and early 19th centuries, the testimonial incompetence of the accused and his spouse was rested on the notion that interested persons were likely to commit perjury ((22) Holdsworth, A History of English Law, vol.9, 3rd ed. (1944), p.196.). But the rule was vigorously attacked by Jeremy Bentham ((23) A Treatise on Judicial Evidence, (1825), p.241.) and, at the end of the 19th century, the legislature intervened to confer on an accused and his spouse the right to testify on his behalf. It was perceived that self-interest might be an objection to the weight of a witness's evidence but not to the competency of the witness. In Australia, the first legislative intervention was in South Australia: the Accused Persons Evidence Act 1882 (S.A.). The passage of this legislation through the Parliament was attended with much concern that an accused should not be prejudiced if he refrained from exercising his newly bestowed capacity to testify in his own defence ((24) South Australia, House of Assembly, Parliamentary Debates (Hansard), July 1882, pp.280, 281, 332, 333,

394-395.).

3. In Queensland, s.3 of the Criminal Law Amendment Act 1892 (Q.) ((25) 56 Vict. No.3.) made a person accused of an indictable

offence and the wife or husband of every accused person a competent but

not compellable witness. In 1961, this provision was carried into

s.618A of The Criminal Code. In 1977, s.8 of the Evidence Act 1977

(Q.) reproduced with some variations the earlier enactments. The

provision relevant to the present case is s.8(1):

> " In a criminal proceeding, each person charged is
>
> competent to give evidence on behalf of the defence
>
> (whether that person is charged solely or jointly with any
>
> other person) but is not compellable to do so."

In several jurisdictions, similar statutes preclude the making of

any comment by the prosecution ((26) Evidence Act 1906 (W.A.),

s.8(1)(c); Evidence Act 1910 (Tas.), s.85(1)(c); Evidence Act 1929

(S.A.), s.18(1)II; Evidence Act 1971 (A.C.T.), s.74(1).) and, in some

instances, by the judge ((27) Crimes Act 1900 (N.S.W.), s.407(2);

Evidence Act 1939 (N.T.), s.9(3); Crimes Act 1958 (Vic.), s.399(3).)

on the failure of an accused person to testify. No such provision is

to be found in the Queensland statute.

4. It is readily understandable that a jury would place a guilty complexion on the failure of an accused person to testify if testimony

be needed to deny, explain or answer the evidence available to prove

guilt. Thus, when Holroyd J was discussing in R. v. Burdett ((28)

(1820) 4 B. and Ald.95, at p.140 (106 ER 873, at p.890).) what we

would call today the "evidentiary onus", he referred to the effect of

the accused's failure to adduce evidence when it is within his power to

adduce it:

> "It is established as a general rule of evidence, that in
>
> every case the onus probandi lies on the person who wishes
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> to support his case by a particular fact, which lies more
>
> peculiarly within his own knowledge, or of which he is
>
> supposed to be cognizant. This, indeed, is not allowed
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> to supply the want of necessary proof, whether direct or
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> presumptive, against a defendant of the crime with which
>
> he is charged; but when such proof has been given, it is
>
> a rule to be applied in considering the weight of the
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> evidence against him, whether direct or presumptive, when
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> it is unopposed, unrebutted, or not weakened by contrary

> evidence, which it would be in the defendant's power to produce, if the fact directly or presumptively proved were not true."

Once juries came to know that an 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. In Kops v. The Queen; Ex parte Kops ((29) (1894) AC 650, at p.653.) a challenge was made to a summing up in which the judge drew the jury's attention to the accused's right to testify and his failure to exercise it when his testimony might have explained matters naturally within his knowledge and when an explanation would be important in view of the evidence already given. The Privy Council upheld the propriety of the comment, saying:

> "There may no doubt be cases in which it would not be expedient, or calculated to further the ends of justice, which undoubtedly regards the interests of the prisoner as much as the interests of the Crown, to call attention to the fact that the prisoner has not tendered himself as a

witness, it being open to him either to tender himself, or

not, as he pleases. But on the other hand there are cases

in which it appears to their Lordships that such comments

may be both legitimate and necessary."

5. The judicial discretion to comment, thus affirmed by the Privy Council, led the New South Wales legislature to enact a prohibition

on any comment on an accused person's failure to give evidence. The

prohibition was a legislative attempt to ensure that no adverse

inference should arise from the failure by an accused to exercise his

statutory right to testify, as Isaacs J explained in Bataillard v.

The King ((30) [1907] HCA 17; (1907) 4 CLR 1282, at pp.1290-1291.):

"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.

Hence the legislature determined to prevent the enactment,

if not used by the prisoner, from being employed as a means

of inculpation."

It is questionable whether, now that juries generally know that

an accused has a right to testify, it is still conducive to the

administration of criminal justice to prevent the judge from directing

the jury about the limits of the use which they can make of an

accused's failure to testify. However that may be, the Queensland

legislation leaves a judge free in an appropriate case to comment on

an accused's failure to give evidence.

6. Counsel for the appellant submitted that any direction which takes as its starting point an accused's decision not to give evidence

infringes the right of silence but that submission is inconsistent

with the judgment of the Privy Council in Kops. Windeyer J pointed

out in Bridge v. The Queen ((31) [1964] HCA 73; (1964) 118 CLR 600, at p.613.)

that Kops has "remained the generally accepted expression of the law

when comment by the judge on the failure of an accused person to give

evidence is not expressly forbidden" ((32) See R. v. Templeton and

Others (1922) St.R.Qd 165, at p.171; Reg. v. Phillips and Lawrence

(1967) Qd R.237, at pp.292-293; Reg. v. Fellowes, Jackson, McGeough and

Buttigieg (1987) 2 Qd R.606; Reg. v. Hocking (1988) 1 Qd R.582.).

However, as his Honour noted ((33) (1964) 118 CLR, at p.614.), the courts have had to face the problem of reconciling "the traditional repugnance aroused by any form of compulsory self-incrimination with the adverse inferences that insistently arise from a failure to answer a charge". His Honour stated the limits of the use to which the accused's failure to testify can be put ((34) ibid., at p.615.):

> "An accused person is never required to prove his innocence: his silence can never displace the onus that is on the prosecution to prove his guilt beyond reasonable doubt. A failure to offer an explanation does not of itself prove anything. Nor does it, in any strict sense, corroborate other evidence. But the failure of an accused person to contradict on oath evidence that to his knowledge must be true or untrue can logically be regarded as increasing the probability that it is true. That is to say a failure to deny or explain may make evidence more convincing, but it does not supply its deficiencies."

It is important that a trial judge should ensure, especially if any comment is made on an accused's decision not to give evidence, that

juries do not use impermissibly the failure to testify. At the least, the jury must be told that the accused is not bound to give evidence and that the onus remains on the prosecution to prove guilt beyond reasonable doubt ((35) Cyril Waugh v. The King (1950) AC 203, at p.212; Reg. v. Bathurst (1968) 2 QB 99, at pp.107-108.). The limited use which can be made of an accused's failure to testify is of special importance when the prosecution case depends upon the drawing of an inference of guilt from the facts proved directly by evidence. In such a case, the jury must not use a failure to testify as a fact, albeit in conjunction with other facts, from which they might infer the accused's guilt ((36) In this sense, it may be said that an accused's failure to give evidence "has no evidential value": Reg. v. Sparrow (1973) 57 Cr.App.R.352, at p.362; (1973) 1 WLR 488, at p.495.). If there is insufficient evidence of the facts from which an inference of guilt could be drawn, a failure to testify cannot supply the deficiency. But the jury may draw inferences adverse to the accused more readily by considering that the accused, being in a position to deny, explain or answer the evidence against him, has failed to do so. In Wilson v. Buttery ((37) (1926) SASR 150, at p.154.), Napier J said:

> "If the truth is not easily ascertainable by the prosecution, but is probably well known to the defendant, then the fact that no explanation or answer is forthcoming as might be expected if the truth were consistent with innocence, is a matter which the Court or jury may properly consider."

Citing this passage in Morgan v. Babcock and Wilcox Ltd. ((38) [1929] HCA 25; (1929) 43 CLR 163, at p.178.), Isaacs J held that, as the affirmative evidence in the case raised "a strong probability" that it was the defendant Company that had paid, or had caused to be paid, the bribe the subject of the charge in that case, "the silence of the Company, and its failure to explain, materially weakens any attempt to suggest in its favour possible hypotheses of innocence". In May v. O'Sullivan this Court said ((39) [1955] HCA 38; (1955) 92 CLR 654, at pp.658-659.):

> "After the prosecution has adduced evidence sufficient to support proof of the issue, the defendant may or may not call evidence. Whether he does or not, the question to be decided in the end by the tribunal is whether, on the whole of the evidence before it, it is satisfied beyond reasonable doubt that the defendant is guilty. This is a

question of fact. In deciding this question it may in

some cases be legitimate, as is pointed out in Wilson v.

Buttery, for it to take into account the fact that the

defendant has not given evidence as a consideration

making the inference of guilt from the evidence for the

prosecution less unsafe than it might otherwise possibly

appear: cf. Morgan v. Babcock and Wilcox, per

Isaacs J ((40) (1929) 43 CLR, at p.178.). But to say this is a

very different thing from saying that the onus of proof shifts."

7. It follows that, in Queensland and in other jurisdictions where there is no statutory prohibition against judicial comment, a judge

may tell the jury that where the facts which they find to be proved by

the evidence can support an inference that the accused committed the

offence charged and where it is reasonable to expect that, if the

truth were consistent with innocence, a denial, explanation or answer

would be forthcoming, the jury may take the accused's failure to give

evidence into account in determining whether the inference should be

drawn. The jury should be told that the onus remains on the

prosecution and that the accused is under no obligation to give

evidence, but that "it is legitimate to have regard to the fact that

the accused has given no evidence or explanation or satisfactory

explanation of the Crown case as a consideration making the inference

of guilt from the evidence for the prosecution less unsafe than it

might otherwise possibly appear": Reg. v. Guiren ((41) (1962)

N.S.WR 1105, at p.1107.).

8. Moynihan J, in directing the jury on the trial of the appellant for the murder of two people who disappeared in circumstances from

which an inference of guilt might have been drawn, said:

> "As has already been said to you, the Crown bears the onus
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> of satisfying you beyond reasonable doubt that the accused
>
> is guilty of the offences with which he is charged. The
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> accused bears no onus. He does not have to prove anything.
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> For that reason he was under no obligation to give
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> evidence. You cannot infer guilt simply from his failure
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> to do so. The consequence of that failure is this: you
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> have no evidence from the accused to add to, or explain, or
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> to vary, or contradict the evidence put before you by the
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> prosecution."

No objection is taken to this direction, but objection is taken to the

passage which followed and which related to the use which the jury could make of the absence of the appellant's evidence in the drawing of an inference of guilt:

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

Later in his summing up, his Honour directed the jury as follows:

> "I remind you that the onus is on the prosecution and the fact that the accused has not given or called evidence proves nothing. I remind you that the consequence of that circumstance is that you have no evidence from the accused to explain the evidence put before you by the prosecution, and that moreover, this is a case where the truth is not easily ascertainable by the prosecution. You remember rather here it seeks to have you infer guilt from such facts as it is able to prove to your satisfaction. Such an inference may be more safely drawn from the proven facts when the accused elects not to give evidence of relevant facts which can be easily perceived to be in his knowledge."

No error appears in these directions. The onus of proof is correctly placed on the prosecution. The facts from which an inference of guilt may be drawn are correctly identified as facts which the prosecution is able to prove. The use to which the appellant's failure to give evidence may be put is correctly restricted to the strengthening of an inference of guilt from the facts proved. And the jury is told not to

use the appellant's failure to give evidence unless relevant facts "can be easily perceived to be in his knowledge". This additional requirement, which follows a decision of the Court of Criminal Appeal of Queensland in Reg. v. Whinfield ((42) Unreported, 16 September 1986, at p.25.), ensures that the drawing of an inference of guilt will not be assisted by an accused's failure to give evidence unless it is reasonable to expect some denial, explanation or answer by the accused to the prima facie case made against him.

9. In the present case, the appellant's several claims to knowledge of the whereabouts or plans of Bayerl and Zack, his possession of their vessel and of their personal possessions and his account of that possession called for an explanation. None was forthcoming. These facts, combined with the long and inexplicable disappearance of Bayerl and Zack and the apparent prevarication of the appellant when explanations had been sought from him, raised a strong prima facie case against him. There was no misdirection by the trial judge. The jury, acting in accordance with that direction, was entitled to convict the appellant of the murder of Bayerl and Zack. The appeal should be dismissed.

GAUDRON AND McHUGH JJ Johann Manfred Weissensteiner ("the appellant") was convicted in the Supreme Court of Queensland of murdering Susan Zack and Hartwig Bayerl at Cairns between 1 November 1989 and 18 January 1990. He was also convicted of stealing a 36-foot cutter at Cairns on 17 January 1990. That vessel, the "Immanuel", belonged or had belonged to Mr Bayerl. An appeal to the Court of Appeal against those convictions was unsuccessful (Pincus and McPherson JJA, Shepherdson J dissenting). The appellant now appeals to this Court.

2. Ms Zack, an English woman, and Mr Bayerl, an Austrian, were engaged to be married. It seems that they lived on board the "Immanuel" in Cairns Harbour until the end of November 1989. They were seen by various people in and around Cairns during November. Ms Zack, who was in the early stages of pregnancy, visited her doctor on 24 November and, it seems, made a small purchase with a credit card on 27 November. Mr Bayerl telephoned his mother in Austria on or about 26 November. Nothing has been heard of or from them since that time or, at the latest, since early December. In particular, neither has since communicated with his or her parents, although both were previously in regular contact with them.

3. The appellant was well acquainted with Mr Bayerl and Ms Zack. He worked on the "Immanuel" with them for several months in the last half

of 1989, preparing the boat for a voyage that Ms Zack and Mr Bayerl

intended to make in the Pacific Ocean. It may be that the appellant

was to accompany them on that voyage.

4. Very early in January 1990, Ms Zack's parents, who live in England, tried to contact her to let her know of her aunt's death.

They eventually made contact with the port officer at Cairns,

Mr Nucifora. On 4 January, he enquired of the appellant as to

Ms Zack's whereabouts and was told that she and the owner of the boat

were "over in the Tablelands" (presumably, the Atherton Tablelands in

the Cairns hinterland) and would be back the following week. The

appellant undertook to get a note to her.

5. The account given by the appellant to Mr Nucifora was slightly different from that given to an immigration officer at Cairns the day

before. On 3 January 1990, in the course of informing an immigration

officer of a return voyage he intended to make to New Guinea, the

appellant said that the owner of the "Immanuel" was visiting friends

in Kuranda and would rejoin the yacht in Cairns at the end of the

month. Later, on 16 January 1990, he told a customs official,

Mr Golding, that he was to meet the owner of the boat in Port Moresby.

6. The "Immanuel" was moved from its usual mooring to a more remote one sometime in December 1989. It left Cairns Harbour on about

17 January 1990, a customs clearance having been issued the day

before. Thereafter, the appellant and the boat were seen in different

places in the Pacific and were finally intercepted in the Marshall

Islands. Various personal items belonging to Ms Zack and Mr Bayerl

were found on board.

7. When interviewed in Majuro in the Marshall Islands, the appellant indicated that his earlier statement to the port officer in Cairns to

the effect that Ms Zack was on the Tablelands was a lie. Instead, he

said that she and Mr Bayerl had left Cairns with a small pack saying

that they were going to Western Australia. He gave other accounts on

other occasions: he told a Mr Dujmovic in Majuro that he had dropped

the couple off at Bougainville; in Kiribati he told a customs official

that they were in Cairns; he also told a police officer in Kiribati

that they were in Kununurra.

8. In the course of his directions to the jury, the trial judge, Moynihan J, instructed them that the accused bore no onus to prove

anything, was not obliged to give evidence and no inference of guilt

could be drawn from his failure to do so. However, his Honour went on

to point out there was no evidence from him "to add to, or explain, or

to vary, or contradict the evidence put before you by the prosecution"

and then said:

> "Moreover, this is a case in which the truth is not easily,
>
> you might think, ascertainable by the prosecution. It asks
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> you to infer guilt from a whole collection of circumstances.
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> It asks you to draw inferences from such facts as it is able
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> to prove. Such an inference may be more safely drawn from
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> the proven facts when an accused person elects not to give
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> evidence of relevant facts which it can easily be perceived
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> must be within his knowledge. You might, for example, think
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> in this case it requires no great perception that the
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> accused would have direct knowledge of events which can be
>
> canvassed only obliquely from the point of view of seeking

> to have you draw an inference from the evidence which has
>
> been led by the Crown. The use that you make of the fact
>
> that there is no evidence given or called by the defendant
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> is that."

Later, his Honour returned to the fact that there was no evidence from the appellant, saying:

> "I remind you that the consequence of that circumstance is
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> that you have no evidence from the accused to explain the
>
> evidence put before you by the prosecution, and that
>
> moreover, this is a case where the truth is not easily
>
> ascertainable by the prosecution. You remember rather here
>
> it seeks to have you infer guilt from such facts as it is
>
> able to prove to your satisfaction. Such an inference may
>
> be more safely drawn from the proven facts when the accused
>
> elects not to give evidence of relevant facts which can be
>
> easily perceived to be in his knowledge".

The issue in this appeal is whether those directions were correct.

9. The argument for the appellant was made by reference to the right to silence and the recent decision of this Court in Petty v. The

Queen ((43) [1991] HCA 34; (1991) 173 CLR 95.). It was said in that case that an incident of the right to silence, which is a fundamental rule of the common law, is that "no adverse inference can be drawn against an accused person by reason of his or her failure to answer questions or to provide ... information" ((44) ibid., per Mason CJ, Deane, Toohey and McHugh JJ, at p.99. Note the possible qualification of the right to silence for the offence of misprision of felony.) when questioned as to the occurrence of an offence ((45) See also, ibid., per Brennan J at pp.106-107; Gaudron J at p.129; cf. Dawson J at pp.120-121.).

It was argued on behalf of the appellant that, as there is no obligation on an accused person to give evidence, the same must be true of his or her failure to do so. And, it was said, a statement that an inference of guilt might more easily be drawn because the accused did not give evidence is, in effect, an invitation to the jury to draw an inference adverse to the accused by reason of that fact.

10. The prosecution countered the submissions for the appellant by arguing that it has long been accepted that if, as in Queensland, there is no statutory prohibition on judicial comment as to the accused's failure to give evidence ((46) Nor is there any statutory

prohibition on comment by the prosecution. In New South Wales, the Northern Territory and Victoria legislation prohibits comment by the judge or the prosecution upon the accused's failure to testify: Crimes Act 1900 (N.S.W.), s.407(2); Evidence Act 1939 (N.T.), s.9(3); Crimes Act 1958 (Vic.), s.399(3). In Western Australia, Tasmania, South Australia and the Australian Capital Territory legislation prohibits comment by the prosecution only: Evidence Act 1906 (W.A.), s.8(1)(c); Evidence Act 1910 (Tas.), s.85(1)(c); Evidence Act 1929 (S.A.), s.18(1)II; Evidence Act 1971 (A.C.T.), s.74(1).), it is permissible, in certain cases, to direct the jury along the lines involved in this case. It was put that the cases in which such a direction may be given are exemplified by those in which innocent explanation, if there is one, is something peculiarly within the knowledge of the accused. And, it was said, this was such a case.

11. Certainly, there is long standing authority to the effect that it is permissible, in some cases, to comment on the failure of an accused to give evidence. Thus it was said by the Privy Council in Kops v. The Queen ((47) (1894) AC 650, at p.653.):

"There may no doubt be cases in which it would not be

expedient, or calculated to further the ends of justice,

which undoubtedly regards the interests of the prisoner as

much as the interests of the Crown, to call attention to

the fact that the prisoner has not tendered himself as a

witness, it being open to him either to tender himself, or

not, as he pleases. But on the other hand there are cases

in which it appears to their Lordships that such comments

may be both legitimate and necessary."

12. There are many other authoritative statements to the same effect as Kops ((48) See, for example, Lord Russell of Killowen CJ in Reg.

v. Rhodes (1899) 1 QB 77, at p.83. This passage, and that

referred to above in Kops v. The Queen, is cited with approval

by Windeyer J in Bridge v. The Queen [1964] HCA 73; (1964) 118 CLR 600, at

p.613. See also Waugh v. The King (1950) AC 203, at

pp.211-212; Mutch (1972) 57 Cr.App.R. 196, at pp.201-203;

Sparrow (1973) 57 Cr.App.R. 352, at pp.363-364; Gallagher (1974)

59 Cr.App.R. 239, at p.245; Stewart v. H.M. Advocate (1980)

SLT 245, at p.252.). Not all of them are confined to the failure

of an accused person to give evidence at trial. However, many have

that focus and, thus, it should be noted that, if failure to give

evidence has any significance at all, it can only be in very limited

circumstances. That is because regard must always be had to the

presumption of innocence and the duty of the prosecution to prove

guilt beyond reasonable doubt. In the light of those considerations,

if failure to give evidence has significance, it can only be because

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.

13. That it is the failure to explain, and not the failure to give evidence as such, that the authorities allow to be taken into

account in appropriate circumstances clearly appears from a passage

in Wilson v. Buttery ((49) (1926) SASR 150, at p.154.) which was

approved by this Court in May v. O'Sullivan ((50) [1955] HCA 38; (1955) 92 CLR

654, at pp.658-659.). It was said in Wilson v. Buttery that:

> "If the truth is not easily ascertainable by the
>
> prosecution, but is probably well known to the defendant,
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> then the fact that no explanation or answer is forthcoming
>
> as might be expected if the truth were consistent with

innocence, is a matter which the Court or jury may properly

consider."

14. Not surprisingly, the cases which focus on the failure of an accused to give evidence, rather than the failure to explain, do not

always provide clear guidance as to the circumstances in which that

failure becomes significant ((51) See, for example, per Lawton LJ in

Sparrow (1973) 57 Cr.App.R., at p.363, where it was said that "(w)hat

is said must depend upon the facts of each case and in some cases the

interests of justice call for a stronger comment. The trial

Judge, who has the feel of the case, is the person who must

exercise his discretion in this matter to ensure that a trial is

fair. A discretion is not to be fettered by laying down rules

and regulations for its exercise". This is cited with approval

in Gallagher (1974) 59 Cr.App.R., at p.245. See, to the same

effect, Reg. v. Rhodes (1899) 1 QB, per Lord Russell of

Killowen CJ at p.83. See also Haw Tua Tua v. Public

Prosecutor (1982) AC 136, at p.153 where it was said that the

inferences to be drawn from a refusal to give evidence "depend

upon the circumstances of the particular case, and is a question

to be decided by applying ordinary commonsense".). However, some

indication appears from R. v. Burdett ((52) (1820) 4 B. and Ald. 95,

at pp.121-122; (106 ER 873, at p.883).), where it was said:

> "But when one or more things are proved, from which our
>
> experience enables us to ascertain that another, not proved,
>
> must have happened, we presume that it did happen, as well
>
> in criminal as in civil cases. ... It is enough, if its
>
> existence be highly probable, particularly if the opposite
>
> party has it in his power to rebut it by evidence, and yet
>
> offers none; for then we have something like an admission
>
> that the presumption is just."

15. The first part of the passage quoted from Burdett is concerned with what is commonly called a "presumption of fact". That expression

is apt to confuse because it may be used to convey two quite different

things. It may be used to refer to a fact which is inferred from

other facts, particularly if it is an inference which is commonly

drawn ((53) Note that it is used in this sense in Cross on Evidence,

4th Aust. ed. (1991), par.7215. Its use in this sense is criticised

in Phipson on Evidence, 14th ed. (1990), par.5-02.). It is in this

sense that the word "presumption" is used in the passage quoted ((54)

It is also used in this sense in Fitzpatrick v. Walter E. Cooper Pty.

Ltd. [1935] HCA 82; (1935) 54 CLR 200, per Dixon J at p.219 and in Watts v. Rake [1960] HCA 58; (1960) 108 CLR 158, per Dixon CJ at p.159.). On the other hand, it may be used to refer to an assumption which, in the absence of evidence one way or another, may and usually will be made by reason of commonsense or common experience. Such assumptions are sometimes called "evidentiary presumptions" ((55) See, for example, Reg. v. Falconer [1990] HCA 49; (1990) 171 CLR 30, at p.83 as to the assumed fact or the evidentiary presumption that an apparently conscious person acts voluntarily.). A presumption, in this second sense, is involved in the observation in Burdett that there is "something like an admission" in the failure to lead rebutting evidence, although that does not clearly appear. It is a conjunction of presumptions, in each of the different senses indicated, which may, in certain cases, give significance to the failure of an accused person to offer an explanation of facts established by the prosecution case. For ease of expression and to avoid confusion, we refer hereafter to inferences and assumptions rather than presumptions.

16. Some facts, of which recent possession of stolen goods is a familiar example ((56) See Raviraj (1986) 85 Cr.App.R. 93, at p.103 where it is said that the so-called "doctrine of recent possession"

is:

> "only a particular aspect of the general proposition
>
> that where suspicious circumstances appear to demand
>
> an explanation, and no explanation or an entirely
>
> incredible explanation is given, the lack of
>
> explanation may warrant an inference of guilty
>
> knowledge in the defendant. This again is only part of
>
> a wider proposition that guilt may be inferred from
>
> unreasonable behaviour of a defendant when confronted
>
> with facts which seem to accuse."), so obviously suggest a
>
> particular state of affairs that they give rise to an inference to
>
> that effect and also give rise to an assumption that an innocent
>
> person faced with those facts would offer some explanation of
>
> them. If no explanation is offered, the conclusion is that there
>
> is only one explanation and it is the one suggested by the
>
> objective facts.

17. The circumstances which so obviously suggest a particular conclusion that they call for an explanation, if there is one

consistent with innocence, are not susceptible of definition. Nor can

they be identified with particularity. However, they are confined by

the presumption of innocence and the duty of the prosecution to prove guilt beyond reasonable doubt. In general terms, they fall into two broad categories. There are those, such as recent possession of stolen goods, 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. Generally, cases in this category involve facts which are such that it can be said that the accused was "caught practically redhanded" ((57) Reg. v. McNamara [1987] VicRp 68; (1987) VR 855, at p.860.) as, for example, if found at the scene of a murder and in possession of the murder weapon. On the other hand, there are those which 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 ((58) See, for example, Purdie v. Maxwell (1960) NZLR 599, at p.602; Stewart v. H.M. Advocate (1980) SLT, at p.252; Reg. v. Guiren (1962) N.S.WR 1105, at p.1107; O'Sullivan v. Stubbs (1952) SASR 61, at p.62.). For example, it may be established that the accused is the owner of the murder weapon, in which event there is an inference that the accused knows how the weapon left his or her possession, if, in fact, it did so and it is

assumed that an innocent person would account for its not being in his or her possession at the relevant time ((59) See, R. v. Steinberg (1931) OR 223, a case involving facts of this kind.). The critical factor in cases of both kinds is that the facts are such as to give validity to the 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 ((60) See, for example, Bruce v. The Queen [1987] HCA 40; (1987) 61 ALJR 603, at p.603; 74 ALR 219, at p.219; Wilson v. Buttery (1926) SASR, at p.154; Reg. v. Guiren (1962) N.S.WR, at p.1107: cf. Anderson v. Geerlings (1988) 6 M.VR 392, at p.397 where there was an "equally consistent and rational explanation of the facts" and an inference could not be drawn because "to convict, the facts must be only consistent with the accused's guilt.").

18. It was argued for the appellant that the authorities which allow for judicial comment to be made as to the failure of an accused person to explain, even in the limited circumstances described, are inconsistent with the right to silence as explained in Petty v. The Queen. And it was put that, on that account, they should no longer be

followed. However, there is a difference between mere silence or the absence of evidence, on the one hand, and, on the other, the failure to explain facts for which, it is assumed, an innocent person would offer some explanation. Where there is an assumption to that effect, the failure to explain is conduct which proves or tends to prove guilty knowledge on the part of the accused ((61) See Bruce v. The Queen [1987] HCA 40; (1987) 61 ALJR 603; 74 ALR 219; Reg. v. Hallocoglu (1992) 29 NSWLR 67, at p.78 where it was said: "The inference is that he did not (attempt to explain what had happened) because there was no acceptable explanation to be given.") and is, itself, evidence.

19. The right to silence is, of course, concerned with more than the presumption of innocence and the duty of the prosecution to prove guilt beyond reasonable doubt. However, it is the presumption of innocence and the prosecution's burden of proof which preclude an adverse inference being drawn from silence which does not amount to evidence or, as we have called it, "mere silence". Because of the presumption and because of the burden of proof, silence of that kind proves nothing and provides no basis for any inference adverse to the accused. But neither the presumption of innocence nor the burden of proof bears upon the situation in which failure to explain is,

itself, evidence. Nor does the privilege against incrimination: 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 ((62) Andrew Bruce comments to this effect in "The right to comment on the failure of the defendant to testify", (1932) 31 Michigan Law Review 226, at p.233. Note also the observation in Chandler (1976) 63 Cr.App.R. 1, per Lawton LJ at p.4 that:

> "The law has long accepted that an accused person is not bound to incriminate himself; but it does not follow that a failure to answer an accusation or question when an answer could reasonably be expected may not provide some evidence in support of an accusation.").

20. Given that failure to explain can amount to evidence, albeit in limited circumstances, there is no basis for departing from the authorities which acknowledge that, in those limited circumstances, it is appropriate to comment on the fact that particular evidence is unexplained or unanswered.

21. In the context of the right to silence, it is important to bear in mind that it is the failure to provide an "explanation or

answer ... as might be expected if the truth were consistent with

innocence" ((63) Wilson v. Buttery (1926) SASR, at p.154.) which

is of evidentiary significance and not the failure to give evidence as

such. In many cases, an explanation can be offered without the giving

of evidence: 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. Moreover,

the assumption that an innocent person would offer an explanation loses

all relevance if there has not been a real opportunity to explain. An

opportunity of that kind, as was made clear in Bruce v. The Queen, does

not encompass the 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" ((64) (1987) 61 ALJR, at p.603; 74 ALR,

at p.219. Note that it was also there said that "the fact that the

caution was given or that the right to silence was asserted or

exercised does not itself provide an explanation" for the facts

involved. See also Petty v. The Queen (1991) 173 CLR, per Gaudron

J at p.127.). Accordingly, directions should be given in terms of the

unexplained facts, rather than in terms of the failure to give evidence

or to meet the prosecution case generally or the failure to answer

questions from investigating police ((65) See Bruce v. The Queen

(1987) 61 ALJR, at p.604; 74 ALR, at p.220.). And to avoid any

possibility of the jury giving significance to the accused's silence

with respect to other matters, a direction, if one is to be given,

should be precisely framed in terms of the particular facts which call

for explanation in the sense indicated.

22. One other matter should be remembered with respect to the right to silence and its application in cases involving circumstances which

call for an explanation in the sense indicated. If an explanation is

offered, the question for the jury is whether that explanation is to

be accepted as a reasonable possibility. If it is not, it is, in

effect, no explanation at all ((66) See, for example, R. v. Aves

(1950) 2 ALL ER 330; Loughlin (1951) 35 Cr.App.R. 69; Raviraj (1986)

85 Cr.App.R., at p.103 and Trainer v. The King [1906] HCA 50; (1906) 4 CLR 126, at

pp.133-134, 138-139 where the failure to provide an acceptable

explanation is treated as having the same significance as failure to

provide an explanation at all.). 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. If an explanation is offered, the right to silence is not infringed merely by pointing out that the explanation was not given when a real opportunity first presented itself for, as already indicated, that ultimately goes to the question whether the facts are or are not explained ((67) See Petty v. The Queen (1991) 173 CLR, per Dawson J at pp.118-119; per Gaudron J at pp.125-127; see also per Brennan J at pp.104-105.).

23. So far as the present case is concerned, the facts clearly suggest that the appellant, above all others, knew how he came to be in possession of the "Immanuel" with the personal belongings of Ms Zack and Mr Bayerl on board. And, since they have apparently disappeared, those facts provide ample foundation for an assumption that an innocent person would offer some explanation of that possession. Unexplained possession of the "Immanuel" was, in the circumstances, evidence which proved or tended to prove guilty knowledge with respect to that possession.

24. Moreover, only the appellant could know why he had given different accounts on different occasions as to the whereabouts of

Ms Zack and Mr Bayerl. Without some explanation of his actions in

that regard, the jury might well conclude that that was because he

had something to conceal concerning the circumstances of their

disappearance. And that was a matter the jury could take into account

in relation to the offences charged if and to the extent it was

satisfied that those actions were inconsistent with his innocence of

them ((68) See Woon v. The Queen [1964] HCA 23; (1964) 109 CLR 529, per Windeyer

J at pp.541-542 where his Honour explains that:

> "the inference which can be drawn from conduct and
>
> demeanour that displays a consciousness of guilt may
>
> depend upon whether there is other evidence pointing to
>
> the accused as guilty of the offence charged. When
>
> there is, false accounts of movements, false denials of
>
> knowledge of relevant facts, any conduct, utterance or
>
> demeanour demonstrative of guilt may go far to support
>
> a conclusion that the accused committed the very crime
>
> charged. But when there is no other evidence
>
> implicating the accused, an attitude of guilt, without
>
> more, may mean only that the accused was a participant

in some wrongdoing, not that he committed the crime

alleged, in manner and form alleged."). But beyond 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, as might be suggested if, for example, it had been

established that they sailed with him from Cairns. Much less can it be

said that the facts so obviously implicate him in murdering them that

they call for an explanation in the sense discussed.

25. The directions to the jury were defective in two important respects. They were couched in terms of the failure to give evidence,

rather than in terms of the unexplained facts. And they were not

confined to the appellant's unexplained possession of the "Immanuel"

in the absence of Ms Zack and Mr Bayerl and his failure to explain

the different accounts given by him on different occasions as to the

whereabouts of Ms Zack and Mr Bayerl. Rather, they suggested that

the appellant's failure to give evidence in relation to some matters

entitled the jury to more readily draw an inference of guilt from the

whole of the Crown case. As already indicated, neither his failure to

give evidence nor his failure to explain the disappearance of Ms Zack

and Mr Bayerl was a matter that could properly be taken into account

on any of the charges.

26. So far as the directions to the jury permitted them to have regard to the failure of the appellant to give evidence they clearly

constitute a serious miscarriage of justice which requires the

convictions for murder to be set aside. They also constitute a

serious miscarriage of justice with respect to the charge of stealing

the "Immanuel", notwithstanding that the appellant's unexplained

possession of the boat was a matter to which the jury could have

regard in reaching a verdict on that particular charge. Although the

case on the charge of stealing may be described as a strong one, the

verdict was not inevitable. Given the terms of the directions, the

jury may well have proceeded on the basis that the appellant's failure

to give evidence with respect to the whereabouts of Ms Zack and

Mr Bayerl was a matter which could be taken into account in reaching a

verdict on that charge. Accordingly, all three convictions must be

quashed.

27. The appeal should be allowed. The judgment and order of the Court of Criminal Appeal should be set aside and in lieu thereof it

should be ordered that the appeal to that court be allowed, the

convictions quashed and a new trial ordered on all charges.