ON NOT SPEAKING

The right to silence, the gagged trial judge and the spectre of child sexual abuse

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Is there a right to silence for people accused of crimes? What is the extent of that right? The right to silence co-exists with the presumption of innocence; both are long-standing principles which have come to be given their effect through rather narrow technical procedures. In NSW and federally these principles are implemented through s 20 of the *Evidence Act 1995*, and the interpretation of s 20 in some of the cases discussed in this article. In criminal matters, the Crown bears the burden of proving the guilt of the accused to the requisite standard: beyond any reasonable doubt. The accused is entitled to be presumed innocent unless and until that standard has been met. The accused need not do anything in their own defence, and under s 20 the failure of the defendant to give evidence does not entitle a trial judge to comment in any way that suggests the defendant has failed to give evidence because they are, or believe they are, guilty of the offence.

Until recently, it had been thought that the right to silence had greater value as rhetoric than as legal doctrine. Accused people were expected to do something in their own defence and, if they did nothing, a jury could infer from their silence something adverse to the defendant. Trial judges were permitted to give directions about the inferences that could be drawn from the failure of the accused to give or call evidence.

The body of cases from *Jones v Dunkel*[1] through to *Dyers v The Queen*,[2] which are the subject of this article, essentially concern themselves with comments made by trial judges to the jury about the failure of the defendant to give evidence. These cases examine whether or not the judge's comments 'suggested' or 'inferred' something adverse to the accused, and whether or not adverse inferences may be drawn by the jury from the accused's failure to say something in their own defence. *Jones v Dunkel* said that, in some circumstances, the adverse inference could be drawn. Ever since that time, the High Court has been retreating from that principle.

The High Court's decision in *Dyers* confirms a reinforced right to silence, overruling the position as it developed up to and including *Weissensteiner v The Queen*.[3] It confirms that the application of *Jones v Dunkel* directions has narrowed so far as to make such directions almost entirely unlawful in criminal trials. *Dyers* says an accused person has an absolute right to silence; nothing adverse to them can be inferred from their decision not to give or call evidence. *Dyers* confirms the view that the High Court has departed altogether from the earlier view, in which the right to silence was a conditional right.

The new position now shifts the entire evidentiary burden onto the prosecution. An accused person is under no obligation to give or call evidence, even evidence of an alibi. All material evidence must be called by the prosecution and, where such evidence is not called, a trial judge cannot direct a jury about drawing adverse inferences against an accused person from its absence. Most of the High Court's view on the right to silence focuses on directions given by trial judges, assuming that such directions are highly influential on a jury, and holding that technically imperfect directions give rise to a miscarriage of justice.

In so doing, the High Court gives no attention to the significance of having developed an entire corpus of generally applicable evidentiary rules from the unique context of child sexual abuse. For the past 15 years, High Court jurisprudence on the rules of evidence has emerged from appeals from convictions of child sexual abuse. Such cases raise unique evidentiary problems, and set usually insurmountable obstacles for prosecutors and victims. The High Court, in *Dyers*, proceeds with doctrinal purity, quarantining these decisions from their very particular socio-cultural contexts and the very difficult prosecutorial challenges they pose. In so doing, they have rendered the criminal courts virtually powerless to convict sexual predators.

The High Court and the right to silence

The right to silence has been the subject of superior court rhetoric for centuries, tied to discourse around the presumption of innocence. Giving real meaning and value to the right to silence has seen courts engage in technical discussion of narrow rules about comments made from the bench, and inferences drawn by the jury. On reading superior court decisions in which the right to silence is at stake, the primary concern of the courts is in ascertaining whether a judicial comment contained something improper, or whether the jury might have drawn an improper inference from a judicial comment. 'Improper', in this context, means anything that is 'adverse' to the accused.

In *Jones v Dunkel* the High Court held that, in certain circumstances, a trial judge can direct a jury that an inference may be drawn from the failure of a party to give or call evidence. It was a civil case concerning a fatal road accident, and whether it occurred on one side of the road or the other. The application of *Jones v*

REFERENCES
1. (1959) 101 CLR 298.
2. (2002) 210 CLR 285.
3. (1993) 178 CLR 217.

Dunkel to criminal matters has long been controversial, and it has been steadily in retreat.

Nevertheless, the High Court used *Jones v Dunkel* as authority for giving judicial directions in *Weissensteiner v The Queen*, where it was held permissible to direct a jury that it could be safer to draw an inference of guilt where the appellant did not give evidence of facts which were 'perceived to be within his knowledge'.[4] Gaudron and McHugh JJ dissented in *Weissensteiner*, saying that nothing can be proved from an accused person's silence, as to do so impinges on their right to silence and the presumption of innocence.[5]

The majority view in *Weissensteiner* entrenched *Jones v Dunkel* into authority for giving such directions in criminal trials, where it may have been more appropriate to develop a jurisprudence specifically applicable to the criminal burden of proof, and genuinely valuing the right to silence and the presumption of innocence. The unsuitability of *Jones v Dunkel* for the purposes to which it was routinely applied enabled the High Court eventually to dispense with it altogether, essentially silencing trial judges in directing juries about absent evidence, rather than arming them with effective and substantive means of protecting the accused and informing the jury.

The High Court's turnaround occurred in *RPS v The Queen*,[6] affirmed the following year in *Azzopardi v The Queen*.[7] *RPS* marked an almost-wholesale rejection of *Weissensteiner* and the authorities supporting it. In *RPS* it was held that, in a criminal trial, the entire onus is on the prosecution, and it will never (or rarely) be reasonable to expect an accused person to give evidence. To do so would be 'contrary to fundamental features of a criminal trial'.[8] Again in *Azzopardi*, the majority of the High Court confirmed this very restrictive view of *Jones v Dunkel* directions, although Gleeson CJ and McHugh J dissented separately. Gleeson CJ stated the right to silence does not necessarily mean there will not be adverse consequences for an accused person who exercises the right.[9] McHugh J reasoned there is no right to silence, but a privilege against self-incrimination,[10] and he favoured the approach taken in *Weissensteiner* to that of *RPS*, which he argued was 'inconsistent' with the earlier authorities.[11]

McHugh J's reliance on the privilege against self-incrimination appears attractive, but the current NSW and Commonwealth *Evidence Acts* preclude this approach having a substantive impact. Section 128 protects witnesses (including the defendant) who give evidence that may incriminate them in other proceedings. The legislative protection does not apply to the defendant in the instant proceedings (s 128(8)). This means, under cross-examination about their involvement in the facts in issue, a defendant may not rely on the privilege. A wider privilege against self-incrimination would seem a better way of ensuring a genuine right to silence for the accused, thus protecting the presumption of innocence. Section 20, by focusing on judicial comments made to the jury about the accused's failure to give evidence, and whether those comments suggest something 'adverse', seems a remote and abstracted attempt to preserve fundamental rights. Perhaps the current state of the *Evidence Acts* has driven courts — and the rights of the accused — into this corner?

Dyers v The Queen

The High Court considered this issue again in *Dyers* because the appellant's trial had taken place prior to the High Court's decisions in *RPS* and *Azzopardi*. At trial, the judge gave a *Jones v Dunkel* direction to the jury, which was justified by the earlier authorities. In *Dyers*, the High Court was able to determine explicitly the status of *Jones v Dunkel* in criminal trials, and the true extent of an accused person's right to silence.

It is necessary to reflect briefly on the facts in *Dyers*, and also on what happened at his trial. This is in order to illustrate one of the themes of this article, which is to question the development of general evidentiary rules from cases arising out of allegations of child sexual abuse.

The appellant, Kenneth Emmanuel Dyers, was the leader of Kenja, described as a 'sect' or a 'cultural social organisation'. The complainant, AP, and her mother were members of Kenja. AP alleged that in 1988, when she was 13 years old, Dyers, then 66 years old, indecently assaulted her during a 'processing session' in an 'energy conversion room'. She first complained of the assault in 1993.

During his trial, Dyers made an unsworn statement in which he claimed to have been in a processing session with a person named Wendy Tinkler at the time AP alleges she was assaulted.[12] He stated he had other appointments during that day. He tendered his appointment diary. He called as a witness his personal assistant, who was also his wife's sister, who gave evidence that she had made these appointments. He

4. *Weissensteiner v The Queen* (1993) 178 CLR 217, [20].

5. Ibid [19].

6. (2000) 199 CLR 620.

7. (2001) 205 CLR 50.

8. *RPS v The Queen* (2000) 199 CLR 620, [32].

9. *Azzopardi v The Queen* (2001) 205 CLR 50, [7-8].

10. Ibid [118].

11. Ibid [86].

12. At the time of Dyers' trial, unsworn dock statements were permitted.

The right to silence co-exists with the presumption of innocence; both are long-standing principles which have come to be given their effect through rather narrow technical procedures.

called other people who testified they had seen him during that day. Wendy Tinkler was not called.

In their summing up for the jury, counsel for both the Crown and defence noted the absence of this witness. The Crown said: 'I suggest to you the reason why those people haven't been called is because they would not [be of] assistance [to] the defence case'.[13] The defence told the jury that 'there are other inferences available to you', one of which was that '[n]othing more would be added and all that would happen would be all the same kind of cross-examination about a non issue'.[14]

In his directions to the jury, the trial judge told the jury 'you are not entitled to speculate on what that witness might have said if the witness had been called'. He also directed they were 'entitled to draw the inference that the evidence of that witness would not have assisted the party who you have assessed should have called that witness'. He did not identify which party should have called the witness. He also said if they decided the witness need not have been called, 'you do not have to draw the inference that I have suggested'. He emphasised that 'it is for the Crown to prove [the charge] and to do so beyond reasonable doubt. And that there is no onus on the accused to prove anything'.[15]

On appeal, the NSW Court of Criminal Appeal (CCA) determined that the direction did not single out the appellant, but related to both parties, describing the direction as 'bi-partisan'.[16] The CCA thought the trial judge made it 'abundantly clear' the onus of proof was on the Crown.[17] It was held that *RPS*, which was considered, did not prohibit a trial judge giving a *Jones v Dunkel* direction.[18]

The High Court, by a majority, allowed the appeal, quashed the conviction and ordered a re-trial. McHugh J dissented. The High Court emphasised that nothing must interfere with the accused person's right to silence, nor with the presumption of innocence, nor with the entire evidentiary burden resting on the Crown. They agreed unanimously an accused person need not give or call any evidence in their defence.[19]

The sole method by which the court sought to ensure the rights of the accused was by controlling judicial comments and directions. The Court held, by majority, that the trial judge erred in giving a *Jones v Dunkel* direction to the jury. They limited the application of *Jones v Dunkel* to civil cases, on the basis that, since the accused is not obliged to give or call any evidence in their own defence, the jury must not draw any inference from a defendant's failure to do so.

The Court provided three principles for why no *Jones v Dunkel* direction should have been given in this matter. First, a jury has no way of knowing whether a witness should be called, and which party should call that witness.[20] *Jones v Dunkel* and *R v Burdett*,[21] the 1820 case establishing the principle, assume that a person who *can* shed light on a subject *should* do so. In criminal matters, there can be no expectation that an accused person will do anything; to say they should do something shifts the onus onto the prosecution to prove the charge beyond reasonable doubt.[22] Following the High Court's decisions in *RPS* and *Azzopardi*, this principle extends beyond the accused personally, and applies also to witnesses who could be called by the defence.[23]

Second, anyone who can give 'credible evidence' must be called by the prosecution. Especially if their evidence is 'important and credible', it is for the prosecution to adduce it. The prosecution must present 'the *whole* truth' to ensure a fair trial. The prosecution is required to call 'all available material witnesses', regardless of whether their evidence assists the prosecution.[24] Third, *Jones v Dunkel* should not be applied to the drawing of inferences where facts are in dispute, as in the instant case.

The High Court held that, where it is possible a jury may think witnesses were not called who ought to have been called, the only correct direction a trial judge may give a jury is a direction not to speculate about what those witnesses may have said. The High Court thought the direction given by the trial judge about drawing inferences contradicted the direction not to speculate about what might have been said by a witness who was not called.[25]

McHugh J's reasons constitute a powerful and comprehensive dissent from the majority view. He argued the High Court's view of these issues changed dramatically with its decision in *RPS* and again in *Azzopardi*. Until that time, decisions up to and including *Weissensteiner* confirmed the 200-year-old principle that adverse inferences could be drawn against an accused who failed to contradict or explain evidence adduced against them by the Crown.[26] Now, he stated, that principle has become 'anathema' and 'heresy'.[27]

Accepting the onus of proof is on the prosecution, McHugh J argues inferences can be drawn against any party that does not call evidence they are 'reasonably

13. *Dyers v the Queen* (2002) 210 CLR 285, [106].
14. Ibid [108].
15. Ibid [109].
16. R v Dyers [2000] NSWCCA 335, 62.
17. Ibid 67.
18. Ibid 67.
19. *Dyers v the Queen* (2002) 210 CLR 285, [9-12], [19] (Gaudron and Hayne JJ), [26–27] (McHugh J), [53] (Kirby J), [119] (Callinan J).
20. Ibid [8].
21. [1814–23] All ER 80.
22. *Dyers v the Queen* (2002) 210 CLR 285, [9] (Gaudron and Hayne JJ), [121] (Callinan J).
23. Ibid [10] (Gaudron and Hayne JJ).
24. Ibid [11–12] (Gaudron and Hayne JJ).
25. Ibid [14].
26. Ibid [24–25].
27. Ibid [25].

expected to call'.[28] In certain circumstances, failure to call evidence can be 'an admission by conduct'.[29]

McHugh J was the only judge to give consideration to the substantive meaning of 'silence'. He distinguishes the genuinely silent accused from the accused who argues an '*affirmative* evidentiary case' in their own defence.[30] McHugh J identified Dyers' defence as an alibi defence: he claimed to have been with another person at the time of the alleged offence.[31] Dyers adduced certain evidence in support of his alibi, but he did not call Wendy Tinkler. An alibi defence is an affirmative evidentiary case, and the 'paradigm case' for giving a direction where an alibi witness is not called. The Crown is under no duty to call the alibi witness.[32] Her evidence is 'relevant only when the appellant asserted that he was with her at the relevant time'.[33] The majority said the onus is on the prosecution to call all material witnesses, regardless of whether their evidence supports the prosecution case.[34] In McHugh J's view, the prosecution need not call every witness who could support the accused's affirmative evidentiary defence: 'The cards are not yet stacked so heavily against the prosecution that it has a duty to call every witness that might support any affirmative case the accused might put forward'.[35] In their joint reasons, Gaudron and Hayne JJ stated explicitly that running an alibi defence does not raise an exception to their reasons, and does not warrant the giving of a *Jones v Dunkel* direction.[36]

The implications of *Dyers*

The decision in *Dyers* raises several concerns. First, the detailed scrutiny of judicial directions assumes — in the absence of any corroboration — that judicial directions, comments and warnings are highly (or even marginally) influential on the decision-making processes of a jury. While such directions attempt to limit the dangers of a jury 'left at large',[37] very little is known about the true significance of judicial directions on a verdict.[38] Superior court scrutiny of the directions given by a trial judge tends to examine the judicial words that were spoken, followed by appellate speculation about whether those words are capable of conveying an adverse inference to a jury. A more appropriate way of proceeding would be to begin with the presumption of innocence, the right to silence, and the burden of proof, and to examine whether, in the context of those principles, the trial was conducted with fairness to the accused. As an attempt to mitigate the likelihood of unfairness, there is nothing to suggest judicial directions are effective. A more cynical reading of appeals based on judicial directions would conclude that appellate interference with directions is as close as it is possible to get to interfering with a jury's verdict. What a trial judge *tells a jury to do* is the subject of frequent criminal appeals; what a jury *actually does* cannot be reviewed.[39]

Second, Dyers permits retrospective interference with directions that, when they were given, were in accordance with High Court authority. Particularly in circumstances such as these, where the High Court has engaged in a complete rejection of its earlier rules, retrospective decisions have the effect of challenging the legitimacy of all earlier directions that were correct when they were made, but have since been declared unlawful. When this kind of retrospective decision-making is practised in pursuit of other social justice ideals, it is denounced as judicial activism. Here, when the ideal (protecting accused people in criminal proceedings) is shrouded within a technical appeal on judicial directions, the decision is protected from much scrutiny. By quarantining the issues to narrow questions about s.20 and *Jones v Dunkel*, the court is not seen to be deciding — and transforming — important legal principles about the fundamental rights of the accused.

Finally, the majority judges in *RPS* sought to distinguish the case from *Weissensteiner* on the grounds that the latter was about circumstantial evidence whereas the former required the jury to evaluate the allegations of a child sexual assault complainant. What emerges from this distinction is a troubling trend in Australian superior courts to establish a body of evidentiary rules based on a series of cases involving child sexual assault allegations. Even a cursory examination of the leading cases on evidentiary rules reveals that an overwhelming number of them arise from cases concerning allegations of sexual abuse of children.

In a large number of these child sexual abuse cases, the courts masked their development of important evidentiary principles by purporting to scrutinise judicial directions. From child sexual assault cases, generally applicable evidentiary rules now apply in the following circumstances:

- where directions are given about a defendant who has failed to explain or deny incriminating evidence[40]
- where directions about drawing adverse inferences from the silence of the accused are impermissible [41]
- where juries are to be directed that there may be good reasons why a child sexual assault complainant may delay in making a complaint[42]

28. Ibid [26].

29. Ibid [26].

30. Ibid [26], [39–41].

31. Ibid [30].

32. Ibid [35].

33. Ibid [35].

34. Ibid [6] and [11] (Gaudron and Hayne JJ), [118–119] (Callinan J).

35. Ibid [35].

36. Ibid [19].

37. Transcript of Proceedings, *Dyers v The Queen*, S255/2001 (High Court of Australia, McHugh J, 12 April 2002) <www.austlii.edu.au/au/other/hca/transcripts> 44.

38. One recent attempt to understand jury reasoning is M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity: An empirical study of criminal jury trials in New South Wales* (2001).

39. Notwithstanding appeals on the basis of verdicts that are 'unreasonable', for which *M v The Queen* (1994) 181 CLR 487 and *R v Gordon and Gordon* (1991) 57 A Crim R 413 are authorities permitting appellate courts, in limited circumstances, to overturn a jury's verdict in criminal matters.

40. *Davis v The Queen* S39/2000 (3 May 2001) (with which *Azzopardi* was joined). *R v OGD* (1997) 45 NSWLR 744, the leading NSW authority and a child sexual assault, was the source of this principle.

41. *RPS v The Queen* (2000) 199 CLR 620, *Dyers v The Queen* (2002) 210 CLR 285.

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- where warnings are to be given about the dangers of convicting where there was delay before making a complaint[43]
- where directions are given about character evidence[44]
- where the admissibility of character evidence is in issue[45]
- where directions are given about similar fact evidence[46]
- where the admissibility of similar fact evidence is in issue[47]
- where there has been a failure to call an important witness.[48]

Finally, just to cover the field, is one authority of truly massive consequence, empowering appellate courts to set aside jury verdicts which they find to be 'unsafe and unsatisfactory', arising from a case in which the evidence of a child sexual assault complainant against her father was uncorroborated.[49]

Child sexual abuse is the unacknowledged source of so much evidentiary rule-making by Australian superior courts. Child sexual assault prosecutions raise unique evidentiary problems, not least of which is that child sexual assaults — particularly those perpetrated within the family — are unlikely to be 'corroborated'. For the High Court to then set down general rules exacerbates the special difficulties of prosecuting offenders in these matters. While I do not challenge the importance of the right of accused people to silence, the presumption of innocence, and the prosecution bearing the burden of proof, much more scrutiny is required of the method by which these principles are protected. I also contend these principles cannot be pursued by surrendering to the growing weight of appellate authority, in so many instances, that prosecuting child sexual assault is just too difficult. By deciding these appeals in what amounts to a factual vacuum, the courts add further prosecutorial burdens which are then borne disproportionately by child sexual assault complainants, who are already some of the most vulnerable subjects within the criminal justice system. These cases would seem to be bad vehicles for arriving at general evidentiary principles, and the doctrinal purity with which the courts proceed masks their underlying policy choices, in which the entire criminal justice system must yield to rules derived from its most troubling failures.

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42. *Crofts v The Queen* (1996) 186 CLR 427.
43. *Longman v The Queen* (1989) 168 CLR 79, *Doggett v The Queen* (2001) 208 CLR 43. *Crampton v The Queen* (2000) 206 CLR 161 and *R v BWT* (2002) 54 NSWLR 241.
44. *R v RJC* (Unreported, NSW CCA, 3 April 1998).
45. *TKWJ v The Queen* (2002) 212 CLR 124.
46. *BRS v The Queen* (1997) 191 CLR 275.
47. *Hoch v The Queen* (1998) 165 CLR 292 and *Pfennig v The Queen* (1995) 182 CLR 461.
48. *R v Kneebone* (1999) 47 NSWLR 450.
49. *M v The Queen* (1994) 181 CLR 487.

ABUSE WATCH

The December *Alternative Law Journal* sought contributions (p 284) from people who have had a poor experience arising out of their dealings with federal, state and local government.

Responses were received from:

- A community group which has been writing to the NSW Premier for over six months and cannot get an answer about its problem — it actually wants to buy an unused government property and has the money. Why won't the NSW Government take it or even reply?
- A youth support group dealing with a federal government agency which rejected its tender for a grant but quoted rules that were inapplicable and cited the opinion of a 'probity officer' who thought the process was done correctly. Think again folks!
- A solicitor and a social worker who were separately dealing with NSW Department of Community Services (DOCS) about various matters where DOCS was, well, being DOCS.

The responses about DOCS were eclipsed by December 2004 media coverage about DOCS in reports by the NSW Ombudsman, but the best was the 20-year-old who asked DOCS for a copy of the record of her telephone conversation with a caseworker. She wrote three letters and sent a fax asking for a copy — never received a copy — but was told she had to lodge an FoI request to get one. Deepest, darkest DOCS just keeps getting better. (If anyone from the NSW Ombudsman's Office is reading this, be patient, a complete file on this matter and others will be heading your way.)

PLEASE, PLEASE email more reports to <herzer@ozemail.com.au>.