does silence imply guilt?

By David Hamer

Australian law gives strong, though not unequivocal, recognition to the right to silence.

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An immediate and clear effect of the right to silence is that a criminal suspect need not answer the questions of police and should be informed of this prior to questioning.[1] Any confession that is induced by threat, force or trickery is liable to be excluded at trial.[2] Moreover, a criminal defendant, although competent to testify at trial, cannot be compelled to do so.[3] A more difficult question, however, is whether the exercise of these rights would carry any cost at trial. Might a court adopt Bentham's view that 'innocence claims the right of speaking, as guilt invokes the privilege of silence',[4] and draw an adverse inference against the criminal defendant? If so, this would exert significant pressure on the suspect or defendant not to exercise their right.[5] Should they withstand this pressure, their silence could render them an involuntary source of self-incrimination.[6]

POLICE QUESTIONS AND THE WITNESS BOX

Australian law draws a distinction between pre-trial silence and silence in court. It appears clear now that a suspect's refusal to respond to police questions should not give rise to an adverse inference.[7] This protection should extend to a suspect's selective responses,[8] and should prevent late defences being denied credibility on the basis of recent invention.[9] In a jury trial, the trial judge should give a direction in appropriate terms to discourage the adverse inference from being drawn.[10]

The validity of the adverse inference arising from a defendant's silence at trial is far less clear. In *Weissensteiner v The Queen*[11] it was suggested that less protection may be required for a defendant in court than a suspect in police custody, since 'the suspect's rights are not immediately amenable to judicial protection'.[12] But it is unclear why it would be any more acceptable that pressure to speak 'is provided by the judiciary rather than the executive'.[13] Be that as it may, a series of High Court decisions has expressed some ambivalence about the adverse inference from a defendant's silence. The court has examined closely the logic of the inference, suggesting that in 'rare and exceptional' cases[14] the inference may be open. But even in those few cases where the inference is open, the court has hemmed it in with restrictions so tight as to deprive it of any force.

THE LOGICAL CONDITIONS FOR THE ADVERSE INFERENCE

As a first step in understanding the logic of the inference, it is necessary to distinguish the genuine inference from an illusory use of silence.[15]

Obviously the silence of the defendant will leave the prosecution case stronger than if the accused had provided plausible exculpatory testimony. But this silence leads to the *absence of an inference favouring the defendant*, rather than the *existence of an inference adverse to the defendant*. In *Weissensteiner*, Mason CJ, Deane and Dawson JJ indicated that it was 'almost a truism' that 'uncontradicted evidence is easier or safer to accept than contradicted evidence'.[16] In this case and in its subsequent decisions, *RPS v The Queen*[17] and *Azzopardi v The Queen*,[18] the High Court focused its attention on the conditions for the raising of a genuine adverse inference; where 'the failure of an accused person to [testify] can logically be regarded as increasing the probability that it is true'.[19]

Logically, for the adverse inference to be warranted, the circumstances must be such as to raise a greater expectation or higher probability that an innocent defendant would testify than would a guilty defendant.[20] Bentham accepted this as a general proposition; however, the courts have recognised that certain conditions must be satisfied before it would be reasonable to expect an innocent person to speak. One condition is that the circumstances must be such as to 'call for a response' from an innocent defendant.[21] As Mason CJ, Deane and Dawson JJ suggested in *Weissensteiner*, 'deficiencies in the prosecution case may be sufficient to account for the accused remaining silent'.[22] If the prosecution has not presented a 'clear prima facie case'[23] an innocent defendant may feel no motivation to testify and may decide not to dignify the prosecution case with a response.

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Even if the prosecution case appeared strong, an innocent defendant may not enter the witness box unless there was something useful he could say in his defence. If the defence is one of simple denial there is no point in the defendant testifying: 'The accused's plea of not guilty stands as that denial.'[24] But if the defendant had knowledge of exculpatory facts inaccessible to anyone else,[25] or made positive claims unsupported by other testimony, such as alibi[26] or mistake, 'one might have thought that he would be very anxious to say so'.[27] The majority in *Azzopardi* suggested that an innocent defendant could be expected to testify only in regard to some 'additional fact known only to the accused and therefore not the subject of evidence at trial if the accused remains silent'.[28] In *Weissensteiner*, for example, the defendant was charged with a double murder. The prosecution established that at the time of the victims' disappearance, the defendant was sailing with them on their yacht. Their gear was still on board and none of their friends or relatives had any knowledge as to their whereabouts. Instead, the defendant moored on various Pacific islands alone. In this case, the defendant, if innocent, would have been expected to testify, and an adverse inference was open from his silence.

There is a clear logic behind the 'peculiar knowledge' and 'additional fact' requirements in *Azzopardi*. Where present, the expectation that an innocent defendant would testify is >>

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increased, providing support for the adverse inference from silence. However, the majority in *Azzopardi* advanced the further requirement that the prosecution case must be purely circumstantial. This requirement was presented as a corollary of the 'additional fact' and 'peculiar knowledge' requirements. However, it does not withstand examination. *Weissensteiner* happened to involve a purely circumstantial prosecution case, but this is not a necessary feature. The majority in *Azzopardi* reasoned: '*If the [eyewitness] were accepted as a credible witness*, the accused could not have given evidence of any additional fact that might have explained or contradicted her account.'[29] But the premise is inappropriate.[30] If the prosecution eyewitness is credible, then the defendant is guilty. The question underlying the adverse inference, however, is whether an *innocent defendant* would be expected to testify. Is there an additional fact of which an innocent defendant would have peculiar knowledge, such as alibi or mistake? This has nothing to do with the existence of a prosecution eyewitness, credible or not.

Putting to one side the illogical circumstantial requirement, the High Court has identified three fundamental conditions underlying the adverse inference from silence: the prosecution case must *call for a response*, and the defendant must be in a position to provide evidence of *additional facts* of which he has *peculiar knowledge*. Of course, these conditions are not exhaustive. The silent defendant might be protecting someone else, nervous about cross-examination, ill, and so on.[31] Ordinarily, when a jury is told that an adverse inference from silence is open, they should also be told that there may be innocent reasons for silence unknown to them.[32]

LEGAL RESTRICTIONS ON THE ADVERSE INFERENCE

Where the *Azzopardi* conditions are satisfied, the trial judge will be entitled to comment on the absence of defendant testimony. In *Weissensteiner* the trial judge said to the jury: 'the prosecution ... seeks to have you infer guilt ... 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.'[33] The legitimacy of this comment was upheld by the High Court. Mason CJ, Deane and Dawson JJ commented that '*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'.[34]

In its subsequent decisions, however, the High Court has constrained the scope of legitimate trial judge comment. In *RPS*, a majority of the High Court disapproved of a trial judge comment that 'you are entitled to conclude, from the accused's election not to deny or contradict that evidence that *his evidence would not have assisted him* in this trial'.[35] In *Azzopardi*, a majority of the High Court rejected a trial judge comment that, as a result of the defendant not testifying, the jury could '*more readily discount*' doubts about the prosecution case, and '*more readily accept*' *prosecution evidence*.[36] The majority even found unacceptable the trial judge's quite mild proposal that the defendant's silence could 'enable [the jury] to *evaluate the weight of other evidence* in the case'.[37] The majority then added the following general restriction:

> '[I]t will almost always be desirable for the judge to warn the jury that the accused's silence in court is not evidence against the accused, does not constitute an admission by the accused, may not be used to fill gaps in the evidence tendered by the prosecution, and may not be used as a make-weight in assessing whether the prosecution has proved its case beyond reasonable doubt.'[38]

There appears to be a clear inconsistency between *Weissensteiner* and *Azzopardi*. *Weissensteiner* upheld the probative use of the defendant's silence. *Azzopardi* effectively rules it out, even in those 'rare and exceptional' cases where the logical conditions are satisfied. Yet *Azzopardi* did not purport to overrule *Weissensteiner*,[39] nor distinguish it upon jurisdictional grounds.[40] More recent decisions have held that *Azzopardi* is not to be taken to have laid down a hard and fast formula for judicial comment.[41] However, it is difficult to see how any judicial comment on the probative impact of the defendant's silence, including that given in *Weissensteiner*, could be upheld under *Azzopardi*.

R v Surrey,[42] a recent decision of the Queensland Court of Appeal, highlights the difficulties and dissatisfaction with *Azzopardi*. The court found that the conditions for adverse judicial comment on the defendant's silence were satisfied. The prosecution case against the defendant, charged with a double murder, pointed

to 'relevant additional facts peculiarly within [his] knowledge'.[43] The evidence suggested that the defendant had the opportunity to kill the victims and to dump their dismembered bodies. It raised questions that only the defendant could answer. Why did the defendant's backpack smell so bad? Why did it contain DNA matching one of the victims? Why was the defendant's carpet wrapped around the torso of the other victim? The trial judge commented that the defendant had no obligation to give evidence, and that there might be an innocent explanation for his silence. However, this did leave aspects of the prosecution evidence unexplained. As a result, 'you might feel you can *more readily draw the inference* that the Crown invites.'[44]

The Court of Appeal held that there were 'apparent deficiencies in that direction, despite its manifest common sense'.[45] It 'did not include the elaboration apparently required by the joint judgment in *Azzopardi*'.[46]

However, paradoxically, the Court of Appeal also suggested that the case 'would have justified a further and fuller direction', that the defendant's absence from the witness box could '*strengthen the inference* that he had murdered [the victim]', and that they 'were entitled *more safely to draw the obvious conclusion*' of the defendant's guilt.[47] In fact, both the trial judge comment and that recommended by the Court of Appeal, while quite logical and consistent with *Weissensteiner*, are in clear conflict with the *Azzopardi* restrictions.[48]

CLARIFICATION OF THE LAW

Given the anxiety expressed by the majority in *RPS* and *Azzopardi* about the inference from silence, it is odd that they took the trouble to explore the conditions under which it would logically arise. The current uncomfortable state of the law could be remedied by a shift in one of two directions. First, the adverse inference and accompanying judicial comment could be prohibited in all cases, including those where an innocent defendant would have possessed peculiar knowledge of additional exculpatory facts. Instead, the *Azzopardi* restriction should be standard.[49]

Alternatively, the *Azzopardi* restriction should be reserved for cases where defendant testimony is not expected. If the *Azzopardi* conditions are present and the defendant would have been expected to testify, the restriction should be omitted and instead the trial judge should be allowed to provide a *Weissensteiner* comment on the defendant's silence. Arguably this infringes the defendant's right to silence. But this would still be an improvement on the current law which is, at best, confusing and complex, and at worst, nonsensical. ■

Notes: **1** For example, *Evidence Act* 1995 (NSW) s139. **2** For example, *Evidence Act* 1995 (NSW) ss184, 138(2). **3** For example, *Evidence Act* 1995 (NSW) s17. **4** J Bentham (Dumont ed), *Judicial Evidence* (1825), 241. **5** For example, *R v Kops* (1893) 14 LR (NSW) 150, 185 (Stephen J). **6** *R v Noble* [1997] 1 SCR 874, 920 [75] (Sopinka J). **7** *Evidence Act* 1995 (NSW) s89; *Petty v The Queen* (1991) 173 CLR 95. **8** *King v The Queen* (1986) FCR 427, 436, but see *Woon v The Queen* (1964) 109 CLR 529. **9** *Petty v The Queen* (1991) 173 CLR 95, 99-101, but see, for example, *Criminal Procedure Act* 1986 s150 (requiring notice of alibi defence). **10** *R v Hodge* [2002] NSWCCA 10 [29]-[32]. **11** (1993) 178 CLR 217. **12** *Ibid*, 231-2 (Brennan and Toohey JJ). **13** Andrew Palmer, 'Silence in Court – The Evidential Significance of an Accused's Person's Failure to Testify' (1995) 18 *University of New South Wales Law Journal* 130, 142. **14** *Azzopardi v The Queen* (2001) 205 CLR 50 [68]. **15** *R v Noble* [1997] 1 SCR 874, 924 (Sopinka J). **16** *Weissensteiner v The Queen* (1993) 178 CLR 217, 227-8. **17** (2000) 199 CLR 620. **18** (2001) 205 CLR 50; see also *Dyers v The Queen* (2002) 210 CLR 285 (defendant's failure to call witness). **19** *Weissensteiner v The Queen* (1993) 178 CLR 217, 227-8 (Mason CJ, Deane and Dawson JJ) quoting from *Bridge v The Queen* (1964) 118 CLR 600, 615 (Windeyer J). **20** D Hamer, 'The privilege of silence and the persistent risk of self-incrimination: Part I' (2004) 28 *Criminal Law Journal* 160, 165-169. **21** For example, *R v Burdett* (1820) 4 B & Ald 95, 161–2 106 ER 873, 898 (Abbott CJ). **22** (1993) 178 CLR 217, 228. **23** *Murray v DPP* [1994] 1 WLR 1, 11 (Lord Slynn). **24** *Azzopardi* (2001) 205 CLR 50 [62]. **25** *Weissensteiner* (1993) 178 CLR 217; *R v Surrey* (2005) 151 A Crim R 547. **26** *R v Noble* [1997] 1 SCR 874. **27** *R v Martinez-Tobon* [1994] 1 WLR 388, 392, 397. **28** (2001) 205 CLR 50 [62]. **29** *Ibid*, [81]. **30** See D Hamer, 'The privilege of silence and the persistent risk of self-incrimination: Part II' (2004) 28 *Criminal Law Journal* 200, 207-11. **31** See Andrew Ligertwood, *Australian Evidence*, Lexis Nexis Butterworths, 4th ed, 2004, p337. **32** *R v OGD* (1997) 45 NSWLR 744, 751; *R v Wilson* (2005) 62 NSWLR 346 [13]-[14]. **33** (1993) 178 CLR 217, 227-8 **34** *Ibid*. **35** (2000) 199 CLR 620 [16], [19]. **36** (2001) 205 CLR 50 [72], [74]. **37** *Ibid* [80], [82]. **38** *Ibid* [51], see also at [67]. **39** See for example, *Ibid* [67]. **40** While *Azzopardi* and *RPS*, unlike *Weissensteiner*, were decided under *Evidence Act 1995* (NSW) s20(2), *Azzopardi* has been taken to have 'pronounced upon the matter for all jurisdictions in Australia': *R v DAH* (2004) 150 A Crim R 14 [84]. However, it is unclear what relevance it has for jurisdictions that purport to prohibit judicial comment altogether: see Ligertwood, 331-2. **41** For example, *DAH* (2004) 150 A Crim R 14 [85]; *Wilson* (2005) 62 NSWLR 346 [25]. **42** (2005) 151 A Crim R 547. **43** *Ibid* [32]. **44** *Ibid* [27]. **45** *Ibid* [27]. **46** *Ibid* [31] **47** *Ibid* [33]. **48** See also *Surrey v The Queen* [2005] HCA Trans 449 (23 June 2005) (special leave denied). **49** Something along these lines was proposed by Callinan J in *RPS* (2005) 151 A Crim R 547, but he conceded in *Azzopardi* (2001) 205 CLR 50 [190] that this was not the view of the majority.

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