Note

RPS v R: The Resilience of the Accused's Right to Silence*

> Why has this Court commented so frequently on the effect of the accused's silence? Why has it arisen so often as an issue before this Court? The reason is simple: silence can be very probative. ... Under the right circumstances ... silence can form the basis for natural, reasonable, and fair inferences.[1]

1. Introduction

In civil law it has long been recognised that the failure of a litigating party to give evidence of facts within his or her knowledge which would provide an exculpatory explanation or contradict the evidence against that party, permits the court to more readily accept the tendered evidence. However, such reasoning in the context of a criminal trial proves difficult to reconcile with the accused's right to silence. Indeed, the 'golden thread' of the adversarial criminal trial that entitles an accused to be presumed innocent is underpinned by procedural and normative principles which require a successful prosecution to discharge the burden of proof, and in so doing not to resort to the accused for this proof.[2] These fundamental principles have precipitated, since the times of Bentham and most recently in the New South Wales Law Reform Commission's latest Discussion Paper,[3] heated debate internationally[4] on the nature and justification of the right of an accused to remain silent at trial. This debate has manifested itself in the courts as a concern to determine in what circumstances, and in what manner, legitimate inferences can be drawn from the accused's refusal to testify, so as to permit the trial judge to correctly direct the jury.

2. The Position Prior to RPS*: Debate over* Weissensteiner*'s limits*

Prior to *RPS v R*[5] the most recent High Court decision on the right of an accused to silence was *Weissensteiner v R.*[6] In this case the accused had been convicted of the murder of his travelling companions, a couple who had employed him to work on their yacht in return for the opportunity to accompany them on their cruise

* The author would like to thank Miiko Kumar for her encouragement and assistance in preparing this paper.

1 *Noble* [1997] 1 SCR 874 at 887–888 (Lamer CJ).

2 DJ Harvey, 'The Right to Silence and the Presumption of Innocence' (1995) *NZLJ* 181 at 181.

3 NSW Law Reform Commission, *The Right to Silence: Discussion Paper 41* (1999).

4 See the discussions of *Murray v United Kingdom* in S Nash, 'Silence as Evidence: A Commonsense Development of a Violation of a Basic Right?' (1997) 21(3) *CLJ* 145 at 149–50 and *Noble* in E Stone, 'Calling a Spade a Spade: the Embarrassing Truth about the Right to Silence' (1998) 22 *CLJ* 17 at 19–20, 24–26.

5 (2000) 168 ALR 729.

6 (1993) 178 CLR 217.

around the Pacific. Several months later when the couple disappeared without trace and the accused was found sailing the yacht alone, his inconsistent explanations to various officials to account for his possession of the yacht and the whereabouts of the couple led him to be charged with their murder. Only the accused knew what had really occurred. Consequently, at trial the prosecution's case was essentially circumstantial, relying upon the accused's inconsistent explanations, on the inference that the presence of a number of valuable and sentimental possessions belonging to the victims still aboard the yacht indicated that they had not voluntarily abandoned it, and on evidence that the couple had not been sighted for eight months. In response to this evidence the accused remained silent and called no witnesses.

On appeal the High Court was required to determine whether the trial judge had erred in directing the jury as to the use that they could make of the accused's silence. The trial judge had instructed the jury that the onus of proof was on the Crown, that the accused was not obliged to give evidence, and that consequently no guilt could be inferred from his silence. However, he had also directed them that an inference of guilt might be more safely drawn from the proven facts when an accused person elected not to give evidence of relevant facts which the jury could easily perceive must be within his or her knowledge. The High Court by a majority of five members to two upheld the trial judge's direction. Consistent with the presumption of innocence the majority affirmed the principles that the failure to give evidence is not of itself evidence, that it does not constitute an implied admission of guilt, and that it cannot fill any gaps in the prosecution case.[7] Nevertheless, the Court's reasoning in *Weissensteiner* also exposed a tension between its purported protection of the accused's right to silence and the erosion of that right in practical terms. This tension arose from the Court's finding that there is a distinction, however fine, between the drawing of an inference of guilt merely from the defendant's silence and drawing an inference more safely because the defendant has not supported a hypothesis which is consistent with his or her innocence from facts which are within his or her knowledge.[8] Mason CJ, Deane and Dawson JJ claimed that this distinction did not deny the right of the accused to silence but merely recognised that the jury could not shut their eyes to the consequences of exercising this right.[9] Nevertheless, both the practical soundness of this distinction and the High Court's reluctance to recognise that the right of silence at trial had effectively been sacrificed have been the subject of criticism, prompting claims that 'to dress the consideration of silence as an evaluating tool is, with respect, elegant sophistry', for the distinction's net effect is to strengthen the case against the defendant.[10]

7 Id at 229 (Mason CJ, Deane & Dawson JJ).

8 Id at 228–229 (Mason CJ, Deane & Dawson JJ).

9 Id at 229 (Mason CJ, Deane & Dawson JJ).

10 Above n2 at 187. See also, for example, M Bagaric, 'The Diminishing "Right" of Silence' (1997) 19 *SLR* 366 and Stone, above n4. See *R v Rodney Grayson Kuhn* (Qld Court of Appeal, 26 November 1996) (Pincus JA).

Prior to *RPS* the appropriate scope of *Weissensteiner* had not been conclusively determined despite the consistent adoption of directions in New South Wales trials framed by the 'general principles' articulated by Gleeson CJ in *R v OGD*.[11] As Macrossan CJ observed, post-*Weissensteiner* cases proved that,

> while the High Court may have felt it unnecessary [in *Weissensteiner*] to determine the precise limits of the circumstances in which such directions could properly be given ... there are already signs that in the everyday work of the courts further attention will have to be given to the problem.[12]

Indeed, the practical effect of *Weissensteiner* in strengthening the case against the defendant gave rise to considerable difference of opinion as to whether the High Court meant to rework the standard direction, or conceived a more limited operation for the direction. Dispute, particularly in Queensland, centred upon whether the directions endorsed in *Weissensteiner* applied to cases primarily involving the direct evidence of witnesses, given that *Weissensteiner* itself was entirely circumstantial.[13] Proponents limiting the application of *Weissensteiner* to only circumstantial evidence cases drew attention to the majority's precondition that there be facts 'peculiarly within the accused's knowledge', claiming that it is only in cases where the truth is difficult to ascertain because of the lack of direct eyewitnesses to the crime that we can say that only the accused would know the truth.[14] However, prior to *RPS* the weight of authority had indicated that judicial directions issued in terms consistent with *Weissensteiner* could apply to circumstantial, direct and identification evidence cases.[15] Whilst *Weissensteiner* led some commentators to declare that the High Court had endorsed a diminishing right of silence at trial, it is evident that the differently constituted[16] High Court majority in *RPS v R* has stemmed this tide. By limiting the decision in *Weissensteiner* to its unusual factual matrix and thus circumscribing the circumstances in which a *Weissensteiner* direction is appropriate, the High Court has confirmed the resilience of the accused's right to silence.

11 (1997) 98 A Crim R 151. Of the 'general principles' the most relevant states that it is commonly appropriate to instruct a jury that failure to contradict or explain incriminating evidence, in circumstances where it would be reasonable to expect it to be within the power of an accused to do so, may make it easier to accept, or draw inferences from, evidence relied upon by the Crown. For the application of *OGD* see: *Nguyen v R* (1998) 102 ACrimR 577, *R v Azzopardy* (NSWCA, 1 October 1998), *R v Leung* (1999) 47 *NSWLR* 405, *R v Kovacs* [2000] NSWCCA 74.

12 *R v Kanaveilomani* (1994) 72 A Crim R 492 at 496 (Macrossan CJ).

13 Ibid.

14 A Palmer, 'Silence in Court – The Evidential Significance of an Accused Person's Failure to Testify', 18(1) *UNSWLJ* 130 at 146.

15 See for examples of non-circumstantial evidence cases: *R v Demeter* (1995) 77 A Crim R 462; *R v Bint & Butterworth* (1996) 187 LSJS 201.

16 Only Gaudron ACJ & McHugh J remain from the bench that heard *Weissensteiner*.

3. *Facts*

The appellant was charged in the District Court of New South Wales with having committed child sexual assault offences upon his daughter, two counts alleging that he had carnal knowledge and six counts alleging that he had engaged in sexual intercourse with her. The prosecution's evidence against the appellant at trial largely relied on the complainant's own evidence, and evidence given by the complainant's mother and grandmother of conversations that they had had with the appellant. In one such conversation the appellant allegedly stated that 'I never had intercourse with her [the complainant] but everything else she said is true.' No circumstantial evidence was given and no expert evidence was adduced. The Appellant did not give evidence at the trial.

In referring to the appellant's failure to give evidence the trial judge directed the jury to the effect that: (1) the appellant's election not to contradict the evidence given by the complainant's mother of what was said to be a partial admission, could be taken into account by the jury in 'judging the value of, the weight of' the prosecution's evidence about it; (2) in the absence of denial or contradiction of the evidence given of the partial admission they could 'more readily' discount any doubts about that evidence and 'more readily' accept the evidence; (3) if it was reasonable, in the circumstances, to expect some denial or contradiction of the prosecution evidence, they were entitled to conclude that the appellant's evidence would not have assisted him in the trial and that the absence of denial or contradiction was a circumstance which could lead them more readily to accept the evidence given by the witnesses for the prosecution; (4) the appellant's election not to give evidence could not fill any gaps in the prosecution case but could enable them to feel more confident in relying on the evidence tendered by the prosecution; and (5) the absence of evidence from the accused meant that the version of events put in cross-examination of the witnesses for the prosecution was not supported by evidence.

The jury found the appellant guilty of four of the original eight counts. The appellant appealed to the NSW Court of Criminal Appeal against his convictions on seven grounds. These grounds included that the trial had miscarried because the trial judge erred in leaving to the jury, as evidence of partial admission, a statement alleged to have been made by the appellant, and the trial judge's demonstrable prejudice against the defence case. However, the Court of Appeal dismissed the appellant's application. By special leave he appealed to the High Court on two grounds. The first of these grounds was the alleged bias of the trial judge. The second and more significant claim for the purposes of this case note was that the trial judge had given directions that were in breach of section 20 of the *Evidence Act* 1995,[17] by reason of the fact that his comments invited the jury to reason that the appellant did not give evidence because he was guilty of the offences charged. This was not a matter raised in the Court of Appeal.[18]

17 Section 20(2) provides that '(t)he judge or any party (other than the prosecutor) may comment on a failure of the defendant to give evidence. However, unless the comment is made by another defendant in the proceedings, the comment *must not suggest that the defendant failed to give evidence because the defendant was, or believed that he or she was, guilty of the offence caused*' (emphasis added).

4. *The Decision in* RPS*: Three Judgments, Three Interpretations — The High Court Divided*

Despite the High Court's unanimous decision that RPS's appeal against his convictions should be allowed, his convictions quashed and a new trial ordered, such unanimity did not manifest itself in either the Court's analysis of the relationship between *Weissensteiner* and section 20(2) of the *Evidence Act*, nor its conclusions concerning the breadth of operation of *Weissensteiner* at common law. Indeed, the three judgments, the majority (Gaudron ACJ, Gummow, Kirby and Hayne JJ), McHugh J, and Callinan J, only reach common ground in their finding that the direction given by the trial judge to the jury that it was entitled to conclude from the accused's silence that his evidence would not have assisted him in his trial breached section 20 of the *Evidence Act* because it suggested that the defendant failed to give evidence because he was guilty of the sexual offences with which he had been charged.[19] All judges agreed that any belief which the appellant held, that his evidence would not have assisted him in his trial, could proceed only from a belief that he was guilty, and that he could not deny or contradict at least some of what had been said against him. Nevertheless, the three judgments together span the full spectrum of possible interpretations as to the scope of *Weissensteiner* not only under the *Evidence Act* but also under the common law.

A. Preserving the 'Golden Thread'?

Central to the appeal and thus the differing analyses of the High Court in *RPS* was the direction of a trial judge endorsed by the High Court in the earlier case of *Weissensteiner v R*, and the effect on this earlier authority of section 20(2) of the *Evidence Act* which had been subsequently enacted. At its most basic, the *Weissensteiner* direction provides that while an accused's evidence cannot of itself constitute evidence, nor an implied admission of guilt, nor fill any gaps in the prosecution's case, it can be used to draw an inference of guilt otherwise available more safely because of the absence of evidence which one could reasonably expect to come from the accused to support a hypothesis consistent with his or her innocence.[20] Now, in New South Wales under section 20(2) of the *Evidence Act,* the trial judge is permitted to comment on a failure of the defendant to give evidence. However, that comment must not suggest that the defendant failed to give evidence because the defendant was, or believed that he or she was, guilty of the offence concerned. Cases under the *Evidence Act* prior to *RPS* had consistently held that section 20 did not deal with the drawing of inferences from a failure to give evidence, and that it followed that there was no express prohibition on the drawing of adverse inferences, other than those constraints imposed by the common law.[21]

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18 According to the counsel of the appellant this matter was not raised because the direction was a direction that was commonly used by trial judges in New South Wales. Mr Bellanto cited in the High Court transcript of the proceedings in *RPS*: Transcript — at 2: <http://www.austlii.edu.au> [*RPS v R* S116/1998 (8 September 1999)].

19 Above n5 at ¶19 (majority), ¶49 (McHugh J), ¶112 (Callinan J).

20 Above n6 at 129.

21 See *Criminal Law (NSW)* (LBC Looseleaf Service, 1996) ¶6.237 and Stephen Odgers, *Uniform Evidence Law*, (3rd ed, 1996) at 55–58.

It was in this context that the High Court had to determine the appropriate scope of *Weissensteiner* and, in particular, whether it applied in the context of the direct evidence of the prosecution witnesses. Thus, it is significant that the majority judgment of the High Court (Gaudron ACJ, Gummow, Kirby and Hayne JJ) in *RPS v R* marks a retreat from the wide application of the *Weissensteiner* trial direction adopted by lower courts, and reaffirms the right of the accused in a criminal trial in all Australian jurisdictions to refrain from giving evidence.

B. Weissensteiner *and the* Evidence Act

The majority were of the view that section 20(2) of the *Evidence Act* must be broadly interpreted as prohibiting the judge from making a comment that *suggests* the accused failed to give evidence because he or she was, or believed that he or she was, guilty, rather than being construed narrowly so as to invite persons to draw fine distinctions.[22] However, despite this broad reading of the prohibition the majority appeared to be of the opinion that a *Weissensteiner* direction could be given under section 20(2) of the *Evidence Act* in *some* cases in which evidence (or an explanation) contradicting an apparently damning inference to be drawn from proven facts could only come from the accused.[23] Indeed, the majority suggested that, unlike the hearsay and evidence of complaint provisions[24] in the *Evidence Act*, the sections of the Act dealing with the accused's silence were to be properly understood and to be determined in the light of, and in a manner that conformed with, the existing common law as they understood it.[25]

The majority's implicit interpretation of the relationship between the common law and section 20(2) was arguably the result of its failure to evaluate or challenge the distinction adopted by the majority in *Weissensteiner*. This distinction between the use of silence as evidence of guilt and as a weighing tool, was premised on the belief that it was consistent with maintaining the onus of proof on the prosecution and did not constitute an implied admission of guilt.[26] These underlying premises have been the subject of much criticism from both academics and judges alike.[27] The corollary of adopting this reasoning without critique is that a *Weissensteiner* direction can lie consistently with section 20(2) because it purportedly does not constitute an admission of guilt.

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22 Above n5 at 735.

23 Id at 737.

24 *Papakosmas v R* (1999) 196 CLR 297 at 302.

25 For a discussion of the anticipated effect of sections 55, 135 and 189 of the *Evidence Act* on *Weissensteiner* see Stone, above n4 at 28–29.

26 Above n6 at 1290. See also the transcript of proceedings seeking leave to appeal to the High Court, above n18 at 33, 31 (Sexton).

27 For example, see Pincus JA in *R v Rodney Grayson Kuhn*, above n10 at 1: 'I am unconvinced that there is, in a practical sense, a difference between drawing an inference from silence (for example, an inference that the accused probably has no credible exculpatory version of events to put forward) and merely treating silence as 'a factor on one side of the balance in determining an issue of fact'. For academic criticisms see, for example, Stone, above n4, who observes that a similar distinction in *Petty* was discarded by the High Court for the confusion caused in its practical application.

On the other hand, Callinan J was of the view that the directions approved of in *Weissensteiner* could have conveyed no suggestion other than that of guilt, expressly recognising that the direction endorsed in *Weissensteiner* infringed the accused's right to silence.[28] In part, Callinan J's finding of inconsistency between section 20(2) and *Weissensteiner* was attributed to the legislature's intention in enacting section 20(2) which, according to his Honour, was to enable a trial judge to make comments only for the protection and benefit of an accused who has not given evidence, so as to avoid the problem of the jury drawing impermissible inferences of guilt because they had received no direction at all.[29] Whilst the author agrees with Callinan J's analysis of the effect of *Weissensteiner*, with respect, his claim that this view is consistent with the Australian Law Reform Commission's Report on Evidence appears to be misleading.[30]

C. Weissensteiner *and the Common Law: A Return to Fundamental Principles*

Despite the majority's failure to address criticisms of the practical and theoretical value of the *Weissensteiner* distinction, between the use of silence to infer guilt directly and to make an inference of guilt safer, the majority subscribed to an approach that operates to limit the appropriate occasions on which a *Weissensteiner* direction may be given. Moreover, the majority grounded its observations independently of section 20(2) in the common law, observing that there are principles fundamental to the criminal trial that make a *Weissensteiner* direction appropriate only in 'some cases in which evidence (or an explanation) contradicting an apparently damning inference to be drawn from proven facts could only come from the accused'.[31]

(i) The Direct Evidence Distinction

The first of these principles is that the mode of reasoning constituting 'plain commonsense' upon which the *Jones v Dunkel* direction in civil trials is founded relates only to the drawing of inferences or conclusions from other facts, and is not concerned with whether the direct evidence of an eyewitness should be accepted.[32] This distinction is invariably important for cases primarily comprised of direct evidence given by witnesses and is contrary to the position that had been widely adopted prior to *RPS* which held that a *Weissensteiner* direction was not limited

28 Above n5 at 755 (Callinan J).

29 Ibid.

30 The conclusion applied in *Weissensteiner* is supported by statements in the Report that suggest that while there may be reasons other than guilt to explain why the accused would not choose to give evidence '(i)t seems a desirable compromise to maintain the present position that silence, while it can be used in relation to other evidence, cannot be used as direct evidence of guilt' and that a trial judge's comment must be in terms 'consistent with legally permissible inferences. It is not necessary to draft legislation to this effect ...': Australian Law Reform Commission, *Evidence* Report No. 26, (1985) at 549–558. The conclusion that *Weissensteiner* is consistent with the Report is confirmed by Palmer, above n14 at 134 and Scott Hencliffe, 'The Silent Accused at Trial — Consequences of an Accused's Failure to Give Evidence in Australia' (1996) 19(1) *UQLJ* 137 at 146 (fn71).

31 Above n5 at 737.

32 Id at 736–737.

only to cases involving circumstantial evidence.[33] More particularly, the drawing of such a distinction has great significance for certain types of cases, such as sexual assaults, where, as in *RPS*, the prosecution is usually reliant entirely upon the testimony of the complainant and his or her close relatives. Through the use of this distinction the majority sought to distinguish *RPS* from *Weissensteiner* on the ground that the complainant's evidence did not require the jury to draw inferences from proven facts, but rather to accept the evidence of the complainant herself which upon satisfaction of the requisite standard, would make out the case against the accused.[34]

Arguably, the majority's reasoning implicitly acknowledges that evaluating direct testimony involves assessing the credibility of such witnesses and not the drawing of inferences from indisputable facts found to be proven on their evidence. Indeed, such an assumption has been attributed to the majority by the Queensland Court of Appeal's recent consideration of *RPS* in *R v Festa*,[35] and is manifested in Gaudron ACJ's comment that,

> The very point of *Weissensteiner* was that there was evidence that needed explaining, that there were facts that needed explaining, otherwise the facts gave rise to a particular inference. This was never such a case. This was a case of straight out allegation, which was denied in the police interview by the plea of not guilty, and that was the beginning and end of it ... once an allegation of this kind is denied, what more can be said than, "I did not do it ..."[36]

Moreover, her Honour observed during the trial that there was little scope for the weight of the accused's silence to come into operation in *RPS*, given that the evidence itself had not been proven beyond reasonable doubt.[37] Hayne J noted that a direction in a case like the present ran perilously close to that classic misdirection, 'Who do you believe, the complainant or the accused?'[38] However, the majority's conclusion that a *Weissensteiner* direction does not apply in cases of direct evidence appears difficult to reconcile with the High Court's earlier observation in *Weissensteiner* that, *'(i)t 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 call it ...' (emphasis added).[39] Such a statement suggests that Mason CJ, Deane and Dawson JJ viewed the absence of evidence as a factor quelling doubts not only about inferences to be drawn from evidence, but also doubts about the credibility of witnesses, and thus of utility in cases involving direct evidence. Nevertheless, Brennan and Toohey JJ also stated that '(t)he use to which the appellant's failure to give evidence may be put is correctly restricted to

33 For a discussion of these cases see above n14 at 146–150.

34 Above n5 at 738.

35 Qld Court of Appeal, 17 March 2000.

36 Above n18 at 33 (Gaudron ACJ).

37 Id at 32.

38 Ibid.

39 Above n6 at 227 (Mason CJ, Deane & Dawson JJ).

the strengthening of an inference of guilt from the facts proved.'[40] This statement lends support to the more limited approach articulated by the majority in *RPS* by suggesting that such a circumscribed application was intended from the outset, and confirms the view of Macrossan CJ in *R v Kanaveilomani* that:

> In cases of a more general kind outside this rather narrow category [where inferences from circumstantial evidence has to be considered and where relevant facts can be regarded as peculiarly within the accused's knowledge], emphasis can remain on the right of an accused person to refrain from giving evidence and on the absence of adverse inferences when accused persons act in reliance on that right.[41]

One rationale advocated in some of the lower courts for adopting the more limited operation of the *Weissensteiner* direction has centred on concerns that such a direction has the potential, in the jury's mind, to result in a reversal of the onus of proof even when accompanied by very careful directions about the approach to be adopted.[42] However, as Cox J observed in *R v Bint and Butterworth*, this is also a danger present in circumstantial evidence cases.[43] Indeed, arguments have been made that it may be safer to give such a direction where there *is* direct evidence which, if believed, proves the accused's guilt, rather than where a jury is asked to infer guilt from facts proved. This is because, in the latter case, there is often a risk that the evidence from which the jury is asked to infer guilt may be insufficient, rather than merely insufficiently convincing, and consequently create a danger that the jury may use the accused's failure to testify to supply the deficiency.[44]

Nevertheless, it is submitted that an alternative rationale for distinguishing between the two sorts of evidence is that in cases where the complainant gives direct evidence, the principal issue for the jury is simply one of credibility; it is not a question, as it was in *Weissensteiner* and may be in other circumstantial evidence cases, of eliminating any hypothesis consistent with innocence that is made unreasonable because of the accused's silence. Moreover, it is arguable that the accused should not be penalised for exercising his or her right to silence when the credibility of a prosecution witness can be tested by cross-examination. In *RPS*, however, the distinction drawn by the majority between direct and circumstantial evidence cases simply relies on precedent for justification, rather than engaging in a valuable analysis of such policy and procedural issues.

40 Ibid (Brennan & Toohey JJ).
41 Above n12 at 497.
42 Ibid.
43 Above n15 at 212 (Cross J).
44 Above n12 at 501 (Davies JA).

(ii) Silence: A Reasonable Response or the Failure of Common Sense?

A second limb of the majority's reasoning which acts as a brake on any expansive application of the *Weissensteiner* direction is its recognition that the premise underpinning the mode of 'commonsense' reasoning employed in civil cases requires that the person who has refrained from giving evidence not only *could* but *would* ordinarily be expected to shed light on the subject in question.[45]

According to the majority, whilst it is very often a reasonable expectation that a party to a civil case would give relevant evidence, it 'will seldom, if ever, be reasonable to conclude that an accused in a criminal trial would be expected to give evidence'.[46] Indeed, the majority were of the opinion that '(t)he most that can be said in criminal matters is that there are some cases in which evidence (or an explanation) contradicting an apparently damning inference to be drawn from proven facts *could come only from the accused*' (emphasis added).[47] In such circumstances, the majority conceded that the jury might more readily draw the conclusion which the prosecution sought.[48] This reasoning seems to implicitly suggest that *Weissensteiner* may only apply where the facts are peculiarly within the accused's knowledge, buttressing the application of *Weissensteiner* only to circumstantial evidence cases, and not to cases of direct evidence where there are other witnesses to the crime.

The majority's conclusion that it will rarely be reasonable to conclude that an accused in a criminal trial would be expected to give evidence, severely curtails the existing operation of *Weissensteiner* in all Australian state and territory jurisdictions, and not just those operating under section 20(2) of the *Evidence Act*. Moreover, this finding led the majority in *RPS* to overrule *OGD*[49] which had provided the framework for judicial directions to the jury in New South Wales for several years. In *OGD*, Gleeson CJ had outlined a number of 'general principles' appropriate to guide a direction by a judge to a jury. One of these principles, which he considered to be 'commonly appropriate', required the judge to direct the jury that a failure to contradict or explain incriminating evidence, in circumstances where it would be reasonable to expect it to be in the power of an accused to do so,

45 Above n5 at 737. But see, Andrew Palmer who had prior to *RPS* considered that the requirement that it must be reasonable to expect that the accused would give that version if he or she was innocent, which he labelled the 'third precondition' of the *Weissensteiner* test, was otiose: above n14 at 134.

46 Above n5 at 737. The majority's acknowledgement that not every case calls for an explanation or contradiction in the form of evidence from the accused resonates with Mason CJ, Deane & Dawson J's conclusion in *Weissensteiner* (above n6 at 228). This conclusion had previously led some commentators and judges to limit *Weissensteiner* to its unusual factual circumstances and endorse a more limited application of the direction like that now advocated by the High Court in *RPS*. See, for example, Macrossan CJ in *R v Kanaveilomani*, above n12.

47 Ibid. Earlier in *Weissensteiner* the court had stated: '[I]n 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.' Above n6 at 227–229 (Mason CJ & Deane & Dawson JJ).

48 Callinan J on the other hand regarded even this as an impossibility under s20(2) of the *Evidence Act*.

49 Above n11.

might make it easier to accept, or draw inferences from evidence relied upon by the Crown.[50] However, under this formulation such a direction ordinarily required the jury to be cautioned that there were possible reasons why the accused might not give evidence.[51] In *RPS* the majority rejected such a two prong direction.[52]

Gleeson CJ's view in *OGD* that a *Weissensteiner* direction is generally appropriate 'in circumstances where it would be reasonable to expect it to be *in the power* of an accused ...' to provide evidence suggests an emphasis on the actual ability of the accused to give such evidence, rather than whether it would be reasonable to expect him or her to do so, the focus of the High Court's analysis in *RPS*. Gleeson CJ's different emphasis manifested itself in a two prong direction; a *Weissensteiner* direction qualified by reference to the possible or actual existence of a good reason why the accused may not have given evidence. In *RPS* this formulation was advocated solely by McHugh J, who thought not only that it was rare that there would be a good reason for the accused's failure to give evidence, but that whether a legitimate reason existed for the accused's silence should be left to the jury to determine.[53] In contrast, the majority in *RPS* found that if, as would usually be the case, there were circumstances indicating that it would be unreasonable to expect the accused to give evidence at trial, it was insufficient to provide a caution with the *Weissensteiner* direction. Hayne J best encapsulated the reason why the majority considered this two prong direction an encroachment on the accused's right to silence, even where the trial judge warned the jury that there might be any number of reasons why the accused would not give evidence or would not want to give evidence, when he observed at trial that '(i)t is merely, "The Lord giveth and the Lord taketh away, blessed be the name of the Lord", is it not?'[54]

The majority's argument that it is usually not reasonable to expect an accused to give evidence in a criminal trial points to the deficiencies of the 'common sense' argument adopted by McHugh J in *RPS* which permitted him to reason that *Weissensteiner* could apply more broadly than the majority had indicated. Whilst the majority regarded the case against a *Weissensteiner* direction to be even stronger where there were multiple charges made against the accused on the basis that any attempt to offer a denial, explanation or answer to one or more charges, would expose the accused to examination more generally on all counts in the witness box,[55] McHugh J regarded such a consideration as a 'tactical reason' which even if causing disproportionate damage to other aspects of an accused's case should have no bearing on the application of *Weissensteiner*.[56]

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50 Id at 158 (Gleeson CJ).

51 Ibid.

52 Although the majority doubted that *OGD* properly understood was authority for charging juries as had been the case in this instance. Above n5 at 738.

53 Id at 744–745.

54 Above n18 at 37.

55 Above n5 at 739–740.

56 Id at 744.

Consequently, McHugh J was of the view that jurors should not be prevented from using the accused's silence where the relevant facts are within his or her knowledge, *merely* because it is a criminal trial or there are several counts in the indictment or because the accused is not required to give evidence or *thinks* that the case against him or her is weak.[57] Indeed, in his opinion the only legitimate reasons which a jury might take into account when considering why it might be unreasonable for an accused to give evidence were 'loss of memory, illness, age, and low intelligence', and in rare instances the fact that there were deficiencies in the prosecution's case so great that the silence of the accused was not material.[58] With respect, this is in direct conflict not only with rational behaviour but with early authority that recognised, as the majority did in *RPS*, that '(r)easons other than a sense of guilt, such as timidity, weakness, a dread of confusion or of cross-examination, or even the knowledge of previous conviction ... might easily prevent the accused person from availing himself of [the right to testify]'.[59]

In contrast to the majority, McHugh J's judgment appears to pivot around an appeal to common sense, for his Honour claims that we should not use the privilege 'to bar ordinary processes of reasoning where they are applicable'.[60] Such analysis, which manifested itself as early as Bentham and has resurfaced in modern critiques of the right to silence, depicts the adverse inferences to be drawn by the jury from silence as rescuing the jury from the artificial situation of trying to follow the trial judge's direction, while repressing 'natural' assumptions. Indeed, one proponent, Glanville Williams, has argued that to allow no such inference to be drawn from silence is 'contrary to commonsense' and runs counter to our realisation of how we would behave if faced with a criminal charge, for '(i)f the suspicion is a serious one we would be ready and anxious to answer the questions of the doubters'.[61] Similarly, Zuckerman has pointed to the fact that if we have violated or offended a moral norm or legal rule, 'our natural moral reaction is to offer an explanation'.[62] However, the relevance attributed by McHugh J and other proponents of the 'common-sense' approach, to silence stems from context and environment-specific generalisations about human nature. Arguably, in the artificial and technical investigation processes of the courtroom, an 'institutional setting charged with the maintenance and reproduction of existing forms and structures of dominance',[63] a desire for self-preservation may not necessarily manifest itself in the accused *personally* expressing his innocence.[64] Indeed, the majority acknowledged as much in the context of considering the alleged 'partial admission' made by the accused to the complainant's mother that 'I never had intercourse with her [the complainant] but everything else she said is

57 Id at 745.

58 Ibid.

59 *Bataillard v R* (1907) 4 CLR 1282.

60 Above n5 at 746.

61 Glanville Williams, 'The Tactic of Silence' (1987) 137 *NLJ* 1107 at 1107.

62 Susan Easton, *The Case for the Right to Silence* (2nd ed, 1998) at 154.

63 Richard Phillips, 'Unequal before the law' in George Zdenkowsky, Chris Ronalds & Mark Richardson (eds), *The Criminal Injustice System Vol 2* (1987) at 201.

64 For a more detailed discussion on this point see Bagaric, above n10 at 381–382.

true', when they stated that it was unreasonable to expect the accused to offer some denial, explanation or answer about that statement, because in order to do so he would have been exposed to examination on all eight counts charged, any one of which he may have thought was insufficiently proven by the prosecution.[65] In contrast, to claim as McHugh J implicitly does, that an innocent person would be anxious to dispel the doubts and accusations of others is an assumption that effectively amounts to a rejection of the presumption of innocence and a shifting of the burden of proof onto the accused. The practical significance of McHugh J's divergence from the majority on this point is no better exemplified than in his Honour's finding that the accused's lack of evidence made it more likely that the evidence of the complainant and her mother was more reliable, for it strengthened the Crown case,[66] a direction that the majority struck down as infringing the right of the accused to silence.

5. *Conclusion*

The majority's concern in *RPS v R* that juries be warned about impermissible forms of reasoning, rather than be instructed about how they may reason towards a verdict of guilt, breathes new life into the right of the accused to refrain from giving evidence at trial. Indeed, the majority judgment marks a retreat from the wide application of the *Weissensteiner* trial direction adopted by lower courts, and emphatically reasserts principles fundamental to the criminal trial including the accused's right to be presumed innocent and the responsibility lying on the prosecution to discharge the burden of proof without the assistance of the accused. The significance of *RPS* is not limited to those states operating under the *Evidence Act* but extends to embrace all Australian criminal jurisdictions under the majority's 'reinterpretation' of the common law. Not only is it evident that a *Weissensteiner* direction will no longer be appropriate in cases of direct evidence, such as sexual assaults of which the present case is an example, but more significantly the High Court has severely curtailed its application so that it is only appropriate to use in 'some cases in which evidence (or an explanation) contradicting an apparently damning inference to be drawn from proven facts could only come from the accused'.[67] Rather than vesting the privilege of silence with more than its due significance and worshipping it blindly as a fetish,[68] the majority have revived the right to silence by adhering to fundamental principles and realistically appraising the position of the accused in the institutional setting of the courtroom. In so doing the High Court has once again proven itself to be the guardian of the 'golden thread'.

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65 Above n5 at 740.

66 Id at 745.

67 Id at 737.

68 As McHugh suggests that those endorsing such a limited application of *Weissensteiner* might be said to do: id at 745–746.