SUPREME COURT OF QUEENSLAND

CITATION:	*R v Doyle* [2018] QCA 303
PARTIES:	**R** **v** **DOYLE, Lionel John** (appellant)
FILE NO/S:	CA No 121 of 2018 DC No 1010 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 4 May 2018 (Clare SC DCJ)
DELIVERED ON:	6 November 2018
DELIVERED AT:	Brisbane
HEARING DATE:	15 October 2018
JUDGES:	Sofronoff P and Fraser JA and Douglas J
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – where the appellant was convicted of various offences stemming from an extended road rage incident – where the sole issue at trial was the identity of the offender – where the vehicle involved in the incident was registered to the appellant and, *inter alia*, the appellant was found approximately two hours after the offending less than two kilometres from where his vehicle had crashed – where the defence case at trial was that someone other than the appellant had been driving the car at the time of the offending – where the appellant did not give evidence – where the learned trial judge directed the jury that the inference that the appellant was the driver of the vehicle could be strengthened by his decision not to give evidence if the jury was satisfied that an innocent explanation for the use of his car and his presence nearby after the offending was peculiarly within the knowledge of the appellant – where the appellant submits that the learned trial judge's direction subverted the jury's proper consideration of the offender's identity – whether the learned trial judge erred in giving the direction *Azzopardi v The Queen* (2001) 205 CLR 50; [2001] HCA 25, cited

Peacock v The King (1911) 13 CLR 619; [1911] HCA 66, cited
R v Kops (1893) 14 LR (NSW) 150; [1893] NSWLawRp 67, discussed
Weissensteiner v The Queen (1993) 178 CLR 217; [1993] HCA 65, cited

COUNSEL: J D Briggs for the appellant
T A Fuller QC for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** At about 5 pm on 26 April 2016, Mr Sam Copeland was driving his car along Bonton Avenue, Deception Bay. His friend Rebecca Boulton was in the front passenger seat beside him. Ms Boulton's seven year old son and her one year old daughter were in the rear passenger seats.

[2] Suddenly, a white Avalon model Toyota failed to give way to Mr Copeland and nearly struck his car. Ms Boulton leaned over and sounded the horn. Upon her so doing, the Toyota drove up behind Mr Copeland's car and rammed it. Ms Boulton screamed at the Toyota to stop. She shouted that she had children in the car. Again the Toyota rammed Mr Copeland's car, then overtook it and stopped in front to prevent him from getting past. The driver left his car and approached Mr Copeland's car. Mr Copeland managed to turn his car around and headed in the opposite direction. As he drove away, the Toyota followed him and again rammed his car repeatedly. Both cars were now travelling at about 140 kph. The ramming continued. Mr Copeland put his handbrake on and this caused his car to spin sideways. The Toyota hit it on its side forcing it off the road. The Toyota also went off the road, smashed through a fence and hit a brick wall.

[3] A man came out of the Toyota wielding a sword. While Mr Copeland bravely distracted this armed assailant, Ms Boulton and her children took shelter in a car that had stopped to help them, driven by Ms Theresa Rush. Ms Boulton would not allow Ms Rush to depart until after Mr Copeland had joined them and then they were driven away to a hospital.

[4] A witness, Ms Emma Granger, saw this offender at the scene "slurring his words when he was swearing and yelling, and he was kind of stumbling around as he was walking". This man was aged in his 40s or 50s of "indigenous or ethnic background, fairly dark-skinned". Another witness, Ms Georgia Spearing, confirmed this general description.

[5] Police were called and attended at the scene. They found an ignition key inside the Toyota but it was not in the ignition. The key fitted the vehicle. Police also found a sword about 250 metres away from the damaged car. They found that the appellant was the registered owner of the Toyota.

[6] As I have said, these events happened at about 5 pm. At about 8.15 pm on the same night police found the appellant on Deception Bay Road about 1500 metres from where his Toyota had crashed. This location happened to be in the direction in which the man with the sword had been seen by witnesses to flee. The appellant appeared to police to be intoxicated. His speech was erratic and slurred. He was

unsteady on his feet. His eyes were glazed. His appearance matched the general appearance of the offender as described by witnesses.

[7] At the trial the defence admitted that the appellant was the registered owner of the Toyota. The defence also admitted that the appellant's thumbprint had been found on the outside of the driver's door of the vehicle, just above the door handle but below the window. It was not possible to determine when the print had been placed there.

[8] There was also no dispute about the events surrounding the commission of the offences with which the appellant had been charged. The only matter in dispute was the identity of the offender.

[9] The Crown submitted that the Crown's case about identity was a circumstantial one. The circumstances relied upon by the Crown were specified in writing and given in that form to the jury. They were as follows:

> "• The Accused was the registered owner of the white Toyota. His fingerprint was on the door handle. The key was left in the car when it was abandoned at the crash site.
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> • All eye-witnesses refer to a male driver, with darker skin.
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> • There was no suggestion of a second person in the white car.
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> • Ms Grainger [*sic*] recalled the man slurring & stumbling and seemed drunk.
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> • The man was last seen walking down Deception Bay Road, away from the collision site.
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> • 2½ hours later, the Accused was found in that direction, 1½ km further down Deception Bay Rd.
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> • The involvement of the accused's car and his presence in the same street, that same night, calls for an explanation from the accused. He has not provided one. There is no innocent explanation on the evidence."

[10] Amongst other things, the learned trial judge reminded the jury about the onus of proof, the presumption of innocence and that the accused was not obliged to give evidence. Her Honour then gave the following direction:

> "Because the accused chose not to call evidence, you do not have additional facts from him to explain the evidence led by the prosecution. The conclusion of guilt contended for by the prosecution may be more safely drawn from the proven facts when an accused person elects not to give evidence of any additional facts which, if they existed, must have been within the knowledge of that defendant, that accused. That is as far as this exception goes. The failure of the accused to call evidence or give evidence does not help you. You are not allowed to resolve doubts about the reliability of witnesses or conclusions to be drawn from the evidence simply because Mr Doyle did not go into evidence. The plea of not guilty is his denial, and in that way, he contradicted the prosecution case in a general way.

> Perhaps if I can recap in this way. If the prosecution raises an inference – if the evidence presented raises an inference that the accused was the driver and the man with the sword, that inference that it was him may be strengthened by the accused's decision not to offer any evidence as an explanation. And it may strengthen it but only if any additional facts that could offer an innocent explanation for the use of his car at that time and his later presence in the street would, if those facts existed, be peculiarly within the knowledge of the accused. It is in those circumstances that the absence of an explanation from him may strengthen the case against Mr Doyle. It does not automatically mean that he is guilty, but it is something that you may consider.
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> And whether you do and the weight that you place on it is entirely a matter for you, but you need to keep in mind that a person charged may have other reasons for not giving evidence other than the fact that his evidence would not assist him. For example, someone might be nervous or might be concerned that he could get confused by cross-examination or may believe that the prosecution case is weak and not capable of proving guilt. So keep those things in mind when considering whether it is safe to accept and act upon the evidence led by the prosecution and to be satisfied of guilt beyond reasonable doubt."

[11] The jury convicted the appellant on all counts. He now appeals those convictions on a single ground. It is as follows:

> "A miscarriage of justice occurred, because absent a proper basis the learned judge commented on the effect of the applicant's failure to provide an explanation. The comment subverted proper consideration of the offender's identity, which was the only issue."

[12] The appellant relies upon *Azzopardi v The Queen*[1] and *Weissensteiner v The Queen*.[2]

[13] In *Weissensteiner*[3] Mason CJ, Deane and Dawson JJ observed that the right of the jury to take into account the silence of the accused does not arise from the right of the trial judge to comment upon it. Juries know that an accused has a right to give evidence and might well consider it material that, in a particular case, the accused has chosen not to do so. Long before 1893, when seven judges of the New South Wales Supreme Court considered the point in *R v Kops*,[4] it was settled law that the failure of an accused person to contradict or explain incriminating evidence was a matter that a jury was entitled to take into account in weighing inferences.[5]

[14] The point of *Weissensteiner* was that, although the failure of an accused to give evidence is not evidence of guilt, nor is it an admission of guilt by conduct, in some circumstances the failure may bear upon the probative value of evidence which has been led by the Crown. In such cases, when evaluating the prosecution evidence, the jury may take into account a failure by the accused to explain it. The jury

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1 (2001) 205 CLR 50.
2 (1993) 178 CLR 217.
3 *supra* at 224.
4 *R v Kops* (1893) 14 LR (NSW) 150; affirmed [1894] AC 650.
5 see *R v Kops*, *supra*, at 166-167 per Windeyer J; see also per Darley CJ at 157-58. *R v Kops* was cited with approval in *Weissensteiner*, *supra* at 225-226.

cannot, and cannot be required to, shut their eyes to the fact that the accused has chosen not to give evidence in such a case.[6] On the hearing of this appeal, Mr Briggs, who appeared for the appellant, accepted that that process of reasoning was open to a jury but submitted that a judge may not tell the jury about it. That submission must be rejected.

[15] The old case of *R v Kops* is instructive. The defendant had carried on business as a storekeeper in a building. Underneath a counter in that building there was found "an elaborate arrangement of inflammable materials". These included a black round-topped hat with a burning candle fixed inside it and so arranged as to ignite the materials about it at a certain time. Nearby was a leather hat-box with a piece of red cord attached to it. The accused lived in a hotel a short distance away. A housemaid who worked at the hotel gave evidence that the leather hat-box with the red cord was similar to one she had seen in the accused's bedroom. It was now missing.

[16] The prosecution case was a circumstantial one based, among other things, upon the finding of the hat and the hat-box in the circumstances described. The accused did not give evidence. In the course of summing up the trial judge said:

> "If the hat, in which the candle was burning, was not the accused's, would you not expect him to deny it? Can you doubt it was his hat? If it was not his hat, why does he not deny it? If it was his hat, why does he not explain how it got there? The hat is a very important bit of the circumstantial evidence."[7]

[17] A point of law about the direction was reserved for the consideration of the Supreme Court which, constituted by seven justices, concluded that the direction had been a proper one.

[18] Darley CJ summarised the accused's argument as one which would require a trial judge to direct a jury that, in considering the inference that arises from the circumstantial evidence, the jury is "not to permit [itself] to be aided in so doing by taking into [its] consideration the fact that the accused has had the opportunity afforded him of offering explanation or contradiction, and has offered none".[8]

[19] Darley CJ said:

> "Surely human nature will revolt against such a direction."[9]

[20] The problem is not that a jury might regard an accused's failure to give evidence as strengthening the Crown case. They are entitled to do so, as the appellant rightly acknowledges. The problem is the possibility that the jury may use the accused's decision not to give evidence as proving too much. In a case in which such reasoning is permissible, it is important for a trial judge to explain to the jury the limited use that can be made of an accused's decision not to offer an explanation. The jury should be told that the accused is not bound to give evidence. The jury should be told that the onus remains on the prosecution to prove guilt beyond a reasonable doubt even if the accused does not give evidence. The jury should be

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6 *Weissensteiner*, *supra*, at 229 per Mason CJ, Deane and Dawson JJ.
7 *supra* at 150-151.
8 *supra* at 162.
9 *supra* at 162.

given to understand that the accused's decision not to offer an explanation does not of itself prove anything.

[21] The jury should be told specifically the limited use to which they can put the absence of an explanation from an accused. It is that in circumstances in which the jury might expect that, if there was an innocent explanation for the facts that give rise to an incriminating inference, then the accused would know what that explanation might be and would offer it and so the accused's failure to offer any explanation strengthens the inference urged by the prosecution.[10]

[22] In *R v Kops* the New South Wales Supreme Court concluded that the judge's direction was a proper one. It is difficult to see any difference in principle between the unexplained presence of the hat at the scene of the crime in *R v Kops* and the unexplained presence of the accused's car at the scene of the crime in this case. In each case the thing in question was used in the commission of the offence. In each case, if the jury accepted that the thing belonged to the accused, then that fact along with others raised an inference that the accused was implicated in the offence. In the present case, of course, ownership of the car was admitted. In each case the jury might have thought that if there was an innocent explanation for the criminal use of property of the accused, then it was the accused who would be able to tell the jury what it was. The decision not to offer that explanation will affect the judgment of the jury about the weight of the remaining evidence because it leaves the inference of guilt unopposed and unrebutted by contrary evidence which, if it existed, would be in the defendant's power to produce.[11]

[23] In this case, the opposing inferences offered by the appellant's counsel at trial, and urged again on appeal, were two in number and, it might be thought, they pretty much exhausted the universe of possible theories to explain the use of the appellant's car in the offences. The appellant may have lent his car "to family members, to friends". It may be that he had sold his car but the change in ownership had not yet been registered. Of course, the criminal owner would not put his name on the register after he had committed the offences.

[24] Each of these theories has three features. First, if true, each is a matter that only the appellant knows about. Second, for the Crown to exclude these theories, it would have to do something that is very difficult or impossible – to prove a negative, namely that the car had not been lent or sold. Third, absent any evidence from the appellant, there was no evidence at all to support these theories.

[25] It is precisely in such a case that a jury is entitled to take into account an accused's failure to give evidence and a judge is entitled to tell a jury how to take that failure into account and is bound to tell the jury how not to use that failure to give evidence.

[26] For these reasons, in my respectful opinion, the directions given by Clare SC DCJ were correct.

[27] However, the appellant seemingly has a second string to his bow. He contends that the effect of the direction was that it foreclosed proper consideration by the jury of a reasonable hypothesis consistent with the appellant's innocence, namely that

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10 *Weissensteiner*, *supra*, at 229 per Mason CJ, Deane and Dawson JJ.

11 cf. *R v Kops*, *supra*, at 162 per Darley CJ.

somebody other than the appellant used his car and committed the offences. It is necessary to consider whether there was a reasonable hypothesis consistent with innocence that the jury had to consider.

[28] It was submitted that it could not be concluded that the appellant must have known whenever somebody else was using his car. It was submitted that there was no evidence that the appellant had any capacity "to perpetually know where his car was" and, as already discussed, the car might have been lent or sold.

[29] In my respectful opinion this submission misunderstands the well-established proposition that, in a circumstantial case, in order to secure a conviction the Crown only has to exclude every *reasonable* hypothesis consistent with innocence. It is important to appreciate that the word "reasonable" does not mean "logically open in theory". Many inferences might be open as a matter of theoretical logic but which, in truth, are entirely unrealistic. Various terms have been used to describe such unreal, but theoretically possible, inferences. They have been called "light" or "rash"[12] and they have been described as "mere conjecture".[13] An alternative hypothesis must be a reasonable one in the sense that it rests on something more than a theoretical possibility or, if one prefers, upon "something more than mere conjecture".[14] It must be based upon evidence.

[30] In *Peacock v The King*, O'Connor J said:[15]

> "In drawing an inference of guilt, or in declining to draw it, the jury must act upon the facts established in evidence, and *if the only inference that can reasonably be drawn from those facts* is that of the prisoner's guilt, it is their duty to draw it. They cannot evade the discharge of that duty because of the existence of some fanciful supposition or possibility not reasonably to be inferred from the facts proved."
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> (Emphasis added)

[31] It is for the jury to determine whether a supposed hypothesis consistent with innocence is or is not reasonable in this sense. Hypotheses consistent with innocence cease to be reasonable when there is no evidence to support them, particularly when that evidence, if it exists, must be within the knowledge of the accused.[16]

[32] The hypothesis urged in this case was unreasonable in that sense. It was theoretically possible that somebody had borrowed the appellant's car and that person had then committed the offences. It was also possible that someone had stolen the car and had then committed the offences. Such things do happen. In the sense of being possibilities, these theories were not irrational. However, the principle under consideration requires more than a theoretical possibility. There must be evidence to support such a hypothesis. There was no such evidence in this case. What is more, the person who could have given evidence about those matters if they were true was

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12 *Peacock v The King* (1911) 13 CLR 619 at 651.
13 *Peacock*, *supra* at 661.
14 *ibid*.
15 *supra* at 662.
16 *Weissensteiner*, *supra*, at 227-228.

the appellant. He chose not to do so. The jury would have been wrong to base an acquittal upon mere theories.

[33] This was not, as the appellant submits, a case in which the evidence of identity was "far from overwhelming". In the absence of any evidence from the appellant this was a case in which, having regard to the appellant's failure to offer any innocent explanation, the evidence raised a strong inference that the appellant was the offender. His decision not to give evidence foreclosed any other rational conclusion but that the appellant was guilty.

[34] I would dismiss the appeal.

[35] **FRASER JA:** I have had the advantage of reading a draft of the President's reasons for judgment. In [27] – [33] of those reasons, the President rejects the appellant's argument that the effect of the trial judge's direction set out at [10] was to foreclose the jury's proper consideration of the suggested reasonable hypotheses consistent with innocence that somebody other than the appellant committed the offences using the appellant's car. The President concludes that the hypotheses consistent with innocence upon which the appellant relies are not reasonable hypotheses. Without expressing any contrary conclusion, I would instead decide this aspect of the appeal upon the basis that, contrary to the relevant contention in the only ground of appeal, the directions given by the trial judge did not subvert the jury's proper consideration of the offender's identity.

[36] The directions given by the trial judge about the onus and standard of proof included directions that the prosecution must prove by evidence that the appellant was guilty beyond reasonable doubt, and the appellant was not guilty if there was any reasonable possibility that the appellant was not the man observed by the witnesses. The trial judge made it clear that the appellant's failure to call or give evidence did not assist the jury and could not be used to resolve doubts about any of the evidence in the Crown case.

[37] The trial judge commented in this context that the jury could use the appellant's failure to give evidence of any additional facts peculiarly within his knowledge which would explain the evidence in the Crown case or contradict a conclusion of guilt only to more safely draw a conclusion of guilt from proven facts. I respectfully adopt the President's reasons at [13] – [25] for concluding that the comments to that effect were appropriate.

[38] The trial judge went on to direct the jury that the absence of such an explanation did not justify the jury in leaping to a guilty verdict; it was merely something the jury might consider; and whether the jury did so and the weight to be attributed to it were matters for the jury.

[39] The comments challenged by the appellant did not qualify or undermine the trial judge's emphatic and conventional directions about the onus and standard of proof. The jury were not diverted from their task, clearly explained by the trial judge, of considering whether the circumstances proved in the Crown case excluded beyond reasonable doubt any reasonable hypothesis consistent with the appellant's innocence. Evidently the jury concluded that the Crown fulfilled its onus of proof and the ground of appeal does not contend that so much was not reasonably open to the jury upon the evidence.

[40] In all other respects I agree with the reasons of the President and I agree that the appeal should be dismissed.

[41] **DOUGLAS J:** I agree with the President's reasons, the reasons of Fraser JA and the proposed order.