SUPREME COURT OF QUEENSLAND

CITATION:	*R v McEwan* [2019] QCA 16
PARTIES:	**R** **v** **McEWAN, Anthony Francis** **(appellant)**
FILE NO/S:	CA No 117 of 2017 DC No 329 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Cairns – Date of Conviction: 8 May 2017 (Harrison DCJ)
DELIVERED ON:	12 February 2019
DELIVERED AT:	Brisbane
HEARING DATE:	16 March 2018
JUDGES:	Sofronoff P and Morrison JA and Brown J
ORDER:	**Appeal dismissed.**
CATCHWORDS:	APPEAL AND NEW TRIAL – NEW TRIAL – IN GENERAL AND PARTICULAR GROUNDS – PARTICULAR GROUNDS – ERROR OF LAW – where the Crown's case was a largely circumstantial case that relied on an array of facts from which it contended the appellant's guilt should be drawn – where the appellant submits that a *Weissensteiner* comment ought not have been given to the jury – where the appellant submits that the case was not of the rare and exceptional character which warranted the making of the comment – where the appellant does not contest that it was open to the jury to determine that the only rational inference on the evidence was the appellant's guilt *Azzopardi v The Queen* (2001) 205 CLR 50; [2001] HCA 25, considered *Peacock v The King* (1911) 13 CLR 619; [1911] HCA 66, cited *R v DAH* (2004) 150 A Crim R 14; [2004] QCA 419, cited *R v Doyle* [2018] QCA 303, cited *R v Hillier* (2007) 228 CLR 618; [2007] HCA 13, cited *R v Surrey* [2005] 2 Qd R 81; (2005) 151 A Crim R 547; [2005] QCA 4, considered *RPS v The Queen* (2000) 199 CLR 620; [2000] HCA 3, cited *Weissensteiner v The Queen* (1993) 178 CLR 217; [1993] HCA 65, considered

COUNSEL: S C Holt QC for the appellant
D C Boyle for the respondent

SOLICITORS: Bosscher Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** I agree with the reasons of Brown J and the order her Honour proposes.

[2] **MORRISON JA:** I have read the reasons of Brown J and agree with those reasons and the order her Honour proposes.

[3] **BROWN J:** After an eight day trial in the District Court, the appellant, Anthony Francis McEwan, on 8 May 2017, was found guilty of two counts of fraud as an employee with circumstances of aggravation. The Crown alleged that the appellant dishonestly obtained money and bank credits from his employer, Simon George and Sons Pty Ltd (**Simon George**), to a value of $1,677,632.81 during two periods: from 1 November 2003 to 30 November 2008 (Count 1) and from 1 December 2008 to 25 July 2013 (Count 2).

[4] The appellant was the proprietor of two businesses, Stinga Enterprises (**Stinga**) and G&M Fresh Produce (**G&M**). It was accepted by the appellant that both businesses were under his control. The appellant was the sole signatory for the bank accounts for each enterprise. The appellant was also the general manager of the Cairns branch of Simon George. Simon George operated a fruit and vegetable wholesale business. In that role the appellant was responsible for everything that occurred at the Cairns warehouse. Stock was managed by a computer software program called 'Fresh'. The appellant had full access to the database and computer systems.

[5] Invoices were submitted to Simon George under each of the business names of Stinga and G&M for fruit and vegetables supplied to Simon George. The Crown's case was that the appellant submitted those invoices to Simon George for payment for fruit and vegetables which were not in fact supplied to Simon George.

[6] At the trial, the appellant accepted that he obtained approximately $1.6 million as payment for the invoices submitted to Simon George and that he was acting in breach of his employment and relevant obligations to the Australian Taxation Office.

[7] The issue at trial was in respect of the element of dishonesty. The Crown's case was that the appellant dishonestly obtained the monies because the fruit and vegetable produce, the subject of the payments and bank credits, was not delivered to Simon George, and that the appellant had simply falsified those records to justify payments made to Stinga and G&M. The only issue at trial in respect of the element of dishonesty was whether the Crown had proved beyond reasonable doubt that the fruit and vegetable produce was not delivered to Simon George by Stinga and G&M.

[8] The Crown's case against the appellant was predominantly circumstantial. The defence did call some evidence. The appellant did not give evidence as to how Stinga and G&M obtained and supplied fruit and vegetables to Simon George. That

was the subject of comment by the trial judge and is the basis of complaint in this appeal.

[9] The appellant did however contend to the jury that while the transactions were not wholly legitimate, being outside the appellant's terms of employment, the fruit and vegetables were delivered by growers with Stinga and G&M acting as agents.

Grounds of Appeal

[10] Two grounds of appeal were originally raised by the appellant. At the hearing, the appellant indicated that he no longer pressed ground 2.[1] That ground is therefore not the subject of any consideration in the determination of this appeal.

[11] Ground 1 of the appeal asserts that the learned trial judge made a wrong decision on a question of law, by acceding to a Crown application that he comment to the jury that adverse inferences may follow from the appellant not giving evidence.

[12] The comment given by his Honour is commonly referred to as a *Weissensteiner*[2] comment. The appellant contends that this case was not of a rare and exceptional character which warranted the making of the *Weissensteiner* comment by the trial judge to the jury.

[13] It was conceded by the Crown that, if the Court determines that the *Weissensteiner* comment ought not have been given, the error of law would be so fundamental in nature as to exclude the operation of the proviso in *Weiss v The Queen*.[3]

***Weissensteiner* Comment**

[14] The majority of the High Court in *Azzopardi v The Queen*[4] outlined the circumstances in which a *Weissensteiner* comment may be warranted as follows:[5]

> "[64] There may be cases involving circumstances such that the reasoning in *Weissensteiner* will justify some comment. However, that will be so only if there is a basis for concluding that, if there are additional facts which would explain or contradict the inference which the prosecution seeks to have the jury draw, and they are facts which (if they exist) would be peculiarly within the knowledge of the accused, that a comment on the accused's failure to provide evidence of those facts may be made. The facts which it is suggested could have been, but were not, revealed by evidence from the accused must be *additional* to those already given in evidence by the witnesses who were called. The fact that the accused could

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1 T1-45/24-25.

2 *Weissensteiner v The Queen* (1993) 178 CLR 217.

3 (2005) 224 CLR 300.

4 (2001) 205 CLR 50 per Gaudron, Gummow, Kirby and Hayne JJ.

5 In *R v DAH* (2004) 150 A Crim R 14, White J at [84] noted that while *Azzopardi* concerned a jurisdiction which placed legislative limits on the entitlement of a trial judge to comment on the failure of a defendant to give evidence, their Honours have pronounced upon the matter for all Australian jurisdictions in respect of the defendant not giving evidence. The reference to the defendant failing to give an explanation as opposed to giving evidence in *Azzopardi* does however appear to be to ensure the statutory prohibition upon commenting on the defendant's failure to give evidence is abided by: see [66]. *Cf Weissensteiner* at p 229 per Mason CJ, Deane J and Dawson J.

> have contradicted evidence already given will not suffice. Mere contradiction would not be evidence of any *additional* fact. In an accusatorial trial, an accused is not required to explain or contradict matters which are already the subject of evidence at trial. These matters must be assessed by the jury against the requisite standard of proof, without regard to the fact that the accused did not give evidence.
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> [65] In *RPS*, McHugh J expressed the view that, if the circumstances of a case are such that some comment is permissible, the preferable course is for comment to be made in terms of a failure to offer an explanation, rather than a failure to give evidence (84). That was the approach that Gaudron J and his Honour endorsed in *Weissensteiner* (85), saying:
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> > 'it is the failure to provide an "explanation or answer … as might be expected if the truth were consistent with innocence" … which is of evidentiary significance and not the failure to give evidence as such. In many cases, an explanation can be offered without the giving of evidence … Accordingly, directions should be given in terms of the unexplained facts, rather than in terms of the failure to give evidence or to meet the prosecution case … or the failure to answer questions from investigating police. (footnotes omitted)'"

[15] The majority further commented that the cases in which a judge may comment on the failure of an accused to offer an explanation will be both rare and exceptional, stating that:[6]

> "They will occur only if the evidence is capable of explanation by disclosure of additional facts known only to the accused. A comment will never be warranted merely because the accused had failed to contradict some aspect of the prosecution case…"

Trial Judge's Determination

[16] At trial, the Crown submitted that the *Weissensteiner* comment ought to be made by the trial judge in his summing up. That submission was opposed by the defence. The Crown argued that additional facts which were peculiarly within the appellant's knowledge related to the operations of G&M and Stinga and the identities of the persons involved, including those who were said to be the growers and transporters of fruit and vegetables supplied through Stinga and G&M.[7] The defence contended that the additional facts which the Crown relied upon as justifying the making of the comment were nothing more than a contradiction of the Crown's case and that the Crown's case was deficient, as the Crown could not prove that the fruit and vegetables were not delivered. His Honour carefully considered the evidence called by the Crown, the arguments put before him and the relevant legal principles by reference to *Azzopardi v The Queen*.[8] His Honour determined that:[9]

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6 At [68].
7 AB, 647 – 648.
8 AB 655 – 656.

> "The basis of the application before me is that, in effect, this is a strong case, and one which calls for explanation from him as to what really happened. There is no evidence before the [Court] as to how either entity operated, although there is clear evidence that he was the person behind those entities. I should add that there is also considerable evidence to show that the payments were made to bank accounts with Suncorp which were under his control and which were bank accounts for both G&M Fresh Produce and Stinga Enterprises.
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> …
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> When I look at the argument here, it seems to me that, as a starting point, there is a strong case against the accused based around the evidence that I have already summarised. And further, it seems to me that if there was an innocent explanation, namely that he was acting as an agent and was purchasing goods from the suppliers, the circumstances surrounding the operation of those businesses, G&M Fresh Produce and Stinga Enterprises, would be additional facts which are peculiarly within his knowledge and would come within the ambit of the principles that I have just summarised. It seems to me that it is not evidence which could've been the subject of evidence from any other person.
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> The defence argue, in this case, that it would amount to nothing more than a contradiction and that the prosecution could've done much more in terms of who they call (sic). But it seems to me that it would've been impossible, as I indicated in argument, to call every possible supplier to a company such as this when the evidence was that the purchase (sic) went from locally to Townsville to Bowen to Brisbane to New South Wales, South Australia and even New Zealand. So it would have been impossible to go to every potential source of potential supply to try and establish that it was not, in fact, being supplied. If, as was suggested in argument, he was running a business there is nothing in any of the documentation to support that and if he was those are all matters peculiarly within his knowledge in accordance with the principles that I've summarised…"

[17] His Honour subsequently gave the following comment to the jury:[10]

> "Now, what I've said there is subject to this qualification in this particular case: the prosecution asked you to conclude that the accused is guilty from the circumstances which it says are established by a number of facts which it claims to have proved. And I will summarise those facts to you: firstly, that it is clear that the substantial moneys were paid to G&M and Stinga Enterprise, and I've summarised how that was done earlier, and how it was recorded. They rely on the fact that none of those people called from Simon George & Sons, who would have worked in the receiving or the fridgeying positions or the

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9 AB, 655/1-12; 657/3-23.
10 AB, 740 – 742.

buying positions, had any knowledge of any deliveries by G&M and Stinga Enterprises, or any stock supplied; that those who worked in the office had had no dealings with any individual for and on behalf of those entities.

They relied on the expert opinion of Mr Bennett in terms of what he said about lifestyle and the capacity to fund the lifestyle from sources other than the money from G&M and Stinga. They relied upon the evidence of Mr Bennet (sic) in terms of the stock adjustments, the weight adjustments, and how they could have been used to effectively mask a situation whereby invoices were being provided for stock that was not being delivered. They relied upon the investigations that were made on the 23rd of July in terms of what stock was on hand, and the fact that some of the items purported to have been recently delivered, as per the invoices, were not there. Particularly, they relied on the evidence of Mr Jackson George. They relied on the fact that there was no follow-up from Stinga or G&M in terms of the outstanding accounts, totalling about $6000, for which payment was stopped by Mr George when he intervened in July of 2013.

Now, the prosecution argue that those facts prove that he is guilty as charged; that, in other words, he did not supply the fruit and vegetables, the subject of the invoices. In this case, you may think that if there are additional facts that would explain that evidence against the accused, or contradict the conclusion of guilt which the prosecution asks you to draw, those additional facts – if they exist – would be additional facts known only to the accused and could not be the subject of evidence from any other source. And these relate to the operation of G&M and Stinga; where they got their stock from, how they got their stock, how they delivered their stock.

These facts would be additional to evidence given by the witnesses who have been called. And a mere contradiction would not be evidence of an additional fact. I'll give you an example: if someone said – got in the witness box and said you assaulted them. You didn't give evidence. We couldn't say that therefore the facts that were solely within your own knowledge, that you've failed to disclose by not giving evidence, because all you could have done was get in the witness box and contradicted. Here, the argument is that the facts which relate to the operation of those two entities were known only to him. And this is not a case where, if he did give evidence, it would amount to nothing more than a mere contradiction of the prosecution case and would not be evidence of any additional facts.

A consequence of the accused electing not to give evidence is that you have no evidence of additional facts from him to explain the evidence put forward by the prosecution. The conclusion of guilt the prosecution argues for may be more safely drawn from the proven facts when an accused elects not to give evidence of relevant additional facts which, if they exist, must be within his knowledge.

> And if, in fact, he was operating as an agent, he was in a position to tell us about that operation.
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> You are not allowed to resolve doubts about the reliability of witnesses or the conclusions to be drawn from the evidence simply because the accused has not contradicted the evidence already given. Remember also that the accused has already contradicted the general allegation against him by his pleas of not guilty. You may only ask yourselves if the prosecution case for the conclusion of guilt is strengthened by the decision of the accused not to offer any explanation in evidence, where, if there are additional facts that would explain the evidence led by the prosecution or contradict the conclusion of guilt that the prosecution asks you to draw, those additional facts, if they exist, would be peculiarly within his knowledge. And he has not given evidence of them.
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> You should keep in mind that a person charged may have a number of reasons for not giving evidence, other than the fact that his evidence would not assist his case. Reasons might include: timidity – being timid about giving evidence; a concern that cross-examination might confuse the person charged; the fact that the person charged has already given an explanation to police; a possible memory loss; fear of retribution from other persons; or a belief that weaknesses in the prosecution case will leave you, in any event, with reasonable doubt as to guilt. These are all possibilities. You must bear this in mind when considering whether it is safe to accept an (sic) act upon the evidence led by the prosecution, and to draw beyond reasonable doubt the conclusion of guilt that it asks you to draw.
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> Now, what I've just brought to your attention, in terms of those additional facts, are matters of comment by me. And I've already given a general direction, but I'll remind you of that: that you can, because you are the sole judges of the facts, feel free to disregard any comment I make on the evidence."

Contentions of the Parties

[18] The appellant contends that ground 1 of the appeal, that the *Weissensteiner* comment was made in error, relies on three propositions,[11] namely that:

[1] The proved facts were not sufficiently established by the evidence to require explanation or justify the comments, and the comments invited the jury to draw impermissible inferences to plug gaps in the Crown case;[12]

[2] An innocent explanation was available on the other evidence adduced, raised in the conduct of the defence case and explicitly adopted in the closing address on behalf of the appellant;

[3] The nature of the Crown case that required it to prove a negative, namely that fruit and vegetables were not delivered, was unsuited to a *Weissensteiner* comment.

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11 Appellant's Outline at [23].

12 Cf *Azzopardi v The Queen* (2001) 205 CLR 50 at [51].

[19] The appellant emphasises that the policy reasons underlying why the *Weissensteiner* comment is rare and exceptional, as recognised particularly by the majority in *Azzopardi*, support his contention that the direction should not have been given in this case. The appellant's case turns on "rare and exceptional" creating an additional threshold that must be met before a *Weissensteiner* comment is appropriate. There is no dispute that it was open to the jury on the evidence to find that the only rational inference was that the fruit and vegetables had not been delivered and that the appellant had acted dishonestly. It is not contended that the verdict reached by the jury is an unsafe or unsatisfactory verdict. It was also accepted that there were additional facts to the evidence called by the Crown which were within the appellant's knowledge.[13] The appellant candidly conceded that if he did not show the case was not a rare and exceptional one, the appeal would fail.[14] Such a concession was a proper one, in my view, given the evidence called on behalf of the Crown and the way the trial was conducted. The policy reasons outlined by the appellant to demonstrate that a case must be rare and exceptional before the *Weissensteiner* comment is given which have been identified in the authorities were:

[1] The risk that the comment reverses or interferes with the burden and standard of proof, in circumstances where a criminal trial is an accusatorial process, in which the prosecution bears the onus of proving the guilt of the accused beyond reasonable doubt;[15]

[2] The difficulties of instructing juries in relation to such comments;[16]

[3] Unnecessary or extensive comments on the facts carry well recognised risks of misstatements or other errors and of blurring the respective functions of the judge and jury.[17]

[20] The appellant contends that even if the preconditions for providing a *Weissensteiner* comment were satisfied, it has been recognised that a comment will not always be appropriate. The appellant places particular reliance on the comment of Mason CJ, Deane and Dawson JJ in *Weissensteiner v The Queen*,[18] that:

> "Even if there are facts peculiarly within the accused's knowledge the deficiencies in the prosecution case may be sufficient to account for the accused remaining silent and relying upon the burden of proof cast upon the prosecution. Much depends upon the circumstances of the particular case and a jury should not be invited to take into account the failure of the accused to give evidence unless that failure is clearly capable of assisting them in the evaluation of the evidence before them."

[21] The Crown contends that:

[1] The strength of the inference from the evidence called in the Crown's case comes from the combination of the circumstances, not from looking at each

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13 T1-12/5-19.
14 T1-12/30-35.
15 *Azzopardi v The Queen* (2001) 205 CLR 50 at [34] and [38].
16 *RPS v The Queen* (2000) 199 CLR 620 at 637, referred to in *The Queen v DAH* (2004) 150 A Crim R 14 at [82].
17 *Azzopardi v The Queen* (2001) 205 CLR 50.
18 (1993) 178 CLR 217 at 228.

piece of circumstantial evidence in isolation as the defence seeks to do. The cumulative effect of the evidence relied upon was that the jury could reach the view that the only rational inference was that the fruit and vegetables had not been delivered by G&M and Stinga. In particular, it relies on *The Queen v Surrey*[19] where Jerrard JA stated:

> "… it can be seen that the circumstances justifying the fuller directions approved in *Azzopardi* are those existing when the Crown has established a sufficiently strong circumstantial case to satisfy the jury of guilt on the *Peacock* test, namely that the inference of guilt is the only rational inference which can be drawn from the circumstances."

[2] The suggestion that there was an innocent explanation raised by the defence, namely that Stinga and G&M were acting as agents in relation to the fruit and vegetables supplied and transport was organised by the growers and that the appellant dealt with the growers on a cash basis, was unsupported by the evidence;

[3] It is irrelevant whether the ultimate inference is framed as a positive or negative. Provided that there is a sufficient evidential basis for the Crown inference and there are additional facts peculiarly within the knowledge of the appellant, a comment in accordance with *Weissensteiner* can be given.

[22] It was not contended by the appellant that the appellant did not have peculiar knowledge of additional facts which could explain the evidence given. The appellant did not seek to continue to challenge the form of direction at the hearing, which was the subject of ground 2 of the appeal.

[23] In my view, the circumstances of the present case are such that it was appropriate to provide a *Weissensteiner* comment, for the reasons set out below.

Consideration

Does a case have to be "rare and exceptional"?

[24] The contention that a case must be able to be characterised as "rare and exceptional" before a *Weissensteiner* comment is appropriately made, incorrectly characterises the comments of the majority in *Azzopardi* as creating an additional threshold or requirement that must be met prior to it being appropriate for the comment to be given. It is evident that the comment made by the majority in *Azzopardi* that the cases in which such a direction will be made are rare and exceptional, is a statement that the preconditions for the making of the comment as outlined in [64] of the judgment are rarely met, not that a case must pass some threshold of being rare and exceptional before such a comment will be made.

[25] This is evident from the comment of the majority which followed their recognition that the cases in which such a comment is appropriate are rare and exceptional, namely that:

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19 (2005) 151 A Crim R 547 at [34].

> "They will occur only if the evidence is capable of explanation by disclosure of additional facts known only to the accused."[20]

[26] The fact that such cases will be rare and exceptional arises from the parameters that have been laid down for the making of a *Weissensteiner* comment. First, that the comment is only properly made where the Crown's case relies on the jury drawing inferences from proved facts.[21] Secondly, that the accused cannot be called upon to give evidence to deny or simply contradict the case against him or her. The entry of a plea of not guilty constitutes a denial. Thirdly, that prior to it being appropriate for a trial judge to make the comment, he or she must be satisfied that the accused had peculiar knowledge of additional facts which would explain or contradict the inference which the prosecution seeks to have the jury draw. Those facts must be additional to the facts already given in evidence by the witnesses who were called.[22] Most cases would involve the accused only being in a position to contradict the case against him or her not to have peculiar knowledge of facts additional to those called which would explain or contradict the inference which the prosecution seeks to have the jury draw.

[27] The evidence called by the Crown must be assessed by the jury against the requisite standard of proof without regard to the fact that the accused did not give evidence.[23] This is in recognition of the fact that in an accusatorial trial, no onus lies on the accused to contradict the Crown's case.

[28] The appellant has highlighted the hallmarks of the accusatorial system which apply to criminal trials as reasons why a case must be rare and exceptional before a *Weissensteiner* comment can be made. However, the High Court has sought to protect those hallmarks by requiring that certain directions and clear parameters which recognise the danger of making such a comment be provided to the jury, not by the imposition of a threshold that a case must be rare and exceptional.[24] As regards those directions that are required to be given if such a comment is made by the trial judge, they were summarised by White JA as follows:

> "[T]he essential elements which must be conveyed to a jury, that is, that no adverse inference may be drawn from the defendant's failure to give evidence, that the onus of proof lies upon the prosecution, that the defendant is presumed innocent until the prosecution adduces sufficient evidence to reach a conclusion of guilt beyond reasonable doubt and that the failure to give evidence does not strengthen the prosecution case or supply additional proof against a defendant or fill gaps in the evidence."[25]

[29] The right of an accused to remain silent is one of the pillars of our criminal justice system. However, the High Court has recognised that there is a distinction between the drawing of an inference from the silence of an accused alone, as opposed to the drawing of an inference otherwise available on the evidence given, where the accused has not supported any hypothesis which is consistent with innocence by explaining or contradicting the inference with facts which are peculiarly within his

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20 *Azzopardi v The Queen* (2001) 205 CLR 50 at [68].
21 *Azzopardi* at [58] referring to the decision of *RPS v The Queen* (2000) 199 CLR 620 at [79].
22 *Azzopardi* at [64].
23 *Azzopardi* at [64].
24 *Azzopardi v The Queen* (2001) 205 CLR 50 at [65] and [67].
25 *R v DAH* (2004) 150 A Crim R 14.

or her knowledge. The comment is directed to the failure to explain or answer evidence which could only be explained by an accused, not the failure of an accused to give evidence.[26] In this context, the majority of the High Court in *Weissensteiner* acknowledged that while the accused has a right to silence, an accused should take into account the consequences of not giving evidence, where the failure of the accused to give evidence may bear upon the probative value of the evidence which has been given and which the jury is required to consider.

[30] The High Court has also provided that it remains for the jury to determine the facts and they do not have to act upon the comment given by the trial judge, given that it is a comment which may be disregarded by the jury and not a direction.[27]

[31] While it is true that the facts in *Weissensteiner* which led to the comment being made were unusual, that again does not support the fact that a case must be "rare and exceptional" before such a comment can be given. The analysis by the majority in *Weissensteiner* of previous authorities led the majority of the High Court to conclude that:

> "We have quoted rather more extensively from the cases than would otherwise be necessary in order to show that it has never really been doubted that when a party to litigation fails to accept an opportunity to place before the court evidence of facts within his or her knowledge which, if they exist at all, would explain or contradict the evidence against that party, the court may more readily accept that evidence. It is not just because uncontradicted evidence is easier or safer to accept than contradicted evidence. That is almost a truism. It is because doubts about the reliability of witnesses or about the inferences to be drawn from the evidence may be more readily discounted in the absence of contradictory evidence from a party who might be expected to give or call it. In particular, in a criminal trial, hypotheses consistent with innocence may cease to be rational or reasonable in the absence of evidence to support them when that evidence, if it exists at all, must be within the knowledge of the accused."

[32] As set out above, the appellant places particular reliance for its contentions on the passage of Mason CJ, Deane and Dawson JJ in *Weissensteiner* which provides that even if there are facts peculiarly within the accused's knowledge, the deficiencies in the prosecution case may be sufficient to account for the accused remaining silent. That does not lend support to the appellant's contention that there is a requirement that a case must be identified as being rare and exceptional before such a comment can be given, nor have subsequent High Court authorities recognised that to be the case when restating the preconditions for a *Weissensteiner* comment being made. The passage referred to is consistent with the fact that, while a judge may comment on the facts, he or she is not bound to do so except to the extent that the judge's other functions may require it.[28] The fact that there may be various reasons for an accused not giving evidence is also the subject of directions given to the jury, which were given in the present case.

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26 *RPS v The Queen* (2000) 199 CLR 620 at 637 per McHugh and Gaudron JJ, referred to with approval by the majority in *Azzopardi v The Queen* (2001) 205 CLR 50 at [65].

27 *Azzopardi v The Queen* (2001) 205 CLR 50 at [67].

28 *RPS v The Queen* (2000) 199 CLR 620 at [41]-[42].

[33] If the Crown's circumstantial case meets the relevant threshold, that the jury may conclude that the only rational inference that may be drawn is that contended for by the Crown, and the evidence is capable of explanation through disclosure of facts additional to those from evidence already called which are known only to the accused, which may explain or contradict the inference contended for by the Crown, a trial judge may conclude that such a direction can be given.

[34] Given the appeal relies on the contention that the present case was not "rare or exceptional" such as to warrant the direction being given, and I have determined that is not the relevant consideration, the trial judge's decision to make the *Weissensteiner* comment to the jury was not an error of law and the appeal must fail. I will however briefly address the individual tenets of the appellant's argument which were relied upon to assert that this case was not "rare and exceptional".

The strength of the Crown's case

[35] The difficulties of the appellant succeeding in his appeal on the basis that the present case is not "rare and exceptional" are further demonstrated by his seeking to challenge the strength of the Crown's case. The point at which a Crown case could be identified as being of sufficient strength to be regarded as "rare and exceptional" could not be readily identified by the appellant.[29] It was not suggested the evidence in the Crown's case needs to be perfect but that the present case had too many imperfections to warrant the comment being made.[30]

[36] Indeed, it was acknowledged by the appellant in the present case it was open to the jury to determine that the only rational inference was that the fruit and vegetables had not been delivered and to conclude that the appellant had acted dishonestly.

[37] The appellant contends, however, that the facts the subject of the comment were not sufficiently established on the evidence and the jury were, in effect, invited to draw impermissible inferences to plug gaps in the Crown's case.

[38] The appellant accepted as accurate the summary of the circumstantial evidence against the appellant set out in the Crown's submissions,[31] which was summarised as follows:

> [1] 15 staff members in the receivals and buying area of Simon George had no knowledge of deliveries by G&M and Stinga and had no recollection of those entities. Administrative staff had no dealings with any individuals from those businesses (i.e. G&M and Stinga);
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> [2] G&M and Stinga were not known to growers or agents called by the prosecution. Nor were they known by the appellant's former wife;
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> [3] No delivery of stock was made on 23 July 2013, the day the appellant was dismissed. A stocktake by Mr Jackson George on 24 July 2013 revealed a shortfall.[32] There was no attempt by any individual to recover, on behalf of G&M and Stinga, outstanding monies under invoices dated 23 July 2013;

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29 T1-13/16-19.
30 T1-30/15-21.
31 Respondent's Submissions at [4.1].
32 There was no stock there to meet those invoices.

[4] The documentation seized of G&M and Stinga only related to billing to Simon George. On financial analysis there was no evidence of payment of stock, transport, wages or other outlays;

[5] There was a manipulation of stock levels in reducing stock in the computer system by way of stock adjustment and wastage. As general manager, the appellant had access to the relevant databases and he conducted the stocktake. There was a correlation between the goods purportedly supplied on the invoices and stock adjustments in the fresh system. He entered the entities in Fresh, generated purchase orders and submitted invoices;

[6] An analysis of the appellant's finances indicated unexplained wealth.

[39] The evidence called on behalf of the Crown included:

[1] Evidence from the appellant's wife, from whom he had separated in 2008, that she was unaware of the businesses, Stinga or G&M;

[2] Evidence from Ms Boardman from the administration section, who stated that she brought to the attention of the appellant that the products' weights in the computer system were less than the actual weight of the products, and was told by the appellant that he would look into it, some nine months before his employment was terminated;

[3] Evidence from the buyers, receivers and fridgeys that they could not recall Stinga or G&M, signing an invoice with a stamp on it from them or any deliveries from them;

[4] Staff who processed invoices for payment in administration recalling Stinga and G&M but not having individual dealings with anyone from those entities;

[5] Documentation of Stinga and G&M was found in a locked briefcase in the appellant's locker which contained cheque books, invoice books and stamps but no business documentation relating to matters such as contact details of agents or growers or as to supplies or as to payments;

[6] Mr Watson, a forensic investigator who conducted a stock analysis in May 2013 of Simon George in relation to six product lines, and found that there was no requirement for the product the appellant purchased from G&M and Stinga in respect of four of the six product lines;

[7] Evidence from Mr Bennett, a forensic accountant, who conducted a financial analysis of Simon George and the appellant for the relevant period. He focussed on weight changes of stock and stock adjustments in Fresh and whether they could be used as a way of covering up the stock not supplied. He considered that the system was open to such manipulation. There were considerable matches between goods being supplied by Stinga and G&M and goods being written off the system using the stock adjustments.[33] He also quantified the amount of additional stock that would have been available as a result of the reduction of weight of bulk products supplied by Stinga and G&M and found there was correlation in a number of cases between the two;

[8] That the appellant was the sole signatory to the two accounts of Stinga and G&M;

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[33] See AB 479/10-16, AB 480/16-24, although the correlations were not exact particularly for the period July 2009-2013.

[9] Mr Bennett analysed the bank accounts of Stinga and G&M and saw no payment of stock, transport, possible wages or those sort of outlays, nor did he see in the accounts any possible payments for wages and payments for the costs of transport of stock. He also gave evidence of the unexplained wealth of the appellant and that the lifestyle being led by the appellant was over and above what he and his wife were earning in income from their employment. He also gave evidence as to the additional cash that the appellant would have required over and above cash withdrawals to afford the fruit and vegetables Stinga and G&M supplied;

[10] The two businesses of the appellant, Stinga and G&M, were entered into the system of Simon George as growers not agents. The appellant had in its opening asserted that Stinga and G&M were acting as agents not growers;[34]

[11] Mr Jackson George thought the expected percentage of wastage for the company was around half a per cent but that weight adjustments were not the norm for every product. Mr George stated that after the appellant left, wastage decreased. Mr Perrott said that he understood that wastage was up to three per cent, but with technology, it would be a lot less. He accepted that the industry percentage was between one and three per cent and could be higher in Cairns than Brisbane. Staff from Simon George also gave evidence as to the appellant's involvement in giving instructions as to weight changes;

[12] Mr Jackson George accepted that there was a large drop in profitability after the appellant left, but stated that the appellant took a lot of knowledge from the company and took it to the competition and was able to set the sale price of goods;

[13] Invoices dated 23 July 2013 from Stinga in the sum of $2,520 and G&M in the sum of $5,136 were located after the appellant's employment was terminated. Evidence was given that there was no subsequent follow up up for payment by anyone associated with those entities. Mr Jackson George did a physical check of the stock in the warehouse and found a shortfall, locating none of the items the subject of the invoices in stock;

[14] Evidence from local growers and agents as to produce they supplied to Simon George, none of whom had heard of Stinga or G&M.

[40] There was some direct evidence that the fruit and vegetables were not delivered called by the Crown. Mr Perrott was the sales manager and second in charge in the period that the appellant was the general manager of Simon George. When the appellant was on leave, Mr Perrott was responsible for stocktakes. He gave evidence that the appellant was responsible for any alterations to the weights that were assigned in Fresh to the bulk products acquired by Simon George from suppliers. He also gave evidence that at stocktakes, notes were made by the appellant and provided to administration staff for entry into Fresh. Mr Perrott gave evidence that he saw G&M and Stinga in the growers listed in the buying book and he asked the appellant, who G&M and Stinga were and what they were supplying. According to Mr Perrott the appellant then responded,[35] "Don't worry about it, you know, they're not supplying us anything. I'm just doing a favour for someone". He

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34 Exhibit 5.1 and 5.2, AB 697-698; AB 767-768.

35 The content of the conversation was disputed by the appellant.

believed the appellant said he was doing the favour for Mick Coleman. Mr Coleman gave evidence and denied receiving any such favours. Mr Perrott also gave evidence that he had not seen any branding on boxes or produce supplied that related to the businesses Stinga or G&M and that in his position he would have expected have known of such produce being supplied. Nor did Mr Perrott have any dealings with any person purporting to be from those entities as growers or agents.

[41] The appellant asserted that there were deficiencies in relation to various pieces of evidence constituting the Crown's circumstantial case. Those deficiencies had largely been the subject of submissions made by the defence in closing address. Those deficiencies were said to have resulted in the *Weissensteiner* comment being used to plug gaps in the Crown's case, which is an impermissible use of the comment. The criticisms raised by the appellant in summary included that:

[1] While the 15 staff members in receivals, fridgeying or buying did give evidence that they did not recall G&M or Stinga, they did not recall other suppliers or agents either and further that there were 30 people on the floor of Simon George;

[2] There were only seven growers and agents who supplied Simon George called, which was insufficient to prove that produce had never been supplied to G&M and Stinga by growers in circumstances where produce to Simon George came from all over Australia and overseas;

[3] No proper stocktake was carried out by Mr Jackson George on 24 July 2013 when ascertaining that the fruit and vegetables the subject of the invoices of Stinga and G&M had not been supplied;

[4] The expert evidence was not comprehensive:

(i) Mr Watson only conducted a limited analysis of six lines of produce during May 2013. For two lines he concluded that there was a requirement to purchase Stinga and G&M produce to cover supply. His analysis did not take into account stock wastage or weight adjustments which would have increased the shortfall or conversely reduced the amount of fruit and vegetable available to cover orders. A further analysis that he recommended be carried out was not done.

(ii) Mr Bennett's evidence, although the result of a more substantial analysis than Mr Watson, was accepted by the Crown as not being perfect, including as to underlying anomalies in the business records including excel spreadsheets which were provided to him.[36] His analysis did not take into account the intermingling of stock adjustments and wastage on Simon George's system, nor the practice that weight adjustments had been used to address shrinkage which he accepted affected his conclusion that more stock had been written off than had been purchased.

[5] The deficiencies in the records of Stinga and G&M such as in respect of weight adjustments, could be regarded as being defective due to poor practices in the business rather than that they were solely the contrivance of a fraudster seeking to cover their tracks;

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36 AB 720/5-24.

[6] The internal systems of Simon George only resulted in a capacity for the accused to put in invoices and to not in fact supply the goods;

[7] Wastage was inconsistently recorded on Simon George's system, sometimes as wastage and sometimes as stock adjustments[37] and weight adjustments were routinely made retrospectively;

[8] No control study was carried out of wastage, weight adjustments and stock adjustments of produce delivered by other agents, notwithstanding that the deficiencies in the records of Simon George included that no invoices were retained from other growers or agents during the period of the alleged fraud.

[42] The appellant also relied on the fact that there was some evidence which was consistent with the appellant's innocence, such as Mr Bennett identifying products where records did not indicate that Stinga or G&M orders were not delivered. This is said to have exacerbated deficiencies in the Crown's case.[38]

[43] The defence did lead some evidence to rebut two of the five matters relied on by the prosecution in its circumstantial evidence. To rebut evidence that the appellant had income beyond that which could be explained from his employment, particularly with respect to trading in cars, it called evidence from Mr Delaforce, who dealt with the appellant in the course of his business of importing classic cars from the USA. Mr Delaforce gave evidence of the potential for the appellant to earn cash through acquiring cars and memorabilia. Mr Delaforce gave evidence that he had not, however, had any dealings with the appellant since he had left Simon George.[39]

[44] Mr Bennett had in his analysis considered evidence from Mr Garozzo. Mr Garozzo, who was the appellant's new employer, gave evidence as to the expected range of wastage that would occur in a fruit and vegetable business, based on his experience in his export operations in Brisbane, Papua New Guinea and Cairns, which was up to three per cent.[40] His company used the Fresh System. He could not however give any evidence about the particular operations in Cairns of Simon George. He also gave evidence that he was aware of the concept of "Free in Store". "Free in Store" refers to a supplier agreeing to provide produce to the front door of the warehouse, such that the transport cost is accommodated by the supplier. However, the extent of the evidence of Mr Garozzo was that he was aware of the term by reference to any general industry.[41] There was no evidence that "Free in Store" applied to supplies to Simon George.

[45] No evidence, however, was given by the appellant explaining who was supplying Stinga and G&M, how goods were being delivered to Simon George and where the stock was coming from.

[46] The defence did not dispute that Stinga and G&M had received payments from Simon George, but contended that the appellant supplied Simon George through Stinga and G&M acting as agents for growers. It was suggested by the defence that the fruit and vegetables could have been purchased on a "Free in Store" basis,[42] as a

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37 After Mr McEwan left wastage was only recorded as wastage in the Fresh system: AB 366/5-9.
38 Appellant's submissions [17].
39 AB 618/1-2.
40 AB 626/29-35.
41 AB 627/15-34.
42 AB 698/30-33.

result of which fruit and vegetables were supplied directly by the growers and there would be no branding from the agent. It was further suggested the appellant may not have wished to give evidence because growers would have been paid in cash and avoided tax and he did not want to name them.[43]

[47] The appellant contends that the defence proffered an hypothesis and led some evidence in contradiction to the Crown's case at the time. It contends that this is a significant factor in terms of the application of *Azzopardi*. However, the difficulty with that proposition is that, while the appellant had contended at trial that the Crown could not prove that the fruit and vegetables had not been delivered through the agency of either Stinga or G&M, the Crown's evidence did support the inference that the fruit and vegetables had not been delivered. Further, there was no evidence to support the hypothesis that the fruit and vegetables were delivered by Stinga and G&M to Simon George, whether as agents or otherwise. As was said by Sofronoff P in *R v Doyle*:[44]

> "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."

[48] The evidence called by the defence did not go beyond suggesting that the appellant may have received cash additional to that identified by Mr Bennett from trading in cars and memorabilia and that the level of wastage experienced in relation to fruit and vegetables in a wholesale business may be higher than that suggested by Mr Jackson George. The defence did not call evidence that Stinga and G&M had operated as agents, sourcing supplies of fruit and vegetables from growers, who then supplied Simon George with those products directly. No evidence called by the Crown supported such an hypothesis. The evidence of Mr Bennett and Mr Watson suggested that there were some products which, based on the records of Simon George, did not appear to have been delivered by Stinga and G&M. While that evidence was less than complete it still supported the fact that the Fresh system was open to manipulation and there was some evidence that such manipulation had occurred when the fruit and produce referred to in the invoices of Stinga and G&M were compared to the write off of stocks and weight adjustments. It is true that in some cases there was evidence consistent with fruit and vegetables having been supplied by Stinga and G&M.

[49] However, there was no evidence to support the fact such deliveries had ever in fact been made by Stinga and G&M and to explain how they occurred without those who were on the floor of Simon George or Mr Perrott having any awareness of such deliveries or having signed for them. That evidence, which could have assisted the jury in its evaluation and explained the evidence called which supported the fact no deliveries were made, was only within the knowledge of the appellant who controlled Stinga and G&M.

[50] Individually, the different pieces of evidence presented on behalf of the Crown would not have been sufficient to establish guilt but cumulatively the evidence was reasonably strong.

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43 AB 707/40-47.

44 [2018] QCA 303 at [31].

[51] The circumstances from which it is determined that the inference of guilt is the only rational inference include any explanation offered by a defendant whether to the police, other witnesses, or the jury.[45] In the present case, the alternative hypothesis put forward by the appellant and the evidence called were not such as to displace the circumstantial case presented by the Crown which was of sufficient strength to satisfy the jury of guilt on the test in *Peacock v The King*.[46]

[52] The approach of the appellant which he seeks to have this Court adopt is contrary to that which is to be adopted in cases which largely rely on circumstantial evidence, such as the present. The appellant took the Court to deficiencies identified in relation to each of the individual categories of circumstantial evidence of the Crown. While the appellant's counsel acknowledged that a circumstantial case must be looked at in its entirety, it submitted that the strength of the circumstantial evidence depends on the strength of the individual pieces of evidence. While to a certain extent that is correct, individual pieces of evidence looked at in isolation may well be weak but when considered in conjunction with other pieces of circumstantial evidence the case looks considerably stronger. The approach is fraught with difficulties where circumstantial evidence is relied upon and is contrary to the established approach in such cases. In *R v Hillier*,[47] Gummow, Hayne and Crennan JJ stated:[48]

> "Often enough, in a circumstantial case, there will be evidence of matters which, looked at in isolation from other evidence, would yield an inference compatible with the innocence of the accused. But neither at trial, nor on appeal, is a circumstantial case to be considered piecemeal."

[53] The individual deficiencies referred to by the appellant (and the defence in closing address) do not negate the overall strength of the Crown's case when all of the individual pieces of evidence are looked at cumulatively. Of course, in a circumstantial case, the jury may not find that the Crown has satisfied them that it has proved every individual category of evidence relied upon. The evidence which the jury does accept may, however, still satisfy it beyond reasonable doubt. In the present case, the Crown relied on a variety of evidence to establish dishonesty, which was of sufficient strength for the jury to draw the rational inference that the fruit and vegetables were not delivered.

[54] There was undisputed evidence that the appellant controlled Stinga and G&M, and that he controlled the bank accounts of Simon George. There was evidence that the financial circumstances of the appellant were much greater than could be explained by his income from Simon George alone, although the defence sought to explain that through the evidence of Mr Delaforce and Mr Bennett from his dealing in cars. There was evidence that a number of people who would be expected to know about the fruit and vegetable deliveries from G&M and Stinga to Simon George could not recall either of those entities. Even though they did not recall other entities who had supplied fruit and vegetables to Simon George, their evidence of non-recollection stood in stark contrast to the administrative people who processed the invoices who had heard of them.

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45 *R v Surrey* (2005) 151 A Crim R 547 at [34] per Jerrard JA.
46 (1911) 13 CLR 619 at 662.
47 (2007) 228 CLR 618.
48 At p 638, [48].

[55] The administrative staff's evidence, however, was that they had not dealt with any individuals from either Stinga or G&M. Mr Perrott's evidence was that given his position, he did not consider that supplies in the amount the subject of the invoices of Stinga or G&M could have been delivered without him knowing.[49]

[56] While the three growers and four agents from the region who were called were small in number when compared to the number of growers and agents throughout Australia, their evidence that they had not heard of Stinga or G&M could not be simply disregarded on the basis they would not necessarily have known of them, since Stinga and G&M could be a potential source of business for the growers or a competitor for the agents. Further, while the defence at trial sought to explain the absence of knowledge of Stinga and G&M by the fact that Stinga and G&M acted as agents and were not growers, the records of Stinga and G&M contained in the Fresh system, which would have been entered by the appellant, identified both of them as growers.[50]

[57] While the evidence of Mr Bennett was not perfect, it did provide evidence as to how stock adjustments and weight adjustments could be used to facilitate the provision and payment of invoices for stock that had not been delivered, and evidence which indicated that such manipulation had occurred. While acknowledging the deficiencies in the exercise he had undertaken, he did not resile from his view that there was evidence that the Fresh system had been manipulated in relation to the fruit and vegetables said to have been supplied by Stinga and G&M. Even though Mr Bennett could not give any evidence as to the actual weight of boxes delivered which were the subject of weight adjustments, or as to what is a normal expected amount of stock adjustments, weight adjustments or waste adjustments, he still did not consider that anomalies in the system could be explained by proper business practices.[51]

[58] Similarly, Mr Watson's evidence, while of limited weight, still supported the fact that for the period which he looked at in May 2013, there was no requirement for the product to be purchased from G&M or Stinga in respect of four of the six product lines investigated. Given the appellant's role at Simon George, he had access to the Fresh system and understood how it worked. Evidence was also given by employees of Simon George of the appellant's involvement in weight adjustments.

[59] Similarly, the disbursements from the accounts of Stinga and G&M were analysed by Mr Bennett and not found to reflect the hallmarks of a business in respect of payment of suppliers, wages and transport.

[60] The evidence of Mr Watson and Mr Bennett was given some support by the evidence of Mr Jackson George, that when he had checked for items of stock which were the subject of invoices in July 2013, on 23 July 2013, no items were found. While that exercise was criticised by the appellant as being cursory it was open to the jury to accept the evidence given.

[61] Similarly, insofar as criticisms were raised of Mr Jackson George's evidence as to the expected level of wastage, when compared to the evidence of Mr Garozzo or Mr Bimrose as to what occurred in the industry, it was open to the jury to accept the

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49 AB 241/42-47.
50 AB 767 and 768.
51 AB 596/15-19.

evidence of Mr Jackson George as opposed to the evidence of Mr Garozzo and Mr Bimrose.

[62] The appellant's contention is that further evidence should have been called by the Crown to make a more compelling case before a *Weissensteiner* comment could be made. While further evidence may have been called by the Crown of the nature described by the appellant, which may have served to make the case against the appellant even stronger, the failure to do so did not result in the *Weissensteiner* comment plugging gaps in the Crown's case. The evidence that the Crown presented was sufficient for the jury to determine that the only rational inference was that the fruit and vegetables had not been delivered and that the test in *Peacock v The Queen* had been satisfied. In *R v Surrey*, Jerrard J considered that a case would be a sufficiently strong circumstantial case to justify the *Weissensteiner* comment being given when the evidence was sufficient to satisfy the jury of guilt on the *Peacock* test.[52] I consider that is correct in a case such as this where the circumstantial case relates to the single issue in dispute. The Crown does not need to exclude any possible hypothesis consistent with innocence, only every reasonable hypothesis.[53] The position may be different where the circumstantial case is directed at a number of issues and the matter in respect of which the comment is sought may be deficient, such that the comment would serve to plug a gap.

[63] Further, the absence of any evidence to support the explanation offered by the appellant as to how deliveries did occur to Simon George without any of the witnesses called being aware of them was a matter which may be considered in determining whether the *Weissensteiner* comment should be given.[54] The Crown's case was of sufficient strength for the *Weissensteiner* comment to be given and did not impermissibly plug holes in the Crown's case or "make weight", but properly may have served to strengthen the inferences sought to be raised from the evidence called by the Crown. The potential strengthening of the inferences sought to be drawn by the Crown is the purpose of such a comment being given, where such an inference could only be explained by the peculiar knowledge of the accused.[55]

[64] The evidence said by the appellant to be consistent with the innocence of the appellant[56] was not evidence of how Stinga and G&M had effected delivery of fruit and vegetables to Simon George by any of the means suggested by the appellant to the jury.[57] It remained unexplained. It was therefore reasonable in the present case for the appellant to give such an explanation or otherwise attract the comment given.

[65] Even if I accepted the appellant's approach and requirement for relative strength of the Crown's case I would not have found that when all the evidence is considered cumulatively, the Crown's case was so weak that the comment should not have been made.

Negative Inference

[66] The appellant's complaint as to the extent of the evidence called and particularly that the *Weissensteiner* comment was inappropriate given that the Crown's case relied on a negative inference being drawn by the jury, namely that no fruit and

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52 *R v Surrey* (2005) 151 A Crim R 547 at 96 [34] per Jerrard J.
53 *Peacock v The King* (1911) 13 CLR 619 at 661.
54 *R v Surrey* (2005) 151 A Crim R 547 at 96 [34] per Jerrard J.
55 *Weissensteiner v The Queen* (1993) 178 CLR 217 at 230-231, per Mason CJ, Dean and Dawson JJ.
56 Appellant's submissions [78].
57 CF AB 698/28-38 and AB 707.46.

vegetables had been delivered by Stinga and G&M, is again unsupported by the relevant High Court authorities. Such an approach would require the Crown, when seeking to prove a negative inference, to exclude every fanciful supposition or proposition in establishing that the inference which the Crown seeks to have drawn is the only rational inference, which is not what is required in a circumstantial case.[58]

[67] The fact that the ultimate inference being propounded by the Crown was a negative inference did not exclude the appropriateness of a *Weissensteiner* comment in circumstances where the Crown had produced a reasonably strong case that no fruit and vegetables had been delivered by Stinga and G&M. That being so, and the inference being open, the appellant was in a position to explain additional facts which were within his knowledge, namely, how fruit and vegetables were delivered to Simon George without people who would be expected to have knowledge of such deliveries and having any such knowledge. In that regard, I accept the Crown's submission that, provided there is a sufficient basis on the evidence of the prosecution for the inference required to be made and where there are additional facts peculiarly within the knowledge of the defendant, a comment in accordance with *Weissensteiner* can be given. The making of such a comment did not reverse the onus of proof in these circumstances by requiring the appellant to prove what did occur.

[68] The inference contended for by the Crown that the fruit and vegetables were undelivered and that the monies were therefore dishonestly obtained, was clearly open on the evidence. The facts called which supported non-delivery called for an explanation if there was an innocent explanation. The supply method of stock by G&M and Stinga was peculiarly within the knowledge of the appellant and could not be the subject of evidence from any other person or source. That evidence comprised facts additional to the evidence of witnesses already called, and was not merely contradictory of the evidence given. It would have assisted the jury in their evaluation of the evidence to determine whether there was any innocent explanation available.

[69] The cases in which a *Weissensteiner* comment is appropriate will be rare and exceptional, given the preconditions that must be met before such a comment is made. The risk that such a comment will serve to confuse the jury is well recognised and careful consideration must be given, and caution exercised, before the comment is made. The learned trial judge gave such careful consideration in the present case and I do not consider any error was made.

Order

[70] I would dismiss the appeal.

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58 *Peacock v The King* (1911) 13 CLR 619 at 661.