SUPREME COURT OF QUEENSLAND

CITATION:	*R v Ryan* [2002] QCA 92
PARTIES:	**R** v **RYAN, Kenneth Leslie** (appellant)
FILE NO/S:	CA No 175 of 2001 SC No 151 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against conviction and sentence
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	22 March 2002
DELIVERED AT:	Brisbane
HEARING DATE:	30 January 2002
JUDGE:	McMurdo P, Thomas JA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**That the appeal be allowed, the convictions be quashed, and order a retrial on counts 1 and 2 of the indictment.**
CATCHWORDS:	CRIMINAL LAW – PARTICULAR OFFENCES – DRUG OFFENCES – POSSESSION – OF EQUIPMENT AND IMPLEMENTS – PRODUCING OR CULTIVATING – appellant convicted of producing methylamphetamine and possession of items used in connection with that drug – where appellant found in vicinity of remote site where it could be inferred production of methylamphetamine had taken place. CRIMINAL LAW – EVIDENCE – CIRCUMSTANTIAL EVIDENCE – EVIDENTIARY MATTERS RELATING TO WITNESSES AND ACCUSED PERSONS – UNSWORN STATEMENTS AND COMMENT ON FAILURE TO GIVE SWORN EVIDENCE – where appellant elected not to give or call evidence at trial – where *Weissensteiner* direction given - where appellant had offered an account to police explaining his presence at the site – where tactical decision not to lead evidence of such an account. CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – MISDIRECTION AND NON DIRECTION – PARTICULAR CASES - whether trial judge erred in giving a *Weissensteiner* direction – where

direction lead to undue focus on the appellant's lack of explanation in circumstances where he had given one – where failure to give warnings as expressed in *Azzopardi*

Azzopardi v R (2001) 75 ALJR 931, considered
M v R (1994) 181 CLR 487, considered
R v Callaghan [1994] 2 Qd R 300, considered
R v Chevathen & Dorrick [2001] QCA 337 CA 301 & 31 of 2001, 24 August 2001 , considered
R v Kochnieff (1987) 33 A Crim R 1, considered
R v Weissensteiner (1993) 178 CLR 217, considered

COUNSEL: S Lewis for the appellant
C Heaton for the respondent

SOLICITORS: AW Bale and Sons for the appellant
Director of Public Prosecutions (Qld) for the respondent

[1] **McMURDO P:** The appellant was found guilty of producing methylamphetamine and possessing items used in connection with producing methylamphetamine. He appeals against that conviction and seeks leave to appeal against his sentence of three and a half years imprisonment.

[2] At the appeal hearing, his counsel abandoned one ground of appeal and added another. His first contention is that the guilty verdicts were not supported by the evidence.

[3] Police located what appeared to be a bush laboratory in a remote State Forest site near Wolvi. Glass flasks, plastic bottles, other glassware and equipment and a loaded military-style semi-automatic rifle were packed into two carry-bags. Traces of methylamphetamine were found in some glass vessels. Police also found garbage bags containing rubbish, including empty VB beer bottles, empty cans of Bundaberg Rum and Coke, empty Gasmate cartridges for a gas burner and other full cartridges.

[4] When police were leaving the site at about midnight, they located the appellant driving his vehicle along a narrow, gravel road, Cooloola Way, which runs between the Wolvi – Kin-Kin Road and the Rainbow Beach Road, 15-20 metres from the turnoff to the small dirt track leading to the site and only 150-200 metres from the site.

[5] Police found items in the appellant's car similar to those found at the site: bottles of VB beer, cans of Bundaberg Rum and Coke, a small gas stove which used gas cartridges similar to those found at the site, and an unused Gasmate cartridge. Microscopic examination of the holes punched in the used gas cartridges found at the site were consistent with being made by the stove found in the appellant's car. Price stickers on the gas cartridges at the site and price stickers on cartridges in the appellant's possession were scientifically similar and were consistent with having been produced by a similar price gun. One of the gas cartridges found in the appellant's possession was manufactured on the same date as gas cartridges located

at the site. The appellant was also in possession of 97 small clipseal bags of a type commonly used for the packaging of illegal drugs.

[6] The appellant did not give or call evidence.

[7] The prosecution's circumstantial evidence was sufficient to allow the jury to be satisfied beyond reasonable doubt of the appellant's guilt.[1] There is no merit in the first ground of appeal.

[8] The appellant's second contention is that the learned trial judge erred in directing the jury in accordance with *Weissensteiner v R*.[2]

[9] That case allows a jury, in defined circumstances, to take into account the failure of an accused to give evidence as a circumstance which may bear upon the probative value of the evidence that has been given.[3]

[10] In his summing-up, his Honour relevantly told the jury:

> "Now, you heard me tell the accused at the close of the Crown case that he was not obliged to give evidence but he could. He elected not to give evidence. His election not to give evidence cannot be treated as any indication of his guilt or innocence.
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> On the other hand, in this particular case, if you, weighing up the whole of the evidence, wondering what explanation he had for the circumstances which the Crown relies upon, you may feel – not must – you may feel it safer to come to the conclusion that there is no explanation that he knows of which would explain away what he was doing there that night with that material in his car.
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> What he was doing there that night, how he came to be there with that stuff in the car so close to the lab site that the police had found earlier that day apparently when they had been informed about its location by somebody, what he was doing there must be within his own knowledge. Only he knows, only he can explain and he hasn't.
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> That does not mean that he was obliged to but if you reach the stage where you think there is a serious – it is a difficult matter to determine. If you are worried or you think it is a difficult matter to determine whether you can be satisfied that there is no explanation other than guilt, that there might be something, that he might have taken the wrong turn, or he might have been going somewhere to have a drink or he might have been taking a shortcut through the forest areas for some reason but there is no evidence of that, well, you may – it is a matter for you. You may feel that you may more safely reject the existence of an explanation which would be consistent with his innocence.

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1 *M v R* (1994) 181 CLR 487.
2 (1993) 178 CLR 217.
3 At 229.

> You should not, however, for one moment say, 'Well, if he'd been innocent he would have given evidence,' because that is not the way the system works. The only weight that you can give, the only consideration that you can give to his not explaining the circumstances, not explaining how they could be consistent with his innocence, is that you may more safely draw the conclusion that there is no rational explanation that he can give for the circumstances upon which the Crown relies to establish his guilt."

[11] At the conclusion of the summing-up, defence counsel, whilst not taking issue with the making of a *Weissensteiner* comment, asked his Honour to advise the jury in clear terms that the accused was entitled to remain silent, to test the prosecution case and not to lose the forensic advantage of the right to last address.

[12] Counsel also requested the judge to remind the jury of the fact that police had a conversation with the appellant at the scene. The content of the conversation was not led in evidence and defence counsel did not request the judge to refer to its content in the summing-up. The appellant told police he had no knowledge of the makeshift laboratory and he "quite often come for a drive out this way, sort of thing … This goes right through to Rainbow (Beach)." His Honour indicated that he had read the transcript of that conversation but because it was not led in evidence naturally did not refer to it in the summing-up. Defence counsel stated that it was not led because it was a self-serving statement.[4] Although not articulated as clearly as it might have been, defence counsel flagged his concern about a *Weissensteiner* comment when the appellant had given an explanation to police which was not led in evidence.

[13] The judge gave the following redirection:

> "Members of the jury, I think I explained to you that you should not draw any adverse inference against the accused because he elected not to give evidence. He was working – he was perfectly entitled to do that. I told you however that his failure to give evidence of explanation of which he alone was aware may make it safer for you to conclude that there was no reason for explanation for the circumstances other than his guilt.
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> I have been asked to – and I omitted to – make another observation to you and that is to draw your attention what I think I advised right at the outset of the trial that as a consequence of the accused not giving evidence he achieved a forensic advantage of his counsel being able to address you last, of his counsel being able to deal with in order each of the arguments that the prosecutor had advanced and this is sometimes thought to be an advantage and that's something that you should take into account if you're wondering why he didn't give evidence. Don't wonder why he didn't give evidence, that's a possible explanation for it, but that doesn't interfere with the consequence of him not giving evidence which simply means that he doesn't give you any explanation for the circumstances if the Crown have proved against him but you should keep in mind that a reason for – a reason – for him taking that decision presumably – or you

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[4] See *R v Callaghan* [1994] 2QdR 300, 302-304.

> might think after consulting with his legal representatives is that a sometimes significant forensic advantage is obtained by the last address."

[14] The redirection did not mention the appellant's conversation with police, or the explanation it contained.

[15] Judicial comment on a accused person's silence at trial has been most recently considered by the High Court in *Azzopardi v R*.[5] Gaudron, Gummow, Kirby and Hayne JJ in their joint judgment emphasise the distinction between a matter for comment by a trial judge and a matter for judicial direction: telling a jury that they may attach particular significance to the fact that the accused did not give evidence is a comment, whilst warning a jury against drawing impermissible conclusions from that fact is a direction of law which the jury is required to follow.[6] A *Weissensteiner* comment is rare and exceptional.[7] There may be cases such as *Weissensteiner* where the failure of an accused to offer an explanation by reference to some matter peculiarly within the accused's knowledge will justify judicial comment.[8] *Weissensteiner* was not a case where the accused simply failed to contradict the direct evidence of other witnesses.[9] A *Weissensteiner* comment is only justified where there are additional facts which would explain or contradict the inference which the prosecution asks the jury to draw and such facts would be peculiarly within the knowledge of the accused; those facts must be additional to those already given in evidence.[10] A *Weissensteiner* comment is permissible in such circumstances where there has been a failure to offer an explanation rather than a failure to give evidence.[11] It should also be noted that in Queensland (whence *Weissensteiner* came) unlike many other Australian jurisdictions, there is no statutory prohibition against such judicial comment by a trial judge or prosecutor.[12]

[16] Although the learned primary judge sufficiently warned the jury that the appellant's silence in court was no evidence against him,[13] the *Weissensteiner* comment made by his Honour here was unfair because it created the false impression that the applicant had given no explanation when in fact he had given an explanation to police at the time of his apprehension. This case was therefore not one where it was appropriate to make a *Weissensteiner* comment.

[17] In addition, the learned primary judge did not make it sufficiently clear to the jury that his *Weissensteiner* comment on the facts was something they were free to ignore[14] or that the appellant's silence in court was not an admission and may not be used to fill gaps in the prosecution case or to tip the scales in assessing whether the prosecution proved its case beyond reasonable doubt.[15]

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5 (2001) 75 ALJR 931.
6 941, [49]-[50].
7 941-942, [52]; 944, [68].
8 941, [52].
9 cf *RPS v R* (2000) 199 CLR 620.
10 943, [61]; 944, [64].
11 944, [65]; *RPS*, 643-644, [62], McHugh J; *Weissensteiner*, Gaudron, McHugh JJ, 245-246.
12 944, [63]. cf *RPS* and *Azzopardi*.
13 *Azzopardi*, 941, [51].
14 *Azzopardi*, 941, [49]-[50].
15 See fn 13.

[18] Although the appellant's explanation to police when first apprehended may not be especially convincing in the circumstances, it cannot be said that a reasonable jury, properly instructed, would have inevitably convicted the appellant, regardless of the error.[16] The appeal must be allowed.

[19] Although the appellant's counsel did not abandon the application for leave to appeal against sentence, he made no submissions in support of it. It is unnecessary to further consider that application in the light of the orders I propose.

Orders*:*

[20] Allow the appeal, quash the convictions and order a retrial on both counts.

[21] **THOMAS JA:** The appellant was convicted by a jury of producing methylamphetamine and possession of items used in connection with producing that drug.

[22] The appellant was found by police in the vicinity of a remote apparently abandoned bush site at which it could clearly be inferred that methylamphetamine had been produced[17]. The items found in the appellant's possession (including gas canisters, similar alcoholic beverage to that consumed at the site, 97 clip seal plastic bags and other items), in association with the other evidence, comprise a reasonably strong circumstantial case connecting the appellant with participation in such production.

[23] When called upon, the appellant elected not to give or call evidence. In due course, without objection, the learned trial judge gave a *Weissensteiner*[18] direction. His Honour's directions included:

> "What he was doing there that night, how he came to be there with that stuff in the car so close to the lab site that the police had found earlier that day apparently when they had been informed about its location by somebody, what he was doing there must be within his own knowledge. Only he knows, only he can explain and he hasn't."
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> and
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> "You should not, however, for one moment say, 'Well, if he'd been innocent he would have given evidence,' because that is not the way the system works. The only weight that you can give, the only consideration that you can give to his not explaining the circumstances, not explaining how they could be consistent with his innocence is that you may more safely draw the conclusion that there is no rational explanation that he can give for the circumstances upon which the Crown relies to establish his guilt."

[24] At the trial, neither prosecution nor defence counsel drew his Honour's attention to the fact that the appellant had given an account to the police explaining how he came to be at that remote place, although his Honour seems to have perused proofs of evidence relative to the giving of such a statement. Inter alia the appellant had

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16 *Festa v R* (2001) 76 ALJR 291.

17 The term "produce" is defined in the *Drugs Misuse Act* 1986 to include the doing of any act preparatory to manufacture or production.

18 *R v Weissensteiner* (1993) 178 CLR 217.

told the police that he was going to go to Rainbow Beach. It may well be that if tendered in evidence such an explanation would have been regarded as implausible. But such an issue was not one which the jury had any opportunity to consider, because the evidence of his having given such an explanation was not led by the Crown prosecutor, presumably on the basis that it was merely a "self-serving statement"[19]. The decision not to lead such evidence was open to the learned Crown prosecutor; but in such circumstances, the giving of a *Weissensteiner* direction invited the jury to engage in considerations on a false premise. It lead to an undue focus on the appellant's "lack of explanation" when he had at least offered an explanation of his movements to the police.

[25] In such circumstances an element of unfairness arises. The very assumption underlying the direction is that the accused person who is the only person from whom an explanation might be given had not offered one. This problem is exacerbated in the present case by the fact that His Honour's directions lacked some of the warnings that *Azzopardi*[20] regards as generally desirable. These are dealt with in the President's reasons with which I agree.

[26] In these circumstances I do not think that the proviso can be applied, notwithstanding the relative strength of the Crown case.

Orders

[27] The appeal should be allowed and the convictions quashed. It is directed that the appellant be re-tried on counts 1 and 2 of the indictment.

[28] **DOUGLAS J:** On 19 August 2000 a number of police officers (acting on information received) went to the Toolara State Forrest at Wolvi. The place to which they went was approximately 150 metres down a bush track which led from, what was described in the evidence as, the Wolvi-Kin Kin Road/ Rainbow Beach Road.

[29] At the site, the police located items which indicated that an amphetamine laboratory had been set up and operated there. They found glass flasks, plastic bottles and other glass wear and equipment, and a loaded military style firearm which were packed into two carry bags. There were also garbage bags that contained rubbish including empty bottles of VB beer, empty cans of Bundaberg Rum and Cola, empty gasmate cartridges for a gas burner, as well as full cartridges suitable for use with such a burner.

[30] The police had been at the scene from around mid-afternoon and completed their investigation at about 11 p.m. They then left the site, travelled up the distance of some 150 metres and turned back on to the Wolvi-Kin Kin/ Rainbow Beach Road. The police located the appellant some 15 to 20 metres from the turn-off and on the road. The location was very remote and it was late at night.

[31] Upon searching the appellant's car the police found a number of items which were similar to those found at the site. There were bottles of VB beer, cans of Bundaberg Rum and Cola (one of which the appellant was drinking when intercepted), a

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19 *R v Callaghan* [1994] 2 Qd R 300, 302-304; *R v Chevathen & Dorrick* [2001] QCA 337, para 26.

20 *Azzopardi v R* (2001) 75 ALJR 931.

clipseal bag containing 97 small clipseal bags, a small gas stove (requiring gas canisters similar to those found at the site, and an unused gasmate cartridge.

[32] The Crown case was that the items found at the site were consistent with items used in the production of methylamphetamine. It relied upon the evidence of the similarity between the items found at the site and the items found in the possession of the appellant. That similarity included evidence of microscopic examination of the holes pushed into the used gas cartridges which was consistent with having been done with the stove found in the possession of the appellant. Also, price stickers on the gas cartridges bore some scientific similarity between the ones at the site and the ones in the appellant's possession; the suggestion being made that they had all been bought from the same shop.

[33] The possession of the bags were said by the Crown to be consistent with bags used for the packaging of a small amount of powder or tablets and could be used to draw the inference (with the other evidence) that the appellant was involved in the production of methylamphetamine.

[34] The case against the appellant was wholly circumstantial. At the trial no explanation was proffered as to why the appellant was in such a remote location late at night and carrying items which were so similar to those found at the site. In the circumstances his Honour, the trial judge, gave a *Weissensteiner* direction: see *Weissensteiner v R* (1993) 117 ALR 545.

[35] At the hearing of the appeal counsel for the appellant was granted leave to add a ground of appeal to the effect that the trial judge erred in directing the jury in accordance with the decision in *Weissensteiner*.

[36] The fact was that, when interviewed by the police officers, the appellant did give an explanation as to why he was there. The conversation took place during the transportation of the appellant to the police station at Gympie. The questions and answers between him and the investigating police officer were as follows:

> "Q Were you going camping tonight or … ? ..
> A No, I had all my camping gear in the car from the other day.
> Q Where were you staying tonight or where are you staying tonight?
> A Mate, I was actually going to go to Rainbow.
> Q To Rainbow? What do you do, you sort of come off that track towards Rainbow?
> A Aye
> Q Wouldn't it better if you come off the track, if you were going towards Rainbow?
> A Well, I don't know, all different tracks here, fucking everywhere, isn't there?

It was then that the appellant gave the explanation that he was in fact going to Rainbow Beach.

[37] Directions consistent with a *Weissensteiner* direction were given by the trial judge. Although accompanied by a warning against saying: "Well, if he'd been innocent he would have given evidence", it did not contain the warnings which the majority in

A*zzopardi v R* (2001) 75 ALJR 931 ("*Azzopardi*") regarded as "almost always desirable". The headnote to that case specifies a group of warnings suggested by the High Court. They are as follows:

> (1) If an accused does not give evidence at trial it will almost always be desirable for the judge to warn the jury that the accused's silence in court is not evidence against the accused, does not constitute an admission by the accused, may not be used to fill gaps in the evidence tendered by the prosecution, and may not be used as a make-weight in assessing whether the prosecution has proved its case beyond reasonable doubt. It does not follow, however, that the judge should go on to comment on the way that the jury might use the fact that the accused did not give evidence.
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> (2) The distinction between a matter for comment and a matter for judicial direction reflects the fundamental division of functions in a criminal trial between judge and jury. Telling a jury that they may attach particular significance to the fact that the accused did not give evidence is a comment by the judge. The jury may ignore a comment, and should be told that they may do so. By contrast, warning a jury against drawing impermissible conclusions from the fact that an accused has failed to give evidence is a direction by the judge that the jury is required to follow.
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> (3) A *Weissensteiner* comment is limited to a reference to an accused's failure to offer an explanation rather than his or her failure to give evidence. It should be made plain to a jury that the comment may be disregarded. The comment should also be placed in its proper context. This requires the judge to identify the facts that are said to call for an explanation and give adequate directions about the onus of proof, the absence of any obligation on the accused to give evidence, and the fact that the accused's failure to give evidence is not an admission, does not fill gaps in the prosecution's proofs and is not to be used as a make-weight.
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> (4) A *Weissensteiner* comment is only appropriate where there is a basis for concluding that there are additional facts that would explain or contradict the inference that the prosecution seeks to have the jury draw, and they are facts that would be peculiarly within the knowledge of the accused. The fact that the accused could have contradicted evidence already given will not suffice. Mere contradiction would not be evidence of any additional fact.

[38] Directions in terms of those warnings were not given by the trial judge. Further, the trial judge did not identify this direction as "commenting" and inform the jury that they were entitled to disregard it (see para 3 of the warnings in *Azzopardi*).

[39] *Azzopardi* was delivered on 3 May 2001 and the present trial occurred after this, namely on 20 June 2001. His Honour may not have been referred to *Azzopardi*. It appears that there was an agreement (of sorts) between the prosecution and defence counsel at the trial that the prosecution not lead the evidence as to the appellant's explanation as to his intended travel. This seems also to have been an agreement (or at least no objection) to the *Weissensteiner* direction being given.

[40] There was no legal error involved in the prosecutor's decision not to lead evidence of the appellant's explanation that he was on his way to Rainbow Beach, and that he was going to camp at Double Island Point: *R v Kochnieff* (1987) 33 A Crim R 1; *R v Callaghan* [1994] 2 Qd R 300, 302-304. It was, of course, open to the prosecutor to have called the evidence. In that case the appellant's explanation for his otherwise suspicious presence near the scene would have been known.

[41] The circumstances in which a prosecutor may exercise his or her prosecutorial discretion to call such evidence was discussed in *R v Chevathen and Dorrick* [2001] QCA 337 at para 26 as follows:

> "We do not think that it matters in the end whether such evidence is regarded as evidence of conduct which enables other evidence to be better understood, as evidence of the appellant's conduct and demeanour, as "narrative", or as evidence of an admission against interest. Such statements would not satisfy the requirements of the last mentioned category however if they were purely self-serving statements. The difficulties surrounding this area of the law are discussed in *R v Callaghan* [1994] 2 Qd R 300, 302-304 which recognises that the rules in this area are by no means hard and fast. Often such statements are mixed, that is to say they contain both incriminatory and self-serving statements. (*R v Cox* [1986] 2 Qd R 55, 63). If called, the whole of the statement both inculpatory and exculpatory is to be received. Such statements may be made, as here, during the first occasion when the accused speaks to an outsider about the victim and may be associated with evidence of demeanour. Such statements may be a part of the history that allows other evidence to be understood in a true context. Once received a statement containing a self-serving statement becomes evidence for the accused as well as against him or her. Although not bound to put into evidence a version which is in substance exculpatory, some prosecutors do so in fairness to the accused especially if it is an apparently early spontaneous reaction. In such instances it may be "a benefit tendered by the prosecution and accepted by the defence". (*R v Callaghan* above at 304). That however was not the case here. Essentially the statements were the first explanation each appellant offered to Margaret's condition, and as attempts to distance themselves from the injuries. Those attempts were however not persisted in for long."

[42] Ultimately, the submission made on behalf of the appellant was that it was unfair in all of the circumstances, when there was an explanation as to the appellant's presence near the scene, for a *Weissensteiner* direction to have been given. As I have said, and unfortunately, the trial judge did not know of this evidence nor of the agreement between counsel at the trial.

[43] In all the circumstances I am of the view that even though the Crown case was a strong circumstantial one, it was unfair for a *Weissensteiner* direction to be given in such circumstances. The trial to that extent, only, miscarried.

[44] This is not a case, in my opinion, where this proviso can be applied.

Orders

[45] I would allow the appeal and order that the convictions be quashed. I would further direct the appellant be retried on counts 1 and 2 of the indictment.