THE COURT OF APPEAL [1994] QCA 193

SUPREME COURT OF QUEENSLAND

C.A. No. 130 of 1993

Brisbane

[R v. Kanaveilomani]

THE QUEEN

v.

SISA KANAENABOGI KANAVEILOMANI
(Appellant)

The Chief Justice
Mr Justice Davies
Mr Justice Lee

Judgment delivered: 15/06/94

Each member of the Court delivering separate reasons agreeing as to the orders made.

APPEAL AGAINST CONVICTION DISMISSED. Application for leave to appeal against sentence granted, appeal allowed, set aside the term of five years imprisonment imposed in the case of the attempted rape and substitute a term of three years. The sentence imposed for the indecent assualt to remain.

CATCHWORDS: CRIMINAL LAW - accused's failure to testify at trial - whether trial judge misdirected jury - circumstances in which judge can direct jury on failure to testify - whether direction permissible in non-circumstantial cases - permissible substance of direction - whether inferences can be drawn from failure - Weissensteiner v. The Queen (1993) 68 A.L.J.R. 23 discussed.

Counsel: Mr Nase for the Appellant
Mr Clark for the Crown

Solicitors: Legal Aid Office for the Appellant
Director of Prosecutiions for the Crown

Hearing Date:15/07/93

JUDGMENT - THE CHIEF JUSTICE

Judgment delivered: 15/06/94

The court is concerned here with appeals against conviction and sentence. The appellant was charged that on 28 November 1992 at Mount Isa he attempted to commit rape upon the complainant and also that on the same day and place he indecently assaulted the same complainant. In the case of the second charge it was specified that he brought his mouth into contact with the complainant's genitals.

The appellant pleaded not guilty but after trial was found guilty on both counts and was sentenced to respective terms of imprisonment of 5 years and 2 years to be served concurrently. At his trial he did not give evidence and no evidence was called for the defence.

The Crown case was dependent upon the jury's substantial acceptance of the version of events given by the complainant even though the trial judge instructed the jury that there were certain matters capable of constituting corroboration. There were some injuries to the complainant but they were not extensive and in view of the version which she gave, they could have been regarded as unexpectedly slight. A further matter which the jury were instructed could amount to corroboration was a certain conversation which the appellant had with a person, Mr Leon on the evening of the following day which was Sunday, when the appellant said that he had got himself "into a bit of trouble" with the complainant. A third item of evidence which the judge instructed the jury could constitute corroboration was an apology by the appellant which another person, a Mr Nutter, said was proffered in his presence when he was sitting with the complainant. Nutter said the accused approached and said that he wished to apologise to the complainant and placed an earring on the table. The earring was identified as belonging to the complainant and the suggestion was that on the occasion referred to it was being returned. It was not argued on behalf of the appellant that the three items of evidence which have been referred to were not capable of constituting corroboration and no submission was made that the judge's direction as to the way in which the jury could regard those matters was erroneous. What was argued on the appeal against conviction was that the judge had given the jury an erroneous direction that they could regard the failure of the defence to contradict the complainant's testimony as being a matter tending

to support her credibility. It was submitted also that the verdict, in view of the evidence, was in any event unsafe. If the appeal against conviction did not succeed, leave to appeal against sentence was sought.

The evidence of the complainant can be summarised.

Before the night of Friday, 27 November 1992, the complainant had never spoken with the appellant. When she finished work on that afternoon the complainant went to the public bar of the Barkly Hotel in Mount Isa and there had three or four drinks of bourbon and coke in company with Nutter. She then went home to change and later attended a barbeque to celebrate Nutter's birthday, arriving at about 7 or 7.30 and staying until about 11.00pm. She had more to drink there, up to about 10 bourbons and coke. After going home for a shower, she went on with a group of people, including Nutter, to Cleo's, a nightclub. There, more drinks were enjoyed and other friends were spoken to. After arriving at the nightclub at a time between 11.30pm and midnight or just after, the complainant thinks she probably had about 15 more drinks. At the nightclub, a man named Clancy introduced the appellant to the complainant. At the nightclub, the complainant sat mainly at a table but she also had a few dances and spoke at times to friends at the bar. When the nightclub closed down a group, which included the complainant, gathered just outside the door and the complainant noticed the appellant was in the vicinity. At this point the appellant, through an intermediary, made some suggestion to the complainant for further contact between them but she declined the offer in forcible terms and she believed he then left. Others who had been in the group also departed. The complainant was left with Nutter and a couple of others as well. Then the appellant returned. The appellant and Nutter were both drunk. Nutter passed out on a step nearby and the appellant and two other men including Clancy drove up in a car. The appellant was the driver and the other two were in the back. Apparently reassured to some extent by Clancy's presence, the complainant got into the back of the car sitting behind the driver. They went towards town with the object of buying cigarettes. The appellant drove in a very erratic fashion. The car pulled up outside the police station and the complainant and the two others got out, the complainant intending to catch a cab. The appellant ran after the complainant and apologising for his previous driving, offered to take her home safely. He persuaded the complainant to leave the other two and rejoin him in the car.

Shortly after driving off, however, and notwithstanding the complainant's protests, the appellant headed in an unexpected direction towards Lake Moondarra. On the complainant's account, the exchange of conversation between the appellant and herself was vehement and crude. The appellant brought the car to a halt in an isolated spot off the side of the road down a little embankment. Then followed the protracted episode which was relied on by the Crown to prove the attempted rape and indecent assault.

The trial judge in his summing up to the jury reminded them of the complainant's account. Her evidence described forceful handling including being flung onto the back seat, forceful removal of items of her clothing, two escapes by her from the car and recapture by the appellant who dragged her back to the car. In the car the appellant endeavoured to restrain the complainant and force her legs into a position which would facilitate his having sexual intercourse with her. During all of this time the complainant, on her own account, kept up a stream of vigorous abuse of the appellant making her intention clear that she was not willing to have sex with him accompanying this verbal tirade with vigorous punching of the appellant and on occasion, kicking. Her account, in summary, described a prolonged assault by the appellant including intimate sexual elements with considerable force used on his part while she continued vigorously to resist, and expressed her wish that sexual intercourse not take place. In the end, the appellant gave up and drove the complainant back to town. If this account was accepted, and on its face there was nothing inherently improbable about it, it was open to the jury to conclude that the appellant was attempting to rape the complainant even if, on her description, he could have used even greater force and violence to achieve his end and even though in the end he desisted of his own accord.

Since the defence called no evidence at the trial and since no one else apart from the complainant and the appellant was said to be present during the events at Lake Moondarra Road, the complainant's evidence on those matters was uncontradicted although some minor contradictions affected other parts of her evidence. There was the feature that she did not volunteer in her evidence in-chief the fact that during an earlier part of the evening she and her companions visited a lookout where, although she did not participate, marijuana was smoked. She explained her reticence in mentioning this matter by saying she did not want to impute wrongdoing

to the others and it would have been open to the jury to accept her explanation. A further matter for consideration was the absence of any substantial injury to her and to the appellant when her account of very vigorous physical contact between the two is considered and her description of her vigorous punching and, at times, kicking, is taken into account. Overall, the trial judge quite fairly directed the jury's attention to matters calling for their scrutiny in deciding whether the complainant was giving a substantially truthful account of the episode involving the alleged attempted rape. When the evidence is reviewed by this Court there is no reason to conclude in respect of the matters to which attention has so far been given that the issues at trial were other than ones properly for the jury's consideration or for thinking that their decision to accept the complainant's account should be regarded as unsafe. There is, however, another matter which must now be considered.

A particular ground argued on the appeal against conviction was the trial judge's alleged error in directing the jury that the failure of the defence to contradict the complainant by sworn evidence was a matter which tended to support her credibility. This submission relates to an observation made by the trial judge at a particular point in his summing up. After he had dealt with the matters capable of constituting corroboration and immediately after he had reviewed other matters which could be considered by the jury as bearing upon the complainant's credibility, he said this:

> "It is for you to assess whether or not that item, or those items, even on their own or coupled with other matters, lead you to doubt her evidence. Some matters which perhaps tend to support her are that her evidence is uncontradicted. There is no evidence to the contrary, no evidence which contradicts her evidence about what occurred out on the Lake Moondarra Road."

Consideration of the question whether a direction in these terms is supportable should now start with the recent High Court decision in Weissensteiner v. The Queen (1993) 68 A.L.J.R. 23. There is some difficulty in discerning from that case the precise limits of the circumstances in which it can be permissible for a direction to be given in a criminal trial that Crown evidence may be supplemented in its effect by the absence of evidence from the defence. Although the limits of those circumstances may remain unclear, it does at least seem to have been

accepted by the judges in the majority that certain limits do exist. Thus at 28, first col, G, and at 29, first col, D, there is in the reasons of Mason CJ, Deane and Dawson JJ, an apparent acceptance of the proposition that it is only in "appropriate" cases that juries should be given a direction upon a way in which, in positive support of the Crown case, they may use the failure of the accused to give evidence and in the reasons of Brennan and Toohey JJ at 33, second col, D-E, it appears to be accepted that there is a restriction on the use of an accused's failure to give evidence to strengthen an inference of guilt. Furthermore, using the lack of evidence from the accused in supporting the Crown case or in facilitating the conclusions which the Crown is inviting the jury to draw seems to be permitted only in dealing with inferences which are said to arise for consideration from facts directly established by evidence: see e.g. per Mason CJ, Deane and Dawson JJ at 28, second col, E and per Brennan and Toohey JJ at 32, first col, E and 33, second col, D. It also appears from the reasons of Mason CJ, Deane and Dawson JJ at 28, first col, G, that it is only in cases where there are facts peculiarly within the knowledge of an accused person that the jury should be directed in the terms which were under consideration in Weissensteiner. The earlier case of Kops v. The Queen [1894] A.C. 650 at 653 and the later Privy Council case of Tumahole Bereng v. The King (1949) A.C. 253 and the remarks of Windeyer J in Bridge v. The Queen (1964) 118 C.L.R. at 615, all of which were cited in Weissensteiner, also accept that relevant limits apply in this area.

The difficulty in deciding on the limits of the circumstances in which it is open to a trial judge to direct a jury in the way under discussion may be partly attributable to the fact that in Weissensteiner the High Court was concerned with a case where the evidence was pre-eminently of a circumstantial character and where relevant facts were accepted as being peculiarly within the knowledge of the accused. In giving its decision upon the form of a permissible direction against that background the High Court may not have felt it necessary to determine the precise limits of the circumstances in which such directions could properly be given but there are already signs that in the everyday work of the courts further attention will have to be given to the problem.

This court in The Queen v. V C.A. No. 399 of 1993 (unreported, judgment 16/12/93), has recently expressed an opinion favouring what might be regarded as a wider use in a summing up of the effect of the failure of an accused to give evidence but the court did so there in the course of

dealing with a very limited and passing reference which had been made by a trial judge upon the absence of evidence from the defence. Apart from the question whether there can be any extension of the Weissensteiner principle into other situations, the observation which had been made by the trial judge in V might be thought to depart from no established rules of practice in this State inhibiting treatment of the effect of the absence of evidence from the defence. The trial judge's remarks in V really went no further than reminding the jury that a particular Crown witness's evidence of a relevant conversation was unopposed by other evidence which would contradict or qualify it. For that reason this court's observations in V, valuable though they are as an indication of its thinking, went further than was strictly necessary to deal with the point that arose. In a somewhat similar fashion the present case does not call for any definitive ruling on the width of circumstances to which the principle in Weissensteiner can be applied. Fundamentally this is because, read as a whole, the trial judge's summing up here should not be regarded as infringing any conventionally established view of how in this State absence of evidence from the defence should be treated by the trial judge in his directions to the jury.

The present case is in a common and uncomplicated category. The central Crown witness gave direct evidence of events occurring between herself and the accused and, if her evidence was accepted, it was at least a possibility that the appellant would be convicted. Notwithstanding this, the appellant gave no evidence to rebut her account. The case was not in any way concerned with events peculiarly within the knowledge of the accused or in any real way with circumstantial evidence or with inferences to be drawn from the complainant's version of the facts, that is, unless, at the margins, attention is given to what might be called circumstantial proof of the mental element involved in attempts to commit offences. The only real question which arose for the jury's attention was the acceptability of the version of the facts to which the complainant directly swore.

Juries are quite properly exhorted by trial judges to decide cases on the evidence which is placed before them. In the present case it was clear that there was no substantial obstacle to acceptance of the complainant's evidence that was constituted by opposing evidence whether from the defence or by other evidence from the Crown. In Weissensteiner v. The Queen at 28, first col, D, Mason CJ Deane and Dawson JJ were not particularly concerned with the simple fact that

uncontradicted evidence is easier or safer to accept than contradicted evidence. They referred to that as "almost a truism". However, there are sensitive areas in the instructions which should be given to juries to assist them with their deliberations. It is likely that too much concentration on what is likely to be a fairly obvious fact, namely that relevant evidence in a particular case is unopposed, risks sending the wrong message to the jury and may induce them to overlook the onus which remains firmly on the Crown throughout a trial and may divert their attention from the fact that, as it is conventionally put in jury trials in Queensland, no inference adverse to the accused should be drawn from his not having given evidence.

There is a difference between these propositions: (1) the pathway to acceptance of evidence is facilitated by absence of opposing testimony and (2), a prosecution witness's testimony is positively supported by absence of opposition. There is difficulty in accepting the second proposition as being correct.

The concepts which are applicable in this area of debate are fundamentally difficult and juries will not find them easy to comprehend. There has been some evolution in the approach taken by the courts since the time when, at the end of the last century, accused persons gained the right to give evidence in criminal trials. It is possible to contemplate further evolution. An era may come when a different rule prevails even in the absence of precise statutory regulation. However, it is not possible at this stage to state what shifts are likely to occur. Until a position is authoritatively decided and until R. v. Fellowes [1987] 2 Qd.R 606 especially at 610 is distinctly overruled there is a good deal to be said for proceeding on the basis that there are limits upon the circumstances in which the form of direction accepted in Weissensteiner should be given and for accepting that those limits are currently to be found in the category of cases there under consideration namely where inferences from circumstantial evidence have to be considered and where relevant facts can be regarded as peculiarly within the knowledge of the accused. In cases of a more general kind outside this rather narrow category, emphasis can remain on the right of an accused person to refrain from giving evidence and on the absence of adverse inferences when accused persons act in reliance on that right. It is desirable that there should not be a great deal of variation in the way in which juries

are directed on this topic. A reasonably uniform content should appear in the directions given by trial judges on basic, frequently recurring matters of general principle.

The extract from the summing up in the present case which is quoted above shows that the trial judge has suggested that the fact that the complainant's evidence was uncontradicted was something which might tend to support the credibility of the version which she gave. The most telling remark, with its reference to the complainant is this, "some matters which perhaps tend to support her are that her evidence is uncontradicted". Considered in isolation, this would constitute a misdirection. It is basically inconsistent with the rules mentioned above that the general onus always lies on the Crown and that there is no obligation on the defence to adduce evidence contradicting the Crown version. It is also inconsistent with the proposition that no adverse inference may be drawn against an accused person because of his failure to give evidence. A notion that a Crown witness's credit is positively enhanced by the defence failure to call evidence seems contrary to some or all of those propositions. In the ordinary case where the Crown is able to present direct evidence to support its allegations and there are no material facts peculiarly within the accused's knowledge there is no call for any specialised direction of the Weissensteiner type and to give it would simply mislead the jury.

Accordingly the position in the present case is that the direction which is objected to is a direction which if it stood alone would be erroneous in point of law. But it did not stand alone. It was a minor and isolated part of a longer treatment by the judge of the onus of proof and the unavailability of adverse inferences due to an accused's decision to give no evidence. The result is that any incorrect impression which might have been given by the quoted isolated remark was obliterated. Immediately after making the observation which is objected to, the trial judge directed in forceful and correct terms on the burden of proof and on the absence of adverse inference resulting from the accused's failure to give evidence and he referred also to the defence arguments designed to lead to doubts regarding the acceptability of the complainant's account. Later, after some correction was sought by defence counsel, a redirection was given by the trial judge again emphasising that no conclusion adverse to the accused could be drawn from his failure to give evidence. No further relevant objection was taken by defence counsel. Whether it is said that this is

a case for the application of the Code s.668E proviso or, more realistically, that the effect of the summing up taken as a whole did not give the jury an erroneous impression on this aspect, no substance remains in the point. No reason remains for thinking that the verdict was unsafe. The appeal against conviction should be dismissed.

The application for leave to appeal against sentence must now be considered. Both the complainant and the appellant were very drunk and had been in one another's company with others present before the complainant got back alone with him in his car and, against her will, was driven out on the Lake Moondarra road. The trial judge accepted that when the appellant persuaded the complainant to re-enter his car before it was driven out of town, the appellant had not formed any specific intention of behaving intimately with her against her will. The appellant had previously been a good citizen with a good employment record. He had no previous recorded convictions.

There is no doubt that the appellant's use of force against the complainant over a protracted period to achieve the objective of having sexual intercourse with her calls for a significant penalty but there were other matters which should not be lost sight of. The episode, with the dimensions which it eventually assumed, seem not to have been planned but to be a drunken affair which got out of hand initiated by the attraction which the appellant, on that night at least, felt for the complainant. He did use his superior strength against her but although there was no one else present to intervene he did not use it to the point of overcoming her resistance or to the extent of inflicting serious injury and in the end, discouraged no doubt by her spirited resistance, he desisted of his own accord.

When the appellant was sentenced below only one case was drawn to the attention of the judge and it was referred to by him in his sentencing remarks. The case was The Queen v. Bugmy C.A. No. 246 of 1987 (unreported, judgment 14/10/87) but the circumstances there were not comparable with the present. The offence of attempted rape in that case was described as "a particularly brutal one" and as "a particularly bad instance of the offence of attempted rape". A girl was followed and attacked by a stranger in a Brisbane suburban street and subjected to a brutal physical assault resulting in a head injury necessitating four stitches. The applicant desisted only because he was disturbed before he could achieve his purpose of raping the girl and he had a

previous criminal history including three convictions for assault. The sentence of six years imprisonment imposed upon Bugmy would hardly support the imposition of a sentence of almost equal length in the present case although it remains a consideration that a sentence of some significance should be imposed. No recommendation for early consideration for parole was made by the sentencing judge below. In all of the circumstances the sentence of five years imprisonment imposed in the present case should be regarded as excessive. The application for leave to appeal against sentence should be granted and the appeal allowed by setting aside the term of five years imprisonment imposed in the case of the attempted rape and substituting a term of three years. The sentence of two years imposed for the indecent assault should remain.

REASONS FOR JUDGMENT - DAVIES J.A.

Judgment delivered 15/06/1994

The relevant facts of this case, the grounds of appeal which were argued and the contentions of the parties before this Court are set out in the reasons of the Chief Justice which I have had the advantage of reading in draft. I shall therefore not state them again. I agree with his Honour that the appeal against conviction must be dismissed. However, I do not agree with his Honour that the learned trial judge's direction, the correctness of which was challenged on appeal, was erroneous. That direction was in the following terms:

"It is for you to assess whether or not that item, or those items, even on their own or coupled with other matters, lead you to doubt her evidence. Some matters which perhaps tend to support her are that her evidence is uncontradicted. There is no evidence to the contrary, no evidence which contradicts her evidence about what occurred out on the Lake Moondarra Road."

That direction cannot be viewed in isolation. Its context included a direction which preceded it as follows:

"I will now give you some directions of law applicable in all criminal trials. Firstly, it is the law of Queensland that every man is presumed to be innocent until he is proved guilty. There is no obligation on an accused person to prove he is not guilty. The

Crown has brought these two charges and the Crown must prove them."

Immediately after the challenged direction, his Honour said:

"Now, in relation to that, it is important that I tell you about the burden of proof in this case. The accused person has not given evidence. That is his right, members of the jury, as you heard me explain to him at the end of the Crown case. The fact that he has not given evidence proves nothing. I direct you that no adverse inference may be drawn against him because of his failure to give evidence. It simply means that the evidence put before you in the prosecution case is not contradicted or explained by any sworn evidence from the accused.

Nevertheless, it is still for the prosecution to prove his guilt beyond any reasonable doubt on the evidence you have heard. The accused is entitled to argue, as Mr Johnson has done on his behalf, that you could not be satisfied beyond reasonable doubt that he is guilty on a consideration of the whole of the evidence put before you in the prosecution case."

And in giving redirections, his Honour said:

"I also drew your attention to the fact that Deborah Palmer's evidence was uncontradicted by any sworn evidence from the accused. However, I remind you again that he has no obligation to contradict it. He is not obliged to prove his innocence and you cannot conclude that he has anything to hide by not contradicting it. I remind you that in the end the verdict depends upon whether or not you believe Deborah Palmer as to the events she describes at Lake Moondarra. Weigh up the whole of the evidence in considering what she has said. If you do not believe her, then you must find the accused not guilty. If you cannot decide whether she is telling the truth, in other words, you cannot make up your mind, then you might think you must have a reasonable doubt and therefore, once again, you must find the accused not guilty. Only if you are satisfied beyond reasonable doubt that she is telling the truth about the events which occurred out on the Lake Moondarra Road can you find the accused guilty of these two charges."

The correctness of a direction of the kind challenged must now be considered in the light of the reasons of the members of the majority of the High Court in Weissensteiner v. The Queen (1993) 178 C.L.R. 217. The principle for which that case stands is, in my view, that where an accused fails to contradict or explain evidence adduced by the Crown which it is within the power of the accused to contradict or explain and which, in the absence of contradiction or explanation, would be sufficient, if accepted, to entitle a jury to convict, the trial judge may invite the jury to conclude that the accused's failure to do so increases the probability that that evidence is true and that whatever inference might reasonably be drawn from it may more readily be drawn.

It is wrong, in my view, to limit that principle or to limit its application, as the reasons of the Chief Justice in this appeal seem to imply, to cases where, as in Weissensteiner itself, the Crown case is circumstantial. There is nothing in the reasons of the majority Justices in Weissensteiner which would so limit it and to do so would be contrary to the unanimous decision of this Court in V (C.A. No. 399 of 1993, unreported, 16 December 1993); see especially at pp. 8, 9. Indeed it may be safer to give such a direction where there is direct evidence which, if believed, proves the accused's guilt, as is the case here, than where a jury is asked to infer guilt from facts proved; because, in the latter case, there is often a risk that the evidence from which the jury is asked to infer guilt may be insufficient, rather than merely insufficiently convincing, and consequently there is a danger that the jury may use the accused's failure to testify to supply the deficiency. See Weissensteiner at 235.

His Honour's direction in the present case said no more than that the complainant's evidence could more readily be accepted as true because it was uncontradicted by the appellant who must have been in a position to contradict it if it was untrue. Such a direction, particularly when read in the context referred to above, was in accordance with the principle stated in Weissensteiner. There is no doubt that, if true, the complainant's evidence was sufficient to convict the appellant.

I agree with the reasons of the Chief Justice with respect to the application for leave to appeal against sentence and with his conclusion in that respect.

JUDGMENT - W.C. LEE J.

Judgment delivered 15/06/1994

I have had the advantage of reading the judgments of the Chief Justice and Davies J.A. The facts have been relevantly set out in them and need not be repeated. Although I agree, for the reasons stated by the Chief Justice, that it is not strictly necessary to determine the substantive question raised by the appeal, in view of its importance it is none the less desirable that some attention be directed towards it.

That question is a short but difficult one, namely, whether a direction that a complainant's evidence in a sexual assault case may be seen to be supported by the fact that the accused neither gives nor calls evidence to contradict it, is consistent with the principle that no adverse inference can be drawn against an accused who relies upon his right to silence: Petty v. The Queen (1991) 173 C.L.R. 95. The difficulty arises because of the fact that in Queensland, unlike some other jurisdictions, no statutory provision prevents a trial Judge from commenting on the failure of an accused to give evidence: cf. Crimes Act 1990 (N.S.W.), s. 407(2); Crimes Act 1958 (Vict.), s. 399(3); Evidence Act 1939 (N.T.), s. 9(3).

The particular direction complained of was in the following terms:

> "It is for you to assess whether or not that item, or those items, even on their own or coupled with other matters, lead you to doubt her evidence. Some matters which perhaps tend to support her are that her evidence is uncontradicted. There is no evidence to the contrary, no evidence which contradicts her evidence about what occurred out on the Lake Moondarra Road."

That direction followed a lengthy passage in the summing-up in which the trial Judge identified certain items of the evidence which, if accepted by the jury, were capable of corroborating the complainant's story. With respect to each item, the trial Judge correctly directed the jury that if they accepted that evidence then they may consider that it tended to "support" the testimony of the complainant. In fairness to the appellant, the jury's attention was then drawn to particular items of evidence which might have been said to have detracted from the truthfulness of her account and consequently might have led them to doubt her testimony.

In the end result, considering the direction, as must be done, in the context of the summing up as a whole, I agree with the Chief Justice that any adverse effect which it may have had the

potential to foster in the mind of the jury was, in that context, eliminated or cured so that it could not be said that the conviction is unsafe.

Nevertheless, having considered the reasons of the Chief Justice and Davies J.A., as well as the recent decision of the High Court in Weissensteiner v. The Queen (1993) 178 C.L.R. 217, I have come to the conclusion that the particular direction complained of, had it stood alone, would have amounted to a misdirection and ought not be given in that form. It went substantially further than the conventional direction approved by the Court of Criminal Appeal in R. v. Fellowes [1987] 2 Qd.R. 606, a direction which, it must be emphasised, is customarily given in the context of explaining to the jury that the accused is not obliged to give evidence and that no adverse inference may be drawn from his failure to do so. In Fellowes the Court (Andrews C.J., Thomas and Ryan JJ.) observed at 611 that:

> "In a case where an accused has failed to give evidence there is nothing wrong in commenting that Crown evidence is uncontradicted but it is a substantially different matter to give a jury the impression that the failure has some probative effect of its own which may support an inference of guilt."

As this passage indicates, a Judge is not prohibited from pointing out to the jury that the effect of an accused's failure to testify is that there is no sworn evidence from him to contradict, add to or explain the Crown case. In the normal course, such an obvious comment does little more than remind the jury of the context in which that case is to be evaluated.

In the present case, however, I am of the opinion that the direction under attack suggested an impermissible course to the jury. It not only highlighted the fact that the evidence of the complainant was uncontradicted, it went so far as to suggest that the jury could somehow use that lack of contradiction, and in particular the appellant's silence, to "support" her testimony. The unfortunate use of the word "support" was, in my opinion, apt to mislead the jury into thinking that the appellant's failure to testify could somehow be used to bolster her credit or corroborate her story. Such an impression could only be founded on the erroneous assumption that an accused's failure to testify is itself of some evidentiary value. If not contrary to the letter of the decision in Petty, it was certainly inconsistent with the spirit of it.

There are clearly limits within which a trial Judge may safely comment upon an accused's failure to give evidence. Usually, as the passage which I have just quoted from Fellows suggests, it will be sufficient, if not necessary, for a trial Judge to restrict those comments to pointing out to the jury that the Crown case is uncontradicted by sworn evidence from the accused with the result that their verdict must depend on the strength or weakness of that case alone. However, as both Weissensteiner and Fellows recognise there are cases in which a trial Judge, in the exercise of his undoubted discretion, need not be so circumspect, but there must be limits. The difficulty lies in prescribing those limits with any precision.

Until now, however, the remarks of the Court of Criminal Appeal in Fellows have been taken as authoritatively marking those boundaries in this State. That case, in turn applied a line of reasoning developed by the Court of Criminal Appeal through a series of decisions including R. v. Young [1969] Qd.R. 417, R. v. Hartas (C.A. 250/81; Court of Criminal Appeal, 30 November 1981, unreported) and R. v. Whinfield (C.A. 132/86; Court of Criminal Appeal, 16 September 1986, unreported).

For the purposes of this exercise, it is, I think, useful to set out the relevant passages from Fellowes in full:

"It is clear that such a direction can be justified only where there are particular circumstances in the case which call for it. The most familiar example which may justify such a direction is the presentation of an entirely circumstantial case by prosecution in a situation where it may reasonably be inferred that the truth, whatever it may be, would be known to the accused, and where the accused neglects the opportunity to explain or place a different complexion upon the facts which the prosecution has presented. That was the position in R v. Young above and R v. Hartas (C.A. 250 of 1981; Court of Criminal Appeal, 30 November 1981 unreported) the two cases in which such directions were upheld. Both cases were entirely circumstantial and it was readily apparent that knowledge of the relevant events or transactions was peculiarly within the knowledge of the accused.

We respectfully agree with the following analysis in R v. Whinfield:

'Both R. v. Young and R. v. Hartas amply illustrate the rule that where the truth is not easily ascertainable by the Crown and guilt remains an inference to be drawn from whatever facts the Crown is able to prove, it is proper to tell the jury that the inference may be more safely drawn from the facts proved if the *accused elects not to give evidence of relevant facts which, it can easily be perceived, must be within his knowledge.* But that is a very different situation from one in which the jury

> is told that guilt can be inferred from the mere fact of an election not to give evidence.'
>
> The words which isolate the situation in which the R. v. Young direction is permissible have been italicised by us. Perhaps there are other instances in which the direction may be suitable, but they do not readily suggest themselves. By way of contrast, in the ordinary prosecution case which is improved by direct evidence, the Crown case should stand or fall on its own merits without any additional strength from the accused's failure to enter the witness-box. In R. v. Whinfield the prosecution case depended largely upon the evidence of a young complainant. The trial judge saw the absence of another prosecution witness (whose statement was admitted in evidence under s. 110A of the Justices Act 1886-1985) as a circumstance tending to justify the R. v. Young direction. This Court repudiated such a suggestion, observing:

'If the direction were held to be proper in the circumstances of this case, it would follow that where direct evidence is given of the commission of an offence, the failure of the accused to give evidence can be taken into account by a jury who can thereby 'infer guilt', that is to infer guilt from the mere fact of a failure to give evidence. That in my view is not and never has been the law.'

> Understanding the danger to be guarded against may perhaps be made easier by commenting that the Crown must have a prima facie case before any inference of guilt may be drawn from the evidence given to support it and that in no circumstances may a gap in the case be closed by a failure on the part of the accused to give evidence; the question relates to weight which may be given to the evidence in the Crown case." at 610-11.

The clear distinction drawn by the Court in Fellows is between the impermissible use of an accused's failure to testify to support an inference of guilt and the consideration by the jury, in certain circumstances, of the lack of contradiction of the Crown case as a circumstance which might render it less unsafe to infer guilt from the facts proved by the Crown to the jury's satisfaction, that being an inference otherwise reasonably open on the Crown case: cf. Morgan v. Babcock & Wilcox Ltd (1929) 43 C.L.R. 163 at 178 per Isaacs J. and May v. O'Sullivan (1955) 92 C.L.R. 654 at 658-9. That distinction is a vital one. It establishes the sometimes precarious balance between the interests of the accused on the one hand and those of the Crown, on behalf of the community, on the other. It ensures that an accused's silence at trial is not used to support an inference of guilt against him whilst maintaining the Crown's right to a conviction should the circumstances otherwise justify it. Of more practical significance, it lays the foundation for a true understanding of the circumstances

in which an extended direction may be given. So much was recognised in the joint judgment of Mason C.J., Deane and Dawson JJ. in Weissensteiner at 228-9:

> "There is a distinction, no doubt a fine one, between drawing an inference of guilt merely from silence and drawing an inference otherwise available more safely simply because the accused has not supported any hypothesis which is consistent with innocence from facts which the jury perceives to be within his or her knowledge. In determining whether the prosecution has satisfied the standard of proof to the requisite degree, it is relevant to assess the prosecution case on the footing that the accused has not offered evidence of any hypothesis or explanation which is consistent with innocence."

In the first instance, the accused's failure to testify is sought to be used as evidence against him. The incontrovertible rule, however, is that no adverse inference may be drawn against an accused who exercises his right not to enter the witness box. That rule, which must be considered an essential adjunct to the presumption of innocence, is one of the cornerstones of our criminal justice system. It is a principle which the courts strive to preserve in spirit as well as letter and one which the courts are diligent to defend against both direct and collateral attack.

A direction which creates a risk that a jury will use an accused's silence impermissibly also creates the risk that that accused's fundamental right to a fair trial will be encroached upon. Such a direction will not be saved merely because it is couched in terms designed, in a different context, to overcome the danger of which I now speak; cf. Fellows at 609. It is the impression that the direction might be expected to create in the mind of a reasonable jury that must determine whether or not such a risk is created, not the manner in which the direction is expressed.

Moreover, as the Chief Justice points out, juries are invariably exhorted to bring in their verdicts solely in accordance with the evidence before them. To invite a jury to speculate as to what evidence an accused may have given and to somehow draw an inference adverse to him from his failure to do so can only lead to injustice. Quite simply, the fact of an accused's failure to give evidence is evidence of nothing; R. v. Sparrow [1973] 1 W.L.R. 448 at 495; [1973] 2 All E.R. 129 at 135 per Lawton L.J. approved in Weissensteiner at 235 per Brennan and Toohey JJ., and he cannot, on that basis alone, be thought to be hiding something if he adopts that course at trial.

In the second instance, however, the accused's failure to testify is not invested with any probative value. Rather the lack of contradiction of the Crown case, which on its own would be sufficient to support an inference of guilt, is used to comfort a jury already disposed to draw that inference in the circumstances. Properly given, such a direction does not entice the jury into travelling down a path which may lead to them using that failure to supplant deficiencies in the Crown case: Tumahole Bereng v. The King [1949] A.C. 253 at 270; Weissensteiner at 229 per Mason C.J., Deane and Dawson JJ. and at 235 per Brennan and Toohey JJ. Indeed, if at the end of the Crown case, the evidence is insufficient to allow a reasonable jury properly instructed to infer guilt, the Judge for that reason alone has a positive duty to take the case away from the jury by directing a verdict not guilty: Doney v. The Queen (1990) 171 C.L.R. 207 at 212.

As I have suggested, however, the real difficulty lies in identifying the common thread which runs through those cases in which a trial Judge is entitled to comment on an accused's failure to testify beyond conventional limits. In answering that question, some preliminary observations can be made.

Firstly, before a direction of the nature under consideration may be given the accused's failure to testify must be clearly relevant in the sense of being capable of assisting the jury in its consideration of the Crown case. That is a necessary but not a sufficient pre-condition.

> "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." Weissensteiner at 228 per Mason C.J., Deane and Dawson JJ.

And at 229:

> "It is only when the failure of the accused to give evidence is a circumstance which may bear upon the probative value of the evidence which has been given and which the jury is required to consider, that they may take it into account, and they may take it into account only for the purpose of evaluating that evidence."

As one might expect, if an accused's failure to give evidence is not a circumstance capable of assisting the jury in their deliberations then it would be simply irrelevant, and perhaps even prejudicial, for a trial Judge to suggest that an accused's failure to testify should be afforded some significance by them. In such a case:

"the judge's repeated comments on the [accused's] failure to give evidence may well [lead] the jury to think that no innocent man could have taken such a course." Waugh v. The King [1950] A.C. 203 at 211-12 per Lord Oaksey.

The process by which the requisite degree of relevance is established is one of logic rather than one of legal reasoning: Hypotheses consistent with innocence which are not reasonably ascertainable by the Crown but which may be expected to be supported by facts within the accused's knowledge are rendered less likely by his failure to take the opportunity reasonably open to him to place those facts before the jury for their scrutiny: cf. Wilson v. Buttery [1926] S.A.S.R. 150 at 154 per Napier J. approved in Weissensteiner at 235-6 per Brennan and Toohey JJ.

The factors which establish the necessary relevance are two-fold but are somewhat interrelated. At the outset, the circumstances must be such that the Crown case can be said to call for an explanation, not merely in the sense that the evidence against the accused is overwhelming or might, if left uncontradicted, be thought to lead to no reasonable inference other than guilt, but in the sense that an opportunity open to the accused to put his case before the jury has been declined when reasonably one would not expect it to have been. It is only if the accused has unreasonably failed to avail himself of that opportunity that his conduct may be considered relevant: Weissensteiner at 236 per Brennan and Toohey JJ.

The other factor relates to the accused's state of knowledge. Clearly an accused's failure to testify is of relevance only if there is a rational basis for concluding that, had he given evidence, it would have contradicted, added to or explained the Crown case: R. v. Martinez-Tobon [1994] 1 W.L.R. 388 at 397. He must, as a matter of reasonable inference, be "in a position to deny, explain or answer the evidence against him": Weissensteiner at 235 per Brennan and Toohey JJ. If there is no basis for such a suggestion, then logically his failure to testify would have no bearing on the probity of the evidence adduced by the Crown and any comment to that effect would be unjustified, and likely to lead only to speculation on the part of the jury. In short, the necessary relevance is established not merely because the facts call for an explanation, but because there is an explanation to be given and because the accused is the only or best person to give it. It is on this basis that a trial Judge must never lose sight of the fact that there are many legitimate reasons why

an accused does not give evidence. The Crown case, although sufficient to support an inference of guilt beyond reasonable doubt, may be weak or flawed, or there may be no facts of which the accused could testify: Weissensteiner at 228 per Mason C.J., Deane and Dawson JJ. In the former case, the evidence, as it exists, may be considered too equivocal to call for an explanation on the part of the accused. In the later case, the accused's failure to testify, being of no possible aid to the assessment of the Crown case, may be said to be of no relevance to the jury's deliberations. In either case the trial Judge must not issue an invitation to the jury to speculate as to whether or not the accused has something to hide.

Secondly, from my preliminary comments about the fundamental nature of an accused right to silence, it seems obvious that an extended direction is only appropriate in those cases where there is no real risk that, properly instructed, the jury might be misled into using an accused's silence in an impermissible way. It must not be given in circumstances which would "contradict or nullify the essentials of the conventional direction": R. v. Martinez-Tobon at 397. It is only in cases where that danger can be avoided that the direction is appropriate and it is only in cases where the jury are capable of clearly seeing the limited assistance which they may derive from that failure that such a danger can be avoided. The purpose of the direction, as I have said, is not to directly bolster or strengthen the Crown case but rather to indirectly contribute that effect by means of negating any hypothetical suggestion that that case may be weak or flawed. As I have said an accused's silence is evidence of nothing. Independently it has no value. It is only when it is used in conjunction with the other evidence in the case to establish the context in which that evidence is to be evaluated that recourse may be had to it.

Finally, and more as a word of caution than as a statement of some distinct principle, it is useful to bear in mind the words of the Privy Council in Kops v. The Queen [1894] A.C. 650 at 653:

> "There may no doubt be cases in which it would not be expedient, or calculated to further the ends of justice, which undoubtedly regards the interests of the prisoner as much as the interests of the Crown, to call attention to the fact that the prisoner has not tendered himself as a witness, it being open to him either to tender himself, or not, as he pleases."

Although judicial opinion as to the precise scope of the extended direction may differ, those differences should only serve to reinforce to a trial Judge how lightly he must tread. If there be any doubt as to whether a direction of the type under consideration oversteps the boundaries of reasonable comment the direction, for that reason alone, should not be given. The paramount need to ensure that the accused receives a fair trial should also ensure that both prudence and caution are exercised in matters of this nature.

With these observations in mind, I consider that the cases in which a direction of the nature under consideration has been approved proceed to apply the following line of reasoning: If an hypothesis is suggested, either by the evidence adduced by the Crown or by the accused himself, which is consistent with innocence in circumstances where the facts relevant to that hypothesis are not readily ascertainable by the Crown but might reasonably be expected to be peculiarly within the knowledge of the accused in the sense that he is the only or best person to give evidence of them, then the fact that the accused does not avail himself of the opportunity to place those facts before the jury in a case where he might be reasonably expected to have done so, is a circumstance which logically renders it less likely that such an hypothesis exists.

As the Court of Criminal Appeal pointed out in Fellowes, it is difficult to conceive of a case, based substantially on direct evidence, where that line of reasoning could be applied to enable the jury to be assisted by a consideration of the accused's failure to give evidence. Indeed all of the cases referred to by the majority judgments in Weissensteiner in which the giving of an extended direction was approved were circumstantial or predominantly circumstantial in nature: see Blatch v. Archer (1774) 1 Cowp. 63, 98 E.R. 969; R. v. Burdett (1820) 4 B. & Ald. 95, 106 E.R. 873; R. v. Kops (1893) 14 L.R. (N.S.W.) 150 and on appeal to the Privy Council [1894] A.C. 650; Wilson v. Buttery [1920] S.A.S.R. 150; Morgan v. Babcock & Wilcox Ltd (1929) 43 C.L.R. 163; Bridge v. The Queen (1964) 118 C.L.R. 600.

Even in May v. O'Sullivan (1955) 92 C.L.R. 65, in which the High Court was primarily concerned with the question of whether or not the burden of proof shifted to the defence once the prosecution had made out a prima facie case, the Court was at pains to stress that an accused's decision not to give or call evidence could not affect the principle that the onus always remains on

the Crown to establish the accused's guilt beyond reasonable doubt. Although the Court added that in "some cases" it may be legitimate for the tribunal of fact to take into account the circumstance that the accused has not given evidence as a consideration making the inference of guilt from the established facts less unsafe than it might otherwise appear, it did not seek to define the nature of those cases to any extent. However, it is interesting to note that once again the two authorities cited in support of that proposition were circumstantial in nature, namely, Wilson v. Buttery and Morgan v. Babcock and Wilcox Ltd.

In a purely or predominantly circumstantial case in which the jury are asked to infer guilt from the facts proved by the Crown to their satisfaction, the Crown quite naturally has the onus of excluding any reasonable hypothesis consistent with innocence: Peacock v. The King (1912) 13 C.L.R. 619. The most obvious application of the extended direction is in those circumstances: Weissensteiner at 227-8 per Mason C.J., Deane and Dawson JJ, and at 235 per Brennan and Toohey JJ. In particular, it naturally lends itself to a case in which the jury are required to decide what weight to give to a purely theoretical innocent explanation which the defence has asked them to consider: cf. R. v. Martinez-Tobon at 396.

It may be, as the Chief Justice points out, that the High Court in Weissensteiner, being concerned with a predominantly circumstantial case, did not find it necessary to prescribe in precise terms the occasions on which similar directions may be justified. Nor do I consider that I need do so in this case. I would simply say that, as presently advised, it is difficult to conceive of a case, non-circumstantial in nature, which would satisfy the strict requirements which I have outlined. I do not doubt, however, that if such a case exists a similar direction could be given. But whatever those limits it seems obvious from my examination of the authorities that it does not lend itself to a case that can be described as one of nothing more than a flat denial of a prosecution case proved by direct evidence: R. v. Mutch [1973] 1 All. E.R. 178 at 181. This was such a case.

As the reasons of the Chief Justice indicate, the principal question for the jury to determine was quite simply whether, on the usual considerations, they found the complainant a credible witness. Apart perhaps from the question of whether, on the charge of attempted rape, the accused had the necessary mental element to constitute the attempt (i.e. the intention to commit rape as to

which the evidence of the complainant concerning his conduct in the car might be thought to lead to only one inference), the only evidence which the accused could have given to rebut or contradict that of the complainant would have been evidence denying that the acts alleged had occurred at all or that it was he who had committed them.

But intention is something which is rarely, if ever, capable of being directly proven. It invariably remains an inference to be drawn from the established facts, and for that reason cannot be said to be peculiarly within the accused's knowledge: see R. v. Hocking [1988] 1 Qd.R. 582 at 589 per Williams J. (Kelly S.P.J. and Ryan J. agreeing).

By pleading not guilty, the accused had already indicated his intention to put the Crown to its proof on all elements of the offence. Entering the witness box would have served to do no more than impugn the complainant's testimony, the veracity of which had already been tested under cross-examination. To permit the Crown to use the accused's silence in such a case to bolster or strengthen the complainant's credibility would have the practical effect of compelling the accused to enter the witness box. In addition, to direct a jury that they can more readily accept the complainant's evidence because it remains uncontradicted by any evidence given or called on behalf of the accused creates the danger that they will be diverted from their duty to scrutinise the complainant's evidence in the way in which the accused is entitled. The potential unfairness to the accused in such a case is manifest. The direction should never have been given.

Before leaving this topic, it is appropriate that I make some observations concerning the decision of this Court in R. v. V (C.A. 399/93; Court of Appeal, 16 December 1993, unreported), lest it be thought that that decision lends support to the proposition that no relevant restrictions operate on a trial Judge's right to comment on matters of this nature. As the Chief Justice points out, it must be emphasised that the direction there under appeal cannot be considered to have transcended the boundaries imposed by Fellowes. For that reason, the comments of the Court, although of assistance, where not strictly necessary for the point which arose. In any event, that decision does not cover the present facts. The case against the appellant in V involved both eye witness and confessional evidence, the latter being in the nature of out of Court admissions. The only ground of appeal related to the direction that the appellant had offered no explanation as to

what admissions he might have made, if at all. The case was peculiar in that "the Judge drew attention to the lack of contradiction on the part of the appellant, not universally, but only in relation" to the alleged admissions: p 10. Importantly, there was no direction with respect to the eye witness evidence and no ground of appeal in relation to it.

Whilst I accept that certain comments made by the Court in V are capable of being understood as suggesting that an extended direction has a much wider application than previously accepted in this State, I cannot think that the Court would have intended that its comments be taken out of context. In particular, the comments of Mason C.J., Deane and Dawson JJ. in Weissensteiner, relied on by the Court in V, make it clear that their Honours were not solely concerned with the fact that uncontradicted evidence is easier or safer to accept than contradicted evidence. They referred to that proposition as "almost a truism": at 227. As I have indicated, other factors operate to limit the scope of the circumstances in which the direction is justified.

I do not think that the decision in Weissensteiner can in any way be said to free a trial Judge in this State from the strictures imposed by Fellowes. Indeed, given that a direction of the nature under consideration was held to be appropriate in that case, two members of the Court referred with apparent approval to the fact that it accorded with the traditional formulation followed in this State: see per Brennan and Toohey JJ. at 237-8.

As I have indicated, however, I am not at this stage prepared to rule out the possibility that there may exist other limited categories of cases in which an extended direction is appropriate. Nevertheless, until the position is clarified by authoritative decision or until the legislature sees fit to intervene, I would join in the Chief Justice's caution that trial Judges should be most apprehensive about giving the direction in other than a circumstantial case.

In the end result, however, I agree that the outcome of the appeal against conviction should be as the Chief Justice indicates. I also agree with the reasons stated and orders proposed by the Chief Justice in relation to the application for leave to appeal against sentence.