THE COURT OF APPEAL [1995] QCA 008

SUPREME COURT OF QUEENSLAND

C.A. No. 254 of 1994

Brisbane

[R v. D]

Before Macrossan CJ
Pincus JA
Mackenzie J

THE QUEEN

v.

D

Macrossan C.J.
Pincus J.A.
Mackenzie J.

Judgment delivered 09/02/1995

Separate reasons for judgment of each member of the Court, Pincus JA and Mackenzie J concurring as to the order made, the Chief Justice dissenting.

APPEAL DISMISSED

CATCHWORDS: **CRIMINAL LAW - APPEAL AND NEW TRIAL - Indecent dealing - child at slumber party indecently dealt with during night by adult male - complainant and two other girls present at party gave evidence as to appearance of accused - complainant and two witnesses asked to make**

dock identification - all identified appellant as the offender - judge made warning to jury - whether dock identification should have been made - whether vitiated trial.
Britten (1988) 51 S.A.S.R. 567.

CRIMINAL LAW - APPEAL AND NEW TRIAL - Indecent dealing - no evidence that anyone apart from appellant and owner of house could have committed offence - owner with wife - appellant gave no evidence at trial - whether trial judge was entitled to give the jury a Weissensteiner direction - whether directions actually given were appropriate.
Weissensteiner (1993) 178 C.L.R. 217

Counsel: Ms L Clare for the Crown.
Mr A Rafter for the appellant.

Solicitors: Director of Prosecutions for the Crown.
Legal Aid Office for the appellant.

Date of hearing: 30/08/1994.

REASONS FOR JUDGMENT - THE CHIEF JUSTICE

Judgment delivered 09/02/1995

Two grounds were argued on this appeal - that dock identification should not have been permitted and that an incorrect direction was given to the jury upon the use which could be made of the appellant's failure to give evidence.

The appellant had been charged with the commission of three acts of indecency performed upon a nine year old girl. The events were alleged to have taken place in the house of a Mr and Mrs T in the early hours of the morning when a number of young girls stayed to sleep after attending a party there. Although the appellant did not give evidence at the trial it was not in contest that he also had stayed at the house for the night.

The complainant and other young girls slept in what was described as a spare room downstairs having retired to bed quite late at some time about 2.00am or 3.00am. The events charged were alleged to have occurred between that time and about 6.30am when the household commenced to stir again. The exact times

when the acts complained of took place could not be accurately established.

Near the downstairs room which has been referred to was another room described as the pool room presumably because it contained a pool table. The complainant and another girl, C, said they saw the appellant dressed and sitting in this room when they got up at about 6.30am to go upstairs.

Amongst the group of girls who had slept in the spare room downstairs there was one, J, who remained there after about 6.30am when others left. J said that a man (and the Crown's suggestion was that it was the appellant), entered the room and there was some conversational interchange between them but nothing of an indecent nature was contained in that conversation.

The three relevant acts charged as involving the complainant had taken place in conditions of relative darkness although on the complainant's evidence there appears to have been some degree of illumination relieving the gloom. The second of the indecent acts to which the complainant deposed was said to have involved a male person present in the room holding the complainant's hand against his penis and C, also, gave evidence that she observed this action. C's evidence was left to the jury as capable of corroborating the happening of all three events of which the complainant spoke and no objection is taken to that aspect.

The complainant, C, and J, in giving their evidence were

unsworn. The description which the first two gave of the intruder observed in the room did not in any particularly precise way fit the appellant, at least, so as to afford what the judge regarded as a secure basis in the circumstances for identification of the appellant as the offender. There were a number of inconsistencies in the description which Crown witnesses gave of the appearance of the appellant on the night in question. These need not be exhaustively listed but at least some of them related to his height, whether or not he had a moustache and how he was dressed.

It is enough to say that the Crown did not contend that the direct evidence which had some tendency to identity the offender was sufficient to achieve what would qualify as satisfactory identification of the appellant. The Crown relied upon a circumstantial case, in effect, one of exclusive opportunity. Its contention was that it could be taken that there were only two male persons in the house, the appellant and Mr T, when the acts complained of occurred after other guests had departed and that all the entrances to the house were either locked or protected by other security arrangements, so that the possibility of the offences being committed by an intruder was excluded. The evidence of the complainant and C taken together pointed to the commission of acts committed by a man who entered the spare room on a total of three occasions.

Since the appellant had pleaded not guilty, the Crown was put to proof of the commission of the acts and the involvement

of the appellant as the offender. Apart from the denial of guilt involved in the appellant's plea, no positive version explaining events came from the defence side. Thus there was no positive assertion that the events did not occur or that Mr T was the culprit or that some intruder or other particular male person was involved. T himself gave evidence.

In putting the Crown to proof, defence counsel did explore some possibilities. It emerged that the girls said that a number of adults, far more than five or so who had been spoken of by some of the adult witnesses, had in fact been present earlier in the evening when the party was in progress. Estimates of up to about twenty or thirty guests were given by the girls. The evidence of T was that when two named guests, a man Walden and a woman, Jones, departed, there were no other guests remaining, that is that the only males then left in the house were Mr T and the appellant. The certainty of this version may have deserved some extra scrutiny in the eyes of the jury because of the issue between the children and the hosts about the greatest number of adult guests which had been present earlier in the evening. There was some suggestion, which the host might have wished to play down, that liquor was being sold there that evening.

T said that when those who remained present retired for the night, he locked all of the doors except for the downstairs one which he left to the appellant to secure. The evidence seemed to be that whether locked or unlocked this particular

door was protected by certain security arrangements, more particularly a sensor light.

There is no doubt that the Crown had a significant circumstantial case against the appellant which he chose not to contest by calling evidence.

The first point argued concerns the dock identification of the offender which the trial judge permitted to take place. The judge did, however, arrange that it should be supplemented by full and detailed warnings about its lack of probative weight in the circumstances. The complainant and the other girls had seen the appellant at the party prior to their retiring to bed and they saw him again in the morning and perhaps subsequently as well before the dock identification took place. They would then have had these other significant points of contact with him from which to make their identification in court. The girls' purported claims of identification were described by the judge as amounting, in the circumstances, to something which had no more value than statements that he was similar to the offender or not dissimilar. The case against the appellant was clearly put on the basis that if it was to succeed it must be as a circumstantial one, with the appellant being shown as the person having an exclusive opportunity. In a case of this kind, it could not be said to have been an error to permit a dock identification accompanied subsequently by full warnings against the danger in attributing significant positive value to it. Considerations to be taken into account in cases of this kind

emerge from discussion in other cases including particularly by King C.J. in Britton (1988) 51 S.A.S.R. 567 at 572. It should be adjudged that the point taken in respect of the dock identification fails.

The so-called Weissensteiner direction (Weissensteiner v. The Queen) (1993) 178 C.L.R. 217) which was given by the trial judge is a different matter. There are, at present, difficulties in determining the limits of the category of cases in which it is appropriate to give a direction of this kind. I expressed my view on this aspect in R v.Kanaveilomani and I am not persuaded that what I said there is incorrect. It is not in every case where a defendant does not give evidence that a direction of that type should be given. There is a danger due to its potential in the jury's mind to result in a reversal of the onus of proof even when accompanied by very careful directions about the approach to be adopted.

This case, it is true, was, unlike Kanaveilomani (supra) a circumstantial one. Yet it was not a case where the defendant had himself expressly advanced some positive version of matters which could be taken as being within his knowledge but failed to support that version by evidence. In this respect it is in contrast with the sort of case which was the subject of observations of the English Court of Appeal in R v. Martinez-Tovin [1994] 1 W.L.R. 388 at 397. The line of defence adopted in the present case essentially amounted to putting the Crown to proof and the appellant should be adjudged entitled to do that.

The law for daily application in the courts in the circumstances is to be found in a number of authorities with particular attention given to the guidance which the High Court has now provided in Weissensteiner, that is within the limits that are seen to have been expressed or are implied within the individual reasons which the judges gave in that case. There appears to be room for differences of view about the extent of the application of the Weissensteiner principle to other circumstances beyond those considered in that case.

To the extent that it can be arranged in the daily work of the criminal courts, trial judges should be clear upon the way in which they should proceed if they are to conduct trials according to law. Also, if trials are to be fair, defendants must have a clear understanding of the way in which any decision by them not to give evidence will be treated within the judicial process. Criminal trials should proceed without traps and without allowing unexpected jeopardies to confront an accused person. For that reason, I expressed the view in Kanaveilomani that outside the limit indicated in Weissensteiner where a different approach was justified, trial judges might find it prudent to adhere to the course indicated in Fellowes [1987] 2 Qd.R. 606.

The present case has now pointed up a different danger which can beset trial judges. Having resolved, unwisely and indeed, probably incorrectly, in my opinion, that the circumstances of the case called for or permitted a

Weissensteiner direction, the judge with a great deal of reiteration occupying a substantial number of pages of the transcript of his summing up and with heavy emphasis, directed the jury's attention to aspect after aspect on which they had not heard from the appellant. He repeated to the jury on a number of occasions, comments along these lines - would it not be expected that they would have heard from the appellant on this or on that, but had not done so. The trend of his directions at times was along these lines, "Where was the accused when the offender went into the room for the first time?", "Where was he when the offender ran out of the room?", and so on. There was an assumption that he knew the answer to these questions. For a dozen or so times variations of propositions of this kind were put accompanied by a further related proposition that if there were an explanation consistent with innocence - would not the jury have heard of it and is not the reason the jury has not heard evidence from the accused is that he was guilty? Throughout the long, at times confused and certainly forceful direction which the judge gave to the jury in this part of his summing up, it is true that he interposed observations that the jury were not entitled to infer guilt from the appellant's failure to give evidence. The difficulty , however, is that read as a whole, the summing up upon this aspect would have been quite confusing to the jury in the philosophical tangles in which it became immersed, in the lack of clarity in the guidance it attempted to provide on essentials

and particularly because its predominant thrust is likely to have been taken to be that the burden of proof had somehow shifted from the Crown so that the jury could infer guilt from the appellant's failure to give evidence.

I consider that this was a case where a Weissensteiner direction should not, in prudence, have been attempted. That is that it would have been wiser not to have gone beyond the standard observation drawing the jury's attention to the fact which applies in all such cases, namely that the absence of evidence from the defence meant that the evidence emerging in the Crown case was left uncontradicted by defence evidence. Apart from this consideration however, it should be adjudged that the direction in the form in which it was given in the present case would have led the jury into error because of its tendency to override the essential aspects of the standard direction on onus of proof. Even though counsel at the trial, given the opportunity, did not take any clear objection to the giving of a Weissensteiner direction in this case or to the form in which it was given, the effect of the summing up was so much to divert the trial from a just course, where the onus of proof would be correctly applied by the jury that the result is that it should be adjudged that a mistrial has occurred. Notwithstanding the strength of the Crown case, where such a vital matter as the onus of proof has not, in the end, been correctly and adequately highlighted, the case cannot be saved by the application of the proviso.

The appeal should be allowed and the verdict and conviction set aside and a new trial ordered.

REASONS FOR JUDGMENT - PINCUS J.A.

Judgment delivered 09/02/1995

The appellant was convicted in the District Court on three counts of indecent dealing with a child under the age of 12 years. The appeal raises two questions, the first of which is the propriety of allowing a dock identification and the second, the correctness of a direction given to the jury as to the relevance of the appellant not having given evidence.

The complainant was a girl, 9 years of age at the time of the alleged offences, which were said to have been committed at the house of people called T. A number of girls about the same age as the complainant came to that house for a pyjama party on 30 April 1993, and on the same night there were adults present, who were being entertained by the parents of KT; she was, it appears, the hostess of the pyjama party. The evidence was that the appellant was a guest in the house that night and it was the Crown case that when the offences were committed, in the early hours of the morning, there were only two male adults in the house, Mr T and the appellant. There was no evidence of the presence of any other male adult at the relevant time, and the Crown case rested partly on the proposition that the offender must have been either the appellant or Mr T; as to the latter, there was no suggestion that he was involved.

The evidence of occurrence of the offences was plain enough and uncontradicted; the real issue was whether it was the appellant rather than some other person who was the offender. A difficulty for the appellant was that the evidence was

that the T's adult guests all left before the appellant; it had been arranged that he would stay the night, as he had done previously. The evidence was that all the doors to the house but one were deadlocked at the relevant time and that one was the appellant's responsibility. It must have seemed to the jury, to put it at the lowest, to be in the interests of the appellant to produce some evidence to suggest that there was some person in the house, other than himself, who might have been the offender. It was suggested by counsel for the appellant below, when he cross-examined, that there were a number of other people, guests of the T's, present until daylight, but there was no evidence to support that; there seemed to be no dispute about the propositions that the appellant was to stay the night and did so.

The Crown did not rely solely upon the absence of evidence that any possible offender other than the appellant was in the house. There was also evidence pointing directly to the appellant as the offender. The complainant girl and another of the girls at the party, C, had met the appellant on the evening before the offences were committed and gave a description of him. The complainant mentioned some of the features of his appearance; that he had a moustache, dark hair and a big nose and that he was "sort of chubby". The complainant attributed those same characteristics to the man who assaulted her, and there was also, according to her evidence, a similarity between the clothing she noticed on that man and the clothing the appellant was observed to be wearing the evening before the offences were committed. The complainant's story was that she was able to observe these things although it was "sort of dark". C gave evidence of a similar character except that it was, to put it briefly, less strong. There was also evidence from another girl, J, which to some extent assisted the Crown in

respect to identification.

It is not contended that the identification evidence was insufficient, nor that the judge summed-up in relation to it inappropriately. The only complaint on this aspect of the case was that each of the three girls I have mentioned, the complainant, C and J, was allowed to identify the appellant in the dock. The appellant's case was, in effect, that the dangers of dock identification are well known and that the dock identifications vitiated the trial.

As to the former point, it is desirable to quote some of what the trial judge told the jury on the subject:

> "Now, it's recognised as one of the most dangerous forms of identification of all time, what is called dock identification, but it's allowed with limitations. Even though it has very limited value, it is allowed for a couple of very good reasons. ...So, dock identification is allowed just for the very, very limited purpose and any dock identification must be approached, as I said, with very, very real care and by itself is insufficient."

The reasons the judge mentioned to the jury were that the witness might be able to identify the person in the dock as the offender, but also might be able ("...a second very important reason...") to say that the person in the dock was not the offender.

It was argued by Mr Rafter for the appellant that dock identification should not always be permitted and with that I agree. As counsel contended, the dangers associated with such identifications are well established; we refer to Alexander (1981) 145 C.L.R. 395 at 399, 427. But it seems clear that there is at least in some circumstances a discretion to admit evidence of this kind. The question in the present case is whether the discretion was properly exercised. In support of the proposition that

such evidence may in appropriate circumstances be admitted, reference was made to Clune [1982] V.R. 1 at 12, De-Cressac (1985) 1 N.S.W.L.R. 381 at 396, and to Britten (1988) 51 S.A.S.R. 567 at 572. In the South Australian case King CJ remarked:

> "...it appears that counsel for the prosecution did not ask [a prosecution witness] to identify the appellant in court. I think that it is apparent from the course of her evidence that she implicitly identified the man in the dock as the man of whom she was speaking, but it is unfortunate that she was not asked to say so explicitly. It is not to be thought that because courts have stated that dock identification is of little value where the accused is not previously known to the witness, the witness should therefore not be asked whether he can see the person concerned in court. This should be done in every case depending upon identification notwithstanding that the evidence principally relied upon by the prosecution is the out of court identification".

Mr Rafter suggested that this dictum is against the respondent, in the present case, because here there was no earlier out of court identification. But King CJ did not say, or mean, that dock identification must be done only where the Crown relies mainly on out of court identification.

It is unnecessary, for the purposes of dealing with this appeal, to attempt to define comprehensively the circumstances in which a dock identification should be allowed to be attempted. But it seems to me plain enough that the suggestion that no such identification should be allowed unless there has been, as the principal Crown case, an out of court identification, is erroneous. An offender may be identified in such a way as to raise a strong prima facie case for the Crown without an out of court identification; there may be, for example, substantial circumstantial evidence implicating the accused. Here, there was independent evidence of identification of the appellant as the offender, to reject which the jury would perhaps have had to conclude (as was apparently suggested below) that the offender might have been a prowler; in view of

the security arrangements at the house, that must have seemed to the jury unlikely. In my view there is a discretion to allow a dock identification, at least where there is, as there was here, strong evidence apart from dock identification that the person accused was the offender. Where dock identification is permitted, there must be an appropriate direction to the jury with respect to its value; in the present case it is not disputed that such a direction, part of which I have quoted, was given.

In a case of this sort it would no doubt ordinarily be assumed by the jury that, to adopt the language of King CJ in Britten, the relevant prosecution witnesses implicitly identified the man in the dock as the offender. I am of opinion that in the particular circumstances of this case it was a permissible and indeed a sound course to allow the Crown to attempt to make that identification explicit. There is always the possibility that that process will unearth a mistake, or the manner of dock identification might engender some doubt about the correctness of the principal identification evidence; if the attempted dock identification is successful, it is unlikely that any injustice will be done to the accused as long as the right directions are given.

The ground of appeal based upon the dock identification must therefore be rejected.

The other ground which was argued was that the judge gave wrong directions with respect to the relevance of the appellant having given no evidence.

The directions the judge gave on the subject were rather extensive. His Honour

told the jury that the appellant bears no onus, does not have to prove anything, and is not obliged to give evidence. He repeatedly used expressions to the effect that the appellant not having given evidence did not prove guilt and that he did not "prove or establish anything".

The judge also remarked:

> "If the truth of the accused's position and situation were consistent with innocence, would a denial, explanation or answer be forthcoming? You might think this is a case in which the whereabouts of the accused is not easily ascertainable by the prosecution, or from anyone other than the accused".
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> ...
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> "The Crown asks you from all the circumstances that have been referred to, applying the tests that you have been asked to, to infer guilt from the whole collection of circumstances referred to. He would ask you to draw inferences from such facts as it is able to prove. Such an inference may more safely be drawn from the proven facts when an accused person elects not to give evidence of relevant facts which can easily be perceived must be within his knowledge".
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> ...
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> "The use to which the accused's failure to give evidence may be put is restricted to the strengthening of an inference of guilt from the facts proved".
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> ...
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> "If from the primary facts the circumstances relied on by the Crown, on the evidence that you accept and act on, you are prepared to draw an inference of guilt, and if you say that there are relevant facts that can be easily perceived to be in his knowledge, namely his whereabouts at the crucial times referred to, the matters referred to, and that if you say that if the truth were consistent with innocence you would expect the denial, explanation or answer would be forthcoming, that with no such answer forthcoming it may in your view strengthen the drawing of the inference of guilt".

It will be recalled that the Crown case was to the effect that the appellant was the only person present in the house when the offences were committed, other than the six little girls staying over and Mr & Mrs T. Unless someone had broken in, or been let in by the appellant, then on the Crown case the appellant must have been the offender, quite apart from the girls' evidence tending to identify him as the offender. One would expect that the jury would, uninstructed, have found it unlikely that the appellant would if innocent not either inform them that he was not the only person present and that there were other possible offenders present, or say that he was elsewhere when the offences were committed.

But the first question is whether the judge was entitled to give any direction of the Weissensteiner type. If his Honour was so entitled, another question is whether the directions given were appropriate to the circumstances of the case.

It seems clear that there is little point in referring to Queensland authorities prior to Weissensteiner (1993) 178 C.L.R. 217, for anything said on the subject must give way to the High Court's authority. The case is the only one in which the Court has ever considered in detail the question whether a judge may give directions to a criminal jury commenting adversely on the absence of evidence from the accused; it was a case from Queensland.

In Weissensteiner all the judges, subject to one qualification, agreed that circumstances may arise which call for a direction to the jury drawing attention to the accused's failure to give evidence. The qualification is that of Gaudron and McHugh JJ (who dissented as to the outcome of the appeal) that 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 generally or the failure to answer questions from investigating police" (246). As I understand their Honours' view, if "the facts are such as to give validity to the assumption that an innocent person would offer an explanation" (244) then the absence of an explanation coming from the accused may be commented upon (246). As is discussed below, their Honours' dissenting judgment has been the subject of comment in the High Court.

A second point to notice about Weissensteiner is that each of the three sets of reasons explained somewhat differently the circumstances in which a direction about the failure to give evidence, or offer an explanation, might be appropriate; this has led to some difficulty in applying the decision, discussed below. Gaudron and McHugh JJ spoke of those circumstances in the terms I have quoted, but were disinclined to specify them precisely:

> "The circumstances which so obviously suggest a particular conclusion that they call for an explanation, if there is one consistent with innocence, are not susceptible of definition. Nor can they be identified with particularity". (243)

Their Honours then went on to mention two "broad categories" into which the circumstances generally fall. The first was "where the objective facts give rise to an inference (in the sense of suggesting one and only one explanation) that the accused committed or was a party to the commission of the offence charged". The other circumstances mentioned:

> "...are those which suggest that the accused is possessed of some special knowledge in the sense that he or she, above all others, knows something of the offence charged or something bearing on it". (244)

In one of the examples their Honours give, Guiren (1962) 79 W.N. (N.S.W.) 811, the

court spoke of telling the jury "that if the truth is not easily ascertainable by the Crown but is probably well known to the accused, then the fact that no explanation or answer is forthcoming, as might be expected if the truth were consistent with innocence, is a matter which the jury may properly consider". (813)

In my view the present case falls reasonably within one of these categories, set out by Gaudron and McHugh JJ, in that the objective facts gave rise to an inference (in the sense of suggesting one and only one explanation) that the appellant committed the offence - as long as the expression "objective facts" is capable of including the fact that there was no evidence that there was anyone in the house but him who could have been the offender. The broader test, conveyed by the expression "the facts are such as to give validity to the assumption that an innocent person would offer an explanation", which test is said by Gaudron and McHugh JJ to be the critical factor in both categories, seems to be also satisfied.

In the judgment of Mason CJ, Deane J and Dawson J, as I read their Honours' reasoning, a rather broad view of the matter is taken:

> "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". (228)
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> "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". (229)

It is true that their Honours used some expressions implying that they had in mind

principally the giving of a direction about the failure to give evidence in answer to a circumstantial Crown case; there is a passage on p. 229 including references to hypotheses consistent with innocence. But it seems reasonably clear that the language in the passages I have quoted is deliberately used, so as to encompass a variety of instances in which the failure to give evidence is of particular significance. My view in that respect is strengthened by their Honours having quoted, with approval, passages from previous decisions of the High Court: Morgan v. Babcock & Wilcox Ltd (1929) 43 C.L.R. 163 at 178; May v O'Sullivan (1955) 92 C.L.R. 654 at 658, 659; and Bridge (1964) 118 C.L.R. 600 at 615, in none of which is there any implication, let alone expression, of the idea that only in circumstantial evidence cases may the court give the appropriate direction. The point is important enough to justify quoting again part of what was described by their Honours as the "well known passage" in May v. O'Sullivan. There, in referring to the question of fact which arises in a prosecution the Court said:

> "In deciding this question it may in some cases be legitimate...to take into account the fact that the defendant has not given evidence as a consideration making the inference of guilt from the evidence for the prosecution less unsafe than it might otherwise possibly appear...". (658)

In the remaining set of reasons, again, a broad view was taken and it may be enough to quote two passages from Brennan and Toohey JJ:

> "But the jury may draw inferences adverse to the accused more readily by considering that the accused, being in a position to deny, explain or answer the evidence against him, has failed to do so". (235)

> "It follows that, in Queensland and in other jurisdictions where there is no statutory prohibition against judicial comment, a judge may tell the jury that where the facts which they find to be proved by the evidence can support an inference that the accused committed the offence charged and where it is reasonable to expect that, if the truth were consistent with innocence, a denial, explanation or answer would be forthcoming, the jury may take the accused's failure to give evidence into account in determining whether the

inference should be drawn". (236)

There is nothing to suggest that the language used was not carefully chosen; it should be noticed, also, that the "well known passage" was again set out.

I have discussed Weissensteiner at some length, principally because of the difference of view which is apparent in two decisions of this Court which were the subject of some discussion before us. In the earlier, V (C.A. 399 of 1993, 16 December 1993) reference was made to the fact that Weissensteiner was itself a prosecution based on circumstantial evidence. The judgment went on:

> "Mr Butler argued, however, that Weissensteiner's case has a more general application and that what was there held constitutes authority relevant to a case such as this, where the Crown did not rely on circumstantial evidence to prove its case, but put forward direct evidence of the commission of the offences charged. In our view, Mr Butler's contention is correct".

In V the accused's brother gave evidence of incriminating conversations with the appellant, in circumstances set out in detail in the reasons. The Court approved a direction drawing attention to the accused not having given evidence contradicting or explaining what the brother said.

But in Kanaveilomani (C.A. No. 130 of 1993, 15 June 1994) a majority of this Court discussed V, but took a view distinctly at variance with that decision. In the judgment of the Chief Justice one finds:

> "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 my respectful opinion, this statement is difficult to reconcile with the judgment of the High Court in Weissensteiner, considered as a whole, and also difficult to reconcile with any of the three sets of reasons there delivered; further, it can hardly be reconciled with the remarks made by the Court in G v. H (unreported, 19 October 1994). G v. H was a Family Court case in which a question of the paternity of a child arose. The question was whether the court could infer paternity against the appellant wholly or partly on the basis of his refusal to take a DNA test. The court held against the appellant, partly on the basis of a provision in the Family Law Act 1975, and made some observations of present relevance.

> "Leaving aside special considerations which arise in criminal cases as a result of the right to silence, it is well settled that, in the course of the ordinary processes of legal reasoning, an inference. And there may sometimes be an inference in criminal cases of 'guilty knowledge' in the sense."

The last reference is to part of the reasons of Gaudron and McHugh JJ in Weissensteiner discussed above. The apparent approval of the approach taken by their Honours appears to me to give support to the view that, where appropriate, a jury may

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See *Petty v. The Queen* (1991) 173 C.L.R. 95 at 99-101, 106-107, 118-122, 125-130. See also *Weissensteiner v. The Queen* (1993) 178 C.L.R. 217 at 224-229, 231-236, 240-246; and the cases there referred to.

Jones v. Dunkel (1959) 101 C.L.R. 298

See, for example, *Weissensteiner v. The Queen* (1993) 178 C.L.R. at 243-245 and the cases there cited.

be directed that the circumstances proved by the Crown call for an explanation and that the absence of explanation of them may, depending on the jury's view, give rise to an inference that the accused knows that the evidence cannot be explained in a way that is consistent with innocence.

It remains to be considered whether the present was a case in which it was permissible for the judge to give a Weissensteiner direction. There was evidence, circumstantial and otherwise, pointing to the appellant as the offender; indeed, if the circumstantial evidence was accepted, leaving aside such direct identification evidence as was adduced, no conclusion was reasonably open other than that the appellant was the offender. Hence, one can say that "the affirmative evidence in the case raises, to say the least, a strong probability that it was" the appellant who dealt with the girl indecently; cf. Morgan v. Babcock & Wilcox Ltd (178). But was the appellant's failure to give evidence "clearly capable of assisting [the jury] in the evaluation of the evidence before them"? (Weissensteiner at 228) and was it "reasonable to expect that, if the truth were consistent with innocence, a denial, explanation or answer would be forthcoming"? (Weissensteiner at 236) And may one say of this case "that the facts are such as to give validity to the assumption that an innocent person would offer an explanation"? (244) And were the circumstances such that it was open to the jury to infer, from the absence of explanation by the appellant, that the appellant knew that the Crown evidence could not be explained in a way that was consistent with innocence? (G v.H, above). In my opinion the answer to these questions is yes. The only person who could say positively whether it was the appellant who assaulted the girl, and the only person who could positively rebut the inference which otherwise appeared to follow from

the circumstantial evidence, that the appellant was the only possible offender, was the appellant himself. This is not to say that the primary judge was obliged to give a direction with respect to the appellant not having given any evidence, but I have concluded that to give one was within the proper bounds of his Honour's discretion.

With respect to the content of the directions given, some criticisms are able to be advanced. But the only specific criticism of its content which was pressed was that the judge did not tell the jury that there might have been reasons why the appellant did not give evidence, other than that the evidence would not assist his case: see Weissensteiner at p. 228. It appears that such a direction should ordinarily be given; in some instances no doubt it will be particularly appropriate, because of some circumstance proved by the evidence. But at least the general warning should be given, focusing the jury's minds on the possibility that although the evidence cried out for a proper response from the appellant, he might have had some reason not to give one, other than the most obvious reason.

Despite this deficiency, I am of opinion that the appeal should be dismissed. I cannot think that the failure to tell the jury of the possibility of a variety of reasons for the appellant not giving evidence could have made any significant difference to the result of their deliberations. The Crown case, standing uncontradicted, was a very strong one. The only concrete suggestion which appeared to be pressed by counsel for the appellant at the trial was that there were a number of other persons present, at relevant times, who might have committed the offence. But there was no evidence whatever to support that and the jury were entitled to think that had it been true, such evidence could

have been expected to be produced - if not from the appellant himself, then from one of the other persons who was supposedly present with him in the house during the relevant period.

In my opinion the appeal should be dismissed.

JUDGMENT - MACKENZIE J.

Judgment Delivered 9 February 1995

The facts are set out in Pincus J.A.'s reasons. I agree for the reasons given by him that the ground of appeal relating to dock identification must be rejected. I wish only to concern myself with the other ground argued which relates to a direction given by the learned trial Judge with respect to the relevance of the appellant not having given evidence. Relevant passages of the summing up are set out in Pincus J.A.'s judgment.

The Crown case was not wholly circumstantial. It consisted of some evidence from the girls about the appearance of the offender and the clothing he wore together with the dock identification. There was also evidence tending to suggest that unless there had been an intruder the appellant was the only adult, apart from the parents of one of the girls in the house at the time of the offences.

In the absence of evidence from the appellant, the jury had before it a case where the evidence tending to lead to the

conclusion that he was the offender was uncontradicted by other evidence. It may also be said that if there were any facts casting a different complexion on the identity of the offender the appellant was in the best position to know such facts. If the evidence of the girls was accepted as truthful and accurate the Crown case was strong.

Weissensteiner v. R (1993) 178 CLR 217 was a case where the evidence was entirely circumstantial. Mason C.J. Deane and Dawson JJ. said that when a party 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. That is so 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 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.

They pointed out that due regard must be given to the possibility that there were reasons, other than that the evidence would not help the prisoner's case, for not giving evidence. For example there may be no facts peculiarly within the accused's knowledge or the Crown case may be sufficiently deficient to account for the decision not to give evidence, the

prisoner having no obligation to fill in gaps in the Crown case. They said the distinction was between drawing an inference of guilt merely from silence and drawing an inference otherwise available more safely, simply because the accused had not supported any hypothesis consistent with innocence from facts which the jury perceived to be within his or her knowledge. They said that they may take the failure into account only when the failure of the accused to give evidence is a circumstance which may bear on the probative value of the evidence which has been given. Further the only purpose for which it may be taken into account is that of evaluating the evidence.

Brennan and Toohey JJ. underlined the limited use which can be made of the accused's failure to testify. They said that the limitation was of special importance when the prosecution case depended on the drawing of an inference of guilt from the facts proved directly by evidence. It was impermissible to use a failure to testify as a fact from which guilt might be inferred. However, the jury was entitled to draw inferences adverse to the accused more readily by considering that the accused, being in a position to deny, explain or answer the evidence against him, had failed to do so. They stated the principle in the following terms:-

> "... a judge may tell the jury that where the facts which they find to be proved by the evidence can support an inference that the accused committed the offence charged and where it is reasonable to expect that, if the truth w