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Fundamental Principles: Adversarial Justice, right to a fair trial & roles in court

Right to silence

Accused is entitled to maintain their right to silence in court (*Weissensteiner*)

Right to silence refers to suspect or accused's entitlement not to respond to police when being questioned or spoken to in relation to an alleged offence (*Carr*). The right is fundamental to CJS- *Petty and Maiden*/

Defendant cannot testify for prosecution- s 17.

- Departure from this rule is departure from rules of evidence- *Kirk v Industrial Court*

Weissensteiner:

- D remained silent in trial with no other evidence called to his behalf.
- Prosecutions case was largely circumstantial
- Judicial Direction:
 - Silence on the part of the accused cannot fill any gaps in prosecution case. Only when failure of accused to give evidence bears on probative value of given evidence; can the silence be considered in evaluating THAT evidence.

Right to Silence AT TRIAL- s 20 UEA

Overarching Legislation- s 20

- (1) This section applies only in a criminal proceeding for an indictable offence.
- (2) The judge or any party (other than the prosecutor) may comment on a failure of the defendant to give evidence. However, unless the comment is made by another defendant in the proceeding, the comment must not suggest that the defendant failed to give evidence because the defendant was, or believed that he or she was, guilty of the offence concerned.
- (3) The judge or any party (other than the prosecutor) may comment on a failure to give evidence by a person who, at the time of the failure, was—
 - (a) the defendant's spouse or de facto partner, or
 - (b) a parent or child of the defendant.
- (4) However, unless the comment is made by another defendant in the proceeding, a comment of a kind referred to in subsection (3) must not suggest that the spouse, de facto partner, parent or child failed to give evidence because—
 - (a) the defendant was guilty of the offence concerned, or
 - (b) the spouse, de facto partner, parent or child believed that the defendant

was guilty of the offence concerned.

(5) If—

- (a) 2 or more persons are being tried together for an indictable offence, and
- (b) comment is made by any of those persons on the failure of any of those persons or of the spouse or de facto partner, or a parent or child, of any of those persons to give evidence,

the judge may, in addition to commenting on the failure to give evidence, comment on any comment of a kind referred to in paragraph (b).

Steps:

- S 20 limits the comments that can be made during the trial with respect to an accused who exercises their right to silence.
- Criminal Proceeding (1)
- Subsection (2), (3)
- Azzopardi Direction: when one accused is testifying, and co-accused remains silent
 - Silence is not evidence against accused- does not constitute an admission by the accused, may not be used to fill gaps in evidence, may not be used as make-weight in assessing whether P has proved case BRD./

20 Comment on failure to give evidence

Section 89: evidence of silence generally

Overarching Legislation; s 89- Evidence of Silence Generally

89 Evidence of silence generally

(1) Subject to section 89A, in a criminal proceeding, an inference unfavourable to a party must not be drawn from evidence that the party or another person failed or refused—

- (a) to answer one or more questions, or
- (b) to respond to a representation,

put or made to the party or other person by an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence.

(2) Evidence of that kind is not admissible if it can only be used to draw such an inference.

(3) Subsection (1) does not prevent use of the evidence to prove that the party or other person failed or refused to answer the question or to respond to the representation if the failure or refusal is a fact in issue in the proceeding.

(4) In this section—

inference includes—

- (a) an inference of consciousness of guilt, or
- (b) an inference relevant to a party's credibility.

Analysis

- Preserves right to silence in UEA.
- Requires judges to exclude evidence relevant only to show such silence and to ensure juries do not draw unfavourable inferences from it- Petty and Maiden
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EXCEPTION- s 89A

89A. Evidence of silence in criminal proceedings for serious indictable offences

(1) In a criminal proceeding for a serious indictable offence, such unfavourable inferences may be drawn as appear proper from evidence that, during official questioning in relation to the offence, the defendant failed or refused to mention a fact:

- (a) that the defendant could reasonably have been expected to mention in the*

circumstances existing at the time, and
(b) that is relied on in his or her defence in that proceeding. ...

(2) Subsection (1) does not apply unless—

- (a) a special caution was given to the defendant by an investigating official who, at the time the caution was given, had reasonable cause to suspect that the defendant had committed the serious indictable offence, and
- (b) the special caution was given before the failure or refusal to mention the fact, and
- (c) the special caution was given in the presence of an Australian legal practitioner who was acting for the defendant at that time, and
- (d) the defendant had, before the failure or refusal to mention the fact, been allowed a reasonable opportunity to consult with that Australian legal practitioner, in the absence of the investigating official, about the general nature and effect of special cautions.

(3) It is not necessary that a particular form of words be used in giving a special caution.

(4) An investigating official must not give a special caution to a person being questioned in relation to an offence unless satisfied that the offence is a serious indictable offence.

(5) This section does not apply—

- (a) to a defendant who, at the time of the official questioning, is under 18 years of age or is incapable of understanding the general nature and effect of a special caution, or
- (b) if evidence of the failure or refusal to mention the fact is the only evidence that the defendant is guilty of the serious indictable offence.

(6) The provisions of this section are in addition to any other provisions relating to a person being cautioned before being investigated for an offence that the person does not have to say or do anything. The special caution may be given after or in conjunction with that caution.

Note—

See section 139 of this Act and section 122 of the [Law Enforcement \(Powers and Responsibilities\) Act 2002](#).

(7) Nothing in this section precludes the drawing of any inference from evidence of silence that could properly be drawn apart from this section.

(8) The giving of a special caution in accordance with this section in relation to a serious indictable offence does not of itself make evidence obtained after the giving of the special caution inadmissible in proceedings for any other offence (whether or not a serious indictable offence).

(9) In this section—

official questioning of a defendant in relation to a serious indictable offence means questions put to the defendant by an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of the serious indictable offence.

special caution means a caution given to a person that is to the effect that—

- (a) the person does not have to say or do anything, but it may harm the person's defence if the person does not mention when questioned something the person later relies on in court, and
- (b) anything the person does say or do may be used in evidence

Analysis

- Judge may direct jury that it is permissible to draw an unfavourable inference where the accused person failed to provide the police with information UNDER QUESTIONING.
- Requires that (2)
 - Investigating officer had reasonable cause to suspect that D had committed serious indictable offence- s 89A(2)(a)
 - Defendant was given a special caution (9) before D's refusal to mention fact (2)(b). The caution must be given in presence of lawyer and accused must have had opportunity to consult with lawyer regarding its effect- (2)(c), (d).
- Provision DOES NOT APPLY TO:

- Accused under 18
- Accused incapable of understanding nature of special caution
- NO UNFAVOURABLE INFERENCE TO BE DRAWN if failure is the **only** evidence that D is guilty of serious indictable offence- (5)(b)

Cases:

Hogg- D charged with SA of minor- exercised silence when questioned- claimed he was not at scene. Trial judge held adverse inference can be used under s 89A

- HELD- error to allow this, given that he had been advised by his lawyer to remain silent. Purpose of section was to draw adverse inferences of silence due to reason that D cannot give explanation consistent with evidence, NOT because he had been advised to.

Post-Offence conduct

Generally, a lie told by an accused to bystanders, the police, family while testifying can be used as an inference of guilt or self-belief of guilt (SW [2013] NSWCCA)

- However, lie told out of panic, to escape unjust accusation, or to protect some other person, or to avoid consequence external to offence- lie cannot be regarded at law as arising from consciousness of guilt- *Edwards* [15].

Jury is to be directed NOT to follow a process of reasoning that **just** a lie told is evidence of guilt- *Zoneff*

- Cases of innocent explanation of lies- *Lane*

Baden Clay:

- HCA held that lies and attempts to conceal crime could be considered by jury as evidence of guilt and intent. Case involved accused going to great lengths to conceal wife's dead body. And court held that it could not possibly be manslaughter.

Prosecutorial Discretion & Pre-Trial Disclosure

Plea Negotiations

Summary:

- Offices of Director of Public Prosecutions institute prosecutions for indictable offences on behalf of the Crown.
- Prosecutor alone to determine whether:
 - Prosecute
 - Aggravated offence
 - Withdraw charges
 - Committal hearing

- Accept plea of guilty to lesser offence

Pleadings

- In crim trial- short e.g. guilty, not guilty- *Gilham*
- Court Attendance Notice- gives list of charges, define court's jurisdiction, establish legal and factual elements P must prove.
 - *HJohnson*- describe offence, identify factual elements, contain name of prosecutor, require accused to appear before court at specified date and time.
- Pleadings must have sufficiency- describe essential legal and factual elements of offence (time, place, manner)- *Johnson v Miller*
- Clarity- Not be duplicitous-

Multiple Accused- Single Trial

- *Webb*- strong reasons why person charged with joint offence should be tried together- seek to cast blame on each other (cut-throat defence)- s 20, 104(6), 111, 101, 137, 65(8)
- *Middis*- Separate trial should be ordered when:
 - Evidence against applicant for separate trial is significantly weaker than and different to that admissible against another or other accused AND
 - Where evidence against other accused contains highly prejudicial evidence against applicant that is not admissible against him AND
 - Real risk that weaker Crown case against applicant will be made *immeasurably* stronger by reason of prejudicial material
- Crucial issue is potential effect of inadmissible evidence on jury's consideration of applicant's case- *Pham*.
- Growing pressure to facilitate joint trials in NSW_ CPA (NSW, s 29A).
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Multiple Charges- Single Accused

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Disclosure

- Imposes duty on prosecutor disclosure material which **might** be relevant to issue, raises new issue, holds out real prospect of providing lead on evidence in first two categories- *Attorney General V XX*
- Requires prosecutor to take 'broad view of relevance- *Reardon*
- Includes:
 - Material gathered during investigation not intended to be used by P
 - Assists defence case
 - OR relates to credibility of P witnesses.
- Regulated by CPA (NSW) s 142
 - P has to provide D with copy of all materials that would be reasonably regarded as relevant to P or D case.
 - P provide D with list of items reasonably regarded as relevant BUT not in possession of P

Prosecutor's in-court fair trial obligations

- Impartiality, fairness, professionalism- Australian Bar Rules

Libke

- Involved P questioning an accused- seeking to undermine credibility
- Made comments such as 'I'm not buying it'
- Held to be not fatal to appeal, but P should not have made comments.