SILENCE AND THE UNSWORN STATEMENT: AN ACCUSED'S ALTERNATIVES TO GIVING SWORN EVIDENCE

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[*In this article, Mr Williams discusses the right of an accused person to make an unsworn statement in lieu of, or in addition to, giving sworn evidence. He makes two recommendations. First, he suggests that where an accused chooses not to give sworn evidence the trial judge should be entitled to comment on that fact to the jury. Secondly, he argues that the right of an accused to make an unsworn statement ought to be abolished.*]

In each of the Australian States the position of the accused as a witness in his own defence is governed by statute. Although there existed in some of the Australian States earlier statutes making the accused a competent witness at his own trial,[1] the statutory provisions in each of the Australian jurisdictions are now based upon the English Criminal Evidence Act 1898.[2] These statutory provisions make the accused a competent, but not a compellable, witness for the defence. In each of the States, with the exception of Western Australia, statutory provisions also confer on the accused the right to make an unsworn statement in lieu of, or in addition to, giving sworn testimony.[3] Thus an accused has three alternatives available to him. First, he may choose to give no evidence at all, exercising what is termed his 'right of silence'. Secondly, he may make an unsworn statement in lieu of, or in addition to, giving sworn evidence. Thirdly, he may give sworn evidence. It is with the first two of these options that the present article is concerned.

The accused's right to remain silent at his trial and his right to make an unsworn statement have been the subject of much debate. In England the

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[1] Accused Persons Evidence Act 1882 (S.A.); Crimes Act 1891 (Vic.), s. 34; Criminal Law and Evidence Amendment Act 1891 (N.S.W.), s. 6, amended by the Accused Persons Evidence Act 1898, s. 1; Criminal Law Amendment Act 1892 (Qld.), s. 3.

[2] Crimes Act 1958 (Vic.), s. 399; Crimes Act 1900 (N.S.W.) as amended by the Crimes and other Acts (Amendment) Act 1974, ss. 407, 413A; Evidence Act 1929-72 (S.A.), s. 18; Criminal Code 1899 (Qld.), s. 618A; Evidence Act 1906-67 (W.A.), s. 8; Evidence Act 1910-67 (Tas.), s. 85.

[3] Crimes Act 1958 (Vic.), s. 399(g); Evidence Act 1958 (Vic.), s. 25; Crimes Act 1900-74 (N.S.W.), s. 405; Evidence Act 1929-72 (S.A.), s. 18(viii); Criminal Code 1899 (Qld.), s. 618; Criminal Code 1924-74 (Tas.), s. 371(vi); Evidence Act 1910-67 (Tas.), s. 85(1)(h).

Criminal Law Revision Committee, in its Eleventh Report, recommended far reaching changes in the law affecting, *inter alia*, these two rights.[4] Their recommendations sparked off a heated debate which still continues in the United Kingdom. This article attempts to present an exposition of the existing law in the Australian States and a consideration, in the light of the debate over the Eleventh Report of the Criminal Law Revision Committee, of the extent to which the law ought to be amended.

The statutory provisions in Victoria may be taken as a convenient starting point. Section 25 of the Victorian Evidence Act 1958 provides:

> It shall be lawful for any person who in any criminal proceeding is charged with the commission of any indictable offence or any offence punishable on summary conviction (whether such person does or does not make his answer or defence thereto by counsel or solicitor) to make a statement of facts (without oath) in lieu of or in addition to any evidence on his behalf.

Section 399 of the Victorian Crimes Act 1958 provides:

> Every person charged with an offence, and the wife or husband (as the case may be) of the person so charged, shall be a competent witness for the defence at every stage of the proceedings whether the person so charged is charged solely or jointly with any other person:
>
> Provided that —
>
> (a) a person so charged shall not be called as a witness in pursuance of this section except upon his own application;
>
> (b) the failure of any person charged with an offence, or of the wife or husband (as the case may be) of the person so charged, to give evidence shall not be made the subject of any comment by the prosecution or unless the accused person elects to make a statement not on oath by the judge or justice;
>
> . . .
>
> (g) nothing in this section shall affect . . . any right of the person charged to make a statement without being sworn.

The position in Victoria is thus that the accused is a competent but not a compellable witness. If he chooses not to give evidence neither the prosecution nor the judge is entitled to comment on this decision. As an alternative to remaining silent, and in lieu of or in addition to giving sworn evidence, the accused is entitled to make an unsworn statement. If he chooses simply to make such a statement the judge may, but the prosecution may not, comment upon the fact that he has not given sworn evidence.

The position in the other Australian States differs from that in Victoria in the following respects. In South Australia and Tasmania the judge may, but the prosecution may not, comment upon the failure of the accused to give sworn evidence. Unlike Victoria this is so not only where the accused makes an unsworn statement, but also where he simply remains silent.[5] The position is the same in Western Australia.[6] There, however, there is the additional factor that the statute does not confer on the accused any right to make an unsworn statement. The accused may make an unsworn

[4] *Evidence (General)* (1972) Cmnd. 4991.
[5] Evidence Act 1929-72 (S.A.), s. 18(ii); Evidence Act 1910-67 (Tas.), s. 85(1)(c).
[6] Evidence Act 1906-67 (W.A.), s. 8(1)(c).

statement with the permission of the court, however the practice appears to be uncommon.[7] The Queensland section provides that the accused may, with the court's permission, make an unsworn statement.[8] In Queensland it appears to be the general practice for such permission to be granted.[9] There exists in Queensland no prohibition on comment by either the prosecution or the judge. Both may comment on the accused's decision either to remain silent or to make an unsworn statement. New South Wales, on the other hand, goes further in the direction of protecting the accused from comment than does Victoria. The New South Wales section provides that no comment may be made by either the prosecution or the judge whether the accused remains silent or makes an unsworn statement.[10]

THE RIGHT TO REMAIN SILENT

1. *The Evidentiary Effect of Silence*

To what extent does an accused, by exercising his right to remain silent at his trial, open the way to adverse inferences being drawn against him?[11] A number of principles appear to be established. First, it is clear that silence does not amount to an admission of guilt by the accused. Delivering the judgment of the Privy Council in *Tumahole Bereng v. R.* Lord MacDermott stated 'an accused admits nothing by exercising at his trial the right which the law gives him of electing not to deny the charge on oath'.[12]

Secondly, the failure of the accused to give evidence cannot convert an insufficient case into a sufficient case. Before the silence of the accused can be said to be a relevant factor there must, independently of the accused's silence, exist a *prima facie* case against him.[13]

Where a *prima facie* case does exist against the accused it does not follow that he is necessarily to be found guilty if he exercises his right of silence. In *May v. O'Sullivan*[14] the accused was charged with offences arising out of alleged betting in a hotel. The accused did not give evidence, and was convicted. His appeal to the High Court was dismissed, but in a joint judgment the Court[15] made it clear that the fact that the accused remains

[7] Edwards E. J., *Cases on Evidence in Australia* (2nd ed., 1974) 330.
[8] Criminal Code 1899 (Qld.), s. 618.
[9] *R. v. McKenna* [1951] St. R. Qd. 299; *R. v. Doolan* [1962] Qd. R. 449.
[10] Crimes Act 1900-74 (N.S.W.), s. 407(2).
[11] See generally O'Regan R. S., 'Adverse Inferences from Failure of an Accused Person to Testify' [1965] *Criminal Law Review* 711.
[12] [1949] A.C. 253, 270. See also *Waugh v. R.* [1950] A.C. 203; *R. v. Guiren* [1962] N.S.W.R. 1105; *R. v. Fisher* [1964] Crim. L.R. 150; *R. v. Pratt* [1971] Crim. L.R. 234; *R. v. Sparrow* [1973] 1 W.L.R. 488. It is suggested that *R. v. Kelson* (1909) 3 Cr. App. Rep. 230 was wrongly decided.
[13] *Weston v. Cummings* [1916] N.Z.L.R. 460; *Dolling v. Bird* [1924] N.Z.L.R. 545; *Wilson v. Buttery* [1926] S.A.S.R. 150; *Tumahole Bereng v. R.* [1949] A.C. 253, 270; *Nicolls v. King* [1951] N.Z.L.R. 91; *Paterson v. Martin* (1966) 40 A.L.J.R. 313. A similar rule applies in civil cases. See *Tyne v. Rutherford* (1963) 36 A.L.J.R. 333.
[14] (1955) 92 C.L.R. 654.
[15] Dixon C.J., Webb, Fullagar, Kitto and Taylor JJ.

silent in the face of a *prima facie* case does not mean that he ought to be convicted. The Court stated that the 'burden of proving guilt beyond reasonable doubt rests on the prosecution from first to last, and, even though the defendant remains silent after a prima facie case has been launched against him, it may very well be that he ought to be acquitted'.[16]

Where a *prima facie* case exists against the accused it is clear that his silence, whilst not conclusive, may add weight to the case against him. This is simply an example in the criminal sphere of the general principle that the failure by one party in an action to deny a fact which it is in his power to deny 'gives colour to the evidence against him'.[17] The general operation of this principle is well illustrated by the case of *Jones v. Dunkel.*[18] The plaintiff's husband was killed in a collision between his International truck and a diesel truck. The plaintiff brought proceedings under the Compensation to Relatives Act 1897-1946 (N.S.W.) against the owner and driver of the diesel truck. There had been no eyewitness to the collision. The driver of the diesel truck did not give evidence at the hearing of the action. The trial judge directed the jury that the burden of proof rested upon the plaintiff, and instructed them that counsel for the defendant was within his rights in not calling the driver. In response to a question by a juror as to the significance to be attributed to the failure of the driver to give evidence, the trial judge told the jury that they could accept the facts given by the plaintiff as proved, and that the question for them was whether they thought that from the proved facts an inference of negligence ought to be drawn. The jury returned a verdict for the defendant. The plaintiff appealed to the High Court where, by a majority of three to two,[19] it was held that the trial judge's direction was incomplete and that a new trial should be ordered. Kitto J. stated:

> It was right enough to point out, in effect, that the evidence given might be the more readily accepted because it had been left uncontradicted, and that the omission to call Hegedus [the driver of the diesel truck] as a witness could not properly be treated as supplying any gap which the evidence adduced for the plaintiff left untouched. But what should have been added, and not being added was in the circumstances as good as denied, was that any inference favourable to the plaintiff for which there was ground in the evidence might be more confidently drawn when a person presumably able to put the true complexion on the facts relied on

[16] (1955) 92 C.L.R. 654, 657. Note also *Ex parte Jones; Re MacReadie* (1957) W.N. (N.S.W.) 136.

[17] *Per* Alderson B., *Boyle v. Wiseman* (1885) 10 Exch. 647, 651. See also *Jones v. Great Western Railway* (1930) 144 L.T. 194, 198; *De Gioia v. Darling Island Stevedoring and Lighterage Co. Ltd* [1941] 42 S.R. (N.S.W.) 1; *The Insurance Commissioner v. Joyce* (1948) 77 C.L.R. 39, 49, 61; *Black v. Tung* [1953] V.L.R. 629, 634; *Tozer Kemsley & Millbourn (A'asia) Ltd v. Collier's Interstate Transport Service Ltd* (1956) 94 C.L.R. 384, 403; *Albus v. Ryder* [1956] V.L.R. 56; *Kennedy v. Ritcher* [1957] V.R. 515; *Waddell v. Ware* [1957] V.L.R. 43; *Tyne v. Rutherford* (1963) 36 A.L.J.R. 333; *Conolan v. Broken Hill and Suburban Gas Co. Ltd* [1969] 1 N.S.W.R. 555; *Nuhic v. Rail and Road Excavations* [1972] 1 N.S.W.L.R. 204; *Australian Safeway Stores Pty Ltd v. Gorman* [1973] V.R. 570; *Earle v. Castlemaine District Community Hospital* [1974] V.R. 722.

[18] (1959) 101 C.L.R. 298.

[19] Kitto, Menzies and Windeyer JJ. (Dixon C.J. and Taylor J. dissenting).

> as the ground for the inference has not been called as a witness by the defendant and the evidence provides no sufficient explanation of his absence.[20]

In the criminal sphere the operation of this principle is illustrated by the case of *R. v. Corrie and Watson*.[21] The accused were charged with unlawful betting. A strong case was presented by the prosecution, and neither of the accused gave evidence. They were convicted and appealed to the Court of Crown Cases Reserved where their appeals were dismissed. Delivering the judgment of the Court, Lord Alverstone C.J. stated:

> No inference should be drawn in support of a weak case from the fact that the defendants were not called; but when transactions were capable of an innocent explanation, then, if the defendants could have given it, it was not improper, once a *prima facie* case had been established, for the jury to draw a conclusion from their not being called.[22]

Given that the failure of the accused to give sworn testimony can be some evidence leading to an inference of guilt, the question to be asked is 'of what weight is this evidence?' No generalized answer can be given to this question, but a number of rules and principles can be identified. The failure of an accused to give evidence cannot amount to corroboration. In *R. v. Jackson*[23] the accused was charged with receiving and being an accessory before the fact to larceny. Evidence was given against him by accomplices. The accused gave no evidence, and the trial judge directed the jury that they could take that fact as amounting to corroboration of the accomplices' evidence. It was held by the Court of Criminal Appeal that this was a misdirection, and that an accused's failure to give evidence could not constitute corroboration.[24]

The silence of the accused will be of greater weight where it appears that he alone is able to explain the true facts surrounding a relevant incident. In *R. v. Sharmpal Singh*[25] the accused appealed to the Privy Council against his conviction for the manslaughter of his wife. The accused had not given evidence at his trial. Medical evidence indicated that sexual intercourse had taken place just before death, which was due to asphyxia caused by pressure on the chest applied simultaneously with pressure on the neck and throat. It was contended on behalf of the accused that the death was caused accidentally in the course of a sexual embrace. The accused's appeal was dismissed. It was held by the Privy Council that the

[20] (1959) 101 C.L.R. 298, 308. Menzies and Windeyer JJ. expressed themselves to a similar effect at 312, 319, 320-2.

[21] (1904) 20 T.L.R. 365. See also *Graves v. Roth* (1904) 29 V.L.R. 841; *R. v. Bernard* (1908) 1 Cr. App. Rep. 218; *Wilson v. Buttery* [1926] S.A.S.R. 150; *Morgan v. Babcock and Wilcox Ltd* (1929) 43 C.L.R. 163; *Nicolls v. King* [1951] N.Z.L.R. 91; *O'Sullivan v. Stubbs* [1952] S.A.S.R. 61; *Ex parte Jones; Re MacReadie* (1957) W.N. (N.S.W.) 136; *Purdie v. Maxwell* [1960] N.Z.L.R. 599; *Hoobin v. Samuels* [1971] 2 S.A.S.R. 238; *R. v. Mutch* [1973] 1 All E.R. 178; *R. v. Sparrow* [1973] 2 All E.R. 129; *R. v. Gallagher* [1974] 3 All E.R. 118.

[22] (1904) 20 T.L.R. 365.

[23] [1953] 1 All E.R. 872.

[24] See also *Tumahole Bereng v. R.* [1949] A.C. 253; *R. v. Blank* [1972] Crim. L.R. 176.

[25] [1962] A.C. 188.

natural inference from the medical evidence was that the accused had gone beyond the limits of the normal accompaniments of sexual intercourse, and had used a degree of force which was unlawful. His conviction for manslaughter was therefore justified. Delivering the judgment of the Court, Lord Morris stated:

> This is the sort of case in which a not incredible explanation given by the accused in the witness box might have created a reasonable doubt. But there is no explanation. . . . How did he come to squeeze his wife's throat? When the prisoner, who is given the right to answer this question, chooses not to do so, the court must not be deterred by the incompleteness of the tale from drawing the inferences that properly flow from the evidence it has got nor dissuaded from reaching a firm conclusion by speculation upon what the accused might have said if he had testified.[26]

The degree of probative value possessed by the accused's silence may also depend upon the strength of the prosecution's case. An innocent man may be considered less likely to refrain from giving evidence where there is a strong case against him than where there is a weak case. In *R. v. Voisin*[27] the accused and a woman named Roche were charged with the murder of a woman, the trunk of whose body had been found in a parcel in Regent Square. A piece of paper with the words 'Bladie Belgiam' upon it was also found in the parcel. The police questioned Voisin. He voluntarily, at their request to write the words 'Bloody Belgian', wrote the words 'Bladie Belgiam'. Neither Voisin nor Roche gave evidence. Roche was acquitted. Voisin was convicted and appealed unsuccessfully to the Court of Criminal Appeal. Delivering the judgment of the Court, A. T. Lawrence J. stated:

> It was a case demanding explanation by the only person who could know the facts if ever a case did. For both the rooms occupied by the prisoner and Roche and those occupied by the victim contained many traces of human blood, and in the prisoner's cellar were found the head and hands of the dead woman. Both the prisoner and Roche had keys of the deceased's flat, and the prisoner had the key of his cellar in his pocket.[28]

The accused's silence cannot, however, form the basis for any inference against him if there exists a good reason for that silence. In *R. v. Bathurst*[29] the accused was charged with murder. His defence was one of diminished responsibility.[30] Two psychiatrists gave evidence on his behalf, but he did not himself give evidence. The trial judge commented strongly on the accused's failure to give evidence, and the accused was convicted of murder. On appeal to the Court of Appeal the conviction was quashed, and a verdict of manslaughter substituted. Delivering the judgment of the Court Lord Parker C.J. stated that in such a case, where the accused may be suffering from delusions or on the brink of insanity, 'it would be the

[26] *Ibid.* 198. See also *R. v. Voisin* [1918] 1 K.B. 531; *Wilson v. Buttery* [1926] S.A.S.R. 150; *Morgan v. Babcock and Wilcox Ltd* (1929) 43 C.L.R. 163, 178; *O'Sullivan v. Stubbs* [1952] S.A.S.R. 61; *R. v. Jackson* [1953] 1 All E.R. 872; *R. v. Guiren* [1962] N.S.W.R. 1105.

[27] [1918] 1 K.B. 531.

[28] *Ibid.* 537. See also *R. v. Sparrow* [1973] 2 All E.R. 129.

[29] [1968] 2 Q.B. 99.

[30] Homicide Act 1957 (Eng.), s. 2(1).

last thing that any counsel would do to allow his client to go into the witness box'. In these circumstances it was a misdirection to instruct the jury that adverse inferences might be drawn against the accused because of his failure to give sworn evidence.[31]

The strength of inferences to be drawn against an accused who does not give evidence may be less in cases where the accused does not have legal representation. In *Nicolls v. King* Adams J. stated that in such cases the need for caution in drawing inferences adverse to the accused was especially great.[32] In such cases the accused may have remained silent because he was bewildered by the proceedings, or because he did not appreciate the importance of rebutting the case against him.

2. *Comment on the Accused's Silence*

In Victoria and New South Wales both the prosecutor and the judge are prohibited from commenting on the accused's decision to remain silent at his trial.[33] This prohibition is enforced rigidly. Any statement by the judge or prosecutor which directs the jury's attention to the ability of the accused to give evidence on oath and his failure to do so will infringe the prohibition. In *Bataillard v. R.* Isaacs J. stated:

> If, however, reference, direct or indirect, and either by express words or the most subtle allusion, and however much wrapped up, is made to the fact that the prisoner had the power or right to give evidence on oath, and yet failed to give, or in other words, 'refrained from giving', evidence on oath, there would be a contravention of the sub-section now under consideration. The question whether the law has been so contravened must depend in each case on the words used and the circumstances in which they are used.[34]

In South Australia, Western Australia and Tasmania the judge may, but the prosecutor may not, comment on the fact that the accused has elected to remain silent.[35] In Queensland the prosecutor as well as the judge may comment.[36] Within what limits may comment be made? It was at one time thought that the nature and extent of comment were entirely matters for the trial judge and could not be reviewed on appeal. In *R. v. Rhodes*, the first case dealing with the English Act of 1898, the question of the scope of permissible judicial comment was considered by the Court of Crown Cases Reserved. Lord Russell of Killowen C.J. stated that the 'nature and degree

[31] [1968] 2 Q.B. 99, 106. See also *Sanders v. Hill* [1964] S.A.S.R. 327.

[32] [1951] N.Z.L.R. 91, 96. *Cf. R. v. Kelson* (1909) 3 Cr. App. Rep. 230, 234.

[33] Crimes Act 1958 (Vic.), s. 399(g); Crimes Act 1900-74 (N.S.W.), s. 407(2).

[34] (1907) 4 C.L.R. 1282, 1291. See also *R. v. O'Connor* [1920] V.L.R. 204; *R. v. Ellis* (1925) 37 C.L.R. 147; *R. v. Corbett* (1931) 32 S.R. (N.S.W.) 93; *R. v. Fenwick* (1954) 54 S.R. (N.S.W.) 147; *R. v. McFadden* (1957) 57 S.R. (N.S.W.) 262; *R. v. Thomas* (1957) 57 S.R. (N.S.W.) 292; *R. v. Franklin* (1958) 58 S.R. (N.S.W.) 18; *R. v. Denton* [1958] S.R. (N.S.W.) 34; *R. v. Johnson* [1959] V.R. 202; *Stuart v. R.* (1959) 101 C.L.R. 1; *R. v. Kosky* [1960] V.R. 526; *R. v. Thompson* [1962] S.R. (N.S.W.) 135; *Bridge v. R.* (1964) 38 A.L.J.R. 280; *R. v. McMillan* (1967) 87 W.N. (N.S.W.) 387; *R. v. Humphries* [1972] 2 N.S.W.R. 783; *R. v. Barron* [1975] V.R. 496. It is suggested that *R. v. Moir* (1912) 12 S.R. (N.S.W.) 111 was wrongly decided.

[35] Evidence Act 1929-72 (S.A.), s. 18(ii); Evidence Act 1906-67 (W.A.), s. 8(1)(c); Evidence Act 1910-67 (Tas.), s. 85(1)(c).

[36] Criminal Code 1899 (Qld.), s. 618.

of such comment must rest entirely in the discretion of the judge who tries the case; and it is impossible to lay down any rule as to the cases in which he ought or ought not to comment on the failure of the prisoner to give evidence, or as to what those comments should be'.[37]

A different approach was adopted in *Waugh v. R.*[38] Waugh was charged with murder. He was employed as a guard on a coconut plantation in Jamaica. Waugh's version of the incident was that he apprehended a coconut thief, and was forced to kill the thief in self-defence when the thief attacked him first with an iron tool and then with a machete. This story was repeated by Waugh several times shortly after the incident occurred. There was no evidence to suggest Waugh's story was untrue, except for a partial dying declaration made by the deceased. The deceased lapsed into a coma from which he never recovered before the declaration was complete. The police apparently accepted Waugh's explanation, and decided not to prosecute him. However, a prosecution was ordered by the coroner. Waugh was tried and found guilty. He gave no evidence, and the trial judge commented no less than nine times on his failure to do so. The accused appealed to the Privy Council and his conviction was quashed. Their Lordships' judgment was delivered by Lord Oaksey, who stated that the rules of Jamaican and English law were identical on this point. His Lordship stated:

> It is true that it is a matter for the judge's discretion whether he shall comment on the fact that a prisoner has not given evidence; but the very fact that the prosecution are not permitted to comment on that fact shows how careful a judge should be in making such comment. . . . [T]heir Lordships think that the prisoner's counsel was fully justified in not calling the prisoner, and that the judge, if he made any comment on the matter at all, ought at least to have pointed out to the jury that the prisoner was not bound to give evidence and that it was for the prosecution to make out the case beyond reasonble doubt.[39]

Since *Waugh v. R.* it has been accepted that there are limits upon the right of the judge to comment on the accused's failure to give evidence.[40] A judge should direct the jury that silence on the part of the accused does not amount to an admission of guilt.[41] In cases in which corroboration is required he should direct them that silence does not constitute corroboration.[42] Where a *prima facie* case exists against the accused the judge may instruct the jury that the accused's silence, whilst not conclusive of his guilt, may be taken into account by them as adding weight to the prosecution's case. In *R. v. Bathurst* a suggestion was made by Lord

[37] [1899] 1 Q.B. 77, 83. See also *R. v. Smith* (1915) 84 L.J.K.B. 2153; *R. v. Voisin* [1918] 1 K.B. 531; *R. v. Templeton* [1922] St. R. Qd. 165, 171; *R. v. Nodder* (1937) Unreported, referred to in Williams G. L., *The Proof of Guilt* (3rd ed., 1963) 59-60.
[38] [1950] A.C. 203.
[39] *Ibid.* 211-12.
[40] *R. v. Jackson* [1953] 1 W.L.R. 591; *R. v. Fisher* [1964] Crim. L.R. 150; *R. v. Vallance* [1964] S.A.S.R. 361; *R. v. Sullivan* [1967] Crim. L.R. 174; *R. v. Bathurst* [1968] 2 Q.B. 99; *R. v. Pratt* [1971] Crim. L.R. 234; *R. v. Mutch* [1973] 1 All E.R. 178; *R. v. Sparrow* [1973] 2 All E.R. 129.
[41] *Supra* n. 12.
[42] *Supra* nn. 23, 24.

Parker C.J. as to the appropriate judicial comment which might be made. His Lordship stated:

> the accepted form of comment is to inform the jury that, of course, he [the accused] is not bound to give evidence, that he can sit back and see if the prosecution have proved their case, and that while the jury have been deprived of the opportunity of hearing his story tested in cross-examination, the one thing they must not do is to assume that he is guilty because he has not gone into the witness box.[43]

This formulation is not, nor was it intended to be,[44] applicable to all cases in which comment might be made. In some cases a comment more favourable to the accused ought to be given.[45] In other cases stronger comment adverse to the accused ought to be made.[46] In *R. v. Sparrow*[47] the accused and one Skingle were charged with the murder of a Detective Sergeant of police. They had stolen guns and ammunition and committed a robbery. They then broke into a garage and made off with a car, carrying the weapons and ammunition with them. They were stopped by the Detective some days later. While the Detective was using his radio to contact his control point the accused and Skingle approached his car. Skingle fired nine shots into the Detective's body at close range. At the trial the defence raised by counsel for the accused was that the accused had never envisaged Skingle doing more than frightening the Detective off with the weapon, and that he ought therefore to be guilty only of manslaughter. The accused gave no evidence. Not surprisingly, the trial judge commented quite strongly on the accused's failure to give evidence. In all he mentioned it a total of seven times. The accused and Skingle were convicted of murder and the accused appealed to the Court of Appeal. Counsel for the accused argued first that comment should only have been made once and, secondly, that any comment should have been in the form approved in *R. v. Bathurst.* Both arguments were rejected and the accused's appeal dismissed. Delivering the judgment of the Court, Lawton L.J. stated:

> In the judgment of this court, if the trial judge had not commented in strong terms on the appellant's absence from the witness box, he would have been failing in his duty. . . . [W]hen an accused person elects not to give evidence, in most cases but not all, the judge should explain to the jury what the consequences of his absence from the witness box are and if, in his discretion, he thinks that he should do so more than once, he may; but he must keep in mind always his duty to be fair.[48]

Referring to *Bathurst*'s case, his Lordship further stated that '[i]n many cases, a direction in some such terms as these will be all that is required. . . . What is said must depend upon the facts of each case and in some cases the interests of justice call for a stronger comment'.[49]

[43] [1968] 2 Q.B. 99, 107-8. Note *R. v. Mutch* [1973] 1 All E.R. 178, 182.
[44] A different form of comment was suggested for cases such as *Bathurst* itself where the defence was one of diminished responsibility.
[45] *E.g. R. v. Waugh* [1950] A.C. 203; *Sanders v. Hill* [1964] S.A.S.R. 327.
[46] *E.g. R. v. Voisin* [1918] 1 K.B. 531; *R. v. Sharmpal Singh* [1962] A.C. 188; *R. v. Sparrow* [1973] 2 All E.R. 129.
[47] [1973] 2 All E.R. 129.
[48] *Ibid.* 135.
[49] *Ibid.* 136.

The approach taken in these States appears preferable to that adopted in Victoria and New South Wales. It has been shown that the silence of the accused can, in some cases, possess evidentiary value. However, in other cases it may possess no evidentiary value. Where silence does have evidentiary value there are limits on the uses to which it may be put. It seems preferable to permit a trial judge to instruct the jury as to the inferences they both may and may not draw from the accused's silence than to have him remain silent on the point and leave the jury to draw what inferences they will. The reason why comment is forbidden in Victoria and New South Wales is that this is thought to benefit the accused; to preserve as far as possible his freedom to choose whether or not to give evidence.[50] Yet the advantage to the accused may be more apparent than real. An uninstructed jury, aware of the accused's right to give evidence, might conclude that his silence constituted an admission of guilt or that it could amount to corroboration. In *R. v. Sparrow* Lawton L.J. stated:

> In our experience of trials, juries seldom acquit persons who do not give evidence when there is a clear case for them to answer and they do not answer it. . . . The reason lies in common sense. An innocent man who is charged with a crime, or with any conduct reflecting upon his reputation, can be expected to refute the allegation as soon as he can by giving his own version of what happened. Juries know this. . . .[51]

Given that juries will undoubtedly draw inferences from the accused's silence, it seems clearly preferable that the judge be permitted to instruct them as to what inferences they are entitled to draw. Nor does it appear improper that in some cases the right of comment should be used by the judge to the disadvantage of the accused. In *R. v. Sparrow* for example, where a strong case was made out against the accused, no reason of principle would seem to require that the judge be prevented from specifically directing the jury's attention to the obvious; that an innocent man would undoubtedly wish to take advantage of the opportunity to tell his version of the events leading to the Detective's death.

The approach adopted in Queensland, of permitting both the judge and the prosecutor to comment on the failure of the accused to give evidence, appears to be unduly favourable to the prosecution. If the prosecutor limits himself, as in theory he always should, to the presentation of objective facts, permitting him to comment on the accused's silence achieves no purpose that is not achieved by permitting the judge to comment. If, however, the prosecution adopts a more partisan role, then it would certainly be unfair to an accused to permit the prosecutor to make numerous and unrestrained comments on the accused's failure to give evidence.

[50] *R. v. Ellis* (1925) 37 C.L.R. 147, 155, 157; *Bridge v. R.* (1964) 38 A.L.J.R. 280, 281.

[51] [1973] 1 W.L.R. 488, 493. See also *R. v. Jackson* [1953] 1 W.L.R. 591, 595; *Bridge v. R.* (1964) 38 A.L.J.R. 280, 282.

3. *Recommendations of the Criminal Law Revision Committee*

The Eleventh Report of the Criminal Law Revision Committee, *Evidence (General)*,[52] was presented to the British Parliament in June 1972. It represents the outcome of almost eight years deliberations by the Committee. The Report is accompanied by a draft Bill embodying the Committee's recommendations. The Report and Bill cover the whole range of the law of evidence in criminal cases. The recommendations made by the Committee are far reaching and controversial. Since the publication of the Report a vigorous debate has been waged between its supporters and its opponents.[53] It is not proposed in this article to enter into that debate beyond considering those aspects of the Committee's Report which relate to the accused's right to remain silent and his right to make an unsworn statement.

Two of the many eminent members of the Criminal Law Revision Committee, Professor Rupert Cross and Professor Glanville Williams, had, prior to the publication of the Committee's Report, argued strongly that the present law in this field is unduly favourable to the accused.[54] It was this view which received the support of the Committee. The Committee stated:

> In our opinion the present law and practice are much too favourable to the defence. We are convinced that, when a prima facie case has been made against the accused, it should be regarded as incumbent on him to give evidence in all ordinary cases.[55]

The Committee's recommendations are embodied in clause 5 of the draft Bill, which provides:

> (1) At the trial of any person for an offence the following provisions of this section shall apply unless he pleads guilty, except that subsection (2) shall not apply if —
> (a) the court holds that there is no case to answer; or
> (b) before any evidence is called for the defence, the accused or counsel or a solicitor representing him informs the court that the accused will give evidence; or
> (c) it appears to the court that the physical or mental condition of the accused makes it undesirable for him to be called upon to give evidence.
> (2) Before any evidence is called for the defence, the court shall tell the accused that he will be called upon by the court to give evidence in his own defence and shall tell him in ordinary language what the effect of this section will be if, when so called upon, he refuses to be sworn; and thereupon or, if the court in the exercise of its discretion under section 4(4) of this Act allows the defence to call other evidence first, after that evidence has been given, the court shall call upon the accused to give evidence.

[52] (1972) Cmnd. 4991.

[53] See, *e.g.*, Sir B. MacKenna, 'Criminal Law Revision Committee's Eleventh Report: Some Comments' [1972] *Criminal Law Review* 605; Miller C. J., 'Silence and Confessions — What are they worth?' [1973] *Criminal Law Review* 343; Zuckerman A. A. S., 'Criminal Law Revision Committee Eleventh Report, Right of Silence' (1973) 36 *Modern Law Review* 509; Cross A. R. N., 'A Very Wicked Animal Defends the 11th Report of the Criminal Law Revision Committee' [1973] *Criminal Law Review* 329.

[54] Cross A. R. N., 'The Right to Silence and the Presumption of Innocence — Sacred Cows or Safeguards of Liberty?' (1970) 11 *Journal of the Society of Public Teachers of Law* 66; Williams G. L., *The Proof of Guilt* (3rd ed., 1963) 45-66.

[55] Para. 110.

(3) If the accused —

(a) after being called upon by the court to give evidence in pursuance of this section, or after he or counsel or a solicitor representing him has informed the court that he will give evidence, refuses to be sworn; or

(b) having been sworn, without good cause refuses to answer any question,

the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences from the refusal as appear proper; and the refusal may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any evidence given against the accused.

(4) Nothing in this section shall be taken to render the accused compellable to give evidence on his own behalf, and he shall accordingly not be guilty of contempt of court by reason of a refusal to be sworn in the circumstances described in subsection (3)(a) above.

(5) For the purposes of this section a person who, having been sworn, refuses to answer any question shall be taken to do so without good cause unless —

(a) he is entitled to refuse to answer the question by virtue of section 6(1) of this Act or any other enactment, whenever passed, or on the ground of privilege; or

(b) the court in the exercise of its general discretion excuses him from answering it.

(6) In relation to the trial of a child *for homicide* the foregoing provisions of this section have effect subject to section 22(3) of this Act.

The changes these provisions would bring about in the law are as follows:

(a) The accused would no longer be regarded as entitled not to give evidence. Sub-clause (4) provides that the accused is not to be rendered compellable to give evidence on his own behalf, and accordingly he would not be guilty of contempt of court if he refused to give evidence. However, the accused's failure to give evidence would be highlighted in a particularly dramatic way. The judge, in the presence of the jury, is to formally call on the accused to give evidence, and explain that if he refuses to be sworn the jury may draw such inferences from his refusal as appear proper.

(b) Where a *prima facie* case is shown to exist against the accused and he refuses to give evidence, there being no reason relating to his physical or mental condition to justify that refusal, the court or jury 'may draw such inferences from the refusal as appear proper'. The present rule is that the judge, if he comments at all on the failure of the accused to give evidence, must make it clear to the jury that they are not entitled to treat the accused's silence as the equivalent of an admission of guilt. The draft clause provides that the jury are to be told they may draw whatever inferences they think proper.

(c) The accused's refusal to give evidence is to be treated as, or as capable of amounting to, corroboration.

(d) Where the accused refuses to give evidence the prosecutor, as well as the judge, may comment on this refusal.

I disagree with each of these proposed changes in the law. I shall deal with them in turn.

(a) The Committee justified these recommendations by saying:

> The intimation by the court will leave the accused under no mistake as to what will be his position. . . . We think that the formal calling on the accused to give

> evidence, followed by his refusal, would have value in demonstrating to the jury or magistrates that the accused had the right, and obligation, to give evidence but declined to do so.[56]

Before the publication of the Committee's Report Professor Cross had considered the subject of the accused's 'right to silence' in a lecture delivered to the Society of Public Teachers of Law.[57] Professor Cross dealt with the 'right' in scathing terms, describing it as 'a sacred cow obstructing the operation of common sense'.[58] The Criminal Law Revision Committee clearly saw itself as removing this 'right', and much of the subsequent debate has been in terms of 'the accused's right to silence'.[59]

It appears to me, however, that it is a mistake to treat the subject as involving primarily a question of whether the accused possesses or should possess a 'right to silence'. It is true that under present law the accused possesses a 'right' to remain silent in the sense that he is not compelled to give evidence. However, it is a 'right' which carries with it the danger that, if exercised, it may lead to his conviction of the offence with which he is charged. The same is true under the proposed new clause. The accused is not rendered a compellable witness; he cannot be prosecuted for contempt of court if he refuses to give evidence. The only difference is that the procedure advocated is designed to highlight to the jury his failure to give evidence, and therefore to increase the risk that he will be convicted of the offence with which he is charged if he declines to give evidence. It therefore seems to me to be better to discuss the matter not in terms of 'rights', but rather in terms of 'to what extent should adverse inferences be drawn against an accused because he fails to give evidence?'

(b) It is, of course, not possible to predict what inferences magistrates and juries might consider it proper to draw from the accused's failure to give evidence. However, having regard to the dramatic way in which the accused's failure to testify is to be highlighted to the jury, coupled with the removal of the prohibition on comment upon the accused's silence by the prosecutor, it appears likely that strong inferences adverse to the accused are likely to be drawn. A jury could well draw the conclusion that failure to give evidence is tantamount to an admission of guilt. This appears to me undesirable. Critics of the Report and draft Bill were quick to point out that a man may remain silent at his trial for reasons other than guilt.[60] He may be too frightened to give evidence, or believe that if he gives evidence he will make a bad witness. He may wish to hide conduct which, while not

[56] *Ibid.* para. 112.
[57] 'The Right to Silence and the Presumption of Innocence — Sacred Cows or Safeguards of Liberty?' (1970) 11 *Journal of the Society of Public Teachers of Law* 66.
[58] *Ibid.* 72.
[59] An exception is Griew E., 'Proposed Reforms of the Law of Evidence in Criminal Cases in England and Wales' (1972) 10 *University of Western Australia Law Review* 243, 245-7.
[60] Sir B. MacKenna, 'Criminal Law Revision Committee's Eleventh Report: Some Comments' [1972] *Criminal Law Review* 605, 620; Miller C. J., 'Silence and Confessions — what are they worth?' [1973] *Criminal Law Review* 343, 352-3.

criminal, is discreditable to him. These are valid points, and they are not met by saying, as Professor Cross does, that:

> The generalization upon which the various major premisses governing every item of circumstantial evidence are based are subject to rare exceptions, but this does not prevent Courts from acting on circumstantial evidence. . . . Innocent men do not normally keep out of the witness box, so the risk that one such man will occasionally court conviction by doing so is one which may legitimately be taken; we can console ourselves with the reflection that such a man would to a large extent be the architect of his own misfortunes.[61]

Perhaps the most notable fact about silence as an item of evidence is its inherent highly equivocal nature.[62] A man may remain silent at his trial for many reasons. Guilt is one of them, and probably the most common. But it is certainly not the only one. The present *status quo* in England, Western Australia, South Australia and Tasmania, appears to me to be a desirable compromise. It is recognized that silence possesses evidentiary value. However, because it is an item of evidence the weight of which is so difficult to assess, limits are placed upon the use that can be made of it. It may perhaps be that silence should be accorded greater weight than it is presently accorded. However, the Criminal Law Revision Committee does not establish, or even attempt to establish, such an argument.

(c) For similar reasons I disagree with the proposal to make silence capable of constituting corroboration. Those areas of law where corroboration is required, as a matter of law or as a matter of practice, all represent areas where the dangers of wrongful conviction are especially great. To permit an item of evidence as equivocal and uncertain as silence to satisfy the necessity for corroboration appears to me to involve considerable danger. I would, for example, be most uneasy at the prospect of a person being convicted of unlawful carnal knowledge where the only items of evidence against him were (i) the unsworn testimony of a 13 year old complainant,[63] and (ii) his own silence.

(d) I have already, when referring to the Queensland statutory provision, suggested that no good purpose appears to be served by permitting the prosecutor as well as the judge to comment on the accused's failure to give evidence.[64]

THE RIGHT TO MAKE AN UNSWORN STATEMENT

1. *Advantages of the Unsworn Statement*

The practice of permitting the accused to make an unsworn statement developed in the mid-nineteenth century to ameliorate the harshness of the

[61] Cross A. R. N., 'The Right to Silence and the Presumption of Innocence — Sacred Cows or Safeguards of Liberty?' *Journal of the Society of Public Teachers of Law* 66, 70.

[62] This point is well made in Heydon J. D., 'Silence as Evidence' (1974) 1 *Monash University Law Review* 53, 55.

[63] For there to be a conviction such evidence must be corroborated. Evidence Act 1958 (Vic.), s. 23(2); Crimes Act 1900 (N.S.W.), s. 418; Evidence Act 1929-69 (S.A.), s. 13(2); Children's Services Act 1965 (Qld.), s. 146; Evidence Act 1906-67 (W.A.), s. 101(2); Evidence Act 1910-67 (Tas.), s. 108(2).

[64] *Supra* 490.

rule precluding the accused from giving sworn testimony.[65] In England the right of an accused person to make an unsworn statement was specifically preserved when the accused was made a competent witness for the defence.[66] Similar provisions now exist in each of the Australian States, with the exception of Western Australia.[67]

The right to make an unsworn statement as an alternative to giving sworn evidence benefits the accused in two ways. First, it gives him the opportunity of putting his version of the facts before the jury without rendering himself subject to cross-examination. Such a right is obviously of benefit to a guilty accused who fears that his inadequate story will be exposed by cross-examination. It is, however, argued that the right also serves the function of giving innocent accused persons who are afraid to give evidence the opportunity of putting their version of the facts before the jury.

The second benefit which the right to make an unsworn statement confers upon the accused is that it enables him to attack the character of the prosecution witnesses without rendering admissible evidence of his own prior convictions or bad character. Each of the Australian jurisdictions has provisions equivalent to those contained in section 1(e) and 1(f) of the English Criminal Evidence Act 1898.[68] These provisions govern the extent to which an accused person who chooses to give evidence may be cross-examined on the subject of his disposition and character. The basic scheme of the legislation is as follows. The common law privilege against self-incrimination possessed by all witnesses is taken away from the accused who chooses to testify.[69] However a new privilege is conferred upon him. He 'shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character'.[70] This privilege is subject to limitations. The

[65] Wigmore J. H., *Evidence* (3rd ed., 1940) ii, 702, n. 5; Stephen J. F., *A History of the Criminal Law of England* (1883) i, 440-1.

[66] Criminal Evidence Act 1898, s. 1(h).

[67] Evidence Act 1958 (Vic.), s. 25; Crimes Act 1958 (Vic.), s. 399(g); Crimes Act 1900-74 (N.S.W.), s. 405; Evidence Act 1929-72 (S.A.), s. 18(viii); Criminal Code 1899 (Qld.), s. 618; Criminal Code (Tas.), s. 371(vi); Evidence Act 1910-67 (Tas.), s. 85(1)(h). In South Australia the right has been held not to exist in summary trials where the accused is represented by counsel. *Lavender v. Petherick* [1960] S.A.S.R. 108, *Ewens v. Burke* [1970] S.A.S.R. 557. The Queensland section provides for the making of an unsworn statement with the leave of the court. The practice of the Queensland courts is to grant such leave. *Supra* n. 9. In Western Australia although there is no specific statutory provision dealing with unsworn statements the courts do have a discretionary power to permit the accused to make such a statement. In practice such statements appear to be allowed only rarely. *Supra* n. 7.

[68] Crimes Act 1958 (Vic.), s. 399(d)(e); Crimes Act 1900-74 (N.S.W.), s. 413A; Evidence Act 1929-72 (S.A.), s. 18(v), (vi); Criminal Code 1899 (Qld.), s. 618A; Evidence Act 1906-67 (W.A.), s. 8(1)(d), (e); Evidence Act 1910-67 (Tas.), s. 85(1)(d), (e).

[69] Crimes Act 1958 (Vic.), s. 399(d); Crimes Act 1900-74 (N.S.W.), s. 413A(2); Evidence Act 1929-72 (S.A.), s. 18(v); Criminal Code 1899 (Qld.), s. 618A; Evidence Act 1906-67 (W.A.), s. 8(1)(d); Evidence Act 1910-67 (Tas.), s. 85(1)(d).

[70] Crimes Act 1958 (Vic.), s. 399(e); Crimes Act 1900-74 (N.S.W.), s. 413A(1); Evidence Act 1929-72 (S.A.), s. 18(vi); Criminal Code 1899 (Qld.), s. 618A; Evidence Act 1906-67 (W.A.), s. 8(1)(e); Evidence Act 1910-67 (Tas.), s. 85(1)(e).

privilege does not apply if such questions would be admissible in accordance with the principle in *Makin v. Attorney-General for New South Wales*[71] to prove the accused guilty of the offence with which he is charged.[72] The accused may lose the privilege if he attempts to establish his own good character, or if he gives evidence against a co-accused.[73] The privilege may also be lost if 'the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution'.[74] A great deal of case law exists on the meaning of this provision, which it is not necessary to analyse in the present context.[75] The rationale of this provision is basically the 'tit for tat' notion that if the accused sets out to blacken the character of the prosecutor or the witnesses for the prosecution it is fair that his own character should be exposed to the jury so that they can decide whom to believe.[76] Such a provision seems quite fair. However, the accused will escape the operation of this provision if he confines himself to the making of an unsworn statement, for these provisions all apply only where the accused gives sworn testimony. Thus an accused can, in the course of an unsworn statement, launch whatever attacks he might wish to against the character of the prosecutor and the witnesses for the prosecution without running the risk of evidence of his own bad character or prior convictions being adduced against him.[77]

2. *The Evidentiary Value of the Unsworn Statement*

Two approaches have been adopted when considering the probative value of an unsworn statement. It has been argued that an unsworn statement is something less than evidence and akin to the arguments of counsel. The argument suggests that while account may be taken of the accused's unsworn statement it should be rejected if it conflicts with sworn

[71] [1894] A.C. 57.

[72] Crimes Act 1958 (Vic.), s. 399(e)(i); Crimes Act 1900-74 (N.S.W.), s. 413A(1); Evidence Act 1929-72 (S.A.), s. 18(vi)(a); Criminal Code 1899 (Qld.), s. 618A(a); Evidence Act 1906-67 (W.A.), s. 8(1)(e)(i); Evidence Act 1910-67 (Tas.), s. 85(1)(e)(i).

[73] Crimes Act 1958 (Vic.), s. 399(e)(ii), (iii); Crimes Act 1900-74 (N.S.W.), ss. 413A(1), 413B; Evidence Act 1929-72 (S.A.), s. 18(vi)(b), (c); Criminal Code 1899 (Qld.), s. 618(b), (c); Evidence Act 1906-67 (W.A.), s. 8(1)(e)(ii), (iii); Evidence Act 1910-67 (Tas.), s. 85(1)(e)(ii), (iii).

[74] Crimes Act 1958 (Vic.), s. 399(e)(ii); Evidence Act 1929-72 (S.A.), s. 18(vi)(b); Criminal Code 1899 (Qld.), s. 618A(b); Evidence Act 1906-67 (W.A.), s. 8(1)(e)(ii); Evidence Act 1910-67 (Tas.), s. 85(1)(e)(ii). The Victorian sub-section provides that the permission of the trial judge must be obtained. On this point see *R. v. Brown* [1960] V.R. 382. The New South Wales equivalent of these provisions is in somewhat different form, and applies only where questions are asked of witnesses for the purpose of attacking their credibility. Crimes Act 1900-74 (N.S.W.), s. 413A(4). This difference does not affect the substantive point here being made.

[75] See Gobbo J. A., *Cross on Evidence* (Aust. ed., 1970) 442-50 and cases there cited. Note especially *Selvey v. D.P.P.* [1970] A.C. 304.

[76] Gobbo J. A., *op. cit.*, 448; *R. v. Preston* [1909] 1 K.B. 568, 575; *R. v. Jenkins* (1945) 31 C.A.R. 1, 14-15.

[77] *R. v. Butterwasser* [1948] 1 K.B. 4; *R. v. Thomas* (1956) 57 S.R. (N.S.W.) 292; *R. v. Franklin* (1957) 58 S.R. (N.S.W.) 18.

testimony.[78] It appears clear, however, that this view is incorrect. An unsworn statement is to be treated as part of the probative material which the jury have to consider along with all the other evidence in the case, giving such weight to the unsworn statement as they think appropriate. The point arose in the High Court case of *Peacock v. R.*[79] The accused was a medical practitioner who was alleged to have performed an unlawful abortion on a young woman. As a result of the abortion the woman contracted septicaemia and died. The accused was charged with murder on the basis of the felony murder rule as it was then understood.[80] The accused did not give evidence but made an unsworn statement. The trial judge directed the jury that they might treat such a statement as evidence and act upon it 'if it is not in conflict with any other evidence in the case, but where it is in conflict with any other evidence the jury should disregard it and act upon the sworn evidence'.[81] The trial judge further directed the jury that evidence connecting the accused with the removal of the deceased woman's body from the hospital where the operation was performed and the concealment of it amounted to evidence conflicting with the accused's unsworn statement. The accused was convicted and appealed to the High Court of Australia. It was held that the trial judge had mis-directed the jury. Griffith C.J. stated:

> The proper direction to be given, it seems to me, is this: that the jury should take the prisoner's statement as prima facie a possible version of the facts and consider it with the sworn evidence, giving it such weight as it appears to be entitled to in comparison with the facts clearly established by evidence. Instead of that the jury were advised that if they connected the accused with the concealment of the body they might infer that the appellant killed the deceased woman, and that if they drew that inference they might disregard his statement altogether. That was manifestly a wrong direction, and the conviction cannot stand.[82]

3. *Exercise of the Right to Make an Unsworn Statement*

An accused person making an unsworn statement may simply give a verbal account of his version of the facts, or he may prepare a written statement prior to the trial and read that statement to the jury.[83] He may, if

[78] *R. v. Morrison* (1889) 10 L.R. (N.S.W.) 197; *R. v. McKenna* [1951] St. R. Qd. 299; *R. v. Kerr* [1953] N.Z.L.R. 75; *Shankley v. Hodgson* [1962] Crim. L.R. 248.

[79] (1911) 13 C.L.R. 619.

[80] See Williams C. R., 'Unlawful Act Manslaughter' (1975) 1 *Monash University Law Review* 234, 252-3.

[81] (1911) 13 C.L.R. 619, 640-1.

[82] *Ibid.* 640-1. See also *R. v. Shimmin* (1882) 15 Cox C.C. 122; *R. v. Riley* (1940) 40 S.R. (N.S.W.) 111; *A.G. v. Riordan* [1948] I.R. 416; *R. v. Simpson* [1956] V.L.R. 490; *R. v. Masnec* [1962] Tas. S.R. 254; *R. v. Frost and Hale* (1964) 48 C.A.R. 284; *R. v. Avery* [1965] N.S.W.R. 1419; *R. v. Jansen* [1970] S.A.S.R. 531; *R. v. Raymond and Hoffman* [1974] 2 N.S.W.L.R. 677; *Barca v. R.* (1976) 50 A.L.J.R. 108. Note also Allen C. K., 'Unsworn Statements by Accused Persons' (1953) 69 *Law Quarterly Review* 22; Cowen Z. and Carter P. B., *Essays on the Law of Evidence* (1956) 205, 209-17. The unsworn statement of an accused person cannot, however, constitute evidence against a co-accused. *R. v. Kelly* (1946) 46 S.R. (N.S.W.) 344; *R. v. Evans* [1962] S.A.S.R. 303; *R. v. Phillips and Lawrence* [1967] St. R. Qd. 237; *R. v. Frost* [1969] Tas. S.R. 172; *R. v. Harbach* (1973) 6 S.A.S.R. 427.

[83] *R. v. Dunn and O'Sullivan* (1922) 17 C.A.R. 12; *Stuart v. R.* (1959) 101 C.L.R. 1; *R. v. Kilby* [1970] 1 N.S.W.R. 158.

he wishes, both make an unsworn statement and give sworn evidence.[84] Where this course is adopted the prosecution is not limited in cross-examination to those matters referred to by the accused in his sworn testimony.[85]

The accused is not completely free to say what he wishes in his unsworn statement. Although this requirement is normally interpreted quite liberally,[86] what he says must be relevant to the charges against him. In *R. v. Dunn and O'Sullivan* the two accused were anarchists charged with murder. The case against them was overwhelming, and they claimed the right to read to the jury an unsworn statement in which they did not deny their guilt but asserted a moral right to commit murder for political purposes. The trial judge refused to permit them to read the statement. They were convicted and appealed to the Court of Criminal Appeal where their convictions were upheld. Lord Chief Justice Hewart stated that '[t]he notion that the prisoner has an unqualified right to fix the limits of what he may say is one which it is impossible to admit'.[87] In *R. v. Kilby* the accused was charged with the rape of a young girl. At his trial he made an unsworn statement in which he sought to allege that the complainant had previously had intercourse with other men. Such evidence is normally regarded as insufficiently relevant to be admissible in such a case.[88] The trial judge refused to permit the making of these allegations. The accused was convicted and appealed to the New South Wales Court of Criminal Appeal, where his counsel argued that an accused person is entitled to assert whatever he wishes in an unsworn statement, provided only that what he asserts must not be 'outrageous' as well as irrelevant. The argument was rejected, the Court stating that 'a prisoner has not the right to make a statement from the dock which is not relevant to any issue in the case being tried'.[89]

Where it is desired to place a material object (a document, a tape recording, a photograph or the like) in evidence, the relevance of that material object must normally be established by sworn evidence.[90] Can a material object, which would be admissible if its relevance were to be established by sworn evidence, be admitted in evidence if the only attempt to establish its relevance is made by the accused in the course of his unsworn statement? An affirmative answer to this question was given by the Supreme

[84] The fact that the rights are correlative is specifically stated in the Victorian section. Although not expressly stated, the same is true in New South Wales, South Australia, Queensland, and Tasmania. See *R. v. Smith* (1896) 17 N.S.W.L.R. 104.

[85] *Brown v. R.* (1913) 17 C.L.R. 570, 575-7, 587-9, 600.

[86] *R. v. Dunn and O'Sullivan* (1922) 17 C.A.R. 12, 14-15; *R. v. Kilby* [1970] 1 N.S.W.R. 158, 159-60; *R. v. Wyatt* [1972] V.R. 902, 907.

[87] (1922) 17 C.A.R. 12, 15.

[88] *R. v. Holmes* (1871) L.R. 1 C.C.R. 334; *Stokes v. R.* (1960) 105 C.L.R. 279.

[89] [1970] 1 N.S.W.R. 158, 159. See also *R. v. Peacock* (1911) 33 A.L.T. 120, 132; *R. v. See Lun and Welsh* (1932) 32 S.R. (N.S.W.) 363, 374; *R. v. Wyatt* [1972] V.R. 902, 907.

[90] *R. v. Matthews and Ford* [1972] V.R. 1, 11.

Court of New South Wales in *R. v. See Lun and Welsh.*[91] The accused was alleged to have used a drum of inflammable material in order to start a fire. It was established that an oil drum of a certain kind had been purchased by the accused prior to the day of the fire and also that a similar drum had been found at the scene of the fire. The accused brought another similar drum into court, and the question arose whether, in the course of an unsworn statement, the accused was entitled to assert that the drum he brought into court was the one which he had purchased, and to have the drum examined by the jury. A majority of the Court held that he was so entitled.[92] A powerful dissent was delivered by Street C.J., who stated:

> The fact that an accused person cannot be examined upon his statement is in my opinion a very strong indication that all that the Legislature intended was that an accused person should be allowed to make a personal statement which the juror would be entitled to take into consideration for what it might be worth. If it is wished to supplement such a statement and to give it greater weight by producing and putting before the jury material objects referred to in it these must in my opinion be proved in evidence in the proper way.[93]

This question was considered by the Full Court of the Supreme Court of Victoria in *R. v. Wyatt.*[94] The accused was charged on a number of counts of unlawfully performing an abortion. The accused made an unsworn statement, and sought permission from the trial judge to play tape recordings to the jury as part of that unsworn statement. These recordings were said by the accused to be relevant to his failing to appear when the trial had first been set down for hearing. The recordings were of telephone conversations between the accused (impersonating a press reporter) and junior counsel for the prosecution. The trial judge refused to allow the tapes to be played to the jury. The accused was convicted and appealed, *inter alia*, on the ground that the trial judge had wrongfully refused him permission to play the tapes. The accused's conviction was upheld. The Full Court suggested that the tapes were inadmissible as irrelevant,[95] but rested its decision upon the ground that even if the tapes were relevant the accused had no right to have them played to the jury. The Court stated:

> To give the jury a document to read or a recording to hear is to employ a form of evidence and persuasion entirely distinct both from sworn oral evidence and from 'a statement of facts' according to the ordinary sense of that expression. It is a form of proof, moreover, which, in the absence of consent or admissions or other exceptional circumstances, is not permitted without sworn evidence first having been given that the necessary conditions exist to entitle the party tendering the document or recording to have it received in evidence and put before the jury.[96]

The Court considered *R. v. See Lun and Welsh* and expressed preference for the 'strongly persuasive' dissenting judgment of Street C.J.[97] The Court

[91] (1932) 32 S.R. (N.S.W.) 363.
[92] Davidson and James JJ.
[93] (1932) 32 S.R. (N.S.W.) 363, 370.
[94] [1971] V.R. 902.
[95] *Ibid.* 907.
[96] *Ibid.* 908.
[97] *Ibid.* 909.

did, however, state that while an accused possessed no right to put before the court in the course of an unsworn statement an unproved document or recording, he might, in appropriate cases, be 'permitted to do this by way of an indulgence'.[98]

The approach adopted in *R. v. Wyatt* appears preferable to that adopted by the majority in *R. v. See Lun and Welsh*. There seems to be no good reason why an accused who declines to give sworn evidence should be entitled, because he makes an unsworn statement, to have admitted into evidence material objects which would otherwise need to be supported by sworn testimony to be admissible. The qualification expressed by the Victorian Supreme Court, that the accused may be 'permitted' by the trial judge to have such objects admitted, would seem adequate to ensure that the normal requirements regarding the admissibility of material objects do not operate unduly harshly upon accused persons.

To what extent is the accused who makes an unsworn statement bound by the rules of evidence other than the rule of relevance? Can he, for example, make statements which infringe the hearsay rule or the opinion rule? In *R. v. McMahon* Higinbotham C.J. and Molesworth J. stated, *obiter*, that an accused person is not bound by the rules of evidence when making an unsworn statement.[99] In *R. v. Howard*[1] the New South Wales Court of Criminal Appeal adopted a different view. In the course of his unsworn statement the accused sought to refer to a letter written to him which corroborated a portion of his story. The Court held that as the letter was hearsay it could not be tendered in evidence, and the accused was not entitled to read its contents to the jury. Street C.J. stated:

> If the accused, instead of electing to make a statement from the dock, had elected to give evidence on oath, he would not have been entitled to bring before the jury hearsay statements contained in Logan's letter. A different course would have had to be taken. If then he could not have deposed to the statements contained in Logan's letter, if he had gone into the witness box, because they were mere hearsay statements, what greater right had he to insist on bringing them before the jury in a statement from the dock.[2]

The conflict between the views expressed in *R. v. McMahon* and *R. v. Howard* was referred to in *R. v. Wyatt*, and the point left open.[3] On principle, the reasoning adopted by Street C.J. in *R. v. Howard* would appear to be compelling. There seems no reason why an accused should, by making an unsworn statement, be able to avoid the operation of rules of evidence which would bind him if he were to give sworn evidence. As with the rule requiring that the accused confine himself to relevant matters it would, of course, be necessary for the rules of evidence to be applied flexibly in the case of an accused making an unsworn statement.

[98] *Ibid.* 910.
[99] (1891) 17 C.L.R. 335, 336, 339. Note also *R. v. Peacock* (1911) 33 A.L.T. 120, 132, 138.
[1] (1932) 32 S.R. (N.S.W.) 541.
[2] *Ibid.* 543-4.
[3] [1972] V.R. 902, 910.

4. *Judicial Comment on the Unsworn Statement*

In each of the Australian jurisdictions both the judge and the prosecutor are permitted to comment on the value of the accused's unsworn statement. With the exception of Queensland, however, the wise prosecutor will normally make no comment. This is because in these jurisdictions the prosecution is prohibited from commenting on the accused's failure to give sworn evidence, and there is always the danger that a permissible comment on the unsworn statement may easily become a prohibited comment on the fact that the accused has failed to give sworn evidence. More will be said about this shortly.

In Victoria comment by the judge on the failure of the accused to give sworn evidence is generally forbidden. However, such comment is permitted where 'the accused person elects to make a statement not on oath'.[4] The prohibition on comment upon the accused's silence by the prosecution remains.

The rules respecting comment on the accused's failure to give sworn evidence have already been dealt with.[5] These rules are equally applicable in the present context. Against any inferences which may be drawn from the accused's failure to give sworn evidence there must, however, be placed the weight of his unsworn statement. The trial judge should draw the jury's attention to the unsworn statement, instruct the jury as to its nature, and direct them to give it 'such weight as it appears to be entitled to'.[6]

A peculiar problem is posed by the New South Wales legislation. Section 407(2) of the Crimes Act 1900-1974 (N.S.W.) prohibits any comment by the judge or the prosecution on the failure of the accused to give sworn evidence. The judge is not prohibited from commenting on the fact that the accused makes an unsworn statement.[7] Indeed, he is required to give the jury a direction on the weight to be accorded to the unsworn statement.[8] However, this direction must be given with great care, since a permissible direction on the weight to be given to an unsworn statement can very easily become a prohibited comment on the failure of the accused to give sworn evidence. This risk is illustrated by *Bridge v. R.*[9] The two accused were charged with larceny of property belonging to the Department of Civil Aviation. Neither accused gave sworn evidence, but each made a brief unsworn statement denying his guilt. The trial judge's direction to the jury included the following statement:

[4] Crimes Act 1958 (Vic.), s. 399(b).
[5] *Supra* 482-3.
[6] *Peacock v. R.* (1911) 13 C.L.R. 619, 641.
[7] *R. v. McFarlane* (1907) 7 S.R. (N.S.W.) 149; *R. v. Bataillard* (1907) 4 C.L.R. 1282; *Jackson v. R.* (1918) 25 C.L.R. 113; *R. v. Corbett* (1931) 32 S.R. (N.S.W.) 93, 101; *R. v. Franklin* [1958] S.R. (N.S.W.) 18; *Bridge v. R.* (1964) 38 A.L.J.R. 280.
[8] *Bridge v. R.* (1964) 38 A.L.J.R. 280, 287.
[9] (1964) 38 A.L.J.R. 280. See also *R. v. McMillan* (1967) 87 W.N. (N.S.W.) 387; *R. v. Humphries* [1972] 2 N.S.W.L.R. 783.

> the statements are not on oath, they are made without the sanction of the oath from the dock, and under these circumstances they could not be asked a single question, they could not be cross-examined, they could not be asked any questions by the judge or anybody else after they had made these statements to you.[10]

The accused were convicted, and sought special leave to appeal to the High Court of Australia. By a majority of three to two the High Court took the view that the trial judge's words went beyond a comment upon the nature of, and the value to be accorded to, an unsworn statement and amounted to a comment on the failure of the accused to give sworn evidence.[11] Barwick C.J. stated:

> I think that these words would clearly contrast in the jury's minds what had happened in the procedure adopted with what might have happened in other circumstances. . . . This, to my mind, was not merely a comment on the weight of what the accused has said. It was calling attention to the position of the accused personally as being sheltered from interrogation by the course they had taken. In my opinion, this was a clear breach of the section — a comment on the failure of the accused to give evidence.[12]

Special leave to appeal was, however, refused on the ground that there had been no substantial miscarriage of justice.

The New South Wales provision is clearly unsatisfactory. As Windeyer J. observed in *Bridge* it 'is hard to see how in [directing the jury in respect of the accused's unsworn statement] the judge can ever be sure that his remarks do not amount to a comment on the failure of the accused to give evidence'.[13] It has already been argued that the judge should be permitted to comment on the failure of the accused to give sworn evidence.[14]

5. *The Case for Abolition of the Right to Make an Unsworn Statement*

In its Eleventh Report the Criminal Law Revision Committee recommended the abolition of the accused's right to make an unsworn statement. Their recommendation is embodied in clause 4(2) of the draft Bill accompanying the Report. That sub-clause provides:

> In any proceedings the accused shall not be entitled to make a statement without being sworn, and accordingly, if he gives evidence, he shall do so on oath and be liable to cross-examination; but this subsection shall not affect the right of the accused, if not represented by counsel or a solicitor, to address the court or jury otherwise than on oath on any matter on which, if he were so represented, counsel or a solicitor could address the court or jury on his behalf.

The latter part of the sub-clause simply preserves the accused's right to act as his own counsel in cases in which he is unrepresented.

The suggestion that the accused's right to make an unsworn statement ought to be abolished had been made by both Judges and academic writers on many occasions prior to the Eleventh Report of the Criminal Law

[10] (1964) 38 A.L.J.R. 280, 281.
[11] Barwick C.J., Menzies and Owen JJ., McTiernan and Windeyer JJ. strongly doubting.
[12] (1964) 38 A.L.J.R. 280, 283.
[13] *Ibid.* 287.
[14] *Supra* 490.

Revision Committee.[15] Those favouring abolition of the right argue that the two advantages which the unsworn statement confers upon an accused are unwarranted advantages. The unsworn statement enables the accused to give his version of the facts without rendering himself liable to cross-examination. It is not, it is argued, unreasonable to require that an accused who takes the opportunity of putting his version of the facts before the jury be required to submit to questioning in respect of the account of the facts which he has put forward. The unsworn statement also allows the accused to attack the character of the prosecution witnesses without rendering admissible evidence of his own prior convictions or bad character. It is argued that an accused should not be able to attack the character of prosecution witnesses while remaining totally immune from attacks upon his own character. Both these arguments were accepted by the Criminal Law Revision Committee,[16] and it is clear that they have considerable force.

The basic argument in favour of the existence of the right to make an unsworn statement is that the right assists the accused who, through ignorance or other shortcoming, might be unable to give a good account of himself under cross-examination.[17] This argument did not find favour in New Zealand, where the right was abolished in 1966.[18] In Australia it has been advanced with more success. The matter was considered in a report by a sub-committee of the Victorian Chief Justice's Law Reform Committee in 1970. That report recommended retention of the right, and this recommendation was adopted by the Chief Justice's Law Reform Committee.[19] In New South Wales in 1974 an attempt was made to abolish the right. Abolition was provided for by clause 8 of the New South Wales Crimes and Other Acts (Amendment) Bill 1974. However, this provision was deleted from the Bill in the Legislative Council.[20] The remainder of the Bill was enacted as the Crimes and Other Acts (Amendment) Act 1974 (N.S.W.).

It is submitted that the argument of those who favour retention of the accused's right to make an unsworn statement is unconvincing. First, there appears to be no justification for assuming, as the argument does, that the jury will not be capable of distinguishing between an accused who does

[15] See *e.g.*, *R. v. McKenna* [1951] St. R. Qd. 299, 305, 308; *Kerr v. R.* [1953] N.Z.L.R. 75, 78; *Masnec v. R.* [1962] Tas. S.R. 254, 259; *R. v. Burles* [1964] Tas. S.R. 256, 259; Williams G. L., *The Proof of Guilt* (3rd ed., 1963) 71-2; Cowen Z. and Carter P. B., *Essays on the Law of Evidence* (1956) 205, 217-18; Gobbo J. A., *Cross on Evidence* (Aust. Ed., 1970) 201, 425.

[16] Paras. 103, 104.

[17] Gobbo J. A., *Cross on Evidence* (Aust. Ed., 1970) 200; Miller C. J., 'Silence and Confessions — What are they worth?' [1973] *Criminal Law Review* 343, 352-3.

[18] Crimes Amendment Act 1966 (N.Z.), s. 5.

[19] I am grateful to Professor P. L. Waller of the Faculty of Law, Monash University, for providing me with a copy of the report of the sub-committee and the minutes of the meeting of the full committee.

[20] New South Wales, *Parliamentary Debates*, Legislative Council, 27 March 1974, 2015-23.

poorly under cross-examination because he suffers from limited intellectual ability or other personal defect, and an accused who shows up poorly under cross-examination because he is guilty. Further, it must be remembered that the prosecution plays a less partisan role than does defence counsel. The prosecutor's duty is not to secure a conviction, but to present the crown case in a manner fair to the accused.[21] It must also be remembered that a trial judge possesses an overriding discretion to ensure that the accused receives a fair trial.[22] As part of this general discretion a trial judge may control the prosecutor in his cross-examination.[23] A trial judge would almost certainly be able to recognize cases in which a prosecutor was taking unfair advantage of an accused's inability to cope with cross-examination. In such a case the trial judge would be bound to direct the prosecutor to conduct his cross-examination in a fairer manner.

CONCLUSION

Two recommendations are put forward in this article. First, it is suggested that where the accused chooses not to give sworn evidence the trial judge should be entitled to comment on this fact to the jury. This is presently the position in England, South Australia, Queensland, Western Australia and Tasmania. In New South Wales comment is prohibited totally, and in Victoria the judge may comment on the accused's failure to give sworn evidence only if the accused makes an unsworn statement. It has been shown that the silence of an accused person at his trial possesses evidentiary value. It has also been shown that the evidentiary value of silence is particularly difficult to assess, and that rules have developed concerning the inferences which both may and may not be drawn from silence. It is clear that a jury is bound to draw some inferences against an accused person from the fact that he fails to give sworn evidence. This being so then it would seem to be greatly preferable that the trial judge be permitted to direct the jury both as to those inferences they may and those inferences they may not draw from an accused's silence.

The approach adopted in Queensland of permitting the prosecutor as well as the judge to comment on the failure of the accused to give sworn evidence was considered and found to be unduly favourable to the prosecution. The recommendations on this matter contained in the Eleventh Report of the English Criminal Law Revision Committee were considered at length, and it was suggested that all of the recommended changes in the law were undesirable. The basic fallacy underlying the recommendations was that of conferring unduly high probative value on an item of evidence which is of its nature extremely equivocal and difficult to assess.

[21] See Humphries C., 'The Duties and Responsibilities of Prosecuting Counsel' [1955] *Criminal Law Review* 739, 740-1, 746.

[22] See *e.g., R. v. Christie* [1914] A.C. 545, 559; *Noor Mohamed v. R.* [1949] A.C. 182, 192; *Harris v. D.P.P.* [1952] A.C. 694, 707; *R. v. List* [1965] 3 All E.R. 710, 711; *R. v. Ireland* (1970) 44 A.L.J.R. 263, 268.

[23] *R. v. Baldwin* (1925) 18 C.A.R. 175; *R. v. Eidinow* (1932) 23 C.A.R. 145.

The second recommendation is that the right of an accused person to make an unsworn statement ought to be abolished. This is the view adopted in the Eleventh Report of the Criminal Law Revision Committee. The right to make an unsworn statement presently exists in England and each of the Australian States except Western Australia. It was suggested that where an accused person takes the opportunity of putting his version of the facts before the court it is not unreasonable that he be required to submit himself to cross-examination about those facts. It was further suggested that the accused should not be able, by confining himself to the making of an unsworn statement, to attack the credit of the prosecution witnesses without rendering admissible evidence affecting his own credit. The argument that the right to make an unsworn statement is necessary to protect the innocent accused who is unable to withstand cross-examination was considered and found unconvincing. It was suggested that this argument does not give sufficient emphasis to the traditional non-partisan role of prosecuting counsel or to the power of the trial judge to use his discretion to ensure that the accused receives a fair trial.[24]

[24] I am grateful to Professor P. G. Nash and Professor P. L. Waller of the Faculty of Law, Monash University, for reading this article and for their comments and criticisms.