

PATHS OF REASONING TOWARDS GUILT: THE PRINCIPLED LIMITS OF DRAWING ADVERSE INFERENCES FROM UNEXPLAINED CIRCUMSTANCES IN CRIMINAL TRIALS

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In criminal trials, drawing adverse inferences from an accused's failure to explain incriminating circumstances is a relatively rare phenomenon. But the principles pertaining to this phenomenon are nevertheless significant because they are connected to questions of paramount importance, namely, fairness to defendants in criminal trials. This article examines three separate but related classes of adverse inferences in order to understand the nature of those inferences and whether their application is unfair. By synthesising the reasoning behind each of them, this article concludes that these inferences are only capable of confirming an inference of guilt that is already available on the evidence, the significance of this being that (1) a Crown case is not unfairly strengthened by permitting reasoning using these principles and (2) 'expecting' an accused to explain and drawing one of the applicable inferences under consideration where they fail to do so does not erode the tenets of accusatorial and adversarial criminal trials and thereby cause unfairness to an accused.

I INTRODUCTION

Criminal trials in Australia are not only adversarial, they are accusatorial as well.¹ An accused is presumed innocent, and is entitled to demand that the prosecution positively produce evidence to prove the accusations made against them beyond reasonable doubt.² In discharging its onus, the prosecution 'cannot compel the accused to assist it in *any way*'.³ Accordingly, there is generally no

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1 *Hofer v The Queen* (2021) 274 CLR 351, 361–2 [29] (Kiefel CJ, Keane and Gleeson JJ) ('*Hofer*').

2 *Woolmington v DPP (England and Wales)* [1935] AC 462, 481–2 (Viscount Sankey); *R v Bathurst* [1968] 2 QB 99, 107–8 (Lord Parker CJ).

3 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1992) 178 CLR 477, 527 (Deane, Dawson and Gaudron JJ) (emphasis added) ('*Caltex*').

expectation that an accused will give evidence, and no obligation upon an accused to explain anything.⁴

The ‘discovery and vindication and establishment of truth’,⁵ at least in the sense of arbitrating ‘a contest between parties who assert different versions of the truth’, are central foci of the criminal trial process.⁶ The drawing of reasonable inferences, including inferences of guilt, by juries is an ordinary incident of that process. But allowing a jury to draw adverse inferences from an accused’s failure to explain allegedly incriminating evidence is especially fraught with danger.⁷ This is because such failures naturally give rise to dangerous reasoning methods that are premised on the notion that innocent individuals would be expected to refute any allegations against them, and so it can be inferred from an accused’s failure to do so that they are guilty.⁸

For this reason, and because of the effect of the burden of proof and presumption of innocence, criminal defendants are generally immune from having adverse inferences drawn against them from their failure to give evidence at trial except in very limited circumstances.⁹ In those limited circumstances, allowing such inferences to be drawn where an accused’s silence leaves evidence unexplained raises questions about whether such inferences undermine the key tenets of the accusatorial and adversarial trial, namely that an accused is presumed innocent, and the onus to discharge the burden of proof rests with the prosecution.¹⁰

But at the same time, ‘silence can be probative and form the basis for natural, reasonable, and fair inferences’.¹¹ It must therefore also be appreciated that, without adequate instructions in the limited circumstances in which adverse inferences of this nature are permitted, juries are susceptible to misunderstanding the permissible modes of reasoning that can be employed to draw these inferences. Problematically, the application of those inferences remains fraught with risk due to the possibility that a jury will reason prejudicially from an accused’s silence, provoking judges and prosecutors to be disinclined to explain to juries the permissible reasoning that

4 *RPS v The Queen* (2000) 199 CLR 620, 632–3 [27] (Gaudron ACJ, Gummow, Kirby and Hayne JJ) (‘RPS’); *GBF v The Queen* (2020) 271 CLR 537, 547 [23] (Kiefel CJ, Bell, Keane, Gordon and Edelman JJ); Andrew Ligertwood and Gary Edmond, *Australian Evidence: A Principled Approach to the Common Law and Uniform Acts* (LexisNexis Butterworths, 6th ed, 2017) 538 [5.122].

5 *Pearse v Pearse* (1846) 1 De G & Sm 12; 63 ER 950, 957 (Knight-Bruce V-C).

6 Justice Stephen Gageler, ‘Evidence and Truth’ (2017) 13(3) *Judicial Review* 249, 252.

7 JJ Spigelman, ‘The Truth Can Cost Too Much: The Principle of a Fair Trial’ (2004) 78(1) *Australian Law Journal* 29, 39; Yvonne Marie Daly, ‘The Right to Silence: Inferences and Interference’ (2014) 47(1) *Australian and New Zealand Journal of Criminology* 59, 73 <<https://doi.org/10.1177/0004865813497732>>.

8 *R v Sparrow* [1973] 2 All ER 129, 133 (Lawton LJ); Justice GL Davies, ‘The Prohibition Against Adverse Inferences from Silence: A Rule without Reason?’ (2000) 74(1) *Australian Law Journal* 26, 36; Kent Greenawalt, ‘Perspectives on the Right to Silence’ in Roger Hood (ed), *Crime, Criminology, and Public Policy: Essays in Honour of Sir Leon Radzinowicz* (Free Press, 1974) 235, 245.

9 *R v Director of Serious Fraud Office; Ex parte Smith* [1993] AC 1, 30–1 (Lord Mustill) (‘*R v Director of Serious Fraud Office*’).

10 Catherine Eakin, ‘RPS v R: The Resilience of the Accused’s Right to Silence’ (2000) 22(4) *Sydney Law Review* 669, 669.

11 *R v Noble* [1997] 1 SCR 874, 888 [15] (Lamer CJ) (‘*Noble*’).

is available in this context.¹² As one commentator put it, prosecutors and judges are reluctant to rely upon these kinds of inferences despite their availability because they are ordinarily ‘not prepared to accept the risk of a successful appeal’ on the ground that such an inference was inappropriately drawn.¹³

Against this background, this article aims to examine and clarify existing principles as to the permissible limits of drawing certain adverse inferences from an accused’s failure to explain incriminating evidence at trial. This is done in order to contribute to the literature on this topic by vindicating the claim that a Crown case is not unfairly strengthened, so as to undermine the presumption of innocence or burden of proof, by juries drawing adverse inferences from an accused’s failure to explain as a result of trial judges explaining to them permissible modes of reasoning from such failures. Three kinds of adverse inferences are examined in order to demonstrate that no such unfairness arises because, as those inferences illustrate, in certain limited circumstances a failure to explain is only capable of confirming an inference of guilt that is already available from the Crown’s evidence.

Further, because a guilty inference must already be available, the common precursor to the availability of the three inferences presently under consideration is the casting of a ‘tactical burden’ onto the accused, and, as this article explains, it is the accused’s failure to discharge that burden which permits the relevant inference to be drawn. This article develops this point, and contributes to the literature by exploring whether the consequences of that tactical burden practically compel an accused to give evidence or suffer the adverse inferences in question, thereby generating unfairness. Ultimately, this article concludes that while there remains a degree of tension between the casting of that tactical burden in the manner discussed and the tenets of an accusatorial trial, that tension is largely resolved by the requirement common to all three inferences (as will be discussed) that the prosecution present a sufficiently strong case before these inferences become available. To that end, this article argues that trial judges should not refrain from providing juries with instructions about drawing those inferences where they are warranted, as there is no risk that these instructions (assuming they are provided without error) will occasion unfairness to the accused. However, it is not argued that adverse inferences of this nature should be used in all types of criminal trials where an accused does not give evidence or otherwise fails to explain. Rather, judges should be more willing to carefully explain to juries the principles pertaining to these inferences in the limited circumstances in which they are properly warranted and applicable, which this article will explore.

12 Jill Hunter et al, *The Trial: Principles, Process and Evidence* (Federation Press, 2nd ed, 2021) 19; Roger Leng, ‘Silence in Court: From Common Sense to Common Law’ (2002) 6(1) *International Journal of Evidence and Proof* 62, 67 <<https://doi.org/10.1177/136571270200600104>>; Rosemary Pattenden, ‘Silence: Lord Taylor’s Legacy’ (1998) 2(3) *International Journal of Evidence and Proof* 141, 162 <<https://doi.org/10.1177/13657127980200301>>.

13 Mark Tedeschi, ‘Is Weissensteiner Dead? High Court Charts a New Direction in *Strbak v The Queen*’ [2020] 67 *Law Society Journal* 86, 87. See also Abenaa Owusu-Bempah, ‘Silence in Suspicious Circumstances’ [2014] 2 *Criminal Law Review* 126, 128.

In particular, as foreshadowed above, the scope of this article will be limited to three interrelated categories of adverse inferences, the commonalities of which have not yet been considered together in literature:

1. The ‘*Weissensteiner* principle’ – that inferences the prosecution seeks to have the jury draw which are otherwise available from proved facts can be drawn more safely where an accused fails to provide ‘additional facts’ of which they have exclusive knowledge that would explain or contradict those inferences.¹⁴
2. ‘[I]nferences arising from objective evidence’ – these are a class of inference arising in circumstances where certain evidence obviously suggests a particular state of affairs, and which makes it incumbent on the accused, as a practical matter, to provide a satisfactory explanation.¹⁵ The archetypal example of this is evidence of recent possession of stolen property, which this article will focus on.
3. The possible inferences arising in wholly circumstantial cases akin to *R v Baden-Clay* (‘*Baden-Clay*’).¹⁶ These are adverse inferences which may be drawn against an accused who is the only source of hypotheses consistent with innocence in entirely circumstantial cases where that accused gives evidence which is disbelieved, or they disavow particular innocent hypotheses, or both. These will be termed the ‘*Baden-Clay* inferences’ and considered in more detail in Part III(C).

This article also seeks to contribute to the literature by examining and expositing the ‘*Baden-Clay* inferences’, which is a topic that has received little academic or judicial attention. As will be explored in Part III(C), these inferences are derived from settled evidentiary principles. However, the situations in which the relevant principles may operate concurrently to an accused’s detriment remain largely unexplored, owing to the rare and confined circumstances which justify their application. The nature of the ‘*Baden-Clay* inferences’ and their potential availability for a jury therefore warrants further careful consideration.

Part II briefly examines the right to silence and its different manifestations. Part III thematically synthesises the three inference categories above in order to articulate and interrogate the reasoning processes involved in each category and their limits. Part IV considers the implications of properly understanding these reasoning processes in relation to the features of an adversarial and accusatorial trial. It argues that those features are not eroded or curtailed by the drawing of the three types of adverse inferences discussed because they do not unfairly strengthen

14 *Weissensteiner v The Queen* (1993) 178 CLR 217 (‘*Weissensteiner*’); *Azzopardi v The Queen* (2001) 205 CLR 50, 72 [58] (Gaudron, Gummow, Kirby and Hayne JJ) (‘*Azzopardi*’); *R v McEwan* [2019] QCA 16, [26] (Brown J) (‘*McEwan*’); Andrew Palmer, ‘Silence in Court: The Evidential Significance of an Accused Person’s Failure to Testify’ (1995) 18(1) *University of New South Wales Law Journal* 130, 134; Soraya Ryan, ‘Whatever Happened to Weissensteiner: The Person and the Principle?’ (Speech, University of Queensland Law School, 22 March 2018) 2.

15 *Weissensteiner* (n 14) 243 (Gaudron and McHugh JJ); *R v Wood* (1911) 7 Cr App R 56 (‘*Wood*’); *R v McNamara* [1987] VR 855, 860 (Young CJ, Newton and Kaye JJ); Palmer (n 14) 135; JD Heydon, *Cross on Evidence* (LexisNexis, 12th ed, 2020) 35–6 [1200].

16 (2016) 258 CLR 308 (‘*Baden-Clay*’).

the Crown case, nor undermine those features by imposing a tactical burden on the accused. Part V concludes.

II RIGHT TO SILENCE

The starting point for considering what inferences may be drawn from an accused's failure to explain incriminating evidence is the notion that the right to silence is a fundamental common law right, which is an aspect of the privilege against self-incrimination.¹⁷ Although the term 'right to silence' denotes a singular right, it is more accurately described as a collection of substantive and procedural rules and principles.¹⁸ For present purposes, the relevant immunities possessed by accused persons undergoing trial are: (1) an immunity from being compelled to give evidence; and (2) an immunity generally from having adverse comments made on their failure to give evidence at trial (except in certain exceptional circumstances).¹⁹ Those immunities find their origins in the fundamental criminal law principle that 'the onus of proving a criminal offence lies upon the prosecution', and consequently the prosecution cannot compel the accused to assist it in discharging that onus.²⁰

If that is truly so, this gives rise to the question of how that is congruous with the notion that there are circumstances in which a jury may permissibly draw legitimate adverse inferences against an accused where they remain silent at trial. The permissibility of at trial adverse inferences also sits uncomfortably with the notion that adverse inferences generally cannot be drawn from pre-trial silence, particularly where an accused relies on their right to silence in the context of police questioning, as embodied at common law and under statute in section 89 of the *Uniform Evidence Acts*. There are, however, limited circumstances in which adverse inferences can be drawn from pre-trial silence in some jurisdictions. For example, unique to New South Wales is section 89A of the *Evidence Act 1995* (NSW), which allows 'unfavourable inferences' to be drawn where, during official questioning by police, an accused fails or refuses to mention a fact that they could reasonably have been expected to mention and that is relied on in their defence. That provision prescribes a number of stringent conditions before such an inference can be drawn.²¹ While an in-depth consideration of adverse inferences from pre-trial silence and the differential treatment given to pre-trial and at trial silence are beyond the scope of this article, something ought to be said about the conceptual distinction between the substantial limitations ordinarily placed on

17 *R v Sang* [1980] AC 402, 436 (Lord Diplock); Ligertwood and Edmond (n 4) 535 [5.117].

18 *Tofilau v The Queen* (2007) 231 CLR 396, 409 [20] (Gleeson CJ); *R v CB* (2011) 291 FLR 113, 142 [96] (McClellan CJ at CL).

19 *R v Director of Serious Fraud Office* (n 9) 30–1 (Lord Mustill); *R v Seller* (2012) 269 FLR 125, 152 [152] (Garling J).

20 *Caltex* (n 3) 527 (Deane, Dawson and Gaudron JJ).

21 For detailed consideration of section 89A, see Patrick Ryan, 'Assessing Pre-trial Silence: The Logic, Construction and Utility of Section 89A of the *Evidence Act 1995* (NSW)' (2025) 48(1) *University of New South Wales Law Journal* 166 <<https://doi.org/10.53637/YNLJ8685>>.

drawing adverse inferences from pre-trial silence compared with the permissibility of drawing such inferences from at trial silence.

In *Petty v The Queen*, the majority of the High Court stated in the context of pre-trial police questioning:

A person who believes on reasonable grounds that he or she is suspected of having been a party to an offence is entitled to remain silent when questioned or asked to supply information by any person in authority ... no adverse inference can be drawn against an accused person by reason of his or her failure to answer such questions or to provide such information. To draw such an adverse inference would be to *erode the right of silence or to render it valueless*.²²

If that is so, why does drawing adverse inferences from at trial silence not ‘erode the right of silence’?

The distinction between how the two kinds of silence are treated and the appropriateness of drawing inferences from one and not the other stems from the fact that, as canvassed above, the so-called ‘right to silence’ is not a single ‘right’ but a collection of principles and rules.²³ The ‘right to silence’ has different manifestations and is therefore treated differently depending on what stage of criminal proceedings it is exercised. The distinction between drawing inferences from pre-trial and at trial silence is justified because the former kind of silence falls to be exercised where a suspect’s rights are not immediately amenable to judicial protection and when the suspect ‘is in a much more vulnerable position against the coercive power of the state’ whereas the latter relates to a setting where the accused is assured of fairness and knows the case they have to meet as well as the nature and strength of the prosecution’s evidence.²⁴ Prohibiting adverse inferences to be drawn from pre-trial silence has the rationale of preventing oppression by police or other State authorities, and the prohibition is not ‘designed to preclude a jury from drawing inferences from silence when a response might reasonably have been expected’.²⁵ It follows that because the ‘right to silence’ is a collection of different immunities, the protection given to an accused in relation to pre-trial silence does not necessarily apply to another aspect of the ‘right to silence’, being the right to silence at trial, to which different considerations apply.²⁶

As will become apparent from the three classes of adverse inferences that are the subject of consideration in this article, despite the differential treatment given to different manifestations of the right to silence, at trial silence is not evidence in itself, and can only be used to assist in the evaluation of other evidence or inferences arising from other evidence where that silence has logical evidentiary significance.²⁷ But even if the accused is free from ‘direct’ punishment in making the choice not to explain incriminating evidence, is the effect of drawing the adverse

22 (1991) 173 CLR 95, 99 (Mason CJ, Deane, Toohey and McHugh JJ) (emphasis added) (*‘Petty’*).

23 *R v Director of Serious Fraud Office* (n 9) 30–1 (Lord Mustill).

24 *R v Crawford* [1995] 1 SCR 858, 877 [25] (Sopinka J); *Weissensteiner* (n 14) 231–2 (Brennan and Toohey JJ). See also Patrick Ryan (n 21) 173.

25 *Petty* (n 22) 107 (Brennan J).

26 Stephen J Odgers, ‘Criminal Cases in the High Court of Australia: *Weissensteiner*’ (1994) 18 *Criminal Law Journal* 163, 164.

27 Scott Henchcliffe, ‘The Silent Accused at Trial: Consequences of an Accused’s Failure to Give Evidence in Australia’ (1996) 19(1) *University of Queensland Law Journal* 137, 146.

inferences under consideration to essentially strengthen the Crown's case (hence undermining the presumption of innocence and lowering the burden of proof) if the consequences of making that choice are adverse to an accused's interests?²⁸ Attempting any exposition of this question requires consideration of the exact reasoning processes a jury may permissibly utilise to draw adverse inferences when an accused fails to explain incriminating evidence.

III CLASSES OF ADVERSE INFERENCES

A *Weissensteiner* Principle

The '*Weissensteiner* principle' refers to the proposition that in certain 'rare and exceptional' circumstances,²⁹ the common law permits trial judges to comment to a jury that it may more safely infer guilt from incriminating evidence if an accused does not provide an explanation for that evidence that is consistent with innocence.³⁰ The reasoning involved in invoking a *Weissensteiner* comment proceeds from the premise that the accused 'not only *could* shed light on the [incriminating evidence] but also *would* ordinarily be expected to do so'.³¹

The facts of *Weissensteiner v The Queen* ('*Weissensteiner*') are illustrative of when an accused may be 'expected' to provide such an explanation. In that case, Weissensteiner set off on a voyage with two others on a custom-made boat belonging to one of them. The two others were not seen again. Weissensteiner remained in possession of the boat and sailed around the Pacific, during which time he told a series of inconsistent stories about the identity of the boat's owner and the whereabouts of the missing persons. He was ultimately apprehended and charged with two counts of murder. There was no direct evidence as to what happened to the two missing persons or direct evidence implicating Weissensteiner in their disappearance. The evidence against him was entirely circumstantial and inferences were required to be drawn from that evidence to prove that the two were dead, as well as to link Weissensteiner to their deaths.³²

The prosecution raised a strong case against Weissensteiner based on, inter alia, his unexplained possession of the boat from which the two missing persons had disappeared inexplicably while on a voyage with him. Only Weissensteiner knew what had really happened to his missing companions, and accordingly he was the only person who could provide an exculpatory explanation for the evidence which implicated him in their murders. He failed to do so, and the trial judge made a comment that the inference that Weissensteiner murdered his companions could therefore be more safely accepted. That comment was held to be permissible by a majority of the High Court on the basis that, while failing to give evidence cannot itself be capable of assisting the prosecution's case, the evidence adduced by the

28 Ligertwood and Edmond (n 4) 535 [5.117].

29 *Azzopardi* (n 14) 75 [68] (Gaudron, Gummow, Kirby and Hayne JJ).

30 Soraya Ryan (n 14) 2.

31 *RPS* (n 4) 632 [25] (Gaudron ACJ, Gummow, Kirby and Hayne JJ) (emphasis in original).

32 *Weissensteiner* (n 14) 220–2 (Mason CJ, Deane and Dawson JJ).

prosecution may be evaluated in light of an accused failing to provide facts which are within their exclusive knowledge.³³

The majority considered that juries may use an accused's failure to offer evidence of hypotheses consistent with innocence to evaluate the prosecution's evidence in cases where an accused has exclusive knowledge of facts that may explain or contradict that evidence.³⁴ For Mason CJ, Deane and Dawson JJ, this was because 'in a criminal trial, hypotheses consistent with innocence may cease to be rational or reasonable in the absence of evidence to support them when that evidence, if it exists at all, must be within the knowledge of the accused'.³⁵

Their Honours drew a distinction, albeit a fine one, between

drawing an inference of guilt merely from silence and drawing an inference otherwise available more safely simply because the accused has not supported any hypothesis which is consistent with innocence from facts which the jury perceives to be within his or her knowledge.³⁶

However, while not overruling *Weissensteiner*, the subsequent cases of *RPS v The Queen* ('RPS') and *Azzopardi v The Queen* ('Azzopardi') have so severely restricted its effect that a *Weissensteiner* comment is only applicable where

there are additional facts which would explain or contradict the inference which the prosecution seeks to have the jury draw, and they are facts which (if they exist) would be peculiarly within the knowledge of the accused ... The facts which it is suggested could have been, but were not, revealed by evidence from the accused must be additional to those already given in evidence ...³⁷

RPS and *Azzopardi* both originated from a *Uniform Evidence Law* jurisdiction. Legislation in those jurisdictions permits judges to comment on the failure of an accused to give evidence but such comments are prohibited from directly or indirectly suggesting that the accused did not give evidence because they were, or believed that they were, guilty.³⁸ The principles espoused in *RPS* and *Azzopardi* nevertheless apply equally in jurisdictions where there is no statutory prohibition on such comments.³⁹

The consequence of this line of authority is that *Weissensteiner* was never intended to be a principle having general application to all cases where an accused does not give evidence. A *Weissensteiner* comment will only be warranted in the 'rare and exceptional'⁴⁰ situation where the circumstances of a case are effectively analogous to *Weissensteiner* itself.⁴¹ Those circumstances, in the words of the majority in *Azzopardi*, are where the accused knows of

33 Ibid 227–9 (Mason CJ, Deane and Dawson JJ), 235–6 (Brennan and Toohey JJ).

34 Ibid 228–9 (Mason CJ, Deane and Dawson JJ), 235 (Brennan and Toohey JJ).

35 Ibid 227–8 (Mason CJ, Deane and Dawson JJ).

36 Ibid 229 (emphasis added).

37 *Azzopardi* (n 14) 74 [64] (Gaudron, Gummow, Kirby and Hayne JJ) (emphasis omitted).

38 See, eg, *Evidence Act 1995* (NSW) s 20; *Evidence Act 1995* (Cth) s 20; *RPS* (n 4) 629–30 [20] (Gaudron ACJ, Gummow, Kirby and Hayne JJ). Cf *Jury Directions Act 2015* (Vic) s 42, which statutorily precludes the making of *Weissensteiner* comments in Victoria.

39 See, eg, *R v Bevin* [2008] QCA 310, [38] (Cullinane J).

40 *Azzopardi* (n 14) 75 [68] (Gaudron, Gummow, Kirby and Hayne JJ).

41 Ligertwood and Edmond (n 4) 544–5 [5.131].

facts which explained or contradicted the evidence against the accused, [and] they were facts which were within the knowledge only of the accused, and thus could not be the subject of evidence from any other person or source ... What is important is that the accused, and *only the accused, can shed light on what happened*, not just by making a sworn denial of the allegation but *by giving evidence of facts which, if they exist, would explain or contradict the evidence tendered by the prosecution*.⁴²

Nevertheless, because the default position is that an accused cannot be expected to give evidence, several relatively onerous preconditions must be satisfied before an ‘expectation’ on the accused to provide an explanation for incriminating evidence arises and a *Weissensteiner* comment can be properly made.

First, the prosecution’s case must be wholly circumstantial.⁴³ This means it must rely on drawing inferences from established facts in circumstances where ‘the truth is not easily ascertainable by the Crown’.⁴⁴ The principal issue a jury must consider here is whether it can eliminate hypotheses consistent with innocence because exculpatory facts which would support them were not the subject of evidence, as opposed to considering whether direct evidence persuades them of the offence’s elements to the requisite standard.⁴⁵ In the latter case, an accused cannot give evidence of any additional exculpatory evidence that might explain or contradict the prosecution’s evidence because the question of whether direct evidence should be accepted does not depend on the jury inferring that any facts or hypotheses exist which were not the subject of evidence.⁴⁶

Secondly, and following from this, at trial silence can only become significant if a sufficiently strong case exists independently of the accused’s silence.⁴⁷ The prosecution’s case must attain a threshold of sufficiency such that the jury could find the material facts proved to the criminal standard on the evidence presented.⁴⁸

Because of this precondition, some commentators have expressed doubts about the continued existence of *Weissensteiner* reasoning. Notably, Mark Tedeschi argues that after the High Court’s decision in *Strbak v The Queen* (*‘Strbak’*),⁴⁹ the circumstances in which a *Weissensteiner* comment can be made ‘are so rare and exceptional as not to exist’.⁵⁰ *Strbak* concerned an offender who

42 *Azzopardi* (n 14) 73–4 [61]–[62] (Gaudron, Gummow, Kirby and Hayne JJ) (emphasis added).

43 *RPS* (n 4) 633–4 [32] (Gaudron ACJ, Gummow, Kirby and Hayne JJ).

44 *Ibid* 630–1 [23]; *R v DAH* (2004) 150 A Crim R 14, 33 [79] (White J), quoting *R v Whinfield* [1986] QSCCA 162, 25 (*‘Whinfield’*); *B v Visser* (2000) 9 Tas R 285, 288–9 [8] (Blow J).

45 *RPS* (n 4) 633–5 [32]–[36] (Gaudron ACJ, Gummow, Kirby and Hayne JJ); *Azzopardi* (n 14) 73–4 [62] (Gaudron, Gummow, Kirby and Hayne JJ); Palmer (n 13) 148; *R v Kanaveilomani* [1995] 2 Qd R 642, 657–8 (Lee J) (*‘Kanaveilomani’*).

46 *Azzopardi* (n 14) 79–80 [81] (Gaudron, Gummow, Kirby and Hayne JJ); *RPS* (n 4) 633–4 [32] (Gaudron ACJ, Gummow, Kirby and Hayne JJ).

47 *Tumahole Bereng v The King* [1949] AC 253, 270 (Lord MacDermott); *May v O’Sullivan* (1955) 92 CLR 654, 657 (Dixon CJ, Webb, Fullagar, Kitto and Taylor JJ) (*‘May’*); *R v Burdett* (1820) 106 ER 873, 898 (Abbott CJ); *Azzopardi* (n 14) 117–8 [190] (Callinan J); Palmer (n 14) 133, 136; CR Williams, ‘Silence in Australia: Probative Force and Rights in the Law of Evidence’ (1994) 110 *Law Quarterly Review* 629, 632.

48 *Weissensteiner* (n 14) 228–9 (Mason CJ, Deane and Dawson JJ), 236 (Brennan and Toohey JJ); *May* (n 47) 658 (Dixon CJ, Webb, Fullagar, Kitto and Taylor JJ); *Whinfield* (n 44) 25 (Carter J); *R v Goldsworthy* [2016] QSC 220, [5] (Burns J); Ligertwood and Edmond (n 4) 123–4 [2.50].

49 (2020) 267 CLR 494 (*‘Strbak’*).

50 Tedeschi (n 13) 88.

pleaded guilty to the manslaughter of her four-year-old son, who died as a result of injuries caused by blunt force trauma to his abdomen. The circumstances of the child's death were unknown. The prosecution's primary case was that Strbak inflicted the blunt force trauma that caused her son's death. She contested those allegations, although she accepted liability for manslaughter on the basis that she failed to seek medical treatment for her son after he received the injuries. Strbak did not give evidence at her contested sentencing hearing. The sentencing judge more readily accepted the prosecution's version of events because Strbak's failure to give evidence left the prosecution's evidence uncontradicted.⁵¹ The High Court held that such reasoning was impermissible in the sentencing context, as the plea of guilty to manslaughter 'did not relieve the prosecution of the obligation to prove the facts of the primary case on which it sought to have the appellant sentenced without assistance from her'.⁵²

Respectfully, contrary to Tedeschi's suggestions, nothing in *Strbak* extinguished the *Weissensteiner* principle nor otherwise affected or altered the law governing the principle. The High Court in *Strbak* merely implicitly recognised the continuing applicability of this second precondition to inferential reasoning of this nature, namely, that the prosecution's case must be sufficiently strong before a *Weissensteiner* inference becomes available. That second precondition recognises and gives effect to the ordinary evidential principle that an inference, including an adverse inference from a failure to explain, must be based on evidence from which one can draw that inference.⁵³ Using the example of manslaughter in a circumstantial case like *Strbak*, 'an offence which may be committed in a notoriously wide range of circumstances' affecting culpability,⁵⁴ the prosecution is first required to present 'an evidentiary foundation for a finding of [guilt]' of the relevant category of manslaughter before an accused's failure to explain can become relevant.⁵⁵ An accused's failure to explain cannot be relevant where there is insufficient evidence from which an inference of guilt could be drawn and a failure to explain cannot supplement any deficiencies in the prosecution's case or 'take it the rest of the way' to reach the beyond reasonable doubt threshold if its case falls short of it.⁵⁶ Although not explicitly acknowledged by the High Court, this is arguably what distinguished *Strbak* from being a '*Weissensteiner* case' – there simply was insufficient evidence from which an adverse inference could have been drawn in the first place.

Nevertheless, this aspect of the *Weissensteiner* principle has also been criticised as involving too great a difficulty in determining whether the strength

51 *Strbak* (n 49) 510–12 [37]–[44] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

52 Ibid 509 [33].

53 *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152, 169–70 (Lord Wright) ('*Caswell*'). See also *R v Kelleher* [2024] QCA 99, [11] (Bond JA): 'a properly instructed jury acting reasonably will form logical conclusions by logical reasoning and not by mere speculation'.

54 *Strbak* (n 49) 509 [33] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ). See also *R v Clappers* [2003] VSC 462, [29] (Nettle J).

55 *Lane v The Queen* (2013) 241 A Crim R 321, 348 [107] (Bathurst CJ, Simpson and Adamson JJ) ('*Lane*').

56 David Hamer, 'The Privilege of Silence and the Persistent Risk of Self-Incrimination: Part I' (2004) 28(3) *Criminal Law Journal* 160, 161 ('The Privilege of Silence Part I').

of the prosecution's case truly calls for a response from the accused.⁵⁷ As David Hamer suggests, 'the crucial underlying question is whether the prosecution case presents such a threat of conviction to the accused as to give rise to an expectation that an innocent accused would testify in response'.⁵⁸ According to Hamer, a bare prima facie case is insufficient and '[m]ore than just the highest end of the range of possible assessments' of the prosecution's evidence is required.⁵⁹ In other words, the prosecution's case would only call for a response from the accused where the prosecution's case is sufficiently compelling in the sense that a properly directed jury could be satisfied beyond a reasonable doubt that the offence is proved.⁶⁰ This can be referred to in shorthand as a 'clear prima facie case'.

That approach has some merit and is consistent with analogous authority. In the context of 'no case' submissions, in order for circumstantial cases that depend on inferences to be fit to go to a jury, the evidence from which those inferences are to be drawn (considered at its highest and assuming its accuracy) must be capable of 'producing in the mind of a reasonable person satisfaction' of the accused's guilt beyond a reasonable doubt.⁶¹ Accepting these principles, to be accurately characterised as a 'clear prima facie case' which justifies a *Weissensteiner* comment being made, a sufficiently strong circumstantial case must be one where 'the inference of guilt is the only rational inference' available on the prosecution's evidence.⁶²

Thirdly, the accused must have failed to provide additional facts of which they have peculiar knowledge.⁶³ Silence in the face of a clear prima facie case by itself is insufficient to found any adverse inferences.⁶⁴ 'Additional facts' are exculpatory facts that would explain or contradict the inference(s) the prosecution seeks to have the jury draw, but which were not otherwise revealed by the evidence and which could *only* be the subject of evidence from the accused.⁶⁵ An accused's failure to explain will have no logical probative value where all they could offer is a mere contradiction of the prosecution's case.⁶⁶ Nor will it have such value where the accused could only testify in support of a simple denial because '[t]he accused's plea of not guilty stands as that denial' and the defence could otherwise be advanced by cross-examination.⁶⁷

57 Ibid, 171.

58 Ibid.

59 Ibid 172.

60 Ibid 172–3; *Murray v DPP (Northern Ireland)* [1994] 1 WLR 1, 4 (Lord Mustill), 11–12 (Lord Slynn) ('*Murray*'); *R v Bromfield* [2002] EWCA Crim 195, [32] (Goldring J), quoting *R v Birchall* [1999] Crim LR 311.

61 *R v Bilick* (1984) 36 SASR 321, 337 (King CJ).

62 *R v Surrey* [2005] 2 Qd R 81, 96 [34] (Jerrard JA) ('*Surrey*'); Stephen Odgers, *Uniform Evidence Law* (LawBook Co, 18th ed, 2023) 136 [EA.20.180].

63 *Azzopardi* (n 14) 73–4 [61], [64] (Gaudron, Gummow, Kirby and Hayne JJ); Mirko Bagaric, 'The Diminishing "Right" of Silence' (1997) 19(3) *Sydney Law Review* 366, 371.

64 *Weissensteiner* (n 14) 228 (Mason CJ, Deane and Dawson JJ).

65 *Azzopardi* (n 14) 73–4 [62], [64] (Gaudron, Gummow, Kirby and Hayne JJ); *ibid* 230.

66 *Azzopardi* (n 14) 74 [64] (Gaudron, Gummow, Kirby and Hayne JJ).

67 *Ibid* 73 [62]; *Kanaveilomani* (n 45) 658 (Lee J).

A problematic aspect of these principles is that the High Court in *Weissensteiner*, *RPS*, and *Azzopardi* arguably did not clearly endorse the exact manner in which an accused's failure to explain becomes an aid for the jury in cases where the *Weissensteiner* principle applies. Is the application of *Weissensteiner* really just a convoluted way of permitting a jury to jump to a conclusion of guilt from an accused's failure to explain? As identified by Hamer, a distinction can be made between: (1) 'strong use' of the accused's failure to explain, which provides positive support for the prosecution's case and is tantamount to a conclusion of guilt; whereas (2) a 'weak use' of the failure to explain at most confirms a finding available on the prosecution's incriminating evidence because the accused has failed to undermine that evidence.⁶⁸

With respect, the better view is that the 'weak use' theory corresponds with the application of *Weissensteiner*. That is because once the above preconditions are met, the *Weissensteiner* principle operates to allow the drawing of inferences otherwise available on the evidence more safely. Because those inferences must already be available, the *Weissensteiner* principle does not permit the prosecution to rely on the accused's silence to bolster its case if it falls short of proving guilt beyond a reasonable doubt.⁶⁹

Nevertheless, while considerable caution is rightly required when applying *Weissensteiner*, some authorities advise that it is often safer for trial judges not to provide *Weissensteiner* comments even though it would be appropriate to do so.⁷⁰ Instead, it is averred that in those cases it is better to simply direct the jury that the issue for it to consider is whether the inferences contended for by the prosecution are the only rational inferences available, and to restrict the jury's consideration to the evidence and arguments of counsel so as to avoid the risk of an appeal.⁷¹ That understanding, and the practical effect of the confined circumstances in which a *Weissensteiner* comment can rightfully be made is that prosecutors are wary of requesting – and trial judges are wary of making – adverse comments on an accused's silence at trial, even when such a comment is fully appropriate, due to the fear that doing so will result in a misapplication of principle or appealable error.⁷² However, that does not mean that judges should be reticent to apply *Weissensteiner* when its application is properly warranted. A proper understanding of the principles pertaining to *Weissensteiner* comments reveals that when such a comment is made in appropriate circumstances, there is no risk of it occasioning an unfair trial and it accordingly should not be avoided where it is warranted.

That is because a *Weissensteiner* comment 'serves merely to advise the jury how to treat' the prosecution's evidence where the above preconditions are met, and like any comment (as distinct from a direction, which juries are required to

68 Hamer, 'The Privilege of Silence Part I' (n 56) 163–4.

69 Cf *Noble* (n 11) 920–1 [76] (Sopinka J).

70 *Surrey* (n 62) 97 [36] (Jerrard JA); *RPS* (n 4) 637 [42] (Gaudron ACJ, Gummow, Kirby and Hayne JJ); *R v Miller* [2004] 1 Qd R 548, 552 [21] (Holmes J) ('*Miller*').

71 *Surrey* (n 62) 97 [36] (Jerrard JA).

72 See *Tedeschi* (n 13) 87.

follow) may be disregarded.⁷³ It does so by allowing the jury to conclude that the failure of an accused to provide evidence of ‘additional facts’ where only they can do so suggests that there is no innocent explanation for the prosecution’s evidence and accordingly ‘that the only rational inference that may be drawn is that contended for by the Crown’.⁷⁴ That conclusion is justifiable because a jury cannot base an acquittal merely on hypotheses ‘logically open in theory’ or unsupported by evidence – a reasonable inference as to innocence must necessarily rest on evidence.⁷⁵ If that evidence is absent, then there cannot be an innocent inference competing with that contended for by the prosecution.⁷⁶ The absence of a competing inference which only an accused can provide an evidentiary basis for may therefore allow the jury to more readily draw the inferences which the prosecution seeks.⁷⁷

In other words, the practical effect of the ‘adverse inference’ permitted by a *Weissensteiner* comment is that once the prosecution’s circumstantial evidence, standing alone, could support a conclusion of guilt because it has ‘enveloped [the accused] in a strong and cogent network of inculpatory facts’,⁷⁸ the accused is practically required to ‘[repel] the inference’ of guilt arising from the prosecution’s evidence in order to avoid conviction.⁷⁹ If the accused is the only potential source of evidence for innocent hypotheses and they fail to provide that evidence, ‘hypotheses consistent with innocence may cease to be rational or reasonable’.⁸⁰ The accused’s failure to provide ‘additional facts’ thereby serves to confirm the inference of guilt that the totality of the incriminating evidence against them already suggests.⁸¹

73 *People v Modesto*, 62 Cal 2d 436, 450 (Cal, 1965) (‘*Modesto*’); *Azzopardi* (n 14) 69–70 [49]–[50] (Gaudron, Gummow, Kirby and Hayne JJ).

74 *McEwan* (n 14) [33] (Brown J). See also *R v Weissensteiner* (1992) 62 A Crim R 96, 110 (McPherson JA) (‘*Weissensteiner First Appeal*’); *Wilson v Buttery* [1926] SASR 150, 154 (Napier J); *R v Hallogoglu* (1992) 29 NSWLR 67, 78 (Hunt CJ at CL); *Modesto* (n 73) 450–2; *People v Adamson*, 27 Cal 2d 478, 490–1 (Cal, 1946); Ian Dennis, ‘Codification and Reform of Evidence Law in Australia’ [1996] *Criminal Law Review* 477, 485; David Hamer, ‘The Privilege of Silence and the Persistent Risk of Self-Incrimination: Part II’ (2004) 28(4) *Criminal Law Journal* 200, 205 (‘The Privilege of Silence Part II’); Soraya Ryan (n 14) 11.

75 *R v Doyle* [2019] 3 Qd R 126, 133 [29], 133–4 [32] (Sofronoff P); *Barca v The Queen* (1975) 133 CLR 82, 104–5 (Gibbs, Stephen and Mason JJ) (‘*Barca*’).

76 *Doyle* (n 74) 133 [29], 133–4 [32] (Sofronoff P); *Barca* (n 75) 104–5 (Gibbs, Stephen and Mason JJ).

77 *RPS* (n 4) 632–3 [27] (Gaudron ACJ, Gummow, Kirby and Hayne JJ); *Odgers* (n 62) 134 [EA.20.180].

78 In the sense of establishing a clear prima facie case: *Noble* (n 11) 889 [17], 895 [24] (Lamer CJ), quoting *R v Johnson* (1993) 12 OR (3d) 340, 347–8 (Arbour JA) (Ontario Court of Appeal) (‘*Johnson*’), quoting *R v Jenkins* (1908) 14 CCC 221, 230 (Irving JA) (Supreme Court of British Columbia).

79 *Morgan v Babcock & Wilcox Ltd* (1929) 43 CLR 163, 178 (Isaacs J); *Weissensteiner* (n 14) 236 (Brennan and Toohey JJ); *A-G (Mass) v Pelletier*, 134 NE 407, 423 (Rugg CJ) (Mass, 1922); Hamer, ‘The Privilege of Silence Part I’ (n 56) 169; JD Heydon, ‘Silence as Evidence’ (1974) 1(1) *Monash University Law Review* 53, 59. See also *Boyle v Wiseman* (1855) 10 Exch 647, 651 (Alderson B); *R v Voisin* [1918] 1 KB 531, 537 (AT Lawrence J).

80 *Weissensteiner* (n 14) 228 (Mason CJ, Deane and Dawson JJ); *R v Fellowes* [1987] 2 Qd R 606, 610 (Andrews CJ, Thomas and Ryan JJ); *Palmer* (n 14) 133, 136; *Blatch v Archer* (1774) 1 Cowp 63, 66 (Lord Mansfield); *McEwan* (n 14) [33] (Brown J).

81 *Weissensteiner* (n 14) 228 (Mason CJ, Deane and Dawson JJ); *Noble* (n 11) 893 [23] (Lamer CJ). See also *Insurance Commission v Joyce* (1948) 77 CLR 39, 61 (Dixon J) (emphasis added): ‘It is proper that a court should regard the failure of the plaintiff to give evidence as a matter calling for close scrutiny of the facts upon which he relies and as confirmatory of any inferences which may be drawn against him’.

B Inferences Arising from Objective Evidence

By contrast to the *Weissensteiner* principle, which is concerned with the Crown's case as a whole, some objective evidence in isolation may so obviously suggest a particular state of affairs that, if it is left unexplained, can give rise to a practical expectation that the accused would offer some innocent explanation for it to dispel the conclusion that the evidence suggests.⁸² Leaving specific types of evidence unexplained suggests that there is no explanation for it consistent with innocence, which may therefore allow an inference suggested by that evidence to be more easily drawn.⁸³ Evidence of recent possession of stolen property is the example this article will focus on. That is not to say that recent possession of stolen property is critical to this category of inference or the only example of it. Rather, it is one of the most well-known illustrations of this category.⁸⁴

Where an accused is found in possession of recently stolen property and fails to provide a credible explanation as to how they came about that property, a jury may (but not must) infer that the accused was the thief or otherwise dishonestly received the goods.⁸⁵ That inference is premised on the common sense understanding that possession of recently stolen property is innately suspicious and tends to suggest that the possessor of the stolen property likely obtained it illicitly.⁸⁶ The suspicious circumstances of being in possession of recently stolen goods would therefore 'demand an explanation' from the possessor to account for their possession in a way that is consistent with innocence since, if the goods were lawfully acquired, the party would likely be able to so account.⁸⁷ An absence of explanation as to how a possessor of stolen goods came about them permits the inference that they are the thief or unlawful receiver to be more easily drawn because silence in those circumstances itself suggests that the failure to explain proceeds from an inability to provide an innocent explanation.⁸⁸

82 *R v Nash* (1911) 6 Cr App R 225, 228 (Alverstone CJ); RS O'Regan, 'Adverse Inferences from Failure of an Accused Person to Testify' [1965] *Criminal Law Review* 711, 716.

83 *Schellenberg v Tunnel Holdings Pty Ltd* (2000) 200 CLR 121, 148 (Gaudron J); *R v FAH* [2016] QCA 122, [18] (Fraser JA), quoting *Bruce v The Queen* (1987) 61 ALJR 603, 603 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ) ('*Bruce*'); *R v Raviraj* (1986) 85 Cr App R 93, 103 (Stocker LJ) ('*Raviraj*').

84 There are other examples and illustrations. For instance, in cases concerning the importation of narcotics, inferences about state of mind and knowledge of the narcotics may be drawn from the fact of importation itself. That is, if a person attempts to import drugs into Australia and offers no convincing explanation for the presence of the drugs, for example, where they are concealed in a suitcase, the jury may infer that the importer knew that the narcotics were there: see *He Kaw Teh v The Queen* (1985) 157 CLR 523.

85 *Bruce* (n 83) 603 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ); *Trainer v The King* (1906) 4 CLR 126, 132 (Griffith CJ) ('*Trainer*'); *Carle v The Queen* [2002] WASCA 71, [109] (Parker J); *R v Langmead* (1864) Le & Ca 427; 169 ER 1459, 1464 (Blackburn J); Thomson Reuters, *Ross on Crime* (online at 18 March 2023) 18 Recent Possession, '18.1200 Meaning' [18.1200].

86 *Bagaric* (n 63) 369; Heydon, 'Silence as Evidence' (n 79) 61; *DPP (England and Wales) v Nieser* [1959] 1 QB 254, 266 (Lord Diplock).

87 *Raviraj* (n 83) 103 (Stocker LJ).

88 *R v Searle* (1929) 24 AR 37, 39–40 (Harvey CJA) (Alberta Court of Appeal) ('*Searle*'), quoted in Roger Beaudry, 'The Doctrine of Recent Possession: A Black Box "Presumption"' (1987) 29(4) *Criminal Law Quarterly* 453, 460; Heydon, 'Silence as Evidence' (n 79) 61; *R v Seymour* [1954] 1 WLR 678 (Lord Goddard CJ). See also Heydon, *Cross on Evidence* (n 15) 36 [1200].

However, because evidence of recent possession is simply just a class of circumstantial evidence,⁸⁹ judges are required to remind juries when giving directions that evidence of recent possession is merely ‘a *potentially* incriminating circumstance which can be taken into account by a jury in deciding whether the accused’ is guilty of the relevant offence.⁹⁰ It alone could not suffice for proof of guilt in all cases because it is not necessarily inconsistent with innocence and recent possession does not, in the absence of further incriminating circumstances, establish the elements of larceny or receiving.⁹¹

The law of evidence is littered with similar examples of circumstantial evidence which might, on its own, suggest an obvious state of affairs, but which alone cannot form the basis for properly drawing an inference of guilt. However, when that evidence is considered together with all of the other evidence, that inference may become available. One example is lies and other post-offence conduct. These are ‘a species of circumstantial evidence’ of consciousness of guilt, and an inference of guilt may be drawn ‘from the concatenation of circumstances’ including the lies and/or post-offence conduct.⁹² Here, consciousness of guilt inferred from this species of evidence is not evidence of guilt itself, although such evidence may suggest that the accused is implicated in the offence(s). Rather, in determining whether the prosecution has established guilt beyond a reasonable doubt in such cases, the jury is necessarily required to evaluate the evidence of lies or post-offence conduct said to give rise to a consciousness of guilt together with all of the other evidence.⁹³ For example, in homicide cases, certain lies or post-offence conduct considered individually may be equally consistent with murder or manslaughter, but intent might nevertheless be inferred from the prosecution’s evidence as a whole, considered together with the relevant lies or post-offence conduct.⁹⁴

The common element between inferences from evidence of recent possession and inferences as to consciousness of guilt from evidence of lies or post-offence conduct is therefore that each species of evidence may justify, but do not necessitate, a finding of guilt in the context of *all of the evidence*.⁹⁵ In other words, evidence of recent possession and evidence of consciousness of guilt both may have limited value in isolation, but that evidence in combination with other incriminating evidence may give rise to a conclusion of guilt and it must accordingly be weighed

89 *R v Beljajev* [1984] VR 657, 663 (Starke J).

90 *R v Cross* (1995) 84 A Crim R 242, 248 (Kirby P) (emphasis added) (‘Cross’); *Bruce* (n 82) 603 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ); *Higgins v McCulloch* [2013] TASSC 49, [4] (Tennent J); JG Starke, ‘Recent Cases: Criminal Law’ (1988) 62(3) *Australian Law Journal* 237, 237–8; Heydon, *Cross on Evidence* (n 15) 36 [1200]; *Ugle v The Queen* (1989) 43 A Crim R 63, 66 (Brinsden J) (‘Ugle’); *R v Cohen* [1951] 1 KB 505, 508 (Lord Goddard CJ); *Ungaro v The King* [1950] SCR 430, 436 (Estey J).

91 Beaudry (n 88) 458–9; Heydon, *Cross on Evidence* (n 15) 35 [1195]; *Searle* (n 88) 39 (Harvey CJA).

92 *R v Ciantar* (2006) 16 VR 26, 40 [44] (Warren CJ, Chernov, Nettle, Neave and Redlich JJA) (‘Ciantar’).

93 *Edwards v The Queen* (1993) 178 CLR 193, 210 (Deane, Dawson and Gaudron JJ) (‘Edwards’); *R v Melrose* [1989] 1 Qd R 572, 579 (Shepherdson J); *Ciantar* (n 92) 52 [87] (Warren CJ, Chernov, Nettle, Neave and Redlich JJA).

94 See *R v Andres* [2015] QCA 167, [127], [131] (Boddice J) (‘Andres’).

95 See *R v Cavkic* [No 2] (2009) 28 VR 341, 359 [70] (Vincent and Nettle JJA and Vickery AJA).

with all the other evidence to reach that conclusion.⁹⁶ Therefore, evidence of recent possession is not tantamount to an automatic conclusion of guilt, but it may suggest guilt if left unexplained. That is why a trial judge must direct the jury that although recent possession of stolen goods without an explanation may entitle the jury to infer that the accused is guilty of stealing or receiving, the onus nevertheless remains on the prosecution to prove the guilt of the accused beyond reasonable doubt on the whole of the prosecution's evidence.⁹⁷ Accordingly, evidence of recent possession is merely an example of drawing adverse inferences in circumstantial cases from particular evidence in the context of the case as a whole where specific evidence is left unexplained, as opposed to drawing inferences of guilt only from specific evidence in isolation.⁹⁸

C 'Baden-Clay Inferences'

The facts of *Baden-Clay* are notorious, at least in Queensland, from where the case originates. They need to be understood properly in order to appreciate how and why the 'Baden-Clay inferences' can arise.⁹⁹ Baden-Clay was charged with murdering his wife. The case against him was entirely circumstantial. His wife's body was found several days after she was reported missing. It was so heavily decomposed that it was impossible to determine her cause of death. The day that Baden-Clay's wife was reported missing, abrasions were apparent on his face, which he claimed were shaving cuts.

At trial, the prosecution contended that Baden-Clay killed his wife during an altercation regarding an extramarital affair he was having and that he disposed of her body to conceal his actions. It also argued that the abrasions were in fact fingernail scratches inflicted by Baden-Clay's wife during the altercation, and that Baden-Clay's lies about them along with his post-offence disposal of the body evidenced a consciousness of guilt of his wife's murder. Baden-Clay gave evidence that he had nothing to do with his wife's death. Through his own evidence and the construction of his case by counsel, including trial counsel's rejection of an alternative argument that Baden-Clay killed his wife unintentionally, he expressly disavowed any hypothesis of manslaughter.¹⁰⁰ A manslaughter hypothesis was never put to the jury.¹⁰¹ His case at trial was 'murder or nothing'. Baden-Clay

96 See, eg, *Festa v The Queen* (2001) 208 CLR 593, 633 [126] (Kirby J). For evidence of consciousness of guilt, see *R v Camilleri* (2001) 119 A Crim R 106, 140 [107] (Ormiston JA). For evidence of recent possession, see *R v Wanganeen* (1988) 50 SASR 433, 436 (King CJ).

97 *R v Stafford* (1976) 13 SASR 392, 403 (Bray CJ); *Ugle* (n 90) 67–8 (Brinsden J); *R v Schama* (1914) 11 Cr App R 45, 49 (Lord Reading) ('*Schama*').

98 *Gilson v The Queen* (1991) 172 CLR 353, 367–8 (Brennan J) ('*Gilson*'); *Schama* (n 97) 49 (Lord Reading); *McCarthy v The Queen* [1985] WAR 84, 86 (Brinsden J); *R v Hepwith* [1955] 2 QB 600, 603–4 (Lord Goddard CJ).

99 Although, 'Baden-Clay inferences' is somewhat of a misnomer – these inferences were capable of arising in *Baden-Clay* (n 16) and the reasoning processes for those inferences were available to the jury, but they were not explicitly discussed by the High Court except with respect to the point about disavowal of hypotheses (discussed in Part III(C)(2) below) and how this has bearing on cases akin to *Baden-Clay* (n 16).

100 *Baden-Clay* (n 16) 319 [32]–[33], 325 [52], 328 [61] (French CJ, Kiefel, Bell, Keane and Gordon JJ).

101 *Ibid* 327 [59].

was convicted of murder, but the Queensland Court of Appeal downgraded his conviction to manslaughter. The Court reasoned that the post-offence conduct and lies remained neutral on the issue of intent such that there remained open a reasonable hypothesis that a physical altercation occurred in which Baden-Clay unintentionally killed his wife and disposed of her body in a state of panic.¹⁰² This hypothesis was raised for the first time on appeal.

The High Court unanimously reinstated the murder conviction on the basis that, *inter alia*, the Court of Appeal's conclusion was not based on a hypothesis available on the evidence.¹⁰³ That was because there was no evidence to support the manslaughter hypothesis relied upon by the Court of Appeal, and Baden-Clay's own evidence was inconsistent with that hypothesis.¹⁰⁴ The absence of an evidentiary foundation for the manslaughter hypothesis 'meant that it was incapable of constituting a reasonable hypothesis' because there were 'no positive proved facts from which the inference' about the manslaughter hypothesis could be drawn such that reliance on it amounted to 'mere speculation or conjecture'.¹⁰⁵

The fact that the jury rejected Baden-Clay's evidence that he had nothing to do with his wife's death did not automatically mandate a conclusion that he caused her death with murderous intent, as the prosecution was still required to prove that intent beyond reasonable doubt. There was circumstantial evidence available from which murderous intent could be inferred.¹⁰⁶ But importantly, because the case was entirely circumstantial and Baden-Clay was the only person who knew the circumstances of his wife's death, it was *only* Baden-Clay who could have offered some explanation consistent with innocence of murder. He therefore had exclusive knowledge of 'additional facts' which could provide that explanation. In those circumstances, a hypothesis consistent with innocence or consistent with guilt of a lesser offence ceases to be rational and consequently becomes unavailable where the only person who could provide evidence supporting it instead provides an account that is inconsistent with it.¹⁰⁷ Once the manslaughter hypothesis was disavowed by Baden-Clay and the jury rejected his version of events, this had the effect that he failed to provide evidence of 'additional facts' that were exclusively within his knowledge and which may have supported an innocent hypothesis. This, combined with the prosecution's circumstantial evidence of intent, meant there was consequently no hypothesis consistent with innocence of murder available.¹⁰⁸

Baden-Clay therefore demonstrates that two paths of reasoning to a guilty verdict by way of adverse inference may follow in circumstances analogous to that case. The nature of the inferences under these two paths is discussed below, and require the following preconditions to be met in order to be drawn. *First*, like in *Baden-Clay*, the prosecution's case is entirely circumstantial. *Secondly*,

102 See *R v Baden-Clay* [2015] QCA 265, [48] (Holmes CJ, Fraser and Gotterson JJA).

103 *Baden-Clay* (n 16) 326 [55] (French CJ, Kiefel, Bell, Keane and Gordon JJ).

104 *Ibid* 321–2 [39], 325 [52].

105 *Ibid* 322 [39], 326 [55], quoting *Caswell* (n 53) 169–70 (Lord Wright).

106 *Baden-Clay* (n 16) 322 [41], 330–1 [69]–[72], 332 [74], 333 [76] (French CJ, Kiefel, Bell, Keane and Gordon JJ).

107 See *ibid* 327 [57].

108 *Ibid* 328–9 [63].

the prosecution has raised a ‘clear prima facie case’ against the accused in the sense discussed in Part III(A). *Thirdly*, the accused is the *only* potential source of hypotheses consistent with innocence in the sense that they would be understood to have ‘additional facts peculiarly within their knowledge’ that would explain or contradict the prosecution’s inculpatory evidence. Those first three preconditions correspond to the preconditions for making a *Weissensteiner* comment. What distinguishes this kind of inference from a *Weissensteiner* inference is the *fourth* additional precondition, which is that crucially, like in *Baden-Clay*, the accused *has given evidence* of purported ‘additional facts’ that ostensibly support hypotheses consistent with innocence, but which (1) are disbelieved and/or (2) amount to disclaiming reliance on or negating certain innocent hypotheses.

Ordinarily, the principles pertaining to these inferences are invoked on appeal to assess the reasonableness of an impugned verdict.¹⁰⁹ Therefore, this analysis is caveated by the notion that these principles concern permissible ways in which juries may reason generally in the relevant circumstances, rather than concerning what comments may be made to provide guidance to juries on how to reason in those circumstances. But the point in discussing them here is to ultimately demonstrate that there is no unfairness in juries reasoning in these ways, irrespective of whether a comment about that reasoning has been made. It is consequently argued that the fulfilment of the fourth precondition in addition to the first three permits *Weissensteiner* reasoning in cases where an accused *does* give evidence for the reasons explained in Part III(C)(1) below.

1 ‘Contrived Silence’

The rejection of an accused’s account does not provide positive proof of guilt nor allow a jury to automatically conclude that they must be guilty.¹¹⁰ Also, when the above four preconditions are met and the jury entirely rejects an accused’s evidence of ‘additional facts’, that does not mean that the accused is treated as having given no evidence at all. Rather, the jury rejecting the accused’s evidence in those circumstances is tantamount to the accused providing no ‘additional facts’ to explain or contradict the prosecution’s evidence in the sense of what can be described as a ‘contrived silence’. This is accordingly treated as having the same significance as if the accused had failed to explain in a material sense, as that rejection has the same *effect* as if the accused actually failed to provide those additional facts by remaining silent.¹¹¹

Therefore, once a jury concludes that an explanation that *only* the accused can give is false, it can more readily infer that there is no explanation for the prosecution’s evidence that is consistent with innocence in the same manner that this inference

109 *Arico v The Queen* (2018) 272 A Crim R 450, 484 [215] n 60 (Maxwell ACJ and Weinberg JA) (‘*Arico*’).

110 *Harling v The Queen* (1997) 94 A Crim R 437, 443 (Anderson J); *Selig v Hayes* (1989) 52 SASR 169, 171–2 (Jacobs J).

111 *Chalmers v The Queen* (2011) 37 VR 464, 473 [42] (Maxwell P, Redlich JA and Kyrou AJA) (‘*Chalmers*’); *Gale v Tasmania* [2024] TASCCA 3, [29]–[31] (Blow CJ) (‘*Gale*’); *Weissensteiner* (n 13) 246 (Gaudron and McHugh JJ); *Trainer* (n 85) 138–9 (O’Connor J); Transcript of Proceedings, *R v Weissensteiner* [1993] HCATrans 146, 17 (Dawson J).

can be drawn under the *Weissensteiner* principle.¹¹² This is because once it has rejected the accused's evidence, the jury is required to put that evidence to one side and then consider whether the prosecution's evidence proves the accused's guilt beyond a reasonable doubt.¹¹³ If the prosecution's evidence constitutes a 'clear prima facie case' from which an inference of guilt can be drawn, and the accused is the only potential source of evidence of 'additional facts' which could explain or rebut the unfavourable inferences arising from the prosecution's evidence, the jury's rejection of the purported additional facts proffered by the accused has the effect that no evidence of those facts has been given.¹¹⁴ There is accordingly no evidence to support hypotheses consistent with the accused's innocence where the jury rejects the accused's evidence and puts it to one side in these circumstances. The result is that innocent hypotheses cease to be reasonable because there is no evidence to support them, and consequently there is no inference which could compete with the incriminating inferences contended for by the Crown.¹¹⁵ In this way, the '*Weissensteiner* adverse inference', which allows a jury to more readily accept the prosecution's evidence, may extend in extremely limited circumstances to cases where the accused *does* give evidence.

But it must be emphasised that the rejection of the accused's account of 'additional facts' is treated as an absence of explanation of those additional facts *only*.¹¹⁶ The rejection of an accused's account and the resulting 'contrived silence' in relation to the purported additional facts does not entitle a jury to disregard or ignore the accused's evidence altogether as having no bearing on the availability of hypotheses consistent with innocence as if they had given no evidence at all.¹¹⁷ Evidence cannot be considered in a 'piecemeal' way, and the evidence that the accused did give must be considered in the context of the *entirety* of the evidence in determining what hypotheses consistent with innocence are available.¹¹⁸ In particular, other evidence or conduct cannot be made to be seen as equally consistent with guilt of a lesser alternative offence by examining it in isolation

112 *Chalmers* (n 111) 473 [42] (Maxwell P, Redlich JA and Kyrou AJA).

113 *Andres* (n 94) [127] (Boddice J).

114 *Arico* (n 109) 484 [215] n 60 (Maxwell ACJ and Weinberg JA); *R v Kaddour* [2018] 3 Qd R 575, 586 [39] (Sofronoff P) ('*Kaddour*'); *Chalmers* (n 111) 473 [42] (Maxwell P, Redlich JA and Kyrou AJA); *Azzopardi* (n 14) 88 [112] (McHugh J); *Gale* (n 111) [29]–[31] (Blow CJ); *Penhall v The Queen* [2020] SASFC 58, [127] (Lovell J) ('*Penhall*'); Transcript of Proceedings, *R v Baden-Clay* [2016] HCATrans 166, 29 (W Sofronoff QC) (during argument) ('*Baden-Clay* Transcript').

115 *Arico* (n 109) 484 [215] n 60 (Maxwell ACJ and Weinberg JA); *Kaddour* (n 114) 586 [39] (Sofronoff P); *Chalmers* (n 111) 473 [42] (Maxwell P, Redlich JA and Kyrou AJA); *Azzopardi* (n 14) 88 [112] (McHugh J); *Gale* (n 111) [29]–[31] (Blow CJ); *Penhall* (n 114) [127] (Lovell J); *Baden-Clay* Transcript (n 114) 29 (W Sofronoff QC) (during argument).

116 *Arico* (n 109) 484 [215] n 60 (Maxwell ACJ and Weinberg JA); *Kaddour* (n 114) 586 [39] (Sofronoff P); *Chalmers* (n 111) 473 [42] (Maxwell P, Redlich JA and Kyrou AJA); *Gale* (n 111) [29]–[31] (Blow CJ); *Penhall* (n 114) [127] (Lovell J).

117 *Baden-Clay* (n 16) 327 [57]–[58] (French CJ, Kiefel, Bell and Keane and Gordon JJ).

118 *Ibid* 326–7 [56], 333 [77]; *Plomp v The Queen* (1963) 110 CLR 234, 242 (Dixon CJ). Cf *BSJ v Western Australia* [2023] WASCA 5, [71], [73] (Mitchell and Vaughan JJA) ('*BSJ*').

from the entire evidential matrix so as to nevertheless make a hypothesis consistent with that lesser offence available despite it being disavowed.¹¹⁹

Separately, a jury may disbelieve an accused's proffered evidence of 'additional facts' and treat the accused as having provided no 'additional facts' at all because it concludes the accused's evidence to be lies. The telling of lies themselves can amount to evidence of an implied admission revealing the accused's consciousness of guilt where the jury concludes that the accused lied because they knew that telling the truth would implicate them in the offence.¹²⁰ As explained in Part III(B), the assessment of a lie's significance must necessarily occur in the context of all of the evidence.¹²¹ But if the jury disbelieves an accused's evidence of 'additional facts' because they assess that proffered evidence to be lies, two consequences may follow.

The first is that in such cases, there remains an absence of hypotheses consistent with innocence competing with contrary inferences urged by the prosecution in the manner described above.¹²² As a result, and as described above, a *Weissensteiner* inference becomes available – that is, an inculpatory inference arising from the prosecution's evidence can be more readily accepted because of the accused's effective failure to provide 'additional facts' by virtue of the jury's rejection of those additional facts.

The second is that this inculpatory inference that is subject to being more readily accepted in the manner described may be compellingly reinforced where the jury disbelieves the accused because they conclude that the accused's proffered explanation at trial constitutes lies told out of a consciousness of guilt.¹²³ That compelling reinforcement occurs because the inferences contended for by the prosecution are capable of being more readily accepted for the reasons above, but also because the telling of lies itself may be taken by a jury to be evidence of guilt such that a conclusion of guilt may become inescapable in these circumstances.¹²⁴ While it would be difficult to charge a jury in these terms and to explain to it these nuances, a jury could nevertheless fairly reason in this way in the relevant circumstances when considering whether hypotheses consistent with innocence are available.

119 *Chalmers* (n 111) 472 [35] (Maxwell P, Redlich JA and Kyrou AJA); *Ciantar* (n 92) 39 [40] (Warren CJ, Chernov, Nettle, Neave and Redlich JJA); Soraya Ryan (n 14) 14.

120 *Edwards* (n 92) 209, 211 (Deane, Dawson and Gaudron JJ); *Zoneff v The Queen* (2000) 200 CLR 234, 244 [16] (Gleeson CJ, Gaudron, Gummow and Callinan JJ) ('*Zoneff*'); *R v Smart* [2023] QCA 222, [84]–[85] (Boddice JA).

121 *Brooks v The Queen* (2012) 36 VR 84, 95 [69] (Weinberg JA); *Baden-Clay* (n 16) 333 [77] (French CJ, Kiefel, Bell, Keane and Gordon JJ); *Ciantar* (n 92) 40 [44] (Warren CJ, Chernov, Nettle, Neave and Redlich JJA).

122 'Appellant's Submissions', Submission in *R v Baden-Clay*, B33/2016, 10 June 2016, [81] ('*Baden-Clay Submissions*'); *Kaddour* (n 114) 587 [40] (Sofronoff P).

123 '*Baden-Clay Submissions*' (n 122) [81]–[82].

124 *Ibid.*

2 Express Disavowal of Hypotheses

Like in *Baden-Clay*, an accused may be the only potential source of hypotheses consistent with innocence, and they may provide an exculpatory version of events, which only they could know, denying involvement in the offence entirely. If the effect of an accused's evidence of 'additional facts' is that the accused themselves has expressly disavowed some hypotheses consistent with innocence, particularly where they are the only potential source of those hypotheses, this excludes those hypotheses as reasonable.¹²⁵ It consequently becomes unnecessary for the jury to consider them.¹²⁶ That is because a hypothesis consistent with innocence or consistent with a lesser alternative offence cannot be a reasonable inference where the accused is 'the only witness who could have given evidence to support the hypothesis [and] gave evidence which necessarily excluded [the hypothesis] as a possibility.'¹²⁷ Because an inference must arise from the evidence,¹²⁸ a version of events for which there is no evidentiary foundation is incapable of constituting a reasonable hypothesis which a jury is required to consider.¹²⁹

A 'contrived silence' resulting from the jury disbelieving the accused's proffered 'additional facts' may work concurrently with an accused's disavowal of favourable hypotheses. Where there is a 'contrived silence', as explained in Part III(C)(1) above, the jury may more readily accept the inferences the prosecution contends for. Where the accused also disavows particular hypotheses consistent with innocence, the inferences the prosecution contends for can be doubly reinforced. That 'double reinforcement' arises from the non-availability of the hypothesis consistent with innocence because the accused has expressly disavowed it, coupled with the permissibility of being able to more readily accept the incriminating inferences because of the 'contrived silence' created by the jury's disbelief of the accused's additional facts.¹³⁰ Ultimately, the practical consequence of this 'double reinforcement' is that in the rare circumstances in which it arises, the accused's guilt would be the sole rational inference left open on the prosecution's circumstantial evidence because there is no inference consistent with innocence competing with the inferences contended for by the prosecution on the one hand,

125 *Baden-Clay* (n 16) 327 [57] (French CJ, Kiefel, Bell, Keane and Gordon JJ); *Clarke v Western Australia* [2022] WASCA 6, [320] (Mitchell JA); *Larussa v Western Australia* [2023] WASCA 62, [64] (Mazza, Beech and Hall JJA); *Dansie v The Queen* [2020] SASCFC 103, [467] (Livesey J); *Peacock v The King* (1911) 13 CLR 619, 629 (Griffith CJ) ('*Peacock*').

126 *Baden-Clay* (n 16) 326 [54], 327 [57] (French CJ, Kiefel, Bell, Keane and Gordon JJ). See 'Baden-Clay Submissions' (n 122) [64]. As Griffith CJ explained in *Peacock* (n 125) 629, 'the effect of an accused's account of the events in question' may be to narrow the question to the consideration whether that [account] be or be not excluded and falsified by the evidence'. See also *BSJ* (n 118) [71] (Mitchell and Vaughan JJA).

127 *Baden-Clay* (n 16) 327 [57] (French CJ, Kiefel, Bell, Keane and Gordon JJ).

128 *Barca* (n 75) 104–5 (Gibbs, Stephen and Mason JJ); *Lane* (n 55) 348 [106]–[110] (Bathurst CJ, Simpson and Adamson JJ); *Caswell* (n 53) 169–70 (Lord Wright).

129 *Baden-Clay* (n 16) 326 [55] (French CJ, Kiefel, Bell, Keane and Gordon JJ); *Penhall* (n 114) [127] (Lovell J); *BSJ* (n 118) [75] (Mitchell and Vaughan JJA); *R v Smith* [2025] QCA 130, [11] (Bond JA).

130 *Baden-Clay* Transcript (n 114) 29 (W Sofronoff QC) (during argument).

while on the other the accused themselves has foreclosed other potential innocent hypotheses through their own evidence.¹³¹

IV TENETS OF ADVERSARIAL AND ACCUSATORIAL TRIALS UNAFFECTED

Accepting these principles gives rise to two interrelated issues and the conceptual difference between them should be noted. The first is the issue of inferential use – that is, what use can actually be made of an accused's failure to explain and what reasoning processes can be employed when drawing adverse inferences because of that failure? Those reasoning processes were examined in Part III. The second is that even if the adverse inferences under consideration are logically and legally open, there may be reasons of fairness not to draw them. The understanding that it is a safer course for trial judges to refrain from making comments to a jury as to what inferences can be drawn from an accused's failure to explain and how they could potentially reason towards a guilty verdict more broadly¹³² must logically stem from concerns that those inferences potentially inflict unfairness on an accused. In the context of a 'fair trial', it has been stated that the 'notion of fairness ... defies analytical definition' and what is 'unfair' depends on the circumstances of each particular case,¹³³ but 'fairness' essentially means avoiding practical injustice.¹³⁴ A broad view of what constitutes an unfair criminal trial involves the risk of an innocent person being improperly convicted: a miscarriage of justice.¹³⁵

Even if 'a failure to give evidence bears on the probative value of the other evidence which has been given',¹³⁶ since the presumption of innocence and the accused retaining the right not to testify against themselves are fundamental hallmarks of a fair trial, is employing these types of inferential reasoning processes unfair?¹³⁷ Particularly, if the right to silence encompasses an immunity generally from having adverse comments made on a failure to give evidence at trial, as outlined in Part II, is it unfair to permit adverse inferences of this nature from an accused's failure to explain where the practical effect of such inferences is that

131 See, eg, *Baden-Clay* (n 16) 328–9 [63] (French CJ, Kiefel, Bell, Keane and Gordon JJ).

132 See, eg, *RPS* (n 4) 637 [42] (Gaudron ACJ, Gummow, Kirby and Hayne JJ); *Azzopardi* (n 14) 70 [52] (Gaudron, Gummow, Kirby and Hayne JJ); *Miller* (n 70) 552 [21] (Holmes J).

133 *Jago v District Court of New South Wales* (1989) 168 CLR 23, 57 (Deane J); *Dietrich v The Queen* (1992) 177 CLR 292, 326, 329 (Deane J) ('*Dietrich*'). 'The fundamental prescript of the criminal law of this country is that no person shall be convicted of a crime except after a fair trial': at 326.

134 *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 13–14 [37] (Gleeson CJ); *Edwards v The Queen* (2021) 273 CLR 585, 609 [74] (Edelman and Steward JJ), citing *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506, 564 [162] (Edelman J).

135 *Dietrich* (n 133) 310–11 (Mason CJ and McHugh J), 365 (Gaudron J).

136 *Odgers* (n 62) 136 [EA.20.180].

137 Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Report No 129, December 2015) 223–4 [8.20]; Heather Douglas, Malcolm Barrett and Emma Higgins, *Criminal Process in Queensland* (Thomson Reuters, 2nd ed, 2017) 222 [9.20]; *Sheldrake v DPP (England and Wales)* [2005] 1 AC 264, 292–3 [9] (Lord Bingham).

the accused *is* required to explain particular matters to avoid an adverse result?¹³⁸ The reasoning involved in these classes of adverse inferences, therefore, appears incongruous with the fundamental notion that an accused is not obliged to assist the prosecution, nor are they required to explain anything.¹³⁹

More critically, allowing a failure to explain to be used as a tool for evaluating other evidence arguably has the ‘net effect [of strengthening] the case against the defendant’.¹⁴⁰ An exercise of the right to silence at trial does not by itself attract a sanction, such as by allowing for a conclusion of guilt to be drawn from it or by allowing it to be treated as an implied admission, nor can it otherwise bolster a weak prosecution case.¹⁴¹ But despite this, if the effect of an accused’s failure to explain is that an unfavourable inference that the prosecution seeks becomes more acceptable, this is arguably tantamount to indirectly strengthening the Crown case because it allows for the conclusions sought by the prosecution to be more easily accepted.¹⁴²

If that is so, then this arguably amounts to ‘[alleviating] the prosecution’s burden to some degree’ because attaching evidential significance to the absence of evidence given by an accused in establishing their guilt may allow the prosecution to ‘obtain a conviction as a result of inaction by an accused extrinsic to the evidence’ presented.¹⁴³ As McHugh J observed in *RPS*, in this way an accused’s silence is a factor which ‘[strengthens] the Crown case and which might induce the jury to find that the Crown had proven the guilt of the accused beyond reasonable doubt’.¹⁴⁴ In other words, as some commentators and judges have argued, inferences of this nature strengthen the prosecution’s case by effectively lowering the prosecution’s standard of proof: that is, in the circumstances that enliven these inferences, ‘the Crown need only prove the case to some point short of beyond a reasonable doubt, and the failure to testify takes it over the threshold’.¹⁴⁵

If these arguments are accepted, two palpable forms of unfairness against an accused are arguably capable of arising by application of the paths of reasoning the inferences under consideration provide, which this article aims to address. *First*, there is arguably practical injustice in ‘expecting’ an accused to provide

138 *R v Director of Serious Fraud Office* (n 9) 30–1 (Lord Mustill); Henchcliffe (n 27) 142; *Weissensteiner First Appeal* (n 74) 118 (Shepherdson J); RH Field, ‘The Right to Silence: A Rejoinder to Professor Cross’ (1970) 11 *Journal of the Society of Public Teachers of Law* 76.

139 See, eg, *Caltex* (n 3) 527 (Deane, Dawson and Gaudron JJ).

140 Eakin (n 10) 670; *Weissensteiner* (n 14) 230–1 (Mason CJ, Deane and Dawson JJ).

141 *R v Bruce* [1988] VR 579, 591 (Gray J) (*‘R v Bruce’*); *Azzopardi* (n 14) 64–5 [34] (Gaudron, Gummow, Kirby and Hayne JJ); Bagaric (n 63) 369; Henchcliffe (n 27) 148. Cf Palmer (n 14) 135.

142 Eakin (n 10) 670.

143 Hamer, ‘The Privilege of Silence Part I’ (n 56) 161; Elizabeth Stone, ‘Calling a Spade a Spade: The Embarrassing Truth about the Right to Silence’ (1998) 22(1) *Criminal Law Journal* 17, 19, quoting DJ Harvey, ‘The Right to Silence and the Presumption of Innocence’ [1995] *New Zealand Law Journal* 181, 184. See also Ian H Dennis, ‘Reconstructing the Law of Criminal Evidence’ (1989) 42(1) *Current Legal Problems* 21, 41 (‘Reconstructing’); Henchcliffe (n 27) 142; *Weissensteiner First Appeal* (n 74) 118 (Shepherdson J); *Noble* (n 11) 920 [75] (Sopinka J).

144 *RPS* (n 4) 642 [59] (McHugh J).

145 See, eg, Andrew Ashworth, ‘Four Threats to the Presumption of Innocence’ (2006) 10(4) *International Journal of Evidence and Proof* 241, 255–6 <<https://doi.org/10.1350/ijep.10.4.241>>; Hamer, ‘The Privilege of Silence Part I’ (n 56) 161; *Noble* (n 11) 921 [76] (Sopinka J).

an explanation for certain evidence and then making it easier for the prosecution to establish guilt if the accused fails to do so. Allowing this arguably impairs the presumption of innocence by reducing the prosecution's burden or otherwise strengthening the Crown's case.¹⁴⁶ *Secondly*, even if the inferences under consideration do not go so far as to strictly reduce the prosecution's burden or strengthen its case, there nevertheless remains a tension between the presumption of innocence and burden of proof on the one hand, and 'expecting' an accused to provide an explanation to avoid a relevant adverse inference on the other. That tension arises because the effect of that 'expectation' is to practically compel an accused to provide evidence, which is unfair in a context where the presumption of innocence and burden of proof do not require an accused to do anything. Both manifestations of unfairness are explored in turn below. A *third* category of how unfairness may manifest peculiarly in the context of the *Baden-Clay* inferences by virtue of the consequences arising from the jury rejecting an accused's evidence in the relevant circumstances is separately considered.

A Crown Case Not Unfairly Strengthened by These Inferences

As has been emphasised, an accused ordinarily cannot be 'expected' to explain anything in a criminal trial.¹⁴⁷ Despite this, the three inference classes under consideration have as their common premise absences of an exculpatory explanation by an accused – real or created – for apparently incriminating evidence which '[calls] for an explanation' that only the accused can provide.¹⁴⁸ The fundamental point that drawing the kinds of adverse inferences under consideration is not contrary to the burden of proof or presumption of innocence, and is otherwise not unfair, therefore requires a proper understanding of what it means in this context to 'expect' that 'if the truth were consistent with innocence, ... [an] explanation or answer would be forthcoming [from the accused]'.¹⁴⁹ With respect, it is submitted that the arguments opposed to drawing the types of adverse inferences discussed on the grounds that they strengthen the Crown case and consequently impair the burden of proof and presumption of innocence are misconceived. Rather, it is argued that the better view is that no prejudice or unfairness is occasioned, nor does an accused lose a chance 'which was fairly open to [them] of being acquitted'¹⁵⁰ by the correct application of the principles pertaining to drawing these adverse inferences. As was pointed out in the context of the *Weissensteiner* principle, but which is equally applicable to the other adverse inferences under consideration: 'Much depends upon the circumstances of the particular case and a jury should not be invited to take into account the failure of the accused to give evidence unless that failure is *clearly capable* of assisting them in the evaluation of the evidence before them.'¹⁵¹

146 Harvey (n 143) 186; Stone (n 143) 19; *Noble* (n 11) 920 [75] (Sopinka J).

147 *RPS* (n 4) 632–3 [27] (Gaudron ACJ, Gummow, Kirby and Hayne JJ).

148 See, eg, *Kanaveilomani* (n 45) 656 (Lee J); *Murray* (n 60) 11–12 (Lord Slynn).

149 *Weissensteiner* (n 14) 236 (Brennan and Toohey JJ).

150 *Simic v The Queen* (1980) 144 CLR 319, 331 (Gibbs, Stephen, Mason, Murphy and Wilson JJ); *Mraz v The Queen* (1955) 93 CLR 493, 514 (Fullagar J).

151 *Weissensteiner* (n 14) 228 (Mason CJ, Deane and Dawson JJ) (emphasis added).

The reference to a failure to explain being ‘clearly capable of assisting’ a jury in evaluating the prosecution’s evidence and the accused being ‘expected’ to provide an explanation really means no more than the prosecution establishing a clear prima facie case in the sense of ‘[doing] more than [satisfying] its evidential burden’ as discussed in Part III(A).¹⁵² More specifically, all three of these types of inferences have as their common and connecting feature the fact that each respective inference’s force is derived from the strength of the prosecution’s case. That is, these inferences are only capable of becoming available once the prosecution has presented sufficient evidence ‘from which “an inference [of guilt is] otherwise open”’ and only the accused can provide evidence which explains or contradicts that evidence.¹⁵³

The reasoning involved in drawing each of the inferences under consideration proceeds on similar, but slightly different, paths. In the context of the *Weissensteiner* principle and *Baden-Clay* inferences, it is only when the prosecution’s circumstantial case is sufficiently strong and the accused has additional facts peculiarly within their knowledge that the ‘apparently damning inference’ to be drawn from proved facts would call for an explanation because ‘the accused is the only or best person’ that could contradict or explain that damning inference.¹⁵⁴ Somewhat differently, recent possession only amounts to ‘a *potentially* incriminating circumstance which can be taken into account by a jury’ in deciding whether to accept an inference that the accused unlawfully obtained the goods, but similarly to the other inferences under consideration, it can justify an inference of guilt so long as the prosecution’s other inculpatory evidence provides a basis to support that inference.¹⁵⁵ Of course, judges should give clear instructions to juries to guard against the prospect of juries reasoning that a failure to explain can itself amount to proof of guilt so as to foster the impression that the accused bears the legal burden of exculpating themselves.¹⁵⁶ But provided that it is clearly explained to a jury that an inference of guilt is incapable of arising from silence alone and that guilt must be a conclusion arrived at upon consideration of the entirety of the evidence, no practical unfairness in the sense of the Crown’s case being unfairly strengthened can result where these inferences may arise, as a guilty inference must already be open before a failure to explain could reinforce it.¹⁵⁷

In that respect, common to all three inferences is the limitation that if a guilty inference is unavailable from the prosecution’s evidence at the outset, a failure to explain cannot reinforce that inference because there is no factual foundation from which to draw that inference to begin with.¹⁵⁸ That limitation is a function of the orthodox principle that all of the evidence in these cases must be considered and

152 Hamer, ‘The Privilege of Silence Part I’ (n 56) 173.

153 Hamer, ‘The Privilege of Silence Part II’ (n 74) 212.

154 *RPS* (n 4) 632 [27] (Gaudron ACJ, Gummow, Hayne and Kirby JJ). See also *Kanaveilomani* (n 45) 656 (Lee J).

155 *Cross* (n 90) 248 (Kirby P) (emphasis added); Heydon, *Cross on Evidence* (n 15) 36 [1200].

156 Beaudry (n 88) 475–6.

157 See, eg, *Gilson* (n 98) 367–8 (Brennan J).

158 See *ibid*. See generally *M’Queen v The Great Western Railway Co* (1875) LR 10 QB 569, 574 (Cockburn CJ).

assessed as a whole and that inferences must be based on facts established by other evidence which are logically capable of supporting those inferences.¹⁵⁹ To illustrate this point without being exhaustive, take the example of recent possession. The effect of explaining to a jury how it may use evidence of recent possession or other ‘objective facts’ does not create practical injustice for an accused by unfairly strengthening the Crown’s case because, as explained in Part III(B), proof of recent possession merely exposes the accused to a risk of conviction if they do not explain how they came to be in possession of the goods, but it does not by itself necessitate that the jury convict or otherwise require the accused to provide an explanation.¹⁶⁰ If evidence of recent possession forms part of the totality of the prosecution’s evidence and the accused fails to explain how they came to possess the property, the unexplained possession may confirm the guilty inference that the prosecution’s evidence already gives rise to and may accordingly allow the jury to more readily draw that inference.¹⁶¹

In the context of the ‘*Baden-Clay* inferences’, if the argument above that it is not unfair to draw adverse inferences from an accused’s failure to explain under the *Weissensteiner* principle is accepted, then by parity of reasoning it cannot be unfair to extend those principles to situations where the accused gives evidence of fabricated or otherwise disbelieved ‘additional facts’, which has the effect that those additional facts are not provided and consequently that no explanation is given for incriminating evidence. If the accused gives no evidence which could assist a finding in their favour in those circumstances, then this would consequently allow the jury to draw the common sense inference that there are no hypotheses consistent with innocence available, provided that a sufficiently strong prosecution case already gives rise to the inferences which the prosecution contends for.¹⁶² A failure to explain – in this context, by giving a false account – merely makes that open inference more readily acceptable to the jury in the same manner as the other inference classes under consideration, rather than the jury being permitted to conclude guilt by virtue of rejecting the accused’s evidence alone.

This analysis demonstrates that an accused’s failure to explain cannot independently strengthen a deficient Crown case and prejudice the accused, in the sense of realistically having the capacity to affect the reasoning of the jury to

159 *Caswell* (n 53) 169–70 (Lord Wright); *Lee v Mavaddat* [2007] WASC 18, [59] (Hasluck J); *R v Waters; Ex parte DPP (Cth)* (2023) 15 QR 73, 96 [66] (Henry J). See generally *R v Hillier* (2007) 228 CLR 618, 638 [48] (Gummow, Hayne and Crennan JJ).

160 *R v Petrie* (1946) 47 SR (NSW) 20, 21 (Jordan CJ); *R v Bruce* (n 141) 599 (Gray J); Beaudry (n 88) 481. This can be contrasted with reverse onus statutory provisions providing that if an illicit drug is found in a place where the accused was the occupier, as a matter of law this is conclusive evidence that the drug was in that person’s possession. This is unless the accused demonstrates that they neither knew nor had reason to suspect that the drug was there. As such, the accused is required to provide an explanation as to their knowledge to avoid conviction. Failure to do so deems the accused, as a matter of law, to be in possession of the drug: see, eg, *Drugs Misuse Act 1986* (Qld) s 129(1)(c); *R v Phan* [2008] 2 Qd R 485, 491–2 [24] (Keane JA).

161 *Whittle v Brown* [2011] WASC 143, [53]–[54] (Jenkins J); *Maslin v Searle* (2010) 202 A Crim R 159, 172–3 [77] (Simmonds J).

162 See David Field, ‘Trial by Motive’ (2017) 29(2) *Bond Law Review* 113, 119 <<https://doi.org/10.53300/001c.5652>>.

its verdict¹⁶³ because the prosecution's incriminating circumstantial evidence must already be logically capable of proving the accused's guilt beyond a reasonable doubt before these inferences become available.¹⁶⁴ In those circumstances, and as suggested by CR Williams, using an accused's failure to explain to confirm or more readily draw a guilty inference, where the accused is the only person who can explain or contradict that evidence, cannot be unfair.¹⁶⁵

Importantly, when the point arrives at which sufficient evidence has been presented to justify an inference of guilt so as to give rise to an 'expectation' that the accused provide an explanation for that evidence, the accused's failure to do so means that they must run the risk of conviction.¹⁶⁶ As Sopinka J explained in the Canadian Supreme Court case of *R v Noble*, that 'expectation' to explain so as to avoid the risk of conviction 'does not involve a shift in the legal burden of proof to the accused, but rather involves a shift of a strategic burden'.¹⁶⁷ This 'strategic' or 'tactical' burden is placed on the accused because they are apparently able to easily exculpate themselves, either because they have peculiar knowledge of additional facts that they do not provide (*Weissensteiner*), or they do provide those facts but are disbelieved (*Baden-Clay*), or they otherwise fail to account for innately suspicious circumstantial evidence suggesting their guilt (recent possession). This point regarding the tactical burden will be returned to and further developed in Part IV(B) below. But for present purposes, it is enough to say that, especially in circumstantial cases, 'juries bring to their task their life experiences and common sense' and that they apply their collective common sense and the common experience of members of the community in determining guilt or innocence.¹⁶⁸ As a matter of common sense, if there were an explanation for a clear prima facie case that is consistent with innocence, then the accused, being the only person who can provide an exculpatory explanation, would be expected (in a tactical sense) to provide it to avoid a conviction.

The common sense conclusion to be drawn from their failure to do so which underlies all three inference classes – particularly because the accused alone could explain their innocence – is that an exculpatory explanation, and therefore innocent hypotheses, do not exist.¹⁶⁹ Therefore, once the jury has concluded that there are no innocent hypotheses available, it follows that it can more readily conclude that

163 *Hofer* (n 1) 366–7 [47] (Kiefel CJ, Keane and Gleeson JJ); *Brawn v The King* (2025) 99 ALJR 872, 874 [3], 876 [10] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ).

164 Hamer, 'The Privilege of Silence Part I' (n 56) 173–4.

165 Williams (n 47) 637. See also the comment of Lee J in *Kanaveilomani* (n 45) 654 (emphasis added) in the context of the *Weissensteiner* principle, which is equally applicable to the other two types of adverse inference under consideration: 'allowing an adverse inference to be drawn from a failure to explain where only the accused can provide an exculpatory explanation' ensures that an accused's silence at trial is not used to support an inference of guilt against him whilst maintaining the Crown's right to a conviction *should the circumstances otherwise justify it*'.

166 Harvey (n 143) 184; Palmer (n 14) 143.

167 *Noble* (n 11) 929 [92] (Sopinka J).

168 *R v Nwabueze* [2012] QCA 275, [32] (White JA); *CW v The Queen* [2011] NSWCCA 45, [97] (Whealy JA).

169 *Weissensteiner* (n 14) 244 (Gaudron and McHugh JJ); *Murray* (n 60) 4–5 (Lord Mustill); Patrick Ryan (n 21) 173. See *Kanaveilomani* (n 45) 657 (Lee J): 'the fact that the accused does not avail himself of the opportunity to place [facts peculiarly within the accused's knowledge] before the jury in a case where he

the inferences contended for by the Crown can be accepted because the accused's failure to explain offers no basis for the jury to conclude otherwise.¹⁷⁰ Nothing in this undercuts the presumption of innocence or the burden of proof, nor are these inferences 'capable of affecting the result of the trial', where the jury are permitted to infer a conclusion of guilt which was already available, or indeed, inevitable, based on the Crown's clear *prima facie* case when the accused refuses or fails to discharge their tactical burden with facts *only they* have knowledge of.¹⁷¹

These principles merely recognise that juries cannot be expected to ignore the consequences of the accused exercising their right to silence.¹⁷² Fundamentally, even if the accused experiences some disadvantage as a consequence of an inference under consideration, a trial is not rendered unfair where it is not 'free from possible detriment or disadvantage of any kind or degree to the accused'.¹⁷³ Ultimately, there is no unfairness to the accused where an inference that is already available is capable of being more readily accepted as a result of the accused's failure to explain, as any detriment or disadvantage to the accused originates from the orthodox notion that their presumption of innocence has been eroded by the prosecution's evidence and the inferences available from it.¹⁷⁴

B Tension between Tactical Burden and Character of Accusatorial Trial

Evidently, the limitations on the use that can be made of an accused's failure to explain are a product of the presumption of innocence and the burden of proof.¹⁷⁵ However, even accepting the argument in Part IV(A) that the inferences in question do not strictly strengthen the Crown case and only impose a tactical burden on the accused, it ought to be considered whether the manner in which these inferences impose that tactical burden nevertheless undermines the accusatorial character of the criminal trial and the presumption of innocence so as to create unfairness. It is in this way that the issue of whether the adverse inferences in question may be logically and legally open but nevertheless unfair becomes significant. Relevantly, 'a trial may be unfair even though conducted strictly in accordance with the

might be reasonably expected to have done so, is a circumstance which logically renders it less likely that such an hypothesis exists'.

170 *Murray* (n 60) 4–5 (Lord Mustill), 11–12 (Lord Slynn); *R v Clune* (1999) 72 SASR 420, 430 [63] (Olsson J); *R v François* [1994] 2 SCR 827, 847–8 (Major J); *R v Lepage* [1995] 1 SCR 654, 671 [30] (Sopinka J) ('*Lepage*'); *Johnson* (n 78) 347–8 (Arbour JA); *Noble* (n 11) 927 [89] (Sopinka J).

171 *Edwards v The Queen* (2021) 273 CLR 585, 609 [74] (Edelman and Steward JJ) (emphasis omitted), quoting *R v Matenga* [2009] 3 NZLR 145, 158 [31] (Blanchard J for the Court). See generally *R v Appleby* [1972] SCR 303, 317–8 (Laskin J) ('*Appleby*'); *Noble* (n 11) 902 [35] (Lamer CJ); *Surrey* (n 62) 96–7 [35] (Jerrard JA); *Baini v The Queen* (2012) 246 CLR 469, 481–2 [33] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *R v Inland Revenue Commissioners; Ex parte TC Coombs & Co* [1991] 2 AC 283, 300 (Lord Lowry); *British Railways Board v Herrington* [1972] AC 877, 930 (Lord Diplock).

172 Sir Anthony Mason, 'Fair Trial' (1995) 19(1) *Criminal Law Journal* 7, 10; *Weissensteiner* (n 14) 229 (Mason CJ, Deane and Dawson JJ); *Bagaric* (n 63) 369.

173 *Jarvie v Magistrates' Court of Victoria at Brunswick* [1995] 1 VR 84, 90 (Brooking J).

174 *McEwan* (n 14) [67] (Brown J); Henschliffe (n 27) 143; Glanville Williams, 'The Tactic of Silence' (1987) 137(6333) *New Law Journal* 1107; RJ Delisle, 'Silence at Trial: Inferences and Comments' (1997) 1 CR (5th) 313.

175 *Strbak* (n 49) 507–8 [31] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ); *Miller* (n 69) 551 [18], 553 [24] (Holmes J).

law'.¹⁷⁶ In the present context, while the inferences in question may be open, their application may nevertheless occasion unfairness if the shifting of the tactical burden onto an accused as described in Part IV(A) causes 'practical injustice' by producing 'for practical purposes a duty to speak'.¹⁷⁷ That unfairness arguably arises because the practical requirement on the accused to produce evidence or provide an explanation runs contrary to the presumption of innocence and burden of proof, both of which signify that it is the prosecution's role to prove guilt.¹⁷⁸

The primary argument opposing adverse inferences from failures to explain on the basis of the tactical burden shifted onto the accused is that this tactical burden has the effect that the prosecution is no longer required to positively demonstrate the accused's guilt within the traditional conception of the accusatorial criminal trial, thereby unfairly assisting the prosecution.¹⁷⁹ Namely, if the accused actually¹⁸⁰ or effectively¹⁸¹ fails to provide an explanation when one is 'called for', the jury may potentially be instructed pursuant to the applicable principles that an accused's failure to explain essentially may make it easier for it to accept the prosecution's interpretation of the evidence.¹⁸² The accused is then either practically compelled to testify, which may potentially contribute to the prosecution's demonstration of the accused's guilt, or they must suffer the consequences of an applicable adverse inference, the effect of which arguably allows a jury to 'more confidently dispose' of doubts about the accused's guilt despite the burden of proof ostensibly remaining on the prosecution.¹⁸³ Ultimately, this article argues that no such unfairness materialises and that conclusion is borne out by the prerequisite of a 'clear prima facie case' common to each inference discussed in Part IV(A), which again illustrates why there is no unfairness so described.

First, a 'tactical burden' entails 'the burden of proof in the sense of *introducing evidence*' – it is distinct from the burden of establishing a case beyond reasonable doubt, which always rests with the prosecution.¹⁸⁴ Questions of fact may only arise for a jury's consideration if the party bearing the tactical burden on a particular issue positively introduces evidence to raise it.¹⁸⁵ In any manner of criminal trial,

176 *Dietrich* (n 133) 362 (Gaudron J).

177 Dennis, 'Reconstructing' (n 143) 41.

178 *Noble* (n 11) 920–2 [76] (Sopinka J); *Strbak* (n 49) 507–8 [31] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ); *Azzopardi* (n 14) 64 [34] (Gaudron, Gummow, Kirby and Hayne JJ).

179 John E Stannard, 'A Presumption and Four Burdens' (2000) 51(4) *Northern Ireland Legal Quarterly* 560, 574 <<https://doi.org/10.53386/nllq.v51i4.638>>.

180 In the context of *Weissensteiner* (n 14) or recent possession cases.

181 In the *Baden-Clay* sense.

182 *Tedeschi* (n 13) 86.

183 Soraya Ryan (n 14) 2; Stannard (n 178) 574; *Noble* (n 11) 923 [80] (Sopinka J).

184 *Braysich v The Queen* (2011) 243 CLR 434, 453–4 [33] (French CJ, Crennan and Kiefel JJ), quoting *Purkess v Crittenden* (1965) 114 CLR 164, 167–8 (Barwick CJ, Kitto and Taylor JJ); *R v Edwards* [2004] 1 WLR 2111, 2118–9 [5] (Lord Woolf CJ); Heydon, *Cross on Evidence* (n 15) 338 [7010]. See also *Criminal Code* 1995 (Cth) s 13.1(3).

185 *R v DPP (England and Wales); Ex parte Kebilene* [2000] 2 AC 326, 378–9 (Lord Hope); David Hamer, 'The Presumption of Innocence and Reverse Burdens: A Balancing Act' (2007) 66(1) *Cambridge Law Journal* 142, 164 <<https://doi.org/10.1017/S0008197307000062>>.

once the prosecution discharges its legal and evidential burden by introducing sufficient evidence to entitle a jury to convict the accused on the criminal standard, despite bearing no legal burden, it nevertheless becomes tactically and practically desirable (although not legally obligatory) for the accused to adduce evidence to raise a reasonable doubt and thereby avoid a finding of guilt.¹⁸⁶ That is because if the accused fails to do so – particularly in circumstances where they are the exclusive source of exculpatory evidence – then the jury is entitled, although not obliged, to return a guilty verdict.¹⁸⁷

Accepting this, it follows that if the prosecution discharges its burden to the requisite standard in the sense of establishing a ‘clear prima facie case’, it has necessarily presented sufficient evidence upon which a jury could base a conviction.¹⁸⁸ It is only then that an accused would be practically ‘expected’ to provide an innocent explanation in order to avoid being convicted.¹⁸⁹ The practical imperative on the accused that arises in the form of the ‘tactical burden’ is merely a function of the forensic reality that many defence cases have little practical chance of success where an accused fails to provide a credible explanation of inculpatory circumstances.¹⁹⁰ Indeed, of particular significance in cases where sufficient inculpatory evidence is presented and an accused is the exclusive source of innocent hypotheses, ‘the accused may be faced with having to [provide an explanation] or risk that he or she will be found guilty’.¹⁹¹ Further, if one aspect of the concept of a ‘fair’ criminal trial can be reduced to the question of whether the accused has had a fair opportunity of dealing with the allegations put against them,¹⁹² and the accused is uniquely the only source of potentially exculpatory information, then the accused being tactically ‘expected’ to provide an explanation to avoid an adverse result does not impair that opportunity.

186 *Cameron v Holt* (1980) 142 CLR 342, 347 (Barwick CJ); *R v Lambert* [2002] 2 AC 545, 588–9 [90] (Lord Hope); Victor Tadros, ‘The Ideal of the Presumption of Innocence’ (2014) 8(2) *Criminal Law and Philosophy* 449, 450; Senthilkumaran Sabapathy and Etsuko Lim, ‘The Shifting of the Evidential Burden in Criminal Trials: A Clarification by the Court of Appeal’ [2022] *Singapore Academy of Law Practitioner* 18, [5].

187 Heydon, *Cross on Evidence* (n 15) 381 [7210]; Stannard (n 179) 571; Ashworth (n 145) 278. See also *Coffin v United States* (1895) 156 US 432.

188 *Noble* (n 11) 895–6 [26] (Lamer CJ).

189 *Weissensteiner First Appeal* (n 74) 110 (McPherson JA); *R v MBP* [1994] 1 SCR 555, 579 (Lamer CJ); Palmer (n 14) 142.

190 *Antoun v The Queen* (2006) 80 ALJR 497, 500–1 [14] (Gleeson CJ).

191 *R v Fairbairn* (2011) 250 FLR 277, 293–4 [95] (Refshauge J). See also *Weissensteiner First Appeal* (n 74) 106 (Pincus JA); *Brauer v DPP (Qld)* [1991] 2 Qd R 261, 268–9 (Thomas J); *Apollo Shower Screens Pty Ltd v Building and Construction Industry Long Service Payments Corp* (1985) 1 NSWLR 561, 565 (Hunt J); Heydon, *Cross on Evidence* (n 15) 362–3 [7165]; DH Jack, ‘The Doctrine of Recent Possession and the Rule Against Hearsay Evidence: *Regina v Graham*’ (1973) 15(2) *Criminal Law Quarterly* 195, 197; AT Denning, ‘Presumptions and Burdens’ (1945) 61 *Law Quarterly Review* 379, 380.

192 See, eg, *Prosecutor v Milošević (Separate Opinion of Judge Shahabuddeen Appended to Appeals Chamber Decision Dated 30 September 2003 on Admissibility of Evidence-in-Chief in the Form of Written Statements)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-02-54-AR73.4, 31 October 2003) 7 [16].

Of course, any of the three inferences that arise in the relevant circumstances where an accused fails to explain will necessarily be unfavourable to the accused.¹⁹³ But, as explained above, the inference contended for must already be available on the evidence to the requisite standard such that these inferences cannot unfairly strengthen the prosecution's case extraneously to the evidence.¹⁹⁴ In this way, a conclusion of guilt beyond a reasonable doubt remains grounded in the evidence and accordingly, 'the stronger and more convincing the prosecution's case the greater the expectation by the jury of some explanation from the accused ... [the adverse inference] ... is really no more than a reflection of the strength of the prosecution's case'.¹⁹⁵

Therefore, any argument that a failure to explain in the contexts under consideration ipso facto acts as a 'makeweight' or can be used to 'dispose' of or disregard doubts, or convert what would have otherwise been an acquittal into a conviction is, with respect, misconceived.¹⁹⁶ Once it is understood that these inferences cannot be drawn unless the prosecution's evidence, standing alone, is sufficiently strong so as to be capable of supporting an inference of guilt, it becomes apparent that a trial cannot be rendered unfair where the strength of the prosecution's case imposes a practical requirement on an accused to rebut or explain certain evidence in order to avoid conviction, particularly where it is a rebuttal or explanation which only they can provide.¹⁹⁷

The 'tactical burden' in the context of these three inferences does not arise by a process of reasoning where the jury is permitted to draw an adverse inference from certain prosecution evidence (which falls short of establishing a 'clear prima facie case'), and then requiring the accused to provide an innocent explanation for that evidence, relieving the prosecution of its burden of *positively establishing* guilt.¹⁹⁸ As explained in Part III(A), where there is insufficient evidence to draw an unfavourable inference, a failure to explain does nothing for a deficient Crown case.¹⁹⁹ The adverse inferences in question cannot exist in a vacuum: they must always have an evidentiary foundation that justifies them. If that foundation is absent and there are no proved facts from which any inference can be drawn, then there is consequently no inference that a failure to explain can strengthen.²⁰⁰

193 See, eg, *R v VN* [2023] QCA 184, [79] (Bowskill CJ).

194 *Weissensteiner* (n 14) 229 (Mason CJ, Deane and Dawson JJ), 244–5 (Gaudron and McHugh JJ); *McEwan* (n 14) [27] (Brown J); *Noble* (n 11) 905–6 [41] (Lamer CJ). See, eg *Pickett v Tasmania* [2022] TASCCA 12, [66] (Brett J).

195 *R v Boss* [1988] OJ No 2016, 19 (Cory JA) (Ontario Court of Appeal). See also *Noble* (n 11) 922 [78] (Sopinka J).

196 Cf *Stone* (n 143) 22; *Harvey* (n 143) 186.

197 *R v Fairbairn* (2011) 250 FLR 277, 293–4 [95] (Refshauge J); *Noble* (n 11) 927 [89] (Sopinka J); *Weissensteiner* (n 14) 229 (Mason CJ, Deane and Dawson JJ); *Davies* (n 8) 30. The comment made by the trial judge in *R v Fernando* [1999] NSWCCA 66 provides an illustration of this in the context of the *Weissensteiner* principle, where the inference in question was framed as being 'available to be drawn from facts proved by the Crown's case': at [173] (emphasis added).

198 Cf *Lepage* (n 170) 677 [49] (Major J); *Telfner v Austria* (2002) 34 EHRR 7, [18] (the Court).

199 See *R v Zouras* [2002] VSCA 182, [12] (Buchanan JA).

200 *Henchliffe* (n 27) 143.

In those circumstances, a jury using a failure to explain to more readily accept a guilty inference that is unavailable would be impermissible speculation.²⁰¹ Therefore, the common precondition to all three inferences that the prosecution's case be sufficiently strong before those inferences become available demonstrates that the burden remains on the prosecution and such an inference cannot supplant the prosecution's case.²⁰²

It must be conceded that a degree of tension remains between the accusatorial nature of the criminal trial on the one hand, and the shifting of the tactical burden effected by the inferences in question so as to practically require the accused to provide an explanation on the other. Nevertheless, as this analysis demonstrates, that tension is largely resolved by the anterior requirement that the prosecution raise a 'clear prima facie case' before the inferences under consideration become available. Because of that common requirement, an accused cannot be 'convicted while a reasonable doubt exists' so as to breach the presumption of innocence, as the existence of a 'clear prima facie case' necessarily means that the evidence presented by the prosecution is capable of excluding those doubts.²⁰³ Accordingly, trial judges and prosecutors should not avoid reliance on these inferences where they are warranted for fear that a jury may reason unfairly or prejudicially.

C No Unfairness Where an Accused's Evidence or their Case's Construction Backfires

Some additional, narrower considerations of unfairness are peculiar to the *Baden-Clay* inferences and do not fit neatly into the two broader categories discussed above. That is because, by contrast to the other two inferences under consideration, the *Baden-Clay* inferences can only arise where the accused *gives evidence* of 'additional facts' they exclusively possess. Consequently, there may be concerns that permitting reasoning in accordance with the principles pertaining to the '*Baden-Clay* inferences' in the extreme cases where those inferences are enlivened could lead to 'poorly educated, inarticulate or hopeless defendants' incurring an unfair disadvantage stemming from their evidence being disbelieved even though their evidence may be truthful.²⁰⁴ Attaching a disadvantage to being disbelieved in the confined circumstances in which the '*Baden-Clay* inferences' may arise might be considered unfair and contrary to the presumption of innocence because by doing so, it is expected that the accused 'has more to say' and that this is not only truthful, but *perceived* to be truthful.

Naturally, a dissection of what evidence was accepted by the jury and how inferences may have arisen from the rejection of particular evidence will arise on appeal. But if trial judges can comment on how a jury may reason where an accused fails to provide additional facts peculiarly within their knowledge, surely by extension juries could be provided with some limiting instructions by way of

201 *Appleby* (n 171) 317–18 (Laskin J).

202 *R v Cowan* [1996] QB 373, 379 (Lord Taylor CJ).

203 See *R v Whyte* [1988] 2 SCR 3, 18 (Dickson CJ).

204 Soraya Ryan (n 14) 1.

comment about how to reason when an accused gives that evidence but the jury rejects it, if that can be done in a way that is clear and not unduly confusing for the jury.²⁰⁵

There is, nevertheless, danger inherent in permitting the jury to be instructed about permissible reasoning in this context. By explaining that they may reason in this way, those instructions might convey the impression to the jury that the trial judge is purportedly making favourable comments on the prosecution's case or suggesting that they should reject the accused's evidence.²⁰⁶ But if one accepts that juries may ignore comments which are intended to assist them in how they may reason,²⁰⁷ and that the determination of all factual matters falls to the jury,²⁰⁸ it must be accepted as axiomatic that the jury may determine whether evidence presented is truthful and that they may embark on permissible forms of reasoning if they determine that it is not.²⁰⁹ With that being so, it should also be acceptable for judges to cautiously explain to juries the ways in which they may reason in these circumstances, particularly with respect to what consequences attach to the jury's disbelief of an accused's 'additional facts'. Unfairness cannot result from the consequences which ensue from a jury rejecting an accused's evidence, particularly where the jury concludes that the accused has lied, because the jury is merely discharging their role by reaching those conclusions. Therefore, 'hopeless defendants' whose purportedly truthful 'additional facts' are disbelieved do not suffer an unfair disadvantage because their effective failure to explain – which stems from the 'contrived silence' the disbelief creates – cannot be considered in isolation to arrive at a conclusion of guilt.

Therefore, the Crown's case is not unfairly strengthened, and the presumption of innocence and burden of proof consequently remain unaffected when the way an accused conducts their case backfires because they have given an absurd or otherwise disbelieved explanation which leaves inculpatory facts unexplained in substance. Existing directions, alongside limiting instructions as to how the '*Baden-Clay* inferences' are to be applied, may be sufficient to adequately inform the jury about permissible reasoning and protect against any perceived unfairness.²¹⁰ Regardless, the use of such reasoning within a jury internally or on appeal when assessing the strength of the Crown's case is not unfair.

Additionally, where an accused provides a version of events that only they would know, and they disclaim reliance on a particular hypothesis, there is no unfairness where that hypothesis becomes foreclosed with the effect that only one inculpatory inference is left open. That is because in the adversarial

205 *Azzopardi* (n 14) 88 [112] (McHugh J).

206 See *McKell v The Queen* (2019) 264 CLR 307, 321–2 [42] (Bell, Keane, Gordon and Edelman JJ).

207 *Azzopardi* (n 14) 69–70 [49]–[50] (Gaudron, Gummow, Kirby and Hayne JJ).

208 *R v Wang* [2005] 1 WLR 661, 665–6 [8] (Lord Bingham).

209 *Doney v The Queen* (1990) 171 CLR 207, 214 (Deane, Dawson, Toohey, Gaudron and McHugh JJ).

210 Such as directions about credibility and reliability, and how a verdict of guilty may be arrived at in wholly circumstantial cases. See, eg, Queensland Courts, 'Supreme and District Courts Criminal Directions Benchbook' (Bench Book, 2026) ch 48 <https://archive.sclqld.org.au/sclpub/supreme-and-district-courts-benchbook/48_circumstantial-evidence.pdf>.

system, parties are free to define the issues and thereby bind themselves by the way that they conduct their cases.²¹¹ ‘A forensic choice made by an accused to put forward’ or disclaim reliance on particular hypotheses will have an effect upon their trial.²¹² It is recognised as undesirable to allow parties to reserve points for tactical reasons in order to promote success on appeal, as this may result in unfairness to the other party, who is required to meet new points of fact or law for the first time on appeal.²¹³ By similar reasoning, if there are no reasonable hypotheses consistent with a version of facts advanced at trial or particular hypotheses are deliberately excluded by the accused’s own evidence of ‘additional facts’, it cannot be unfair to confine an accused to the course adopted, particularly where the accused is the only person who could explain the true facts of the relevant incident.²¹⁴ There is no unfairness in allowing a jury to reason that a hypothesis ceases to be available where the accused themselves disavows it, particularly where this is coupled with the fact that the prosecution’s evidence supports an inference of guilt in the first place, so that the disavowal makes the conclusion that there is no innocent hypothesis more readily available. As with the *Weissensteiner* principle, both permutations of the ‘*Baden-Clay* inferences’ alone or in combination do not independently strengthen the Crown case because they can only be used to evaluate whether any reasonable hypotheses consistent with innocence remain available.

V CONCLUSION

This article has interrogated the reasoning processes involved in the *Weissensteiner* principle, inferences arising from evidence of recent possession of stolen goods, and the ‘*Baden-Clay* inferences’ to demonstrate that permitting these classes of inferences, correctly understood and applied, does not infringe key tenets of the adversarial trial so as to cause unfairness to an accused, nor do they unfairly strengthen the Crown case. In doing so, the reasoning processes involved have been expounded in order to clarify how this reasoning operates. In particular, this article’s exploration of the relatively novel phenomena of the ‘*Baden-Clay* inferences’ argues that *Weissensteiner* reasoning can extend, in circumstances narrow enough to be analogous to *Baden-Clay* itself, to situations where an accused does give evidence, provided certain preconditions are met.

By analysing these classes of inferences and the reasoning they involve, it has been demonstrated that it is a failure to provide an exculpatory explanation – that, if it existed, only the accused can provide – in the face of a sufficiently

211 *Nudd v The Queen* (2006) 80 ALJR 614, 618–9 [9] (Gleeson CJ); *Miechel v The Queen* (2010) 207 A Crim R 334, 341 [34]–[35] (Maxwell P, Neave JA and Lasry AJA).

212 *Kaddour* (n 114) 586 [35] (Sofronoff P).

213 *Coulton v Holcombe* (1986) 162 CLR 1.

214 See generally *Water Board v Moustakas* (1988) 180 CLR 491, 497 (Mason CJ, Wilson, Brennan and Dawson JJ); *R v Tracey* [2024] QCA 19, [131] (Morrison JA). See also *R v Luhan* [2009] VSCA 30, [37] (Maxwell P, Vincent and Neave JJA); ‘*Baden-Clay* Submissions’ (n 122) [64].

strong Crown case which allows a jury to more readily reach the common sense conclusion that there is no exculpatory explanation and which consequently allows the jury to more readily accept the inculpatory inference already available on the evidence. Because the adverse inference to be drawn from a failure to explain in each of these inference classes is premised on there existing other evidence from which guilt can be concluded, the burden of proof and presumption of innocence remain unaffected, and the Crown's case is not unfairly strengthened in a true sense.

Additionally, this article has also explored whether the 'tactical burden' that is placed on the accused before a relevant inference becomes available raises issues of unfairness. It is concluded that while there remains somewhat of a tension between that tactical burden and the presumption of innocence and burden of proof, that tension does not rise to the level of unfairly advantaging the prosecution. That is so in circumstances where the prosecution is required to raise a sufficiently strong case before the tactical burden arises, which is a prerequisite to the inferences in question becoming available in any event. It must be appreciated that because the presumption of innocence only benefits the accused up to the point where the presumption has been displaced by evidence which can establish guilt beyond a reasonable doubt,²¹⁵ no tenets of the adversarial and accusatorial system are lost when an accused risks conviction by failing to provide exculpatory facts which they are the only potential source of.

None of this is to suggest that every case where an accused fails to provide an explanation justifies the application of any of the adverse inferences discussed. Rather, the point is that these inferences should be available where they are properly warranted, and the Crown should not be reluctant to rely on them, nor should trial judges be reticent to give proper instructions to a jury about drawing these inferences for 'fear that appealable error will creep into the trial' or for fear that the proper application of such inferences are unfair to an accused.²¹⁶ Therefore, as this article has argued, the application of these inferences should not be avoided for fear of occasioning unfairness where their application is properly warranted, because drawing these inferences ultimately does not unfairly disadvantage the accused.

Our system of criminal justice is premised on the assumption that juries assiduously apply the instructions that they are given by trial judges in reaching their verdicts.²¹⁷ Provided that juries are properly instructed about how an accused's silence can (and not must) be used to evaluate evidence in appropriate circumstances, prosecutors and trial judges should not be deterred from explaining to juries (by way of comment that can be disregarded) how to employ their common sense and draw inferences from failures to explain where they are be satisfied that the prosecution's case is strong enough on its own to give validity to the conclusion that

215 Harvey (n 143) 184.

216 *R v Chan* [1998] VSCA 145, 15 (Brooking JA) in the context of lies as consciousness of guilt.

217 *Gilbert v The Queen* (2000) 201 CLR 414, 420 [13] (Gleeson CJ and Gummow J), 425–6 [31] (McHugh J).

the accused's failure to explain is inconsistent with innocence.²¹⁸ Fundamentally, the decision to explain or remain silent is 'rarely devoid of consequences'.²¹⁹ It cannot be unfair to allow a properly-directed jury to give effect to these consequences in their paths of reasoning, where the endpoint of that reasoning is a conclusion as to the accused's guilt that is already open.

218 *Weissensteiner* (n 14) 244 (Gaudron and McHugh JJ). See *R v Doherty* (2003) 6 VR 393, 409–10 [27] (Winneke P). See also *Zoneff* (n 120) 246–7 [30] (Kirby J).

219 *Azzopardi* (n 14) 58 [8] (Gleeson CJ).