31. The Rule in *Jones v Dunkel*

31.1 Legislation

[Last reviewed: February 2025]

Nil.

31.2 Commentary

[Last reviewed: February 2025]

Failure by defence to call witness

In *Dyers v The Queen* [2002] HCA 45; (2002) 210 CLR 285, the High Court restricted the application of *Jones v Dunkel* (1959) 101 CLR 298. It is no longer appropriate for a *Jones v Dunkel* type direction to be given in relation to the failure of the defence to call witnesses, except in the rare exceptions referred to in *Azzopardi v The Queen* [2001] HCA 25; (2001) 205 CLR 50, [74]. Other than those rare circumstances, the first direction set out below (which is modelled on what was said in *Jones v Dunkel*) should be given.

In *Dyers*, Gaudron and Hayne JJ at [5] (with whom Kirby J agreed on this point) said:

> 'As a general rule a trial judge should not direct the jury in a criminal trial that the accused would be expected to give evidence or call others to give evidence. Exceptions to that general rule will be rare. They are referred to in *Azzopardi*. As a general rule, then, a trial judge should not direct the jury that they are entitled to infer that evidence which the accused could have given, or which others, called by the accused, could have given, would not assist the accused. If it is possible that the jury might think that evidence could have been, but was not, given or called by the accused, they should be instructed not to speculate about what might have been said in that evidence.'

In *Azzopardi,* Gaudron, Gummow, Kirby and Hayne JJ at [74] said:

> There may be cases involving circumstances such that the reasoning in *Weissensteiner* will justify some comment. However, that will be so only if there is a basis for concluding that, if 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, that a comment on the accused's failure to provide evidence of those facts may be made. The facts which it is suggested could have been, but were not, revealed must be additional to those already given in evidence by the witnesses who were called. The fact that the accused could have contradicted evidence already given will not suffice. Mere contradiction would not be evidence

> of any additional fact. In an accusatorial trial, an accused is not required to explain or contradict matters which are already the subject of evidence at trial. These matters must be assessed by the jury against the requisite standard of proof, without regard to the fact that the accused did not give evidence.

The reasoning which underpins the decisions in *Azzopardi* and *RPS v The Queen* [2000] HCA 3; (2000) 199 CLR 620 is not confined to the Defendant failing to give evidence personally, but applies with equal force to the Defendant's failure to call other persons to give evidence.

See in relation to directions in cases where the Defendant does not give evidence, the discussion of the *Azzopardi/Weissensteiner* direction in **Chapter 27 – Defendant Not Giving Evidence, where no adverse inference** and **Chapter 28 – Defendant Not Giving Evidence, where an adverse inference may follow from that**.

Failure by prosecution to call witness

It is also usually inappropriate to give a direction in relation to the failure of the prosecution to call witnesses.

In *Dyers v The Queen* [2002] HCA 45; (2002) 210 CLR 285, Gaudron and Hayne JJ at [6] said:

> 'Further, as a general rule, a trial judge should not direct the jury in a criminal trial that the prosecution would be expected to have called persons to give evidence other than those it did call as witnesses. It follows that, as a general rule, the judge should not direct the jury that they are entitled to infer that the evidence of those who were not called would not have assisted the prosecution. A direction not to speculate about what the person might have said should be given. Again, exceptions to these general rules will be rare and will arise only in cases where it is shown that the prosecution's failure to call the person in question was in breach of the prosecution's duty to call all material witnesses.'

In *RPS v The Queen* [2000] HCA 3; (2000) 199 CLR 620, Gaudron A-CJ, Gummow, Kirby and Hayne JJ at [633] said:

> '… if the question concerns the failure of the prosecution to call a witness whom it might have been expected to call, the issue is not whether the jury may properly reach conclusions about issues of fact but whether, in the circumstances, the jury should entertain a reasonable doubt about the guilt of the accused.'

The trial judge may, but is not obliged to, question the prosecution in order to discover its reasons for declining to call a particular person, but the trial judge is not called upon to adjudicate the sufficiency of the reasons that the prosecution offers. Only if the trial judge has made such an inquiry and has been given answers considered by the judge to be unsatisfactory, would it seem that there would be any sufficient basis for a judge to tell the jury that it would have been reasonable to expect that the prosecution would

call an identified person. There would then be real questions about whether, and how, the jury should be given the information put before the judge and then a further question about what directions the jury should be given in deciding for itself whether the prosecution could reasonably have been expected to call the person. Only when those questions have been answered would further directions of the kind contemplated by *Jones v Dunkel* be open (see *Dyers v The Queen* [2002] HCA 45; (2002) 210 CLR 285, [17] (Gaudron and Hayne JJ, Kirby J agreeing)).

In *MFA v The Queen* [2002] HCA 53; (2002) 213 CLR 606, [20], [36], [81], the High Court approved a full *Jones v Dunkel* direction, adverse to the Crown, given in that case, where the prosecution had not called relevant witnesses because they were considered to be 'in the camp of the Accused.' The Court held that did not *ipso facto* entitle the Crown to regard that evidence as unreliable. A further case where the Court of Appeal considered it appropriate to give such a direction is *R v Palmer* (1998) 103 A Crim R 299, which entailed the failure by the prosecution to call a corroborating police officer in respect of disputed, unrecorded admissions allegedly made by the Defendant

31.3 Suggested Direction

[Last reviewed: January 2025]

It may appear to you that witnesses other than those who have given evidence might have been able to give some relevant evidence (on some aspect of the case**). You may not speculate about what others who were not called might have said if they had been called. You should act on the basis of the evidence that has been called and only that evidence.**

(Failure by prosecution to call material witness**):**

You heard reference to [X**] who was present when [**insert description of act**] occurred. The prosecution could have called [**X**] to give evidence, but it did not do so. Since there is no explanation of [**his/her**] absence, you may infer that nothing [**he/she**] could have said would have assisted the prosecution case. You cannot infer that [**he/she**] would have given evidence damaging to the prosecution case, but you may consider that it affects your readiness to accept the evidence of [**insert name of witness**] for the prosecution. You may find that you can accept more readily the evidence given by [**insert name of witness**] for the defence since it is not contradicted by anything [**X**] might have said.**