Jones v Dunkel in the criminal trial – witnesses other than the accused

*By Nick Boyden**

Recent authorities severely limit the availability of a J*ones v Dunkel* direction against a silent accused in a criminal trial[1]. This article considers authorities on the availability of such directions in criminal trials in relation to a party's failure to call a witness other than the accused. These authorities suggest that such directions will rarely be given, especially against the defence.

1. The facts of *Jones v Dunkel*

In *Jones v Dunkel*[2], a civil negligence case, the High Court held that the jury should have been told that any inference favorable to the plaintiff from the evidence might be more confidently drawn when a person presumably able to put the true complexion on the facts relied on as the ground for the inference has not been called as a witness by the defendant, and the evidence provides no sufficient explanation for his absence. Kitto and Menzies JJ also held that the failure to call a particular witness cannot fill an evidentiary gap in the opponent's case.[3]

Judges should avoid directions that encourage juries to speculate on what that evidence must have been and thus to infer (impermissibly) that the evidence would have been unfavourable

The facts of *Jones v Dunkel* concerned a motor vehicle accident to which there were no witnesses. The defendant did not call evidence from his employee, the driver of the vehicle.

A number of cases have since clarified and limited the circumstances in which the rule can be applied[4]: These principles are, in summary:

- the unexplained failure by a party to adduce material evidence may, not must, lead to an inference that the evidence would not have assisted that party's case;
- the rule does not permit an inference that the evidence not tendered would have been damaging to the party who failed to adduce it – it cannot be used to fill gaps in the opponent's case;
- the rule only applies where a party must explain or contradict evidence of 'facts requiring an answer';
- the rule does not apply where the absent witness is the party's solicitor;
- the rule does not operate to require a party to give repetitive evidence;
- the rule cannot be applied to the failure to call a witness by a party unless it would be natural and expected for that party to call the witness; and
- the principles can apply to the failure by a party to ask a witness called by that party particular questions in chief.

Since *Jones v Dunkel*, the courts have held that the mere absence of a witness does not necessarily support an inference that the witness would not have helped the impugned party's case. In *RPS* the majority of the High Court expressed caution about the principle, noting that:

> it is essential to note its limits. It relates to the drawing of inferences or conclusions from other facts … the mode of reasoning which is described proceeds from the premise that the person who has not given evidence not only *could* shed light on the subject but also *would* ordinarily be expected to do so.[5]

Jones v Dunkel was a circumstantial case and its application should, in the opinion of the author, be limited to such cases. Judges should avoid directions that encourage juries to speculate on what that evidence must have been and thus to infer (impermissibly) that the evidence would have been unfavourable.[6]

2. Application of *Jones v Dunkel* in the criminal trial

The principles in *Jones v Dunkel* apply to criminal as well as civil trials. However, courts have emphasised the need for caution in criminal cases:

> in many cases the absence of a witness either for the Crown or the accused might well be explicable upon grounds not readily capable of proof. If it is suspected that there may be some valid reason for a witness not being called, then, in a criminal trial in particular, a careful appraisal is requisite before commenting on the absence of that witness[7].

Since *Jones v Dunkel*, this principle has been strictly applied, both in favour of the defence and the Crown.[8]

It is now well established that where, in a criminal circumstantial case, the accused does not give evidence, an inference might be drawn about his or her failure to give evidence if there were facts which explained or contradicted the evidence against the accused, they were facts which were within the knowledge only of the accused, and could not be the subject of evidence from any other person or source.[9] However the High Court's recent decisions in *RPS* and *Azzopardi & Davis* show that such cases will be very rare[10].

3. *Jones v Dunkel* directions against the Crown

The prosecution duty to present its case fairly includes the calling of all relevant witnesses.[11] Where the prosecution fails to call a witness whom it might have been expected to call, the High Court has recently noted that:

> 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.[12]

This statement appears to be stronger than the Court's previous observations in *Apostilides*.[13]

3.1 Has the proposed witness made a statement?

In assessing whether or not the Crown

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should call a witness, a significant factor will be whether or not the witness has actually made and adopted a statement.

It could hardly be suggested that the prosecution should call a witness where the witness has not made a statement of some sort.[14] However, where the witness' account was 'fresh in his or her memory', evidence from investigating police who obtained a verbal statement could be led, assuming that the witness was to be or had been called.[15] Where appropriate, the witness might be declared 'unfavourable' (refer below). The question is what circumstances constitute a 'sufficient explanation' for failing to call a particular witness. In some cases this may merely be indolence or incompetence on the part of the police and/or the Crown – in other cases there may be something more sinister (especially where the evidence would have been expected to exculpate the accused), and practitioners should be alert to whether a 'sufficient explanation' exists.

There will be situations where a witness has made a statement containing material against an accused yet there is no sufficient explanation for the witness' absence. To direct a jury that they may more confidently draw an inference favourable to the accused because of the witness' absence would be misleading assuming there is no suggestion that the statement was improperly obtained or fabricated. There may be difficulties however where other witnesses have mentioned the absent witness in the course of giving evidence so that it might be expected that the absent witness would have been in a position to give evidence about a material issue; in such cases the jury should be directed that they should not speculate about what evidence the absent witness may have given.

3.2 Alibi witnesses

Of particular significance is the situation where the accused has served notice of alibi on the Crown.[16] Depending on the level of detail provided in the notice, it may well become incumbent upon the Crown to properly investigate the alibi. Where the Crown do not call persons named by the accused in the notice, it might be inferred that the proposed witness' evidence would not have assisted the Crown case in refuting the claims of alibi. A 'sufficient explanation' for not calling the proposed witness might include evidence of unsuccessful attempts to locate them.

Significantly, however, s48 does not seem to place a statutory obligation on the Crown to investigate or call alibi witnesses notified by the defence – it simply prevents the defence adducing alibi evidence unless notice has been given or leave granted. Accordingly, where the Crown investigate an alibi witness and this witness supports the accused's case, s48 merely permits the accused to call the witness in his or her defence without the need to obtain leave. While there is no statutory obligation on the Crown to call the witness as part of their case, there is ample common law authority and professional and ethical rules[17] to suggest that the witness should be called by the Crown, if only to be made available for cross-examination.

In a recent CCA case[18] the accused raised alibi in his recorded interview with the police yet no formal notice of alibi was served. Notwithstanding this, police obtained a statement from one of the alibi witnesses which tended to assist the accused. This witness was not called by either party, yet the accused was cross-examined on the absence of that witness. The CCA held that the cross examination was inappropriate, absent a proper basis for seeking to establish *false* alibi. In noting that no request had been made by the defence that the Crown call the witness, the CCA observed that the Crown would have had to overcome s18 of the *Evidence Act 1995 (NSW)* given that the proposed witness was the accused's wife.[19]

3.3 Unreliable witnesses

It is well established that there should be 'identifiable factors clearly establishing unreliability' before a decision not to call a material witness on the ground of unreliability can be justified.[20] There is a lack of authority as to what actually constitutes 'unreliability' although 'mere inconsistency of the testimony of a witness with the Crown case is not grounds for refusing to call the witness'.[21] The prosecution cannot decline to call that witness merely on the basis that the absent testimony suggests that they are 'in the camp of the accused' or 'some case theory that does not accord with all the otherwise reliable evidence'.[22] Moreover, 'the advisability, if not necessity' that a prosecutor should actually conference the witness prior to concluding that he or she is unreliable should be considered.[23]

In many cases where a witness might possibly be considered 'unreliable', application might be made by the prosecutor to cross-examine an unwilling witness under s38 of the *Evidence Act 1995 (NSW)* (assuming the requisite pre-conditions can be satisfied). Significantly, a prosecutor can now call a witness known to be unfavourable for the purpose of adducing a prior inconsistent statement (the contents of which become evidence of the truth of what was said) if the evidence is relevant for another purpose (i.e. for a purpose other than proof of the truth of what was said in them).xxiv In such cases a *Jones v Dunkel* direction against the Crown for failing to call such a witness may well be justified .[25]

3.4 Is the proposed witness compellable to give evidence for the Crown?

Where the witness is the spouse, *de facto* spouse, parent or child of the accused, he or she may object to giving evidence on behalf of the prosecution.[26] This should not form the basis for a decision not to call the witness given that the balancing test in s18(6) is a matter for the trial judge to determine – if the 'test' is satisfied then the witness must not be required to give evidence. If the witness is not required to give evidence, this would undoubtedly constitute a 'sufficient explanation' for their absence justifying a *Jones v Dunkel* direction not being given against the Crown for that particular witness or witnesses. In the case of Kirby noted above, while the CCA noted the difficulties the Crown may have faced in relation to s18, there was no attempt by the Crown to have the accused's wife give evidence at trial. In such circumstances, it is surprising that the CCA was not critical of the Crown's failing to call the wife (albeit that the defence did not request that she be called), especially after noting that her evidence 'tended to assist the accused'.

3.5 Would or should the Crown have been aware of an absent witness?

In many cases the prosecution will have no notice that an absent witness exists until the defence case unfolds.[27] In such cases it could not be expected that an inference adverse to the prosecution could be drawn unless it can be shown

that the prosecution was or should have been aware of the witness within a reasonable time prior to trial. For example, the absent witness may have been in the accused's presence at the time of the offence or the accused may have mentioned the absent witness in an interview with the police.[28] In such cases the prosecution is clearly on notice that there may be a witness or witnesses who could provide relevant evidence (irrespective of whether the evidence either inculpates or exculpates the accused).

3.6 Corroborative witnesses

As noted above, the rule does not operate to require a party to give merely repetitive evidence. This is of particular significance where police officers merely corroborate each other's evidence. In many cases however there will be tactical reasons for the defence asking that what are ostensibly 'merely corroborative' witnesses be called or made available for cross-examination.

3.7 Is the absent witness open to suspicion on the Crown case or on the accused's version of events?

In some cases the proposed witness might reasonably be supposed to be criminally concerned or in fact an accomplice/'associated defendant'.[29] While generally an associated defendant is not compellable to give evidence on behalf of the prosecution, he or she is compellable if tried separately from the accused [30] or has already been dealt with. An accomplice warning would invariably be given.[31]

In theory it could be argued that associated defendants tried separately from the accused should be called by the prosecution to avoid the possibility of a *Jones v Dunkel* direction unless there is a 'sufficient explanation' for not calling them. Indeed such a witness would invariably be protected by the privilege against self-incrimination and granted a certificate under s128 of the *Evidence Act 1995* (unless of course he or she has been dealt with to finality). In practice, however, many proposed witnesses that might reasonably be supposed to be criminally concerned or in fact an accomplice/associated defendant would be unwilling to co-operate with prosecuting authorities for a number of reasons such as fear of retribution.

In *Newland*[32] Gleeson CJ outlined factors relevant to a decision by the Crown not to call an accomplice:

- on the Crown case, Collins was an accomplice of the appellant and a warning under sec 165 of the *Evidence Act* would have been required;
- he was compellable and if called by the Crown it was possible that he could have been questioned under sec 38 of the *Evidence Act*; and
- if the Crown was unwilling to call Collins because he was regarded as unreliable then that would have been a proper reason for not calling him.[33]

In concluding that this was not a case where a *Jones v Dunkel* direction was required, but rather an instruction to the jury to refrain from speculation as to why Collins and Paul Newman were not called, Gleeson CJ stated:

> In some cases the question of who might reasonably be expected to call a witness might be answered simply as a matter of common-sense. In other cases, of which the present is an example, it might be a question the answer to which is far from simple. Cases of that kind require a deal of caution before *Jones v Dunkel* is involved.[34]

Such a direction might more readily be given where the proposed witness has not been charged and is therefore not an 'associated defendant'.

4. *Jones v Dunkel* directions against the defence for witnesses other than the accused

As noted above, although the principles in *Jones v Dunkel* apply to criminal, as well as, civil trials, courts have emphasised the need for caution in such cases, as the witness' absence might well be explicable upon grounds not readily capable of proof:

> it can be very difficult in a criminal case to know, or to explain, in a way which does not cause embarrassment or prejudice to an accused, why a particular witness is not being called.[35]

Moreover, it will be harder to justify a *Jones v Dunkel* direction against the defence in a criminal trial primarily because the accused has a presumption of innocence, the prosecution bears the onus of proof and has a responsibility to ensure that the prosecution case is presented with fairness to the accused.[36] Indeed it was recently noted that such an expectation that the defence call a particular witness might well involve 'an inversion of the onus of proof'.[37]

4.1 Cross-examination of the accused about the absent witness

In many cases there will be a sufficient explanation for the witness' absence justifying a *Jones v Dunkel* direction not being given. Where the accused has given sworn evidence it would be very unfair to give such a direction if the accused was not cross-examined and given a chance to provide an explanation for the witness' absence, assuming this to be within the knowledge of the accused.[38] Potential prejudice and questions of relevance may make it desirable for such cross-examination to occur on the *voir dire*.

In *R v Donnelly*[39], the CCA(NSW) held that cross-examination of the accused about persons with whom he had been drinking on the evening of the offence was 'of no particular significance' and best left alone. A *Jones v Dunkel* direction was not given by the trial judge and the CCA held that in the circumstances there was no unfairness to the accused.[40]

4.2 Alibi witnesses

As noted above, sec 48 of the *Criminal Procedure Act 1986 (NSW)* states that an accused may not, without the leave of the court, adduce evidence in support of an alibi unless formal notice of alibi has been served on the Crown. Where an accused attempts to call an alibi witness but has not given notice and leave is refused to call the witness, this would somewhat paradoxically seem to constitute a 'sufficient explanation' for the witness' absence. On the other hand, where notice has been given and a statement obtained that does not assist the accused, it would be expected that the Crown would call the witness as part of the Crown case without the need to rely on a *Jones v Dunkel* inference being drawn against the accused.

4.3 Circumstantial cases

There appears to be only one case in NSW where a *Jones v Dunkel* direction given against the accused regarding a missing witness (other than the accused) was undisturbed on appeal. In *R v Champain*[41] the accused was convicted of five offences of defrauding the

Commonwealth. The offences occurred over seven years while the accused was an employee of the Department of Social Security. Notably, the Crown case was entirely circumstantial[42] heavily relying on the close correspondence between the accused's movements and the time and location of withdrawals made from accounts set up to receive the funds.

In one particular instance the accused gave evidence that she could not have been responsible for a withdrawal in Sydney as she was in Maitland at a funeral. In evidence she nominated her father (since deceased) and his solicitor as being with her at the funeral but could not call anyone who remembered her being at the funeral and her name did not appear in the condolence register at the funeral. Moreover, her notice of alibi did not identify the solicitor as a person who could support her alibi. A *Jones v Dunkel* direction was given in respect of the father's solicitor.

4.4 Co-accused

Sub-section 20(4) of the *Evidence Act 1995 (NSW)* seems to allow a co-defendant to suggest that the defendant's spouse etc did not give evidence because the defendant is guilty of the offence charged and the spouse etc believes that the defendant is guilty. Surprisingly, the sub-section does not provide for situations where there is 'sufficient explanation' for the absence of the spouse etc. It is suggested that the making of such comment should, in practice at least, be extremely rare for the following reasons:

- the usual dangers of running a 'cut-throat' defence;
- the rules applying to the application of *Jones v Dunkel* in a criminal trial, especially against an accused; and
- the highly and unfairly prejudicial nature of such a comment and the difficulty if not impossibility of the judge neutralising such prejudice by 'commenting on such a comment' (sec 20(5)).

4.5 Where the witness is open to suspicion on the Crown case or on the accused's version of events

The NSW CCA recently noted that it will rarely be appropriate for *Jones v Dunkel* direction to be given against an accused where the absent witnesses are themselves open to suspicion on the Crown case or on the accused's account of events.[43] If such a direction is to be given the jury's attention should be drawn to the following matters:

- the witness would have been entitled to claim privilege against self-incrimination. The question of a certificate[44] would then have arisen with uncertain outcome;
- the witness may have chosen to lie rather than either to tell the truth or claim privilege in order to distract suspicion from him or herself; and that this would or might have occurred may have been known to the accused;
- there may have been threats if the accused sought to call the witness or fear of retaliation if he or she did. If that was the case the accused may have thought it unwise to disclose the explanation for not calling the witness; and
- there may be an explanation that has not been disclosed because the accused has reasons for not disclosing it, especially where the absent witnesses are members of the accused's family – 'one cannot know what under-currents might have come to bear on such a decision'.

Given the numerous qualifications that would need to be given with such a direction, the potential for confusion of the jury to the extent that they are distracted from the real issues to the prejudice of the accused is manifest. In many cases it would be desirable to direct the jury to refrain from speculating at all about the reasons for absent witnesses not giving evidence.[45]

4.6 Cases where the accused bears the onus of proof

Despite the numerous authorities dealing with *Jones v Dunkel* in a criminal trial, there do not appear to be any authorities dealing with the situation where, in a criminal trial, the accused bears the onus of proof. A common example is a case of supply prohibited drug where the prosecution relies upon the deeming provision. Once the prosecution proves beyond a reasonable doubt that the accused had in his or her possession not less than the trafficable quantity of the particular drug, the accused must then prove on the balance of probabilities that he or she had the drugs in their possession 'otherwise than for the purposes of supply'.[46] In this regard the accused might then be considered to bear an onus similar to that of a plaintiff in civil proceedings.

Nevertheless, even where the accused bears the onus, the prosecution still has an overriding duty to conduct its case with fairness to the accused and there remains the presumption of innocence and the right to silence :

> an accused person has a privileged position compared to litigants in civil proceedings. In particular the latter do not have the benefit of the presumption of innocence or the right to silence.[47]

It might be argued that because the accused bears the onus of proof, the rules relating to the application of *Jones v Dunkel* against an accused should be relaxed. In this regard it could be said that where the onus is reversed, there is a presumption of guilt rather than innocence. Additionally, most cases where the onus is reversed are circumstantial ie the tribunal of fact is being asked to infer guilt from the circumstance that the accused had in his or her possession a specified quantity of drugs or in a goods in custody case, an item of property reasonably suspected of being stolen or otherwise unlawfully obtained. However, because it is a criminal trial, the stakes are substantially higher than that of the litigant in a civil trial:

> The peril of liberty and the risk to reputation have imposed on criminal trials over the centuries a rigorous discipline so that procedural requirements are strictly complied with … Rules of practical commonsense and flexibility, which have become increasingly acceptable in civil trials, must be viewed with reservation and care in the context of criminal trials[48].

Moreover, where the absent witness(es) 'are themselves open to suspicion on the Crown case or on the accused's account of events' the principles in *Zrieka* (above) apply.

Accordingly it is submitted that the mere reversal of the onus does not lessen the strict rule relating to the giving of a *Jones v Dunkel* direction against the accused. Where there is a chance of a *Jones v Dunkel* direction being given against the accused, it would be desirable that the Crown call the witness if only to make him or her available for cross-examination by the accused.

5. Conclusions

It is arguable whether the rule in *Jones v Dunkel* is applicable in any case other than a circumstantial case, be it civil or criminal, given that the decision concerned the drawing of inferences from facts proved by direct evidence as opposed to the mere absence of a possible witness without sufficient explanation. In relation to criminal cases, this argument has considerable support given that the only case in NSW where a *Jones v Dunkel* direction against the accused was undisturbed on appeal arose from a circumstantial case.[49] However, in view of the numerous authorities relating to the duties of the prosecution to call material witnesses, it is very doubtful whether the application of *Jones v Dunkel* against the Crown should be limited to circumstantial cases. Given the presumption of innocence, the fact that the prosecution nearly always bears the onus of proof and has a responsibility to ensure that the prosecution case is presented with fairness to the accused, it is submitted that the Crown bears a very heavy burden in seeking to deflect, at the very least, a Jones v Dunkel direction in respect of an absent witness without sufficient explanation.

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1 *RPS v R* (2000) 168 ALR 729, *Azzopardi v R; Davis v R* (2001) 179 ALR 349

2 (1958-1959) 101 CLR 298

3 id at 308, 312. See also *Dilosa v Latec Finance Pty Ltd* (1966) 84 WN(Pt 1)(NSW) 557 at 582

4 Heydon, J, *Cross on Evidence (6th ed)*, Butterworths, Sydney, 2000 at paragraph 1215

5 *RPS v R* (supra) at 737

6 *Brandi v Mingot* (1976) 12 ALR 551

7 *R v Buckland* [1977] 2 NSWLR 452 at 459 per Street CJ

8 *R v Champain*, (Unreported, Court of Criminal Appeal; 5 December 1997); *Taufua* [1999] NSWCCA 205; *R v Zreika* [2001] NSWCCA 57; *R v Newland* (1997-1998) 98 A Crim R 455; *Scott* [2000] NSWCCA 187. In all these cases (apart from *Champain*), the convictions were quashed and a new trial ordered

9 *Weissensteiner v The Queen* (1993) 178 CLR 217

10 RPS (supra); *Azzopardi*; Davis (supra).

11 *Kneebone* [1999] NSWCCA 279; *Richardson v The Queen* (1974) 131 CLR 116 at 119; *R v Apostilides* (1984) 154 CLR 563; DPP(NSW) *Prosecution Policy 15 – Witnesses;* New South Wales Barristers' Rules 62, 66B

12 *RPS v The Queen*; op. cit. at para 29 per Gaudron ACJ, Gummow, Kirby and Hayne JJ. Callinan J held (at para 111) that there is 'no doubt' that that a *Jones v Dunkel* direction may given against the Crown and that the need for such a direction will be heightened by the Crown's responsibility to present its case with fairness.

13 *Apostilides* (1984) 154 CLR 563 at 575

14 In *Fabre v Arenales* (1992) 27 NSWLR 437 at 450 the Court noted that 'a party is not, under pain of detrimental inference, required to call a witness 'blind'.

15 Section 66 *Evidence Act 1995 (NSW); Lee v The Queen* [1998] HCA 60

16 Section 48 *Criminal Procedure Act 1986 (NSW)*

17 See for example '3.3 – *Unreliable witnesses*'. Moreover, where an accused has a reasonably solid alibi the Crown should be considering 'No billing' the matter or where a bill has been found, discontinuing the proceedings.

18 *R v Kirby* [2000] NSWCCA 330

19 Refer also *'3.4 – Is the proposed witness compellable to give evidence for the Crown?'*

20 *Kneebone*; op. cit. at para 49
Apostilides (1984) 154 CLR 563 at 576

21 ibid; *Whitehorn v The Queen* (1983) 152 CLR 657. DPP(NSW) *Prosecution Policy 15 – Witnesses*

22 *Kneebone* op. cit. cf New South Wales Barristers' Rule 66B(h) and Law Soc.of NSW '*Revised Professional Conduct and Practice Rules*', A.66B(h)

23 *Kneebone;* op. cit. at paragraph 51, 52

24 *R v Adam* [2001] HCA 57

25 Note that in respect of civil cases, it has been held that a Jones v Dunkel inference may not arise if a witness has a reason for not telling the truth or refusing to assist the party who calls them – *Fabre v Arenales* (1992) 27 NSWLR 437; the authority of this decision would seem to be in doubt given *Adam* and the fact that sec38 applies to both criminal and civil trials.

26 Section 18 *Evidence Act 1995 (NSW)*

27 See for example *R v Champain,* (Unreported, Court of Criminal Appeal; 5 December 1997); 5.12.97; *R v Zreika* [2001] NSWCCA 57; *R v Donnelly* [2001] NSWCCA 394

28 See above 3.2 *Alibi witnesses* esp. *R v Kirby* [2000] NSWCCA 330 where the accused named his wife as a possible alibi and police obtained a statement yet she was not called to give evidence.

29 *The Evidence Act 1995* (NSW) refers to 'associated defendants' as defined in Part 1 of the Dictionary to the Act.

30 Section 17(3) *Evidence Act 1995(NSW)* (subject to secs18,19 *Evidence Act 1995*(NSW)).

31 Section 165(1)(d) *Evidence Act 1995(NSW).*

32 (1997-1998) 98 A Crim R 455

33 It might also be noted that if Collins' or Paul Newlands' evidence merely corroborated Floyd's evidence this would also appear to constitute a sufficient explanation for their not being called – Heydon, J D *Cross on Evidence (6th ed)* Butterworths, Sydney, 2000 at para 1215.

34 *Newland;* op. cit, at 462

35 *Champain*; op. cit. at 8 per Gleeson CJ

36 *RPS v R* (supra) at para738, 756; *Weissensteiner v The Queen* (1993) 178 CLR 217; *Taufua* [1999] NSWCCA 205

37 *Taufua* id. per Carruthers J at para 49

38 *Browne v Dunn* (1894) 6 R 67 (HL)

39 [2001] NSWCCA 394

40 Refer also to *R v Kirby* [2000] NSWCCA 330 discussed above – 3.2 *Alibi witnesses*.

41 CCA(NSW), unrep; 5.12.97

42 In this regard it should be noted that the only case in which a *Jones v Dunkel* direction in respect of an accused's failure to give evidence has been undisturbed by the High Court was also entirely circumstantial – *Weissensteiner* (1993) 178 CLR 217.

43 *R v Zreika* [2001] NSWCCA 57 at paragraph22

44 Section 128 *Evidence Act 1995(NSW).*

45 *R v Newland* (1997-1998) 98 A Crim R 455

46 Sections 25, 29 *Drug Misuse and Trafficking Act 1985* (NSW). Although *Zrieka* was a case of 'deemed' supply, the issue of the absent witnesses arose in relation to the question of possession and as such the prosecution bore the onus of proof.

47 *Taufua* at para 53. Indeed an accused may discharge the onus relying exclusively on the evidence of the Crown case – *Fong*; (Unreprted, NSW Court of Criminal Appeal, 29 November 1996)

48 *R v Birlut* (1995) 39 NSWLR 1 at 5 per Kirby P

49 *R v Champain,* (Unreported, Court of Criminal Appeal; 5 December 1997)