

JUDICIAL COMMENT ON THE FAILURE OF AN
ACCUSED TO GIVE EVIDENCE

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A great American judge once said that "the history of liberty has largely been the history of observance of procedural safeguards" (1). One of the safeguards embedded in our criminal procedure was the rule forbidding comment by the judge on the accused's failure to give evidence. This rule was first enacted in New Zealand by s. 4 of the Criminal Evidence Act 1887 which was as follows :

"If a person charged with an offence shall refrain from giving evidence, or from calling his wife or her husband, as the case may be, as a witness, such person shall not be prejudiced thereby, and no comment adverse to the person charged shall be allowed to be made thereon".

This section was replaced by s. 400 of the Criminal Code Act 1893 which was in the same terms except that the words "such person shall not be prejudiced thereby" were omitted (2). Section 400 was re-enacted by s. 423 of the Crimes Act 1908 which in turn was re-enacted by s. 366 of the Crimes Act 1961.

In the face of official opposition from the New Zealand Law Society (3) and private opposition from many members of the legal profession, Parliament chose to remove this procedural safeguard by enacting s. 4 (1) of the Crimes Amendment Act 1966 which repealed s. 366 and substituted the following section :

"366 (1) Where a person charged with an offence refrains from giving evidence as a witness, no person other than the person charged or his counsel or the judge shall comment on that fact.

(2) Where a person charged with an offence refrains from calling his wife or her husband as the case may be, as a witness, no comment adverse to the person charged shall be made thereon."

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(1) McNabb v. U.S. 318 U.S. 332, 347 (1943) per Frankfurter J.

(2) As Williams J. pointed out in R. v. Brown and McCann (1909) 29 N. Z. L. R. 846, 849 "the words were probably omitted because it was impossible to give effect to them. If a jury knows that the law is that a prisoner can give evidence, then in a case where his evidence might have cleared up everything it would be impossible to prevent his being prejudiced if he refrained from giving evidence". Other New Zealand cases on this subject are : R. v. Barker and Bailey (1913) 32 N. Z. L. R. 912; R. v. Neary [1916] N. Z. L. R. 518; R. v. Dallard [1957] N. Z. L. R. 1092 (C. A.).

(3) See Submissions by the New Zealand Law Society to the Statutes Revision Committee on the Crimes Amendment Bill 1966 (hereinafter referred to as "Submissions").

The arguments against the change as presented by the New Zealand Law Society were, in my respectful submission, never really overcome by the proponents of the Act. However, irrespective of one's views on the merits of the legislation, it is clear that for one reason or another neither side gave the matter the kind of attention which it deserved. Under our system of government, which is characterised by a unicameral legislature having virtually absolute and unfettered legislative power, it is essential that public opinion be allowed to express itself upon pending legislation (4). However, with statutes relating to matters of criminal law and procedure the general public is not in a position to appreciate the effect of such legislation. But the legal profession is peculiarly fitted to comment upon these matters because its members alone have the knowledge and experience necessary to appreciate and evaluate the issues at stake (5). It is therefore disturbing to read that the New Zealand Law Society's submissions were "very hastily prepared, as unfortunately the Law Society had no prior notice before the introduction of the Bill of the proposed changes". (6) Furthermore, the debate in the House of Representatives was frequently of a low standard. One's confidence in the legislative process is hardly bolstered by a question-begging statement like the following :

"I support the proposals in the Bill. Let members on both sides of the House look at it with the utmost care, as we all will, but why on earth should we help so much these people who are criminals ? Everybody knows they are, and they are able to get away with crime because of some silly provision in the law." (7)

The purpose of this article therefore is to examine the nature and purpose of the "no-comment" rule and to evaluate the arguments advanced in support of its abolition.

1. The Origins of the No-Comment Rule

On the most general level the no-comment rule is a by-product of the accusatorial system of criminal justice. "Ours is the accusatorial as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber from the Continent whereby an accused was interrogated in secret for hours on end Under our system society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its case, not by interrogation of the accused, even under judicial safeguards, but by evidence independently secured through skilful investigation." (8) If the jury were to be directed to draw inferences from the fact of the accused declining to avail himself of his right to give evidence

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- (4) See K. J. Keith, Submission to Constitutional Reform Committee on the Petition to Parliament by the Constitutional Society for a Second Chamber 2 - 4 (1964).
 (5) See Submissions 1.
 (6) Submission 6. See also F. R. Macken, Law Reform - Intention and Effect [1967] N. Z. L. J. 73.
 (7) (1966) N. Z. Parl. Deb. 493 (Sir Leslie Munro).
 (8) Watts v. Indiana 338 U.S. 49, 54 (1949) per Frankfurter J.

the result might well be that the accused would feel obliged to give evidence and run the risk of incriminating himself. Therefore the no-comment rule provides that if the accused wishes to remain silent his right to do so should not be weakened by permitting the judge to comment. This brings us to the privilege against self-incrimination. It is a long established principle of English law that no accused person is required to incriminate himself and it is clear that if the silence of the accused is a permissible subject of judicial comment the accused is in effect compelled to give evidence which may be incriminating (9).

More specifically, the no-comment rule is associated with the emergence of the right of the accused to give evidence at his trial. Formerly he was an incompetent witness but in New Zealand in 1889 he was given the right while at the same time comment on his failure to testify was expressly prohibited. (10) The justification for this approach was explained by Isaacs J. in Bataillard v. The King (11) where, in dealing with the similar New South Wales legislation, he said :

"A new opportunity had been afforded to a prisoner to establish his innocence if he could. But reasons other than a sense of guilt, such as timidity, weakness, a dread of confusion or of cross-examination, or even the knowledge of a previous conviction, certainly in a summary proceedings, and perhaps in the case of a trial for an indictable offence, might easily prevent the accused from availing himself of the new means permitted by law. Hence the legislature determined to prevent the enactment, if not used by the prisoner, from being employed as a means of inculcation."

2. The Purpose of the No-Comment Rule

The simple fact is that in criminal matters the failure of the accused to give evidence conveys to the average juror some suggestion of guilt. This is because almost every man called to serve on a jury knows quite well that an accused person can give evidence if he wishes and also for the reason that "men are naturally inclined to a conclusion adverse to a man who does not answer an allegation or give an explanation of facts when an answer or an explanation of facts would ordinarily be expected". (12) The prior New Zealand legislation, implicitly recognising that "the operations of the mind cannot be neutralised by an Act of Parliament", (13) did not try to prevent the jury from considering the fact of the accused's silence but in fairness to the accused it provided that his silence should not be transformed into evidence against him by permitting the judge or the crown prosecutor to dwell on it. In my submission this was an entirely acceptable compromise.

The purpose of the no-comment rule then may be described briefly as follows : "Let the crown case rely mainly on its own strength; let not too much be made of the fact that the accused has exercised a right of election which the law confers on him." (14) There are, however, other policy considerations which

- (9) See the dissenting judgment of Innes J. in R. v. Kops (1893) 14 L.R.N.S.W. 150, 182.
 (10) Criminal Evidence Act 1889 ss. 2 and 3.
 (11) (1907) 4 C.L.R. 1282, 1290 - 1291.
 (12) Per Windeyer J. in Bridge v. R. (1965) 38 A.L.J.R. 280, 285.
 (13) Per Windeyer J. in R. v. Kops supra note 9, 174.
 (14) H.A. Snelling Commentary upon Comment (1962) 35 A.L.J. 395, 401.

justify the no-comment rule and these will be discussed later in this article when the merits of the Crimes Amendment Act are considered.

3. The Law of Some Other Common Law Jurisdictions

(a) England

Although the Criminal Evidence Act 1898 prohibits comment by the prosecution it says nothing about the judge. However, in R. v. Rhodes (15) it was held that if the accused does not give evidence the judge may comment on this fact. Of the five judges who heard the appeal only Lord Russell dealt with this question and his treatment of it was rather cursory. He said :

"The third and last question is whether the presiding judge has a right under the Criminal Evidence Act, 1898 to comment on the failure of the prisoner to give evidence on his own behalf. In this case the prisoner was not called; and the only question that we have to consider is whether the Chairman of Quarter Sessions had a right to comment on his absence from the witness-box. It seems to me that he undoubtedly had that right. There is nothing in the Act that takes away or even purports to take away the right of the Court to comment on the evidence in the case, and the manner in which the case has been conducted. The nature and degree of such comment must rest entirely in the discretion of the judge who tries the case; and it is impossible to lay down any rule as to the cases in which he ought or ought not to comment . . ." (16)

In R. v. Voisin (17) the Court of Criminal Appeal held that the judge's comments were "within his judicial discretion and are not matters for this court to review". However, in Waugh v. The King (18) the Privy Council appears to have held that the exercise of the discretion is reviewable. Lord Oaksey delivering the advice of the Privy Council said :

"The law of Jamaica is the same as the law of England . . . as to the right of a judge to comment It is true that it is a matter for the judge's discretion whether he shall comment on the fact that a prisoner has not given evidence; but the very fact that the prosecution are not permitted to comment on that fact shows how careful a judge should be in making such a comment. Here the appellant has told the same story almost immediately after the shooting, and his statements to the prosecution witnesses and his statement to the police the same day were put in evidence by the prosecution. Moreover, his story was corroborated In such a state of the evidence the judge's repeated comments on the appellant's failure to give evidence may well have led the jury to think that no innocent man could have taken such a course. The question whether a prisoner is to be called as a witness in such circumstances and on a murder charge is always one of the greatest anxiety to the prisoner's legal advisers, but in the present

(15) [1899] 1 Q. B. 77.

(16) Id. 83.

(17) [1918] 1 K. B. 531, 537.

(18) [1950] A.C. 203 (P.C.).

case their Lordships think that the prisoner's counsel was fully justified in not calling the prisoner, and that the judge, if he made any comment on the matter at all, ought at least to have pointed out to the jury that the prisoner was not bound to give evidence and that it was for the prosecution to make out the case beyond a reasonable doubt." (19)

On this and other grounds the conviction was quashed.

(b) Scotland

In Scotland, where the same Act is in force, the position is not so clear but it seems that a different interpretation prevails. In Brown v. MacPherson (20) it was held that the judge, may in some circumstances, call the jury's attention to a defendant's failure to give evidence but in a subsequent case (21) two judges questioned the wisdom of this rule, and the court quashed the conviction with the holding that in any event it was wrong to emphasise or repeat such comments. In this latter case Lord Moncrieff said (22) :

"In my view, it is of the very substance of the remedy introduced by the Criminal Evidence Act, 1898, that the evidence of the accused in criminal cases is to be made available to the Court only upon his own application. It is true that in a succeeding subsection it is for the prosecutor only that it is expressly made incompetent to comment upon the failure of the accused to avail himself of this privilege. I cannot, however, hold that this warrants an inference that comment by the judge is to be competent. It rather appears to me to anticipate that a prohibition of judicial comment is not likely to be required. I do not think that the substance of the enactment, which secures that the privilege shall be available to the accused at his own option, will be preserved if the accused is also to realise that the exercise of the option according to his choice may result in a most gravely serious reaction against his defence." (23)

(c) Canada

Under the Evidence Act 1952, (24) which governs prosecutions for all major crimes, the defendant is a competent witness but he may not be compelled to appear and neither the prosecution nor the judge may comment on his failure to go into the witness box.

(19) Id. 211 - 212.

(20) [1918] J.C. 3.

(21) Scott v. H. M. Advocate [1946] J.C. 90

(22) Id. 97 - 98.

(23) See also J. A. Coutts The Accused : A Comparative Study (1966) 71, and Willcock, Where Silence is Golden [1958] Scot. L. Times 13.

(24) Canada Evidence Act 1952 s. 4 (5). For Canadian cases on the subject see Crankshaw Criminal Code of Canada (7th ed. 1959) 1310 - 1313, 1316.

(d) India

The Code of Criminal Procedure s. 324A provides that failure to give evidence may not be commented upon by either the prosecution or the judge.

(e) United States

In Griffin v. California (25) the Supreme Court of the United States, by a 5-3 majority, held that a state may not constitutionally permit either a judge or a prosecutor to comment on the failure of the accused to give evidence. The trial judge had instructed the jury that it might take into account Griffin's failure to give evidence and that, among the inferences that might reasonably be drawn from his silence, those unfavourable to him were the more probable. It had been held in an earlier case, Wilson v. U.S., (26) that as a matter of statutory construction such comment was forbidden in federal prosecutions. The court in the Griffin case, in coming to its conclusion that comment was also forbidden in state prosecutions as a violation of the Fifth Amendment privilege against self-incrimination, placed reliance on the following passage from the Wilson decision :

"... (T)he Act was framed with a due regard also to those who might prefer to rely upon the presumption of innocence which the law gives to every one, and not wish to be witnesses. It is not every one who can safely venture on the witness stand, though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would therefore willingly be placed on the witness stand. The statute in tenderness to the weakness of those who from the causes mentioned might refuse to ask to be witnesses, particularly when they may have been in some degree compromised by their association with others, declares that the failure of a defendant in a criminal action to request to be a witness shall not create any presumption against him." (27)

The court in the Griffin case also remarked that "comment on the refusal to testify is a remnant of the inquisitorial system of criminal justice... which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly". As to the argument that the inference of guilt for failure to testify as to facts peculiarly within the accused's knowledge is, in any event, natural and irresistible, the majority answered that "what the jury may infer given no help from the court is one thing. What they may infer when the court solemnizes the silence of the accused into evidence against him is quite another". (28)

(25) 380 U.S. 609 (1965).

(26) 149 U.S. 60 (1893).

(27) 380 U.S. 609, 613 (1965) per Douglas J. writing for the majority.

(28) Cf. the critical comments of Justice Schaefer of the Illinois Supreme Court in Police Interrogation and the Privilege Against Self-Incrimination (1966) 61 Northwestern U. L. Rev. 506.

(f) Australia

In New South Wales the no-comment rule applies by virtue of s. 407 (2) of the Crimes Act 1900 (29). In Victoria comment by the judge is permitted only when the accused makes an unsworn statement, (30) while in Queensland comment by the judge is allowed. (31) Judicial comment is also permitted in South Australia but the legislation also provides that no presumption of guilt shall be drawn from the accused's silence. (32) In Tasmania (33) and Western Australia (34) legislation identical to the English Criminal Evidence Act is in force but the sections do not appear to have been judicially interpreted. More than likely comment by the judge would be permitted but it is possible that the Scottish view might find favour.

4. Arguments in Support of the Abolition of the No-Comment Rule in New Zealand

When the Crimes Amendment Bill was introduced in the House of Representatives by the Minister of Justice on the 15th June, 1966 he said inter alia :

"This change has been advocated for many years by jurists and by judges, and, to be fair, has been equally resisted by many lawyers, particularly defending counsel. I shall not go into detail unless asked to do so by the House, but perhaps I should emphasise that this is the law of England, of Tasmania and of Western Australia, but not the law of Canada, New South Wales or Victoria." (35)

Subsequently the Minister gave additional reasons for the elimination of the no-comment rule. (36) First of all, he mentioned that in certain situations, for example where the accused pleads an alibi, the accused does not get into the witness box himself, though he is the one person who could throw light upon the subject. "Now if he does not give evidence that fact can be most significant. Where there is an innocent explanation the accused is likely to want to tell his story to the jury, yet as the law now stands the judge ... has his hands tied; he cannot present the whole case because he cannot even hint that the person who could give an account of the true facts was the accused himself." As to the argument that "if the judge has the right to comment, counsel for the accused may deem it advisable for the accused to go into the box and give evidence, and the accused may be of nervous disposition and not show up well under cross-examination" the Minister replied that "experience has shown that even a nervous witness can impress with his honesty". Then he emphasised that the change would "simply bring New Zealand law into line with what it has been in England for almost 70 years", that the Bill did not "provide

(29) The section was exhaustively considered by the High Court of Australia in Bridge v. R. (1965) 38 A.L.J.R. 280. See especially the masterly judgment of Windeyer J. See also Snelling supra note 14.

(30) Crimes Act 1958 s. 399 (b).

(31) See R. v. Templeton and Ors. [1922] St. R. Qd. 165, 171 per McCawley C.J.

(32) Evidence Act 1929 - 1957 s. 18(ii). See Stuart v. R. (1959) 101 C.L.R. 1 and Tuckiar v. R. (1934) 52 C.L.R. 335. As to the difficulty of reconciling these two provisions see Windeyer J. in Bridge v. R. supra note 29, 286.

(33) Evidence Act 1910 s. 85 (i) III.

(34) Evidence Act 1906 s. 8 (i) (c).

(35) (1966) N.Z. Parl. Deb. 490.

(36) Id. 3295 - 3296.

or imply that the judge will comment in every case" and that the judges will exercise their power with caution. Finally, he referred to the fact that "in a recent year nearly 40 per cent of those who pleaded not guilty before the Supreme Court were acquitted" and said that he did not believe for a moment that all or perhaps even most of those persons were in fact innocent. He continued :

"If I am right this is a serious failure of justice and one that we cannot, as responsible legislators, ignore. We will all agree that it is better for the guilty to escape than for the innocent to be condemned, but surely it is better still that the innocent should go free and that the guilty should not escape. This is the goal at which any system of criminal justice should aim and in allowing a judge discretion to draw the jury's attention to the failure of an accused person to give evidence I believe that we are taking a step towards achieving that goal."

5. Validity of the Argument for Abolition

(a) The opinions of the judges on the question

The opinions of the judges on the matter are of considerable importance but when the judges descend into the forum of public discussion their view must be subject in the ordinary way to analysis and criticism. In any event it is by no means clear that the judges are unanimous on the question. Although three of their Honours have advocated the abolition of the no-comment rule (38) the opinions of their brethren on the Bench are not known publicly. It is worth mentioning that in England Lord Devlin has spoken in favour of the no-comment rule. (39)

(b) Laws of other jurisdictions

It has been shown above that the majority of the major common law jurisdictions retain the no-comment rule. Canada, India, the United States, New South Wales and probably Scotland have the no-comment rule while only England, South Australia and Queensland permit comment by the judge in any case where he thinks it desirable. In Victoria comment is allowed only when the accused makes an unsworn statement and in Tasmania and Western Australia the position is uncertain although it is possible that comment would be allowed.

(c) The silence of the accused in situations where he alone has knowledge of the facts is significant but the judge cannot point this out to the jury

The parliamentary debates on this argument were somewhat superficial and in my respectful submission the fundamental issues at stake were not adequately presented. The basic problem has been neatly stated by Windeyer J. as follows :

"For various reasons other than guilt of the crime charged a man may decline to go into the witness box and submit to cross-examination.

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- (38) McCarthy J. [1961] N. Z. L. J. 87, 88; Woodhouse J. [1963] N. Z. Justices Quarterly (June) 6; Henry J. [1964] N. Z. L. J. 227, 229.
 (39) See G. L. Williams The Proof of Guilt (3rd ed. 1963) 60.

And the fundamental problem in the background of both the enactments of legislatures and the decisions of courts has been, and is, to reconcile the traditional repugnance aroused by any form of compulsory self-incrimination with the adverse inferences that insistently arise from a failure to answer a charge. The former attitude is . . . largely the result of deeply rooted fears and memories of the Star Chamber methods. The latter is the product of natural processes of reasoning." (40)

In some jurisdictions, for example in South Australia, the legislation forbids the drawing of any inference or presumption from the silence of the accused. But, as we have seen, after the Criminal Code Act of 1893 the New Zealand law did not run into the logical difficulties created by such legislation for it did not seek to prevent juries taking the silence of the accused into consideration but merely prohibited the prosecution or the judge from reminding them that they could do so. The law proceeded on the assumption that it was more in the interest of the accused and of justice to forbid comment than to permit. There were very good grounds for taking this course. One eminent member of the profession has said :

"During fairly lengthy experience of criminal matters I have seldom put an accused in the box, not because I think he is guilty but because a man fighting for liberty, with emotion suppressed in his bosom is not in a position to do himself justice. The hasty answer quickly retracted, the nervous glancing and licking of the lips, the fright he feels if he makes a slip, all seem to the jury signs of guilt. There are often other reasons; for instance foreigners, Dalmatians for example, with their rapid speech, always seem to be liars, although quite often, not so at all. The rapidity of their speech raises suspicion in the Anglo-Saxon mind.

Other people are stupid, their reaction time is lengthy in understanding a question if they understand it at all and the ensuing hesitation and wrong answer may well seem signs of guilt. Ill health is another cause for keeping a man out of the box as well as old age. Very often an innocent accused has spent a couple of nights in prison, had a pretty rough breakfast, comes to Court sleepless and feeling as if he has been dragged through a furze bush backwards." (41)

In a similar vein the New Zealand Law Society stated in its submissions :

"It is the experience of all persons concerned with the Courts that may a perfectly honest man intending to give honest evidence makes a bad impression upon the Court because of a defective way of giving his evidence or an apparent reluctance to answer questions and many a case has been lost because of the failure of witnesses to give their evidence in an effective way. How great then is the responsibility of the counsel for an accused person in deciding whether or not his client will help himself on his trial if he gives evidence on his own behalf and surely as a counsel decides that it is better that his client does not give evidence for reasons quite unknown to the judge, how can it be helpful to the cause of justice that the judge can be allowed to make adverse

(40) Bridge v. R. supra note 29, 287. See also W. V. Schaefer supra note 28, 511.

(41) Submissions 3 quoting Mr L. P. Leary Q. C.

comment on the silence of the accused." (42)

On the other hand it can be argued that "to deny the judge the right to explain to a jury what inferences can properly be drawn from a failure to give evidence may in some cases be to the disadvantage of the accused for the jury may infer more from his silence than they ought to do". (43) However, the very fact of judicial comment, no matter how carefully it is phrased, may lead the jury to think that no innocent man could have taken such a course.

In my submission the prior law, in holding that the dangers of permitting judicial comment outweighed the advantages to be gained by permitting it, represented an acceptable compromise of the countervailing considerations described by Windeyer J. The burden of proof in matters affecting civil liberties rests upon the innovators and in my view that burden was not satisfied by the proponents of the Act.

(d) The change would "simply bring New Zealand law into line with what it has been in England for almost 70 years"

It is a little surprising to hear the Minister speaking in this vein because in his important booklet on Law in a Changing Society he said, in discussing the causes of the inadequacy of law reform in New Zealand :

"A more fundamental cause is the view already mentioned that important changes in the common law should not normally be made except in accordance with changes in England. This too is not good enough The most fitting attitude, it may be suggested, is to retain the utmost respect for the principles of justice and wisdom that underlie the common law but no longer to test proposed changes by the measure of English law." (44)

In any event there are two significant differences between the law of England and New Zealand in this area. The first is that although comment on the silence of the accused is allowed in England the right of the court to give permission to the prosecution to cross-examine an accused giving evidence as to his previous character and convictions appears to be more restricted under the English Criminal Evidence Act 1898 than under s. 5 of the Evidence Act (N. Z.) where the control of cross-examination of the accused in this way is to some extent, left to the discretion of the judge. (45) Secondly, in England the right to make an unsworn statement from the dock is retained whereas s. 5 (46) of the Crimes Amendment Act 1966 eliminated it in New Zealand.

(42) Submissions 2.

(43) Per Windeyer J. in Bridge v. R. supra note 29, 287.

(44) The Law in a Changing Society 20 (1965) (emphasis supplied).

(45) See R. v. Clark [1953] N. Z. L. R. 823, 830 (C. A.). See also note in (1965) 1 N. Z. U. L. R. 544.

(46) See G. L. Williams supra note 39, 71.

(e) The judges will not comment in every case and will exercise their power with caution

This is a de minimis argument; it does not go to the merits of the case at all but merely suggests that the judge will not comment in every case and will use the power with caution. This goes without saying but it seems to me that here the Minister is tacitly admitting the weakness of the proposal. Furthermore, it may be asked - how can the judge know all the circumstances that have led an accused person to decide not to give evidence? The judge sees him only at the trial and there may be any number of factors unknown to the judge. It is all very well to say that the judges will act with caution but frequently they will not be in possession of certain knowledge which would materially affect the decision to comment or not.

As far as the exercise of the discretion is concerned, the English decisions do not provide much guidance and each case will ultimately turn on its own peculiar factual situation. Waugh v. The King (47) makes it clear, though, that the exercise of the discretion is reviewable by the appellate court. (48)

(f) The abolition of the no-comment rule will increase the convictions rate in jury trials

I respectfully agree with the New Zealand Law Society in saying that "while the Society is entirely in sympathy with the principle that the guilty should be convicted it is reluctant to see the passing of a provision which weakens in any way whatever the principle that the accused is innocent until he is proved guilty that the burden of proof is on the crown and the accused is not to be convicted out of his own mouth or to endanger in any way the proud boast that under our system of justice we prefer that ten guilty men should go free rather than one innocent man be convicted". (49)

6. Some Conclusions

When we are disturbed by crimes of cruelty and violence we turn too quickly to proposals for changes in rules of law favouring the accused. The common denominator of these proposals is the restriction of the rights of accused persons and although they cannot on that ground alone be dismissed, they must not be accepted unless they are entirely convincing. We must remember too that there are other ways of dealing with the war on crime; improvement in the conditions under which our police force operates is one method that comes to mind. (50)

The danger is that the pressures created in the climate of a war on crime may cause the government to act unwisely. It is to be hoped that on the next occasion when the government considers a change of this nature the issues involved will be examined and appraised in a more satisfactory manner.

(47) [1950] A.C. 203 (P.C.).

(48) For recent English cases see R. v. Fisher [1964] Crim.L.Rev. 150; R. v. Morley [1966] Crim.L.Rev. 332; and R.v. Sullivan (1966) 116 New L.J. 1685.

(49) Submissions 3.

(50) See Report on the N. Z. Police 5, 12, (1966) as to understaffing and inadequate facilities.