SUPREME COURT OF QUEENSLAND

CITATION:	*R v ABD* [2019] QCA 72
PARTIES:	**R** **v** **ABD** (appellant)
FILE NO/S:	CA No 123 of 2018 DC No 30 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Kingaroy – Date of Conviction: 24 April 2018 (Long SC DCJ)
DELIVERED ON:	3 May 2019
DELIVERED AT:	Brisbane
HEARING DATE:	19 September 2018
JUDGES:	Sofronoff P and Philippides and McMurdo JJA
ORDER:	**The appeal be dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – NON-DIRECTION – where the appellant was convicted of one count of maintaining an unlawful sexual relationship with a child, three counts of indecent treatment of a child under 12, under care, three counts of rape and one count of involving a child in making child exploitation material – where the appellant appeals against those convictions on the ground that the trial judge erred in failing to direct the jury as to lies allegedly told by the appellant (ground 1) – where the appellant was said to have lied about whether he owned a utility – where the trial judge did not give an *Edwards* direction – where the appellant submitted that notwithstanding the prosecutor's contention that the lie was not relied on as an *Edwards* lie, the manner in which the relevant passages of interview were presented to the jury, together with the submissions made, suggested to the jury that the appellant told a deliberate untruth which revealed a consciousness of guilt – where defence counsel did not seek an *Edwards* direction at trial – whether the trial judge should have given an *Edwards* direction – whether there has been a miscarriage of justice CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR

CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – NON-DIRECTION – where the appellant was convicted of one count of maintaining an unlawful sexual relationship with a child, three counts of indecent treatment of a child under 12, under care, three counts of rape and one count of involving a child in making child exploitation material – where the appellant appeals against those convictions on the ground that the trial judge erred in failing to direct the jury in relation to post offence conduct (ground 2) – where the complainant had disclosed the offending to others and the appellant then directed the complainant to tell those others that she had fabricated the allegations – where the appellant submitted that there was a real risk that the jury may have attributed the appellant's behaviour to consciousness of guilt when an innocent explanation for this post offence conduct existed – where the trial judge did not give a direction in relation to post offence conduct – whether the absence of a direction informing the jury of how they could use the post offence conduct of the appellant deprived the appellant of a fair chance of acquittal – whether there has been a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – INTERFERENCE WITH DISCRETION OR FINDING OF JUDGE – GENERAL PRINCIPLES – where the appellant was convicted of one count of maintaining an unlawful sexual relationship with a child, three counts of indecent treatment of a child under 12, under care, three counts of rape and one count of involving a child in making child exploitation material – where the appellant appeals against those convictions on the ground that the trial judge erred in failing to rule that the pretext telephone conversation between the appellant and complainant in which the appellant apologised for unidentified conduct was inadmissible (ground 3) – where the appellant submitted that the prejudicial weight of the evidence outweighed its probative value, warranting its exclusion – whether the pretext call ought to have been inadmissible

Evidence Act 1977 (Qld), s 130

Dhanhoa v The Queen (2003) 217 CLR 1; [2003] HCA 40, applied
Edwards v The Queen (1993) 178 CLR 193; [1993] HCA 63, considered
R v MBV (2013) 227 A Crim R 49; [2013] QCA 17, considered
Zoneff v The Queen (2000) 200 CLR 234; [2000] HCA 28, considered

COUNSEL: D P Jones for the appellant
C W Wallis for the respondent

SOLICITORS: Fredericks Turner for the appellant

Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** The facts are comprehensively set out in the reasons of Philippides JA.

[2] The appellant submits that the learned trial judge, Long DCJ, should have given the jury an *Edwards* direction.[1] The appellant submits that, because an *Edwards* direction was not given, there was a real danger that the jury may have used lies of the appellant to arrive at a conclusion of guilt without taking into account alternative explanations. The lie that the appellant pointed to was a statement that he had made about owning a utility.

[3] A miscarriage will have occurred if the direction should have been given and it is reasonably possible that the failure to direct may have affected the verdict.[2] A failure to seek a direction is significant to the question whether there has been a miscarriage of justice. In *R v Smart*[3] the Victorian Full Court[4] said that in general an applicant for leave to appeal against conviction is not allowed to rely on a criticism of a summing up which was not raised at trial. That limitation is not imposed as a punishment for counsel's conduct of the trial but exists because a jury trial involves the making of constant decisions by counsel, as well as the trial judge, based upon perceptions and motivations, many of which will be in conflict. Moreover, many of these decisions must be taken by counsel knowing that there are risks attendant upon each available course.

[4] *General Motors-Holden's Pty Ltd v Moularas*[5] was a personal injury case tried before a jury in which the unsuccessful defendant appealed on the ground that the trial judge had failed to direct the jury about possible contingencies that might reduce the plaintiff's future economic loss, and particularly in relation to a pre-existing condition. On appeal it was said that the failure to give such a direction had occasioned a miscarriage of justice. The Victorian Full Court dismissed the defendant's appeal.

[5] In the High Court, Barwick CJ considered the course that trial counsel had taken. After the summing up, counsel had raised with the judge his failure to give the direction. The judge asked whether he should now bring the jury back and give them the further direction. Barwick CJ said:

> "Counsel, who realized that he faced a dilemma – of either risking undue emphasis in the minds of the jury on the issue of damages or of forfeiting or risking the benefit of the deficiency in the summing up by not requiring the judge to amend his charge, opted to take that risk. In my view, he chose not to ask the judge to correct the summing up in the aspects he had raised. In thus reciting the conduct of the trial I am far from criticizing the course counsel took. He was in the atmosphere of the trial and chose what may well have been the wiser course in the interest of his client. But his choice cannot be

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1 (1993) 178 CLR 193.
2 *Dhanhoa v The Queen* (2003) 217 CLR 1 at [49] per McHugh and Gummow JJ.
3 [1983] 1 VR 265 at 297.
4 Young CJ, McInerney and Gobbo JJ.
5 (1964) 111 CLR 234.

> regarded as without consequence before the Full Court and before us on appeal from the Full Court."[6]

[6] Barwick CJ then considered the terms of the summing up. Although his Honour thought that the trial judge should have alerted the jury about how to use evidence of the plaintiff's pre-existing condition when assessing damages, he said that nevertheless there was no misdirection.[7] His Honour regarded it as significant that counsel, who had heard the summing up, and who "may have thought that the jury had had their attention sufficiently called" to the issue, had sought no redirection.[8] Barwick CJ observed that, although there were some directions that are so indispensable that they must be given in all cases, as to other directions, "the infinite variation of the facts of cases, and the varying consequences of the manner in which they are fought and the different ways in which a summing up may communicate the issues and the facts of a case to a jury make it … undesirable to make any universal and inflexible rule with respect to them."[9]

[7] Experience in the conduct of trials shows that such omissions are often due to conscious decisions made after a considered weighing of competing risks. At other times, as Gleeson CJ pointed out in *TKWJ v The Queen*,[10] such decisions are made almost instinctively and on the basis of experience and impression rather than analysis of every possible alternative.

[8] An appellate court cannot have the same appreciation of everything that happens at a trial that the trial participants themselves have. That is why counsel's omission to take an objection becomes important. The fact trial counsel takes no objection to matters put or omitted to be put by a trial judge in a summing up is cogent evidence, in most cases, that counsel, absorbed in the atmosphere of the trial, saw no injustice or error in what was done.[11] *R v Gallagher*[12] was such a case. Ashley AJA observed that the fact that no exception had been taken at trial was an indication that a point taken on appeal may have had no significance at the trial. Ashley AJA thought that this lack of significance was reinforced by the fact that the point was not even taken in the notice of appeal but only emerged as the appeal evolved. In the present case, too, the point now urged was not taken at trial and also escaped the attention of the drafter of the original notice of appeal.

[9] This is the reason why it has been said that in such cases it will not be often that an appellant will be able to establish a miscarriage of justice.[13] The making of a choice is an exercise of the right to a fair trial and in most cases the fact that the choice has led to an adverse result does not render the trial unfair.[14]

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6 *supra*, at 240.
7 *supra,* at 241.
8 *ibid.*
9 *ibid.*
10 (2002) 212 CLR 124 at [16].
11 *R v Tripodina and Morabito* (1988) 35 A Crim R 183 at 191 per Yeldham J; *R v Gallagher* [1998] 2 VR 671 at 681-683 per Brooking JA, at 685 per Callaway JA.
12 *supra*.
13 see *Dhanhoa*, *supra*, at [59], [63]-[64] per McHugh and Gummow JJ; *Suresh v The Queen* (1998) 72 ALJR 769 at [13] per Gaudron and Gummow JJ, at [22]-[23] per McHugh J and at [57] per Kirby J; *Nudd v The Queen* (2006) ALJR 614; *TKWJ*, *supra*.
14 *R v Miletic* [1997] 1 VR 593 at 597-598.

[10] Moreover, although a trial judge has a duty to ensure that a trial is fair, including by giving directions that neither counsel may have sought, as Kirby J has said a trial judge needs to be cautious in making decisions of that kind. This is because the judge may have insufficient materials upon which to understand why a particular course has been adopted and, ordinarily, a judge is entitled to presume that counsel will decided upon trial tactics that serve the client's interests.[15]

[11] It is necessary to appreciate the direction that, it is now said, should have been given. The Benchbook sets out a standard Edwards direction in the following terms:

> "The prosecution relies on what it says are lies told by the defendant as showing that he is guilty of the offence.
>
> (Here, the trial judge would be obliged to tell the jury the particular statements that are said to be lies.)
>
> Before you can use this evidence against the defendant, you must be satisfied of a number of matters. Unless you are satisfied of all these matters, then you cannot use the evidence against the defendant.
>
> First, you must be satisfied that the defendant has told a deliberate untruth. There is a difference between the mere rejection of a person's account of events and a finding that the person has lied. In many cases, where there appears to be a departure from the truth, it may not be possible to say that a deliberate lie has been told. The defendant may have been confused; or there may be other reasons which would prevent you from finding that he has deliberately told an untruth.
>
> Secondly, you must be satisfied that the lie is concerned with some circumstance or event connected with the offence. You can only use a lie against the defendant if you are satisfied, having regard to those circumstances and events, that it reveals a knowledge of the offence or some aspect of it.
>
> Thirdly, you must be satisfied that the lie was told because the defendant knew that the truth of the matter would implicate him in the commission of the offence. The defendant must be lying because he is conscious that the truth could convict him. There may be reasons for the lie apart from a realisation of guilt. People sometimes have an innocent explanation for lying.
>
> (At this point the judge would explain to the jury the potential innocent explanations that might explain why the defendant lied.)
>
> If you accept that a reason of this kind is the explanation for the lie, then you cannot use it against the defendant. You can only use it against the defendant if you are satisfied that he lied out of a realisation that the truth would implicate him in the offence."

[12] I turn to consider the relevant aspects of the trial.

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15 *Suresh*, *supra*, at [54].

[13] The complainant was about 10 years old at the date of the first offence and about 14 years old at the date of the last offence. Her evidence took the form of pre-recorded evidence in chief and-cross examination. On its face, her evidence was clear and was attended only by the lack of detail that can be expected in evidence given about four years after the events in question.

[14] Her credibility was supported by evidence of preliminary complaint to four people. One of these was SRQ, the complainant's auntie. The complainant told her that the appellant was having intercourse with her. She also told her auntie that she and the appellant had watched pornographic movies together. Another person to whom the complainant spoke was PJM, who is now married to her. She told Mr PJM that the appellant would "isolate her or take her away from her mother and force her to, you know, do sexual acts and have sexual intercourse with him". The complainant said the same thing to Mr PJM's sister TJM and to their mother WJM. None of this evidence was challenged.

[15] The complainant's evidence also had support from a pretext phone call. The appellant's initial reaction to receiving a call from the complainant was cheerful. But, his tone changed as soon as the complainant told him that she was giving him a "sort of the heads-up" that she was "going to the police about what happened when I was younger". He responded, "So why are you going to do this to me?" Later in the conversation he admitted that what he had done was "wrong". He said that he wished that "we could work it out" by "me paying you some money." He said, "that's really fucked up my whole life, hasn't it?"

[16] A few days after this call, police interviewed the appellant and it is an exchange during that interview has become the subject of ground one of the appeal. The appellant was asked what cars he "would have had back then". He recalled that he had "a Commodore" and "a black Fairlane". In response to the question, "Anything else?" he replied, "Nah. I think that was it." He was then asked, "Did you own a utility at any stage?" to which he answered in the negative.

[17] In fact, at all material times the appellant's employer had given him the use of a white utility vehicle. It was his work car and there was no issue raised at the trial that that was so. It was also common ground that he did not "own" the utility and that his denial that he had owned a utility was literally true.

[18] The significance of the appellant's denial that he had ever owned a utility was that, if the jury concluded that he was trying to conceal his possession of the utility, then that might affect his credit in their eyes or they might even regard his statement as evidence of his consciousness of guilt. The prosecution disavowed any reliance upon these denials as evidence of consciousness of guilt.

[19] But, as Philippides JA has described, the prosecution nonetheless relied upon the denial as showing that the appellant was eager to conceal material facts. The prosecutor invited the jury to conclude that the denial was dishonest. She suggested that the denials were the appellant "trying to conceal things" and that he was "simply not credible".

[20] After the evidence concluded on the afternoon of Thursday 19 April 2018, Long DCJ began to hear submissions about the content of his proposed summing up. Some matters that are now unimportant were briefly discussed and then the

prosecutor raised the subject of the pretext phone call. She informed the judge that she would be relying upon it as evidencing the appellant's consciousness of guilt in a number of ways. This implication was said to emerge from his tone of voice and the content of the conversation itself.

[21] Long DCJ then turned to the subject of the record of interview. After some brief exchanges between the learned judge and the prosecutor, Long DCJ asked the prosecutor whether he was right in understanding that she was "not asking for any particular direction about any further demonstration of a consciousness of guilt by any particular lie in the interview". The prosecutor replied in the affirmative. Defence counsel then engaged in several exchanges with his Honour but did not seek any particular direction about his client's statement about the utility. The trial was adjourned to the following day and submissions about the content of the summing up resumed. Insofar as time spent on a subject indicates its importance, the matter of greatest interest to defence counsel was the content of the *Longman* direction that Long DCJ had said he would be giving. Counsel wanted to ensure that the judge referred to certain specific disadvantages caused by the four year delay between alleged offending and trial and how important was delay in a case in which the complainant's evidence was central to the prosecution case. The matter of preliminary complaint evidence then occupied some time, as did the Crown's intention to emphasise the threats that the appellant was said to have made to induce the complainant's silence.

[22] Both counsel addressed the jury after lunch and the trial was then adjourned to the following Monday when his Honour summed up.

[23] It was not suggested in this appeal that counsel's omission to seek an *Edwards* direction was inadvertent. Certainly defence counsel exhibited deliberation about the specific matters that he wanted to be included in the summing up.

[24] There can be disadvantages to the defence when an *Edwards* direction is given. As can be seen from the standard Benchbook direction that I have set out, the direction requires the judge to set out in detail the statements that the prosecution relies upon as lies. When such statements constitute a significant part of the Crown case, there is no disadvantage in the giving of the direction because the statements will have been repeated almost *ad nauseam* by the prosecutor. When the statements do not loom so large, the invocation of the direction may be a disadvantage to the defence by creating emphasis where there was none.

[25] In this case, the prosecutor had herself acknowledged to the jury that one explanation for the appellant's statement was that he did not own a utility was true. That is how defence counsel also disposed of it in his very brief reference to the matter. A direction would have risked the whole thing being raised to the level of importance equal to the judge's treatment of the pretext phone call and the preliminary complaint evidence. It would have required pointing out to the jury the conditions upon which they might use that statement as evidence of guilt itself. In *Zoneff v The Queen*,[16] the appellant had been unrepresented at trial and the trial judge have given an *Edwards* direction. On appeal it was argued that the giving of the unasked-for direction had prejudiced the appellant. The High Court held that the direction should not have been given because it raised issues upon which the

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16 (2000) 200 CLR 234.

parties had not joined and had the effect of highlighting issues of credibility so as to give them an underserved prominence in the jury's mind to the prejudice of the appellant.[17] The majority then posited a direction that might be given "in this unusual case" that might have allayed the concerns that the trial judge evidently had.[18]

[26] In my view the present case was one in which the real force of the Crown's case was contained in the complainant's own evidence that was supported by her preliminary complaints and by the contents of the pretext phone call, and that is how the defence saw it. There were two ways in which the defence might have dealt with the statement about ownership of the utility. One was to invoke *Edwards v The Queen*. The other was to offer the jury the obvious answer that the statement was true when it was made. Neither course was without some disadvantage.

[27] In the circumstances of this case, I am not satisfied that the appellant has suffered a miscarriage of justice by reason of Long DCJ's omission to give a direction about the impugned statements. I am not satisfied that counsel's omission to ask for such a direction was other than the result of a deliberate decision made to resolve the dilemma that I have attempted to describe. In my view, in the circumstances of this case, it would have been wrong for Long DCJ to have given an *Edwards* direction when defence counsel did not seek it. Nor am I prepared to conclude that, had the direction been given, it would have made any difference to the verdicts that were given.

[28] I agree with the reasons of Philippides JA and agree that the appeal should be dismissed.

[29] **PHILIPPIDES JA:** On 24 April 2018, following a five day trial for 11 counts of child sexual offences before Long SC DCJ, the jury returned guilty verdicts for nine of the counts as follows:

- Count 1: Maintaining an unlawful sexual relationship with a child.
- Counts 2, 3, and 9:[19] Indecent treatment of a child, under 12, under care.
- Counts 5, 7, and 8: Rape.
- Count 6: Involving a child in making child exploitation material.
- Count 11: Unlawful carnal knowledge of a child under 16[20] as an alternative to rape of which the appellant was found not guilty.

[30] The appellant was acquitted of counts 4 and 10 which alleged indecent treatment of a child under 16, under care.

Grounds of appeal

[31] The appellant appeals against the convictions on the following amended grounds of appeal, namely that the trial judge erred in failing to:

- direct the jury as to lies allegedly told by the appellant (ground 1).

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17 *supra*, at [20] per Gleeson CJ, Gaudron, Gummow and Callinan JJ.

18 *ibid*. at [23], now called a *Zoneff* direction.

19 The charge of which the appellant was convicted on count 9 was as an alternative charge to rape of which he was found not guilty.

20 The alternative verdict for count 11 was incorrectly recorded as indecent treatment of a child under 16, under care (expose) in the notice of appeal.

- direct the jury in relation to post offence conduct (ground 2).
- rule that the pretext telephone conversation between the appellant and complainant was inadmissible (ground 3).

The Crown case

[32] The Crown case was that, in 2007, the complainant, who was about 10 years old, her two siblings and mother moved into the appellant's home to live with him. At the time, the complainant was in grade 5. Shortly thereafter, the complainant's mother and the appellant commenced a relationship. In the period from 2007 to late 2010, the complainant, her mother and siblings lived with the appellant for about six months, then moved out for a period of months to live in M, returning to live with the appellant for about one and a half years.[21] During the periods that the complainant and the appellant lived together, he held a position of authority over the complainant, akin to a stepfather. The appellant continued to have frequent contact with the complainant during the period her family was not living with the appellant.

[33] The sexual relationship between the appellant and complainant commenced with low level touching, which progressed over time to include touching around the genital area, digital penetration of the complainant's vagina, the complainant masturbating the appellant, the complainant performing oral sex on the appellant through to multiple occasions of sexual intercourse. The complainant's evidence was that the offending was committed at a number of locations including on occasions when the appellant and the complainant would drive to a shop at Nanango in order for him to purchase cigarettes.[22] These drives occurred at least three times per week.

[34] In addition to her evidence of unparticularised instances of sexual offending, the complainant was able to give evidence of 10 particularised acts of sexual offending, which formed the basis for counts 2 to 11.

[35] The complainant's evidence was that the first sexual contact with the appellant occurred at the appellant's house on an occasion when her mother and sister were not home. She said she was in her room because she had fought with her mother. She walked out of her room past the appellant who was watching pornography in the lounge room. The complainant apologised and went towards her room. The appellant called her over and made her sit on a couch while he sat on a recliner chair and they watched pornography (count 2).[23] The appellant then told the complainant to sit on his lap. The complainant complied and the appellant then grabbed her hips and "sort of pulled [her] onto his … penis area".[24] The complainant described the appellant's penis as hard and he was thrusting, "sort of like rocking", and that she could feel his penis pulsing (count 3).[25] The complainant left the room crying.

[36] The complainant gave evidence of another occasion, after the complainant, her mother and sibling had moved to M, when she and her sister had a sleepover at the appellant's house. This occurred after the complainant had fought with her mother. The complainant and her sister slept in the appellant's bed for the night. The

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21 AB2 at 7.15-7.17.
22 AB2 at 16.18-16.20.
23 AB2 at 7.43-8.5.
24 AB2 at 8.7.
25 AB2 at 8.8-8.10; 11.17.

complainant said that she was sleeping beside the appellant and woke to find the appellant's hand under her shirt and on her breast.[26] The complainant said the incident occurred in 2008 when she was in grade 6. The complainant's evidence was that she said, "What are you doing" and that the appellant responded that the complainant had told him to do it, which she denied. She then grabbed her sister and they slept in the lounge room.[27] This constituted count 4, in respect of which the appellant, as mentioned, was acquitted.

[37] Count 5 concerned an occasion in 2008 during the period after the complainant and her mother and sister had moved back in with the appellant. The complainant said that she went for a drive with the appellant so that he could buy some cigarettes. The appellant rubbed the complainant's thigh and genital area before digitally penetrating her vagina. The complainant told the appellant "she didn't want to do it" and said that the appellant said "that if [she didn't] then [he'd] do it to [my younger sister]".[28] The complainant referred to uncharged acts of a similar nature occurring two or three times a week.[29]

[38] Count 6 related to one particular occasion when the appellant gave the complainant his mobile phone and told her to take a photograph of her vagina. The complainant went into her bedroom, complied with his direction and returned to give the phone to him. The incident occurred at a time before the appellant commenced having intercourse with her.[30]

[39] Count 7 related to the complainant's evidence that, just before her 13th birthday, the appellant had sexual intercourse with her. The complainant described that the appellant was driving a white Ford and that he stopped on the side of the road near an "old beat-up caravan". The two of them got into the back seat of the car. The appellant pulled the complainant's pants down, wet his penis and inserted it into the complainant's vagina. This caused the complainant pain.[31] The complainant felt scared but did not fight him because she remembered him previously saying that if she "didn't let him do it to [her] he would do it to [her sister]".[32] The complainant's evidence was that the incident occurred in 2009.[33]

[40] Count 8 concerned the complainant's recounting of another particularised occasion, during the 2009 Christmas holidays, when the appellant and the complainant went to an abandoned house. The complainant remembered this occasion as the first time that the appellant licked her vagina. She told him to stop but the appellant had inserted his penis into her vagina and said, "No", and that he had "nearly finished".[34] The incident occurred when she was about 13.[35]

[41] Count 9 related to an occasion when the appellant had sexual intercourse with the complainant in his work utility at the same place near the caravan where he had previously taken her. The complainant described the utility as a single cab white

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26 AB2 at 11.30-11.34.
27 AB2 at 14.
28 AB2 at 17.15.
29 AB2 at 18-20.
30 AB2 at 29.38-29.45.
31 AB2 at 22.1-22.24.
32 AB2 at 23.45-23.47.
33 AB2 at 28-30.
34 AB2 at 27.25-27.36.
35 AB2 at 28.

vehicle in addition to the white Ford sedan.[36] After having sex with the complainant, the appellant told her to sit on the gearstick and he applied some sort of lubricant to the gearstick.[37] The complainant placed one leg either side of the gear stick and sat down onto it. The gearstick penetrated her vagina to the extent that the whole of the handle was inside it.[38] The complainant got stuck at one stage and the appellant laughed.[39] The complainant hurt her vagina and had to apply pressure to it in order to reduce the pain.

[42] After this occasion, the appellant had sexual intercourse with the complainant around three times per week.[40] It stopped just before she moved in with her father when she was about 14 years old.[41]

[43] Count 10, of which the appellant was acquitted, concerned the complainant's evidence of an occasion when she was around 14 years old. The complainant said she and the appellant went into the bedroom the appellant shared with her mother. They sat on the bed and the appellant played a video of the appellant and a person she said was her mother having sexual intercourse.[42]

[44] Count 11 concerned the complainant's evidence of the last particularised occasion of sexual intercourse, which she said was also the last occasion that the appellant had sexual intercourse with her. The incident occurred when the complainant's sister and mother had left the house. The appellant had sexual intercourse with the complainant on her bed.[43]

[45] The prosecution relied on a pretext telephone call between the complainant and the appellant and a police interview with the appellant conducted some five days after the pretext telephone call.

[46] The complainant's mother gave evidence, some of which supported the complainant's evidence, such as to opportunity to commit the offences, and other evidence which contradicted her evidence, such as the existence of a video of sexual intercourse between her and the appellant.

Ground 1: Error in failing to direct the jury as to lies allegedly told by the appellant

[47] Ground 1 concerned the appellant's answers in his interview with police when asked to list the vehicles he had at the time of the alleged offending and after having been asked whether he ever drove the complainant in his vehicle.

[48] The complainant listed a Commodore and a black Fairlane. The appellant was asked, "Any other cars beside a grey Commodore, the black Fairlane?" To which he replied "Nah, that's it".[44] He was specifically asked whether he owned a utility at any stage, which he denied. The prosecution relied on that denial as a lie. It was common ground that the appellant appeared to have unrestricted use of the utility, although it was not in fact owned by him.

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36 AB2 at 24.16-24.18.
37 AB2 at 73.35.
38 AB2 at 73.15.
39 AB2 at 25.4-25.5.
40 AB2 at 25.40-25.41.
41 AB2 at 25.43-25.45.
42 AB2 at 28.45-29.18.
43 AB2 at 30.21-30.24.
44 AB1 at 55.44-56.1.

The appellant's submissions

[49] The appellant submitted that, although the prosecution relied on a number of aspects of the appellant's police interview as amounting to statements against interest, for example, that the appellant had the opportunity to commit the offences and that there were occasions when the appellant admitted to having the complainant in his care, the perceived value of the interview related to the appellant's denial of owning a utility at the relevant time. The appellant referred to the prosecutor's opening address where it was stated, "There was potentially some important evidence where he denied owning a utility around this time".[45] Reference was also made to the closing address, where it was said that this denial was "not an insignificant point".[46]

[50] It was submitted that the utility featured in a significant way in the Crown case, being central to the complainant's allegation in respect of count 9, which was the most confronting and graphic allegation the complainant made and one that did not follow the other general pattern of offending. The appellant submitted that it would have been memorable to the jury because the complainant was given a break with the Court adjourning after defence counsel showed her a photograph of a gear stick from a similar utility.[47]

[51] The appellant referred to the trial judge's discussion with counsel as to the formulation of directions concerning the appellant's denial of ownership of the utility during which the prosecutor accepted that the lie by omission "doesn't go as high as an *Edwards* lie".[48] The appellant also referred to the trial judge's confirmation that the prosecutor was not relying on the lie as going to a consciousness of guilt and his Honour's statement[49] that the way the questions were asked of the appellant did not suggest the need for an *Edwards* direction.[50]

[52] It was submitted that, notwithstanding the prosecutor's contention to the trial judge that the lie was not relied on as an *Edwards* lie, the manner in which the relevant passages of the interview were presented to the jury, together with the submissions made, amounted to an invitation for the jury to conclude that the appellant told a deliberate untruth about a material aspect of the Crown case which did reveal a consciousness of guilt. The appellant placed particular reliance on the following italicised submissions in the prosecutor's closing address about the appellant's use of a utility during the relevant period:[51]

> "So what I'd ask you to do is to think about that whole of the interview and think about his statements and think about what you accept as being true and what you can accept as not being true. ***There is some times where you can see that he's trying to conceal things in his interview***. … So the defendant at this point in time has been made aware [of the allegations made by the complainant]. ***And then consider the evidence in relation to the car. So he's - now, that's the four-wheel drive. So that's not an insignificant point***. …

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45 AB1 at 21.42-21.43.
46 AB1 at 53.38.
47 AB2 at 60.26. See also AB1 at 103.22.
48 AB2 at 253.34-253.36.
49 AB2 at 254.30.
50 *Edwards v The Queen* (1993) 178 CLR 193. See also Benchbook direction No 39 - Lies Told by the Defendant (Consciousness of Guilt).
51 AB1 at 53.30.

…

Now he's been given an outline about what they're investigating in relation to the matter, the timeframe, 2001, and then they're being asked, 'Did you take [the complainant] into Nanango?', and they're asked about what car he had at the relevant time? ***Really, ladies and gentlemen, how could it slip your mind about what cars he would have had at that relevant time***? I mean, there's been evidence about him and his association with cars and doing work on cars. ***How could that detail about the ute really have slipped his mind?... He must have known that was important at the time, in my submission to you.*** So [the complainant's] evidence is that there is a ute. Her mother confirms this as well. So he goes through and says:

> *Oh, jeez. Is it a Commodore? I think I had a Commodore.*

The police say:

> *Anything else?*

And then he goes, 'Um.' They say:

> *What colour was it?*

He says, 'Grey.' And so the police officer says – sorry. And the police officer says:

> *So, specifically, I'm asking you, like, what – what – when [the complainant and her mother] were living with you.*

And then he said:

> *I had a black Fairlane.*

The question:

> *Yeah. A black Fairlane. Anything else?*

And then there's a long silence, you'll remember. And then he's asked:

> *Anything else?*

It couldn't have possibly slipped his mind, I would suggest to you, that he had a work utility. Those are the questions that he was asking about – being asked about. When they asked if there was anything else, he said:

> *Nah. I think that was it.*

Police then go on to directly draw his attention in relation to him having a utility. They go on and ask:

> *Did you own a utility at any stage?*

And I accept that's slightly different, because he had a work ute, but clearly police are interested in what other vehicles he's had, and it's about a ute. And, obviously, that gives some credence about [the complainant's] evidence in relation to these offences happening in a

> ute. So he said, no, he didn't own a ute, and that's probably technically right, that he didn't own a ute. The questioner then goes on to ask about registrations of utilities in his name, and he says no. And so then the question:
>
> *Any other cars beside a grey Commodore, the black Fairlane?*
>
> And he goes:
>
> *Nah, that's it.*
>
> ***Ladies and gentlemen, I'd suggest to you he just wasn't honest about that aspect. He wasn't credible, I suggest***…
>
> So he's flip-flopping in relation to having the kids in his care…
>
> ***So I'd suggest to you those are two [instances] where he's trying to conceal things. He's simply not credible.*** So, as I said before, that interview happened five days after [the complainant] had called him and told him she was going to police. Ladies and gentlemen, I'd ask you to think about how that may have been operating on his mind when he was in the police station…
>
> You might find that he was operating with [the complainant's] phone call on his mind, and that's impacted on how he's answered some of the questions. So there are parts that are consistent with [the complainant's] evidence, such as him caring for the girls, that you can accept, but there are other parts of his evidence that you wouldn't accept and you would set aside."

[53] At trial, defence counsel submitted to the jury that the specific question asked by the police was whether the appellant owned a utility and that, although the utility was his work vehicle, his answer was correct in that he did not own it.[52]

[54] The appellant's complaint was that the trial judge did not direct the jury as to what use they could make of the evidence relating to the utility.[53] It was accepted that, as a general rule, an *Edwards* direction[54] should only be given if the prosecution contended that a lie had been told out of a consciousness of guilt. However, it was argued, citing *Zoneff v The Queen*,[55] that there may be occasions where the jury might misunderstand the use they can make of the lie and, in such circumstances, the trial judge should give an *Edwards* direction, notwithstanding that the prosecution has not submitted that the lie could reveal a consciousness of guilt. Relying on *Dhanhoa v The Queen*,[56] the appellant argued that the present case was one where, in the absence of an *Edwards* direction, there was a real danger that the jury may have used the lie to arrive at a conclusion of guilt, so that the appellant was thus deprived of a fair chance of an acquittal. It was also submitted that there was a danger that the submissions made by the prosecutor may have caused the jury to apply a similar line of reasoning to the white Ford Falcon which the appellant

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52 AB1 at 64.14-64.16.

53 AB1 at 96.1.

54 *Zoneff v The Queen* (2000) 200 CLR 234. See also Benchbook Direction No 40 - Lies Told by the Defendant (Going only to credit).

55 (2000) 200 CLR 234 at [16].

56 (2003) 217 CLR 1 at [34].

omitted to mention that he owned[57] (and which was where the offending the subject of count 7 was alleged to have occurred).

The respondent's submissions

[55] The respondent submitted that the prosecutor relied on the appellant's police interview primarily to enable the jury to assess properly the appellant's veracity in his denials of the allegations.[58] In that respect, it was submitted that the appellant was told of the allegations against him and was acutely aware of them before he embarked on a course of "conceal[ing] things" which might tend to incriminate him. Relevantly, it was submitted that the appellant was not forthcoming as to his access to a vehicle alleged to be that in which count 9 occurred. It was argued that the prosecutor, at no time, sought to rely on the omission by the appellant as evidencing a consciousness of guilt. Further, the appellant's statements as to the ownership of the utility, while technically truthful, were to be seen in light of the allegations known to the appellant. As such, the prosecutor properly addressed the jury as to the reasons why the jury may be circumspect in accepting the appellant's statements where they were not otherwise supported by the complainant.[59] It was, therefore, not incumbent on the trial judge to direct the jury as to how they may use the statements, which were never categorised as lies and could only possibly be said to be a lie by specific omission.[60]

Consideration

[56] I am unable to accept the appellant's submissions on ground 1. The thrust of this ground of appeal was that an *Edwards* direction should have been given. There was no complaint in the written submissions that there was a miscarriage of justice because the trial judge did not give an appropriately worded *Zoneff* direction. The latter was raised faintly in oral submissions before this Court in this way: "There's the other direction, being the *Zoneff* direction that would have perhaps provided a ceiling on the way in which the jury could have used the lie".[61] The *Zoneff* direction is to the effect that any conclusion that the appellant deliberately told lies was relevant only to his credibility and the jury should not follow a process of reasoning to the effect that, just because a person is shown to have told a lie about something, that is evidence of guilt.[62]

[57] In my view, there was no miscarriage of justice in the trial judge not giving an *Edwards* direction. As Gleeson CJ and Hayne J stated in *Dhanhoa*:[63]

> "It is not necessary for a trial judge to give a direction, either of the kind referred to in *Edwards*, or of the kind referred to in *Zoneff*, every time it is suggested, in cross-examination or argument, that something that an accused person has said, either in court or out of court, is untrue or otherwise reflects adversely on his or her

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57 Both the complainant at AB2 at 24.25 and her mother at AB2 at 160.41 gave evidence that the appellant owned a white Ford Falcon.

58 AB1 at 52.46-57.43.

59 AB1 at 57.42.

60 Although it must be recognised that in the context of many, if not all, prosecutions a denial of the offending (including a plea of not guilty) must be advanced by the prosecution as an untruth.

61 Appeal Transcript 1-11.

62 See Benchbook Direction No 39.1.

63 (2003) 217 CLR 1 at [34].

> reliability. Where the prosecution does not contend that a lie is evidence of guilt, then, unless the judge apprehends that there is a real danger that the jury may apply such a process of reasoning, as a general rule it is unnecessary and inappropriate to give an *Edwards* direction. *Zoneff* was said to be an unusual case, and the direction there proposed was said to be appropriate where there is a risk of misunderstanding about the significance of possible lies. The present was not such a case." (citations omitted)

[58] Also pertinent is the observation of McHugh and Gummow JJ[64] in *Dhanhoa* that, while prudence dictated a direction limiting the use of the "lies" would have been best, "It is not necessary for a trial judge to give a direction concerning lies as evidence of guilt whenever a prosecutor suggests directly or indirectly that an accused's out-of-court statement is a lie".

[59] In the present case, as counsel for the appellant conceded, there was no explicit statement that the omission was relied upon as indicating a consciousness of guilt. Nor, in my view was such an approach implicit in the prosecutor's submissions. On the contrary, the prosecutor indicated that the denial of ownership of a utility was relied upon as going to the appellant's credibility and stated as much, linking the concealment to a lack of candour going to credibility. That approach was also the subject of submission by defence counsel in his address to the jury as follows in relation to the appellant's interview and his failure to mention the utility: [65]

> "Now, when you watch the interview, again, I'd ask that you assess [the appellant's] demeanour during the interview, also. Yes. I think it's fair to say [the appellant] came across as defensive, but if you were sitting there, by the police, being accused of some sort of sexual misconduct, would you not like to think that you would become a little defensive too? In my submission, he came across to you as matter of fact, forthright. There's no doubting he's rough around the edges, but that does not make him guilty of any offence. In my submission, he came across to you as honest, in his denial of doing anything to [the complainant].
>
> True, it is, that he denied ever owning a ute, but the question he was asked was if he had ever owned a ute and the evidence of all concerned is that the vehicle that he had that was a ute was a work vehicle, not one that he owned. And it's important to bear in mind that this is a question he's being asked years after the fact. At the end of the day, the interview contains denials, by [the appellant], of any sexual offending against [the complainant] and it's my submission that you would accept those denials were given in an honest manner.
>
> Now, ladies and gentlemen, there is, of course, the option open to you to reject that submission, but just because you don't accept [the appellant's] denial does not mean that you are automatically entitled to move to the position of finding him guilty. You must still conduct a proper assessment of the Crown evidence in this case and, in my

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64 (2003) 217 CLR 1 at [59].

65 AB1 at 64.5-64.30.

> submission to you – my submission to you is that even if you do that, and once you have done that properly, you will still be left with a reasonable doubt, because the only evidence that exists, of sexual offending by [the appellant], comes from [the complainant]."

[60] The trial judge in summing up the defence case stated:[66]

> "For the defence, or for the defendant, it is particularly emphasised that the context is to understand the long delay in the complaint to the police and, therefore, this prosecution. That, it is important to take into account the warning that I have given you in respect of that, and it provides the context to both the phone call and the interview with the defendant. You are particularly urged to note the absence of any specific reference to sex, let alone any particular sexual misconduct, in the recorded telephone call. And the contention is that that does not allow for the conclusion that the prosecution contend for in respect of that phone call. It leaves open, the defence contend, the possibility of other rational inferences for the apology and the offer of payment, when the complainant indicates she is wanting to take something to the police. In the record of interview, it is contended you would take into account that the defendant does not attempt to hide the fact of the phone call. He tells the police about that. That is, in the context that he has some awareness that she is intending to go to the police or is going to the police about something, but that he does agree to answer questions, to a point. That he exercises his right and I have instructed you about the correct reasoning in relation to that, to elect not to answer further questions. And that you would not be dismissive of his denials as to offending, albeit in an understandably defensive way. **But, and it has correctly been pointed out to you, that even if you are not impressed by that and you are not prepared to act on his denials, that cannot mean, ladies and gentlemen, that you automatically, because of that reasoning, jump to a conclusion of guilt. And that is correct.** You are still left with your assessment of the other evidence, including the complainant's evidence, as to whether you are satisfied beyond reasonable doubt as to the commission of any particular offence." (emphasis added)

[61] In the present case, there was no possibility of risk that the jury might misunderstand the significance of the evidence, nor the use to be made of it, by impermissibly using the appellant's omission to mention the utility as evidence of consciousness of guilt. Defence counsel did not apparently perceive such a risk, as no *Edwards* direction was sought. Further, as the trial judge indicated to counsel he would do,[67] his Honour directed the jury not to reason to guilt because of a conclusion that the appellant had deliberately lied. His Honour gave his imprimatur (in the highlighted portion of the directions referred to above) to the submission made by defence counsel specifically reinforcing that the appellant's denials could not be used to automatically lead to a conclusion of guilt. His Honour's direction was given in the context of reminding the jury that a long time had elapsed since the period the appellant was being questioned about. No complaint was made at trial

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66 AB1 at 104.21-104.44.

67 AB2 at 255.10, 255.40.

that an inadequate *Zoneff* direction was given. In my view, the direction given was adequate to convey that the jury should eschew reasoning to guilt from the lies.[68]

[62] Furthermore, even if it would have been better to give an *Edwards* direction, as now contended for, to specifically limit the use to be made of the denial or lie by omission, it does not follow that a miscarriage of justice resulted. As McHugh and Gummow JJ emphasised in *Dhanhoa*,[69] citing *Simic v The Queen*,[70] to succeed on appeal the appellant must establish more than that there was a "possibility" that the jury may have impermissibly reasoned to guilt. It must be shown that it is a "reasonable possibility" that the failure to direct the jury "may have affected the verdict". In the circumstances of this particular case, the risk of impermissible use was so slight that it cannot be concluded that the appellant was deprived of a fair chance of acquittal. In that regard, it should also be observed that there were good forensic reasons why the now argued for direction was not sought at trial. Had an *Edwards* direction been given concerning the omission to mention the utility on the basis that another explanation other than consciousness of guilt was available (for example that the appellant was not in fact the owner, although he had unrestricted use of it) it would have served to highlight that that alternative explanation was not available in relation to the Ford Falcon connected to count 7.

[63] This ground fails.

Ground 2: Error in failing to direct the jury as to post offence conduct attributed to the appellant

[64] Ground 2 concerned evidence of post offence conduct by the appellant, upon becoming aware that the complainant had disclosed the offending, in directing her to tell others that she had fabricated the allegations.

The appellant's submissions

[65] The evidence which the appellant contended required a specific warning concerned evidence referred to by the prosecutor in her closing address.[71] That evidence included:

(a) evidence of the complainant's first complaint to her friend, CW, in 2010 about the appellant sexually abusing her.[72]

(b) evidence by CW that the complainant told her not to tell anyone, but that CW told her mother about what the complainant had disclosed to her.[73]

(c) evidence from CW's mother was put before the jury that she spoke with the complainant's mother about the disclosure[74] and that the complainant's mother told her, "I will sort it".[75]

(d) the complainant's evidence that she was confronted by the appellant regarding the disclosure that she made to CW and that "[The appellant] said

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68 See *R v Scott* [2011] QCA 343 at [31].
69 (2003) 217 CLR 1 at [38].
70 (1980) 144 CLR 319 at 332.
71 AB1 at 37.41-38.16, AB1 at 39.23, AB1 at 46.4; AB1 at 49.17 and AB1 at 51.10.
72 AB2 at 34.40-34.45 and 76.6.
73 AB2 at 76.30.
74 AB2 at 218.15.
75 AB2 at 219.10.

to me once that – he said why – why did I tell [CW] that we were having sex and to tell her that [she] was lying".[76]

(e) the complainant's evidence as to why she later told CW that the disclosure was a lie.[77]

(f) evidence by CW confirming that the complainant later told her that the disclosure "wasn't true".[78]

(g) the denial by the complainant's mother of having a conversation with CW's mother regarding a disclosure of a sexual nature by the complainant against the appellant.[79]

[66] In referring to that evidence, the prosecution's submission to the jury was that, despite the complainant's mother's denial of having been approached by CW's mother, the evidence supported the conclusion that the appellant had confronted the complainant about her allegations and told her, in effect, to withdraw them. The prosecutor submitted that the jury should reject the complainant's mother's evidence in circumstances where the defence counsel did not challenge it.

[67] On behalf of the appellant, it was argued that there was, however, a real risk that the jury may have attributed to the appellant's behaviour, in asking the complainant to tell her friend that she had lied, a consciousness of guilt when there was an innocent reason available for confronting the complainant. That innocent explanation was that the conduct described was equally consistent with an innocent man trying to stop a false allegation being levelled against him. It was submitted that the absence of the direction by the trial judge resulted in the appellant not being afforded the protection that such a direction would have given him.[80] The appellant thus contended that he was deprived of a fair chance of acquittal as a result of the trial judge's failure to direct the jury as to how they could use the post offence conduct of the appellant.

The respondent's submissions

[68] The respondent argued that the evidence as to the complaint made by the complainant to CW was used by the prosecutor in the context of how the jury should consider the evidence of the complainant's mother and reconcile any inconsistencies in it with the evidence of the complainant and, further, how the jury might assess the complainant's credibility through the consistency of her account with CW's evidence, and the validity of her recantation to CW and finally to demonstrate the knowledge held by the appellant at the time of a pretext phone call (dealt with in ground 3).

[69] The respondent emphasised that it was in that context that the prosecutor drew to the jury's attention the sequence of events as to the evolution of the complaint by the complainant and the reason for a subsequent recantation. Further, since the prosecution did not rely on the conduct as a piece of circumstantial evidence, there

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76 AB2 at 35.34-35.36.
77 AB2 at 35.38.
78 AB2 at 76.46.
79 AB2 at 164.28-164.30.
80 *R v Chang* (2003) 7 VR 236 at 254-5; *R v SBB* [2007] QCA 173 at [4]-[5].

was not a reasonable possibility that the failure now contended for may have affected the jury.[81]

Consideration

[70] It is evident when regard is had to the context of the submissions made by the prosecutor to the jury that, in referring to the evidence of the appellant's post offence conduct in telling the complainant to retract her allegation, the prosecutor was not putting the evidence forward as conduct demonstrating a consciousness of guilt on the part of the appellant. Rather, as the respondent argued, the evidence was relied upon as evidence which was to be taken into account in assessing the complainant's credibility as well as indicating what the appellant may have been admitting in the recorded phone call.

[71] Given the way in which the evidence was relied upon by the prosecution, there was no call for a direction as to an innocent explanation for the conduct of the appellant. There was no risk that the jury might rely on the post offence conduct as evidence of demonstrating a consciousness of guilt. Indeed, if a direction had been given as to the evidence of the appellant's conduct being consistent with an innocent explanation, there was a real risk that that might elevate the relevance of the evidence beyond that for which it was relied upon.[82] It is unsurprising that defence counsel did not seek a direction in the terms now contended for.

Ground 3: Error in failing to rule that the pretext telephone conversation between the appellant and the complainant was inadmissible

[72] The error raised by ground 3 concerned a pretext recorded phone conversation, during which the appellant apologised to the complainant, in respect of conduct which the appellant submitted was not identified to or by the appellant, thus rendering the evidence of the phone call inadmissible.

[73] The conversation was as follows:

"APPELLANT:	Hey. Hello?
COMPLAINANT:	Hello.
APPELLANT:	Hello.
COMPLAINANT:	Hello is this [the appellant].
APPELLANT:	Yeah.
COMPLAINANT:	Hi … it's [the complainant].
APPELLANT:	How are you?
COMPLAINANT:	I'm good how are you?
APPELLANT:	I'm real good.
COMPLAINANT:	Um, look I just wanted to um let you know that I'm going to go to the police about what happened when I was younger. Are you there?

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81 *Dhanhoa v The Queen* (2003) 217 CLR 1.

82 See *Dhanhoa v The Queen* (2003) 217 CLR 1 at [64].

APPELLANT: Yeah.

COMPLAINANT: Yep, so I just wanted to give you sort of a heads up sort of thing.

APPELLANT: So why are you going to do this to me?

COMPLAINANT: Because--

APPELLANT: I mean why don't you come and see me?

COMPLAINANT: Because I um, it's hard with me to deal with now, what you did was wrong.

APPELLANT: Oh you're killing me. This is bull.

COMPLAINANT: Alright well um, I was just sort of giving you sort of a heads up to let you know that's all.

APPELLANT: Ah I wish you wouldn't?

COMPLAINANT: Why?

APPELLANT: I mean my life's turned upside down matey I'm about to loose me house.

COMPLAINANT: Well really what you done was wrong.

APPELLANT: Yeah.

COMPLAINANT: Don't you agree?

APPELLANT: Hey?

COMPLAINANT: Don't you agree?

APPELLANT: Yeah I know. And I'm really sorry but that, that means nothing does it?

COMPLAINANT: No it doesn't.

APPELLANT: Hey?

COMPLAINANT: No it doesn't.

APPELLANT: Yeah I'm just, I'm [INDISTINCT] now I think, I had bloody what's their name trying to take me because of bloody nothing, because of my mother. Nothing ever happened there, you know I'm still going through bloody lawsuit with her, that's what I'm saying I'm about to lose my house and everything. I just wish there was some way we could work it out but uh, no way of working it out?

COMPLAINANT: No.

APPELLANT: You know me paying you some money?

COMPLAINANT: Well hmm.

APPELLANT: Hey?

COMPLAINANT:	Nup.
APPELLANT:	You know like all I need is your bank account and I'll start putting money in your account.
COMPLAINANT:	No I'm sorry no.
APPELLANT:	No?
COMPLAINANT:	No.
APPELLANT:	Oh man, well um that's just fucked my whole life, it has.
COMPLAINANT:	You, you stuffed my whole life … like."

The application to exclude the pretext call

[74] An application pursuant to s 590AA of the *Criminal Code*, to exclude the pretext telephone conversation between the complainant and the appellant, brought on behalf of the appellant, was refused by Kingham DCJ.[83] Exclusion was sought pursuant to s 130 of the *Evidence Act* 1977.

[75] The pre-trial judge observed that the basis upon which the prosecution sought to rely on the pretext call was two-fold:[84]

> "… firstly to rely upon the demeanour of the [appellant] during the telephone call as indicating his consciousness of guilt of the charges laid against him; and secondly as evidence of generalised sexual misconduct by the [appellant] which can be relied upon by the jury in forming its conclusion on count 1 (the charge of maintaining)."

[76] Her Honour observed that the two bases for admissibility were conceded by defence counsel and that defence counsel's argument for the exclusion of the pretext call proceeded on the ground that its contents were ambiguous or equivocal such that it was unfairly prejudicial.[85] Applying *R v IE*,[86] her Honour held that the possibility of an innocent explanation did not deprive the evidence of its relevance. In relation to the issue of ambiguity, her Honour stated:[87]

> "[8] It is an unusual pretext call in one respect. On the one hand it could be argued to be ambiguous or equivocal because the complainant did not particularise any actual sexual misconduct. But on another reading, it is completely unambiguous and unequivocal in the defendant's acknowledgement that he has committed some wrong against the complainant when she was young; that he accepts responsibility for it and that he tries to dissuade her from going to the police, as she told him she was intending to do.
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> …

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83 *R v ABD* [2016] QDC 95.
84 *R v ABD* [2016] QDC 95 at [2].
85 [2016] QDC 95 at [5].
86 [2013] QCA 291.
87 [2016] QDC 95.

> [10] So it is not ambiguous in these ways: that she is talking about serious wrongdoing by [the appellant] to her in her youth; that he admits that he did something to her that was wrong; and that he tries to deter her from complaining to police.
>
> [11] What is ambiguous is precisely what wrongdoing is being admitted. That is not, in itself, a ground for exclusion; that is a question for the jury to determine. In the context of the complainant's evidence at trial, it would be open to the jury to reasonably conclude that their conversation relates to the complaints that she went on to make to police about the [appellant's] sexual misconduct."

Submissions

[77] The appellant's contention before this Court was that there was nothing in the pretext call itself that could have assisted the jury in concluding that the appellant was admitting to generalised sexual misconduct against the complainant. In those circumstances, the prejudicial weight of the evidence outweighed the probative value of it and warranted its exclusion.

[78] The respondent submitted that the defence counsel's concession that the recording was relevant and admissible as being probative of both a consciousness of guilt as to the offending and as evidence of "generalised sexual misconduct" in support of count 1 was properly made and that the appellant was bound at trial by his counsel's concessions[88] and, once the evidence held the probative value ascribed to it, it became admissible. Additionally, a further matter for the jury's consideration in relation to the pretext call, as advanced by the prosecution at trial, was that the pretext call occurred in the context of the prior complaint to CW of the appellant's sexual misconduct, inferentially communicated to the appellant and his conduct in seeking to have the complainant retract the complaint.[89]

Consideration

[79] The pre-trial judge was correct to reject the contention that the pretext call was of such ambiguity that its probative value was slight and outweighed by the prejudicial effect.

[80] While there was an element of contextual ambiguity, that did not deprive the evidence of its probative force. As the respondent submitted, the call disclosed an admission to serious misconduct against the complainant when she was a child, warranting a complaint to police. It was open for a jury, properly instructed, to infer the admissions were in regard to sexual offending, in circumstances where no other wrongdoing was alleged. This was particularly so given that it was not the defence case that the admissions concerned some other conduct, nor was such a proposition put to the complainant.

[81] This was not a case where the prejudicial effect of the evidence was of such a substantial nature and its probative value so slight that it ought to have been excluded in the exercise of the discretion.[90]

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88 *TKWJ v The Queen* (2002) 212 CLR 124 at [8] and [79].
89 AB1 at 94.19-94.33.
90 *R v Hasler; ex parte Attorney-General* [1987] 1 Qd R 239, 246, 251, 259.

[82] The observations of McMurdo P in *R v MBV*[91] are pertinent in the present case:

> "… the impugned evidence was relevant and admissible: it was capable of satisfying the jury beyond reasonable doubt of the appellant's consciousness of guilt. As the trial judge explained to the jury, it was a matter for them as to whether they accepted the inference advanced by the prosecution (that the appellant was effectively admitting the conduct alleged by the complainant) and rejected beyond reasonable doubt the defence contention (that the appellant was shocked and denying any touching). If the jury accepted the prosecution contention, the impugned evidence supported the complainant's account."

[83] It was a matter for the jury to determine what the admissions were in relation to and any potential for misuse by the jury was, as the pre-trial judge determined, able to be overcome by appropriate directions, such as were in fact given by the trial judge[92] and in respect of which no issue was raised.

[84] No error is demonstrated in the refusal of the application to exclude the pretext call.

Order

[85] The appellant has failed on all grounds of appeal. The order I would propose is that the appeal be dismissed.

[86] **McMURDO JA:** The evidence and the arguments are set out in the judgment of Philippides JA and need not be repeated here. I agree with her Honour's reasons for rejecting grounds two and three of the appeal, but I have reached a different conclusion about ground one. In my view, it was necessary for the trial judge to direct the jury that, if they considered that the defendant was lying about the utility, this was relevant only to his credit and it could not be treated by the jury as evidence of his guilt.

[87] In *Osland v The Queen*,[93] Gaudron and Gummow JJ said:

> "Where, as here, there is a risk that a jury might treat lies as evidence of guilt, the preferable course is for the trial judge to ascertain precisely what use the prosecution contends may be made of the evidence in question. And if the evidence is to be left to the jury as evidence of guilt, it should be instructed as required by *Edwards v The Queen*. If not, it should be instructed that the evidence is relevant only to the credit of the accused. Only by adopting that course can a trial judge guard against "a perceptible risk of injustice"."
>
> (Footnotes omitted.)

[88] In this case, the prosecutor told the judge that what the defendant said to police about the utility did not "go as high as an *Edwards* lie", thereby making it clear that the prosecution case was that this was not a lie which was told out of consciousness of guilt. But of course that was a statement made in the absence of the jury. If there

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91 (2013) 227 A Crim R 49; [2013] QCA 17 at [21].
92 AB1 at 63; AB1 at 99.
93 (1998) 197 CLR 316 at 333–334 [44].

was a real danger that the jury might use this evidence as evidence of the defendant's guilt, it was necessary for them to be directed that they should not do so.[94]

[89] In her opening address to the jury, the prosecutor described the evidence which the jury would hear from the complainant about the offence involving the gear stick in a utility then used by the defendant. The prosecutor also told the jury that they would hear "potentially … important evidence where [the defendant] denied owning a utility around this time."

[90] In her closing address to the jury, the prosecutor said that the jury could see that the defendant was "trying to conceal things in his interview [by police]". The prosecutor instanced that part of the interview in which the defendant had been asked to recall what vehicles he had at relevant times, arguing in this way to the jury:

> "Really, ladies and gentlemen, how could it slip his mind about what cars he would have had at that relevant time? I mean, there's been evidence about him and his association with cars and doing work on cars. How could that detail about the ute really have slipped his mind? … He must have known that was important at the time …
>
> It couldn't have possibly slipped his mind, I would suggest to you, that he had a work utility … Ladies and gentlemen, I'd suggest to you he just wasn't honest about that aspect. He was incredible, I suggest."

[91] At that point in her address, the prosecutor then referred to the defendant's statements to police on another subject, which was whether the complainant's mother would take the children with her when she worked as a cleaner. Those statements were relevant as to whether there were opportunities for the offending to occur with the children being under his care. The prosecutor argued that, on that subject, the defendant had made statements to police which were not "completely honest", before saying that, on that subject and the subject of the utility, the defendant had been "trying to conceal things". The prosecutor then said:

> "He's simply not credible. So as I said before, that interview happened five days after [the complainant] had called him and told him she was going to police. Ladies and gentlemen, I'd ask you to think about how that may have been operating on his mind when he was in the police station."

[92] In the pretext telephone call to the defendant, the complainant had not referred specifically to an offence having occurred in a vehicle. The prosecutor, in the above passage, was suggesting that the defendant was sufficiently concerned that the police not know of his use of the utility that he tried to conceal it. There was a serious risk that there would be "the elision which may occur between the conclusion that a person lied and the inference that he or she did so from the consciousness of guilt", as Basten JA put it in *Cesan v Director of Public Prosecutions (Cth)*.[95] The prosecutor did not explain to the jury that what the defendant did or did not say to police about the utility was relevant *only* to his credibility. Nor, with respect, did the trial judge do so.

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94 *R v Dhanhoa* (2003) 217 CLR 1 at 12 [34].

95 (2007) 174 A Crim R 385 at 418 [133].

[93] I should mention something which the trial judge did say about the use of the defendant's denials. In summarising the argument of defence counsel, his Honour said:

> "But, and it has been correctly pointed out to you, that even if you are not impressed by that and you are not prepared to act on his denials, that cannot mean … that you automatically, because of that reasoning, jump to a conclusion of guilt. And that is correct. You are still left with your assessment of the other evidence, including the complainant's evidence, as to whether you are satisfied beyond reasonable doubt as to the commission of any particular offence."

In my view, that was not sufficient to avoid a risk of the misuse of this evidence. What his Honour then said was that they should not jump to a conclusion of guilt from a finding of a false denial. They were not told that they could use that false denial, together with other evidence, as probative of guilt.

[94] It is for the appellant to establish that a failure to give a necessary direction constituted a miscarriage of justice. In *Dhanhoa v The Queen*,[96] McHugh and Gummow JJ said that:

> "In such a case, a miscarriage of justice will have occurred if the direction should have been given and it is "reasonably possible" that the failure to direct the jury "may have affected the verdict"."[97]
>
> (Footnotes omitted.)

The complainant's evidence about count nine, involving the gear stick in the utility, would have been particularly disturbing to the jury and this could well have heightened the jury's interest in why the defendant had concealed his use of the utility when he was interviewed by police. The prosecutor made much of the evidence in her closing address, consistently with her indication, when opening the case, of its potential importance. I am unable to accept that the evidence and the prosecutor's argument about it could have had no effect on the verdicts. In the terms of s 668E(1) of the *Criminal Code*, there has been a miscarriage of justice.

[95] I would allow the appeal and, on each count, set aside the conviction and order a re-trial.

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96 (2003) 217 CLR 1 at 15 [49].

97 Citing *Simic v The Queen* (1980) 144 CLR 319 at 332.