

SUPREME COURT OF QUEENSLAND

CITATION: *R v Nash* [2020] QCA 127

PARTIES: **R**
v
NASH, Mark Kevin
(appellant)

FILE NO/S: CA No 308 of 2019
DC No 61 of 2019

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: District Court at Gladstone – Date of Conviction: 24 October 2019 (Dearden DCJ)

DELIVERED ON: Date of Orders: 13 May 2020
Date of Publication of Reasons: 12 June 2020

DELIVERED AT: Brisbane

HEARING DATE: 13 May 2020

JUDGES: Sofronoff P and Boddice and Ryan JJ

ORDERS: **Orders delivered: 13 May 2020**

- 1. The appeal is allowed.**
- 2. The conviction is set aside.**
- 3. A re-trial is ordered.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – OTHER IRREGULARITIES – where the appellant was found guilty by a jury of one count of rape – where the appellant was sentenced to six years’ imprisonment – where the appellant appeals against the conviction on the ground that the trial Judge erred in ruling that the appellant’s false statements about the state of his memory were available to the jury as lies told in consciousness of guilt – where the complainant was working as an au pair for the appellant’s children – where the appellant admitted the act of intercourse with the complainant – where the appellant accepted he lied in a pretext call with the complainant following the offence – where the appellant accepted he remembered more than he suggested in the pretext call – where the prosecutor at trial relied on the contents of the pretext call as lies indicative of a consciousness of guilt – where the appellant’s counsel submitted at trial that the lies were explained by the appellant’s fear for his marriage if his wife, who was beside

him during the pretext call, found out what had happened – where the appellant’s counsel on appeal submitted that the directions given to the jury regarding the appellant’s lies were insufficient and gave rise to a miscarriage of justice – whether the appellant’s lie as to a lack of memory was capable of being used by the jury as evidence implicating him in the offence – whether the jury may have used the lies to impermissibly reason that the appellant was guilty of the offence – whether there was a miscarriage of justice

Edwards v The Queen (1993) 178 CLR 193; [1993] HCA 63, cited

R v Brennan [1999] 2 Qd R 529; [\[1999\] QCA 522](#), cited
R v SCL; Ex parte Attorney-General (Qld) [2017] 2 Qd R 401; [\[2016\] QCA 107](#), cited

COUNSEL: B J Power for the appellant
 C W Wallis for the respondent

SOLICITORS: Fisher Dore Lawyers for the appellant
 Director of Public Prosecutions (Queensland) for the respondent

- [1] **SOFRONOFF P:** I agree with Boddice J.
- [2] **BODDICE J:** On 24 October 2019, a jury found the appellant guilty of one count of rape. The appellant was sentenced to six years’ imprisonment.
- [3] The appellant appealed his conviction. He relied on two grounds of appeal. First, the learned trial Judge erred in ruling that the appellant’s false statements about the state of his memory were available to the jury as lies told in consciousness of guilt. Second, a miscarriage of justice was occasioned by the failure of the trial Judge to direct the jury correctly on lies.
- [4] On 13 May 2020, this Court ordered that the appeal be allowed; that the appellant’s conviction be set aside; and that there be a retrial.
- [5] These are my reasons for joining in those orders.

Background

- [6] The appellant was born on 24 May 1976. He was aged 41 at the time of the offence and 43 at the date of conviction and sentence.
- [7] The offence of rape was committed on 11 March 2018. It took place in the appellant’s residence. The appellant shared that residence with his wife and children.
- [8] The complainant was a 24 year old national of the Netherlands. She had travelled to Australia in December 2017 for a working holiday. At the time of the offence, she was working as an au pair for the appellant’s children.

Offence

- [9] The offence of rape involved the appellant having penile/vaginal intercourse with the complainant. The Crown case was that the complainant could not have consented to that act of intercourse because she was asleep.
- [10] At trial, the appellant admitted the act of intercourse with the complainant. The issue for determination was whether the Crown had satisfied the jury beyond reasonable doubt that that act of intercourse occurred without the complainant's consent.

Evidence

- [11] On 2 March 2018, the complainant arrived at the appellant's residence, having agreed by Facebook message to work as an au pair. The current au pair, a German national, gave the complainant a handover and stayed for a number of days to assist in teaching the complainant the routine with the appellant's children. There were three children.
- [12] The complainant said she chose the appellant's family because she wanted older children and two of their children had autism. The complainant had previous experience teaching children with autism.
- [13] The complainant was intending to stay for three months. The appellant's family had previously had two au pairs. The first lasted only a short time. The second (and current one) had been there for six months. The appellant's family had arranged for another au pair to start in June 2018.
- [14] The complainant's duties included making breakfasts and taking the children to school, undertaking some cleaning before collecting the children from school and cooking dinner. She ate with the family. She was free to go during the day when she had finished those various duties.
- [15] The appellant's wife worked, as did the appellant. He usually had left home before the complainant awoke each morning. He returned home at around four o'clock each afternoon. The complainant described her relationship with the appellant and his wife as "okay".¹ She "had a good time".²
- [16] The complainant described the appellant's house as having two storeys. The children's bedrooms were upstairs. The complainant's bedroom was downstairs, as was the bedroom used by the appellant and his wife.
- [17] On the night of 11 March 2018, the complainant, the appellant and his wife had dinner together. The children were inside watching a movie or playing video games. They had a number of friends over at that time.
- [18] The complainant's recollection was that she drank four or five glasses of wine. She was not drunk. The appellant drank more than the complainant. The appellant's wife was quite drunk. She went to bed because she was so drunk. By that stage, the children were already in bed.

¹ AB198/45.

² AB199/5.

- [19] The complainant remained talking and drinking with the appellant after the appellant's wife went to bed. One topic of conversation was that the complainant preferred girls. The complainant said it was important to her that they knew who she was and that they accepted that situation.
- [20] The complainant went to bed at around 11.30 that evening. The appellant also went to bed. However, he found his bedroom door was locked. The complainant, who was standing next to him, said "oh well, for me it's not a problem ... I want to go to bed. You can sleep next to me if you just go to sleep". The complainant said she did not have any concerns about the appellant sleeping in her bed. She trusted him and it was normal for her to just sleep with men because there was zero attraction.
- [21] The complainant said the appellant confirmed that was okay. Otherwise, she would not have agreed to the appellant coming into her bed. The complainant could not recall if he indicated that confirmation by nodding his head or by saying yes or of course. She was, however, sure he confirmed that he would just go to sleep.
- [22] The complainant said she went to bed wearing a black singlet top, a bikini bottom and grey jean shorts. The shorts had a zipper at the front. The complainant said she fell asleep on the bed. She did not hear the appellant come into the bedroom.
- [23] The complainant next remembered waking up and realising after a minute that a body was on top of her, having sex with her. The appellant had his penis in her vagina. The appellant was making noises like "you're horny". The complainant said "hey, what you're doing. Stop it". The appellant stopped directly and said "oh, oh, oh, sorry".
- [24] The complainant said the appellant was "just doing it while I was asleep. I couldn't defend myself, so he didn't have to force anything, and when I was realising he was just having sex, it was just normal. He didn't have to force me because it just already happened. He didn't have to force me, but he didn't it wasn't painful at all, or anything like that. When I was talking, he also just stopped".³ The complainant assumed the appellant did not wear a condom as she did not feel or see it. The complainant said when the appellant stood up, he was naked. She was still wearing her black singlet top but her bottom was naked. The appellant had taken those clothes off. The appellant very slowly put his clothes on. She described the appellant as pretty calm when he left her bedroom. The appellant used the words "no worries. It's okay". The complainant said she became panicky and said "go away. Hurry up".
- [25] The complainant locked the door. She tried to ring friends, Bryce and Vera. The complainant tried to contact her parents and other au pair girls. She tried to call her Facebook or WhatsApp group.
- [26] The complainant texted Vera at 3.20 that morning, asking if she could call her now and saying it was important. She had a discussion with Vera. The complainant cried a lot. She told Vera what had happened with the appellant. Subsequently Vera sent a text asking her to let her know more and if she could do anything for the complainant. The complainant texted back that she was with police now and that it was okay.⁴

³ AB203/45.

⁴ AB205/25.

- [27] The complainant had met Bryce on Tinder earlier that week. The complainant sent Bryce several text messages that night. The first message asked him to send her a message, saying it was really important. The complainant also texted “The au pair father was having sex with me and then wake up. I feel so unsafe now. Can you please help me?”.⁵
- [28] The complainant also spoke to Bryce on the telephone. She did not tell Bryce, at any stage, that she had invited the appellant to spend the night in her bed. She told him that the appellant had sex with her. Bryce told her to call the police.
- [29] The complainant called 000. The complainant told the operator that she woke up half an hour ago and “the father was having sex with me, I am an Au Pair and I really feel unsafe now ...”.⁶ The complainant said they had been drinking wine together, that the appellant’s wife was really drunk and went to bed and locked the door and that the complainant had told the appellant he could sleep on her bed “but don’t do anything”. The complainant fell asleep and woke up and he was having sex with her. His penis was inside the complainant.
- [30] The complainant remained in her bedroom with the door locked until police telephoned her about 10 minutes later to say they were at the front door. The complainant did not see the appellant at any stage when she was walking through the house to the police or whilst the police were at the house. The complainant later located her shorts and bikini bottom in the bedroom.
- [31] Police recorded their conversation with the complainant. She identified the clothing she had been wearing that evening. She told police they had commenced drinking together at about seven o’clock. They were drinking upstairs on the deck. She estimated they drank a bottle of wine each. She said the appellant’s wife was really drunk but that the complainant and the appellant were not really drunk. They went to bed around 12 o’clock.
- [32] The complainant told police the appellant’s wife went to bed early, locking the bedroom door. The complainant told the appellant he could sleep in her bed. She fell asleep. When she woke up, the appellant was having sex with her. He had taken her shorts off. He stopped when she said “don’t. Stop it”. She told him to go away and locked the door. The complainant said the appellant had his penis inside her and that she was not sure if he was wearing a condom.
- [33] The complainant said she did not know how long the appellant was having sex with her. She said “it was already happening but maybe he thought I was awake but I wasn’t ... when I woke up, it was still happening”.⁷ The complainant said the appellant had not finished when she told him to get off.
- [34] The complainant was asked if she wished to make a rape complaint against the appellant. The complainant replied “Yeah, of course”.⁸ The complainant said she did not give the appellant permission to have sexual intercourse with her. The complainant also said she was not a light sleeper. She had previously slept through

⁵ AB206/25.

⁶ AB616/20.

⁷ AB626/40.

⁸ AB625/22.

a fire alarm. On another occasion, she was sleeping so deeply that a person pinched her nose shut to wake her up.

- [35] On 11 March 2018, police arranged for the complainant to make a pretext call to the appellant. That call, shortly after 8.15 in the morning, was recorded by police. In it, the complainant asked the appellant to “please tell me why you had sex with me last night in my room? Why it did happen?”. In response, the appellant said he thought he was very drunk and asked if they could talk about it in person. There then occurred the following exchange:

“COMPLAINANT: But did it already happen when I fell asleep or was it during the night? I think I woke up at 3:15. Can you please tell me what you did, did before because I really feel unsafe now while sleeping?”

APPELLANT: I, I really don’t know.

COMPLAINANT: Well I think that’s not an answer. I think you have to try ...

APPELLANT: I, I ...

COMPLAINANT: To answer me.

APPELLANT: I cannot remember, [complainant], I really can’t. I’m sorry.”

- [36] The appellant went on to say that he remembered the complainant slamming the door but, in response to the complainant’s statement “I can’t imagine that that’s the only thing you mean you remember. But you had sex with me” the appellant replied “I’m not sure. I, I cannot remember”. The appellant said he thought he had fallen asleep and that he could not remember anything after lying down.

- [37] The appellant also said that he did not know why the complainant would smash the door. He said that woke him up. The appellant went on to say “I obviously did something wrong and I fucked up. I, I just want to apologise, so that ... [i]t just feels weird doing this over the phone, that’s all”.⁹

- [38] There also occurred the following exchange:

“COMPLAINANT: Well, what happened? Please tell me. I won’t, I don’t remember. I only remember that I woke up while your penis was in me and was it already taking a while? What did you do? Did you fell asleep? Please talk to me.

APPELLANT: All I can remember is falling asleep and then all of a sudden you being grumpy and the door closing, so I really have a, a blank, I’m sorry.”

- [39] The appellant was later recorded as asking the complainant “did I say anything, I’m not sure?”. When the complainant told the appellant he had taken his time to take his clothes and to leave and that she found it frustrating, “like it was really normal that he was naked”, there occurred the following exchange:

⁹ AB554/10.

“APPELLANT: Yeah, I honestly don't know, [complainant]. I can't explain it to you. I was drunk. I cannot remember. I'm ridiculously sorry. I'm, I don't know what happened.

COMPLAINANT: And how do you think that I feel now?

APPELLANT: I can imagine how you feel now, yes.

COMPLAINANT: Mmhmm.

APPELLANT: I am sitting here next to [my wife] as well. I can just imagine her going through it now, so ...

COMPLAINANT: Sorry, you're sitting next to what?

APPELLANT: [My wife].

COMPLAINANT: Oh she knows it?

APPELLANT: She, she can hear, hearing everything I'm saying so yeah.

COMPLAINANT: Okay, what did you tell her?

APPELLANT: Hey?

COMPLAINANT: What did you tell her?

APPELLANT: She just heard that I got drunk last night and I have no idea what I did. I, I woke up with that so, I'm assuming I did something wrong, so ...

COMPLAINANT: I have a feeling that you know, that you remember more than you're telling me now. I can imagine that you only feel like you did anything wrong.

APPELLANT: I, I don't have any memory at all. I'm just all, up, up blanks, mental blanks from last night.

COMPLAINANT: But did you first fall asleep before it started?

APPELLANT: Hey?

COMPLAINANT: Did you first fall asleep before it started?

APPELLANT: I think I fell asleep. I'm not sure. I can't, I remember lying down and that was it.

COMPLAINANT: I was wearing my clothes, right?

APPELLANT: I, I assume so yes.

COMPLAINANT: Yep. But I was naked when I woke up.

APPELLANT: I know.

COMPLAINANT: You know?

APPELLANT: You said that before. I'm sorry, [complainant], I really am.

COMPLAINANT: Okay. Do you want to say anything else to me now before I hang up?

APPELLANT: Just that I'm really sorry and I, I, I didn't mean for anything to happen. I didn't plan for anything to happen. I didn't want to do this to you. I'm sorry, very sorry.

COMPLAINANT: Yep. I feel the most sad about, that I was sleeping and that must be the most safe place in your house or whatever, where it is and then this happened. I trusted you.

APPELLANT: Yep, I know.

COMPLAINANT: I really trusted you.

APPELLANT: I'm sorry."¹⁰

- [40] In cross-examination, the complainant denied flirting with the appellant. She denied putting her hand on his leg, shoulder and waist from time to time. She did not touch the appellant at all. She denied that, at one point, the appellant's wife told the complainant they would have to review how long she stayed because the wife was not comfortable with how she was behaving with the appellant. She denied having any sexual interest in the appellant.
- [41] The complainant denied telling the appellant that her sexual preferences were both men and women. She was sure she had told him she preferred girls. She did not ever talk with him about sex. She denied that the appellant had told her he and his wife had an open marriage or that he told her about sexual activity with his wife and some friends. She denied ever having a discussion about her sex life or about drugs.
- [42] The complainant denied that when they were downstairs together, the appellant went to obtain spare keys in a cupboard next to her room. The complainant accepted there were other places where the appellant could have slept. There was the couch but no other bed. The complainant denied offering more than once for the appellant to sleep in her bed in her room. She denied the appellant hopped into bed first. She denied she was wearing only a G-string. She denied touching herself in an intimate way and that the appellant then performed oral sex on the complainant. The complainant did not know what the appellant did to her. She was sleeping and woke up with him in her bed. She denied ever willingly engaging in any sexual activity with the appellant.
- [43] The complainant denied using her hand to guide the appellant's penis into her vagina; or, at one point, rolling over and hopping onto her knees before continuing sexual intercourse. She denied that, after the appellant went to sleep, she subsequently pushed him from the bed screaming "what are you doing in my room? Why are you in my bed?". She may have screamed "why am I naked. Get out. Get out". She denied having locked her bedroom door before she went to bed.
- [44] The complainant accepted that the purpose of the pretext call was to see if the appellant would say some things about what had happened that evening. It was the police who suggested she call him. The complainant accepted that the appellant did not want to speak to her on the telephone; he wanted to speak to her in real life. The complainant said she wanted him to say he had sex with her without permission because "he is the wrong guy in this situation. I did not do anything wrong".¹¹

¹⁰ AB555/1 – 556/20.

¹¹ AB227/10.

- [45] The complainant accepted she had asked questions in that pretext telephone conversation but denied asking those questions because she was not really sure what had happened that night. The complainant wanted to know what had happened when she was asleep. She did not know whether he was having sex for three hours or for only half an hour. She did not know what he did in the time between. The complainant accepted she did not know how she came to move from one side of the bed, where she fell asleep, to the other side. The complainant said the appellant had taken her clothes off without her waking up, so she did not know what he did in all the time she was asleep. She accepted she did not suffer any bruising or physical injury.
- [46] The complainant said, when she first woke up, she was on her belly. It took a minute or two before she fully realised what was occurring in her bed. It was about another 20 or 25 seconds before she said to the appellant “what are you doing? Stop it”.¹² During that period, the appellant was continuing to have sexual intercourse with her. In the period before she realised what was going on, the appellant turned her from her belly to her back and was still having sex.¹³ The complainant accepted that nowhere in her statement to police did she mention anything about the appellant having sex with her whilst she was on her back.
- [47] During the course of the trial, there were a number of admissions. Those admissions included that the appellant had sexual intercourse with the complainant in the early hours of 11 March 2018; that a medical examination of the complainant that morning revealed no bruises, abrasions or lacerations to the complainant’s body or vagina; that the appellant had an open marriage with his wife and that his wife permitted him to engage in sexual activity with other women. There were also admissions in relation to text messages sent from the appellant’s mobile telephone to a friend “Zoe”, between 5 March 2018 and 8 March 2018.
- [48] Vera Lukkezen, a friend of the complainant from school days in the Netherlands, received text messages from the complainant that morning, asking to speak with her and saying it was very important. She messaged back. Lukkezen said the complainant then called her in a real panic. She was crying. She told her the father of the family just went out of her room but that he had “fucked her”.
- [49] The complainant said they had been drinking and had gone to bed around midnight. The appellant’s wife had gone to bed earlier and locked the bedroom door. The complainant told the appellant it was okay if he slept in her bed but to make sure that he was sleeping. The complainant went to bed with all her clothes on, bikini and shorts. She had woken up with all her clothes off. The appellant was “fucking her”.¹⁴ The complainant told him to stop and asked him to leave. Lukkezen said the complainant remained on the telephone with her until police arrived at the house.
- [50] Lukkezen said she has observed the complainant when she is asleep. She is very hard to wake up. The complainant does not wake up when Lukkezen walks into the room. She could even touch her nose.

¹² AB231/30.

¹³ AB231/40.

¹⁴ AB287/45.

- [51] Bryce Daley said he received a telephone call from the complainant that morning. He was in Brisbane and did not answer the telephone. However, after he received a text message from the complainant stating “is it you, Bryce? Bryce please send me a message. Really important. The au pair father was having sex with me and then I woke up. I feel so unsafe now. Can you please call me? Please – can you please help me?”, Daley replied and received a phone call from the complainant. The complainant was extremely distraught. He tried to calm her down. He told her to get off the phone and to call 000. The complainant told him she had locked herself in her room.
- [52] In cross-examination, Daley accepted that the first text message received from the complainant was at about 3.46 in the morning. He also received two telephone calls from the complainant. In the first telephone call, he could not make out too much. He thought it was a pocket dial. He only picked up the later call because he had received the text messages from the complainant. In neither telephone call, nor in the text messages, did the complainant tell him she had invited the appellant to spend the night in her bed in her room.
- [53] Michelle Sullivan was one of the police officers who attended the appellant’s residence that morning. She arrived just after four o’clock in the morning. The complainant answered the door. She went with the complainant down to the complainant’s bedroom. They had a conversation in that room, which was recorded by her body worn camera.
- [54] Megan Johnston was another police officer who attended the residence. She arrived at about half past eight in the morning. The complainant had already left the residence. When she went into the downstairs area, she observed the appellant coming out of the master bedroom. She had a brief conversation with him before placing him under arrest. She also had a brief conversation with the appellant’s wife.
- [55] Scenes of crime officers later arrived and took exhibits for examination. As part of that forensic examination, DNA samples were taken from the complainant. An order was made to obtain a DNA sample from the appellant. The appellant’s mobile telephone was also seized by police. It was examined for relevant messages.
- [56] Donna Anderson, another police officer, took the complainant to the police station, where she made a formal complaint and signed a statement. The complainant’s clothing was seized for examination. The clothes were a pair of black shorts, a black singlet and striped bikini bottoms. To her knowledge, the bikini bottoms were never tested forensically. She subsequently arranged for the complainant to make a pretext telephone call to the appellant before taking the complainant for a medical examination.
- [57] The appellant gave evidence that his wife had undertaken the process of engaging the complainant as an au pair. He did not have any conversations with the complainant before she arrived at their residence on 3 March 2018.
- [58] The appellant accepted that he had a text message exchange with a female friend on 5 March 2018. Those text messages included:

- (a) an outgoing message from the appellant stating “Keep having naughty thoughts about corrupting Roos – ” with a winky emoji sent on 5 March 2018;
 - (b) an incoming message from the female, in response, including the words “She’s young and gorgeous but sadly that’s probably worse than doing a work colleague. I’m sure between Joan and your other ladies, we can help you with any building frustrations – ”;
 - (c) an outgoing message from the appellant stating “Overactive imagination on my end” with a winky emoji.
- [59] The appellant said his friend was aware they had a new au pair. This exchange was about the new au pair. He described the text message exchange as a conversation about nothing. It was a bit of banter between two people; “Nothing was ever going to happen. She was the au pair”.¹⁵
- [60] The appellant said that he and his wife, who were married in December 2000, had an open marriage. They had had detailed conversations about none of the au pairs knowing about their open marriage. They were both also very firm on “none of the au pairs ever having any sort of sexual contact or anything like that” with them.¹⁶
- [61] The appellant accepted he had had a text message exchange with his wife about the complainant on 8 March 2018. Those text messages included:
- (a) a text message received by the appellant on 8 March 2018 from his wife’s mobile telephone stating “We – I don’t mind you having a drink, but I would get pretty pissed off if you and our au pair are cosyng up, drinking reds on the deck, while I look after the kids” and, in response to a reply text from the appellant “Cosying up?” a text “Sitting, chatting like long lost friends over wine you offer her, while you offer me nothing”;
 - (b) a text message sent by the appellant to his wife’s telephone, later that same day, containing “And I don’t want to get cosy with Roos” followed by “I’d fuck her. But I have – have no interest in [cosying] – ” with a wink emoji;
 - (c) a response sent from his wife’s telephone “Fair enough. Maybe we should join a wine club and get cheap wines”.
- [62] The appellant said he used to tease his wife about all the au pairs and other people as well. These text messages were about teasing his wife. It was open banter.
- [63] The appellant said that, on 10 March 2018, his children had some friends staying overnight. The appellant, his wife and the complainant had dinner and drinks. Initially, they drank white wine. They moved onto red wine. The appellant estimated that he had up to two bottles of wine. The complainant probably had a little bit less, close to a bottle and a half. His wife was not there for the entirety of the time. She was going inside, checking on the children. He estimated his wife had a bottle at the most.

¹⁵ AB336/15.

¹⁶ AB336/20.

- [64] The appellant said their conversation included talking about the children and the complainant's background. He described the complainant as very interactive. As she drank more, she became more talkative. The complainant also became flirty with the appellant. At times, she had her arm on his shoulder. He said he was paying the complainant a lot of attention and she was doing the same to him. At one point, a video was taken depicting the complainant and his wife. That video was taken by him 20 minutes to half an hour before his wife went to bed.
- [65] The appellant said his wife went to bed because she was not happy with the level of flirtation between the appellant and the complainant. His wife had, on a couple of occasions, indicated to the appellant that they were getting too flirty. When his wife decided to go to bed, she asked if he was coming to bed. He replied "No, I'll stay up here and finish the bottle".¹⁷ His wife then went downstairs to bed.
- [66] The appellant said the flirtation escalated a little bit. They started to have some very intimate and inappropriate conversations around drug use. The complainant asked the appellant if he would ever let someone use drugs in his house. He abruptly replied "No, I would not let that happen".¹⁸ The appellant said, at that point, there was a period of awkward silence and then the conversation changed to the complainant asking him about his wife and his marriage.
- [67] The appellant told the complainant they had been together for 17 years. The complainant said she was not sure whether she would end up with a male or a female. She liked both. The complainant said 17 years is a very long time and asked how they keep things interesting for that long. The appellant told her that they tried to spice things up and keep things fresh. When the complainant asked for examples, he "stupidly did what I told [my wife] I wasn't going to do. And I told [indistinct] about us having an open relationship".¹⁹
- [68] The appellant said the complainant was taken aback and asked what an open relationship meant between he and his wife. He told the complainant they had special friends that they used to enjoy sexual experiences, both together and alone. The complainant then told the appellant about some of her experiences and preferences. She was specifically asking the appellant about his interaction with her preferences and the things she liked to do. The appellant told her about things he had done that related to her preferences. He described the complainant as very interested and said they had a very in depth conversation for about 20 or 25 minutes.
- [69] The appellant said, when that conversation went silent, the complainant downed her drink and said she was going to bed. The appellant told the complainant he was going to stay to finish the bottle and to clean up. After five or 10 minutes of cleaning up, he went downstairs to the bathroom. By that stage, he was affected by alcohol but was not falling over drunk or unable to remember.
- [70] The appellant said he went to his bedroom and found it was locked from the inside. He tried calling out to his wife but received no response. He went to the key cupboard adjacent to the bedroom used by the complainant to grab the spare keys for his bedroom. The complainant came out of her room. He told her his wife had locked him out and he was trying to get a spare key. She offered for him to sleep in

¹⁷ AB339/25.

¹⁸ AB340/15.

¹⁹ AB340/35.

her bed, saying “you can sleep in my bed if you want” or “why don’t you just sleep in my bed”. He said “No, I’ve – I’ve got a spare key here somewhere. I’ll – I’ll grab it and just get into my room”.²⁰

- [71] The appellant started trying various keys. He was unsuccessful in gaining entry to his bedroom. At that point, the complainant, who had gone into the bathroom, passed by and again said “why don’t you just come and sleep in my room”. The appellant said he replied “No. If I can’t find the key I’ll go upstairs on the couch. It’s okay”.²¹ The appellant said when he returned the keys to the key cupboard, the complainant came out of her room and “basically insisted that I should sleep in her bed”.²² He asked “Are you sure about that?” because at the time he knew it was wrong.
- [72] The appellant said no the first two times because it was crossing a line he knew he should not cross. When asked to explain, the appellant said:
- “[M]y wife and I had a very strong agreement that we should never do anything sexual, have any sort of relations with the au pairs or even – and no. So what – I had already crossed a line upstairs on the – on the balcony and this was just taking it one step further. I knew I shouldn’t have been doing it.”²³
- [73] The appellant said he asked the complainant if she was sure because, with the flirting and the previous conversation, he was thinking she was wanting more than just sleep. The complainant replied she was sure and then went back to the bathroom and toilet. He put the keys away and went into her room. The appellant conceded that, at that point, he did have sexual interest in the complainant. He described her as an attractive girl. He had said in text messages to his wife that he would “fuck her” but said he did not want to break the rule he had with his wife.
- [74] The appellant said he hopped under the covers and closed his eyes. He was wearing shorts and a singlet. He was in bed for a good five minutes before the complainant came back into the room. The complainant closed the door before getting into bed. The appellant described his mind as racing, as he did not know what was going to happen. He was “pretty sure that she wanted to do something, given the conversations and flirting before”.²⁴
- [75] The appellant said he was contemplating whether or not he should do anything, but before he did the complainant snuggled up against him. She was rubbing herself. He leant over and assisted her. He then rolled on top of her and gave her oral sex through her underwear. He described the complainant as definitely awake. She had her hands on his head and it was obvious she was enjoying it.
- [76] The appellant said that, after a couple of minutes, he took her underwear off. She lifted her bottom up and put her knees together to help him. He described her as wearing a black lace G-string. He then continued to give the complainant oral sex without her underwear on.

²⁰ AB343/30.

²¹ AB344/5.

²² AB344/25.

²³ AB344/35.

²⁴ AB345/35.

- [77] The appellant said that, after another few minutes, he kissed the complainant and played with her breasts through her singlet and rubbed his penis on the outside of her vagina. He described the complainant as interacting with him, pushing against him. After that, the complainant helped guide his penis into her vagina. They had sex in the missionary position for probably four or five minutes. The complainant was awake, pulling him into her and actively pushing against him.
- [78] The appellant said he then changed position. He put the complainant's legs up on top of his shoulders and had sex with her for another five or ten minutes. He continued playing with her breasts. They were kissing each other. He described the complainant as obviously enjoying it. The appellant said "It got to the point where she started to get jerky. She would – she lost – she lost her rhythm. He started – when she was pulling into me, she was starting to get more and more – not aggressive, but just rigid in her movements, and then she stopped interacting with me from kissing, so I'd go into kiss her and she – she'd move her head to the side. She'd turn away. So that – that put me off. I didn't like that. I struggled to maintain sex at that point".²⁵
- [79] The appellant said he struggled to keep an erection. The complainant became pretty aggressive, trying to pull him into her. The complainant pulled out of that position and moved onto her knees. He tried to enter her again when she was on her knees. It was "a bit hit and miss". The complainant was getting frustrated that it was not working and eventually dropped onto her belly flat. He tried to continue in that position, but the complainant moved her arm to indicate for him to get off. That pretty much was the end of it.
- [80] The appellant said he tossed up whether he should leave the bedroom. He decided to stay there for two reasons. A selfish one, in that he thought the complainant may wake up and they could continue where they left off; and another one when he did not want to leave her there as it was "a bit rude".²⁶ He estimated their sexual activity lasted for 25 to 30 minutes "tops". The appellant said he ended up going to sleep next to the complainant. He described the complainant as probably not far from sleep from the point that they ceased sexual activity.
- [81] The appellant said his next memory was waking up to the complainant pushing him off the bed with her knees and arms and screaming hysterically "Why are you in my room? Get out of my bed. Why am I naked? Get out. Get out. Hurry up. Hurry up". He had no idea how long he had been asleep at that time.²⁷ The appellant said he tried unsuccessfully to calm the complainant down. He put his boxers back on and left the room. He described the complainant as basically pushing him out of the room before she slammed the door behind him.
- [82] The appellant said he stood for 10 or 15 seconds outside the room, trying to work out what had happened as it seemed very incongruent. He then went to his bedroom and found the door was still locked, so went upstairs to sleep on the couch. He does not know how long he slept for on the couch. His next memory was his wife waking him up and asking him to come to bed. He then went into the master bedroom and fell asleep.

²⁵ AB347/15.

²⁶ AB347/35.

²⁷ AB348/15.

- [83] The appellant said the next morning he saw there was a missed call from the complainant. He telephoned her back. He had no idea where that call was being made. He agreed he told the complainant in that conversation that he was drunk and could not remember what had happened between them. That was a lie. He could remember exactly everything that had happened that night. He lied as he was in his bedroom with his wife next to him, listening to the conversation. They had an arrangement where he was not to have anything to do with the au pairs, sexually or otherwise. He was scared for his marriage.
- [84] The appellant accepted that during that telephone conversation, he apologised to the complainant. The appellant said he did a “whole heap of things that night that I shouldn’t have done, so – the – the flirting in the lead-up to getting into her room, getting into her room, having sex with her. I was sorry for all of that. I was sorry for the position that I put her in. It wasn’t in the context of having sex with her without her permission or while she was asleep. I wasn’t – that wasn’t why I was saying, “I’m sorry””.²⁸ The appellant denied having sex with the complainant whilst she was asleep, or without her consent.
- [85] In cross-examination, the appellant said that his banter message to his friend about corrupting the complainant meant having a chat with her, to get her interested and “maybe want to do that”. It was around having a conversation about an open marriage where you have sex with other people in group type situations. The friend was one of his sexual partners.
- [86] The appellant accepted he had a definite agreement with his wife about not having sex with the au pair, but that in the first week that the complainant was working for them, he had kept commenting about her in a sexual way. The appellant said it was quite common for him to have a bit of a dig at his wife. The appellant did not dispute he sent his wife a message on 3 March 2018, that stated “she is tall but very nice, and she’s outdoorsy”, with the following message “tits aren’t great but everything else seems to fit”. Both were followed by smiley faces. The appellant said it was possible he was talking about the complainant. He agreed he had told his wife he would “fuck her”. He said his wife trusted him and he trusted himself.
- [87] The appellant said he had told his wife he had had sex with the complainant. He remained married to his wife. He agreed she is a loyal wife. The appellant said the reason they had an open relationship was because his wife’s libido did not match his own.
- [88] The appellant said that, at no stage prior to that night, had he or his wife indicated to the complainant that they were not pleased with her performance. His wife had complained to him about how much the complainant ate and drank in her text messages in the first week of the complainant’s employment. She had also complained about the complainant sitting on the deck drinking while she had to look after the children. The appellant did not accept that the complainant had not flirted with him. His wife saw it more than he did. He was “a little bit blind to it until that last night”.²⁹ He just thought the complainant was being friendly.³⁰
- [89] The appellant estimated that the sexual discussion with the complainant that night lasted 10 to 15 minutes. He described the complainant as most definitely engaged

²⁸ AB350/20.

²⁹ AB382/25.

³⁰ AB382/40.

in that conversation. She knew what she was talking about and was not so drunk she was passing out. He did not accept that the complainant ever said anything like “just sleep” on any of the occasions where she invited him into that bed.³¹

- [90] The appellant accepted that he was grumpy with his wife, as he could not get into the bedroom. That anger and frustration was part of the reason he accepted the complainant’s invitation. The complainant asked him twice and insisted on the third time. He agreed he could have knocked back her invitation at any time. He did not accept that the complainant did not fancy him. The appellant said “If someone asks me into their bedroom after talking about sex and revealing their sex life to me, I was pretty sure she fancied me”.³²
- [91] The appellant agreed he lied in the pretext call. He was afraid of endangering his marriage and said he had had too much alcohol and did not make a judgmental decision he would normally make. He accepted that during the pretext telephone call he did not have the telephone on speaker. His wife could hear what he was saying but could not hear what was being said by the complainant. After the pretext call, he told his wife that he had slept in the complainant’s room after she had asked him too and that he could not remember what he had done. He accepted he lied to his wife after the pretext call.
- [92] The appellant accepted that towards the end of the pretext telephone call he had said he knew the complainant had woken up naked. He agreed that indicated he remembered more than he had actually let on during the call.³³ He denied he had rehearsed an untrue version of events in giving evidence to the Court. The version of events had been the same since it happened, other than the lie in the pretext call and what he told his wife straight after the pretext call.
- [93] The appellant said he could not remember what happened to the G-string underwear. He threw it somewhere around the room. He denied he could not remember where he put it because that underwear had never existed. He did not contradict what was said in the pretext call, even though it was clearly different to what he says happened that night. He apologised to the complainant in the pretext call because she was obviously upset and he had put her in a really stupid situation, something he should not have done. He agreed that, at that stage, he did not know the complainant had gone to police.
- [94] The appellant accepted that, after the pretext telephone call, his wife did not indicate that she had heard the complainant’s allegations. He accepted he is honest with his wife about his sex life. Despite the fact that on his version there was consensual sex with the complainant, he could not admit that to his wife that morning. He denied the reason he could not admit it to his wife was that he had raped the complainant. The appellant denied he had been fantasising about the complainant since her arrival. He had had a couple of thoughts. He said on the night they had rigorous sex but denied he knew he could always blame her for inviting him into her bed.
- [95] The appellant’s wife said, on the evening of 10 March 2018, she had sat with the appellant and the complainant after dinner. They were trying to get to know each other. Her first impressions of the complainant had not been the best. She was not

³¹ AB383/35.

³² AB385/10.

³³ AB391/20.

sure the complainant wanted to be there for her children. The complainant was different to other au pairs. She would spend most of her time sleeping in her room.

- [96] The appellant's wife estimated she drank a bottle of light, white wine during the evening. She was affected by the alcohol but was still completely in control. The appellant was drinking red wine with the complainant. She had less to drink than the appellant. The complainant was going drink for drink with the appellant.
- [97] The appellant's wife said that, during the evening, she saw the complainant's hand resting on the appellant's leg. On other occasions, she would rest her arm on him while she talked to him. At one point, when the appellant went to go to the toilet, she told the complainant she was not feeling confident with what was happening between the two of them and that, in the morning, they should have a conversation about her future in the family. The complainant looked away and did not respond. The appellant's wife then walked away to the couch. When the appellant returned from the bathroom, she said "I am going to bed".³⁴ The appellant's wife said she was angry because there seemed to be a lot of flirting both ways. She felt left out.
- [98] The appellant's wife said she went into her bedroom and she locked the door. At that stage, she did not want to talk to anybody. She fell asleep. The next morning, when she woke up, she went upstairs and saw the appellant was sleeping on the couch. She told him to go and sleep in their bed. He got up and walked downstairs to their bedroom. She returned to the bedroom and went back to sleep.
- [99] At one point, during that morning, the appellant's telephone rang. It was the complainant. He did not answer it in time. He tried to ring back. She did not answer. He sent her a text message. The complainant then called him back. At that time, the appellant's wife was lying in bed next to the appellant. She could only hear his side of the conversation. She heard him say "I'm sorry" and "I don't remember".
- [100] When the conversation ended, she asked the appellant about that conversation. The appellant told her that, when she had locked him out of the bedroom, he could not find the key to get in and the complainant had asked him to sleep in her bed. She remembered feeling confused and said there was a lot of silence and not much talking.
- [101] In cross-examination, the appellant's wife accepted she had screened the complainant. She screened all of their au pairs. She did not accept that the complainant had indicated she was interested in working for their family because their children had autism. The complainant never mentioned that she was looking for children with special needs. The appellant's wife said, in that first week, the complainant spent a lot of time in her room, "so-called sleeping". Even when things were planned to be done as a family, someone had to get her to come upstairs.
- [102] One issue she had with the complainant was that she was spending too much time with the appellant. To her, the complainant was flirting with the appellant.³⁵ The appellant's wife was also concerned about the extravagance of the complainant's types of food. That was the context of her messages to the appellant about eating

³⁴ AB404/25.

³⁵ AB410/40.

too much. She also had an issue about the amount of wine the complainant was drinking and about cosying up with the appellant.

- [103] The appellant's wife accepted that in their email communications, the appellant had said "I'd fuck her but I have no interest in cosying" with a winky emoji and that she had responded "fair enough".³⁶ They had had conversations in which the appellant had jokingly said he found the complainant attractive. She denied that her resentment about the complainant was jealousy. It was more a boundary; she was their employee.
- [104] The appellant's wife was aware the appellant has had multiple sexual partners at any given time. The appellant ran past her any person he was interested in; the final decision was up to her. It surprised her that he showed a sexual interest in the complainant. She knew he found her attractive and saw on occasion that the complainant showed interest in the appellant.
- [105] The appellant's wife accepted that, on the morning of 11 March 2018, she told one police officer she was upset because the complainant had not come to her. She did not ever tell that officer the complainant had been behaving inappropriately with the appellant. She told the officer she was getting to know the complainant for the first time as she had just arrived to be their au pair.
- [106] The appellant's wife accepted that, after the appellant had been arrested, she told a police officer she was confused as to why he was being arrested after the complainant had invited him into her room. She accepted she may have said "I'm just going by [the appellant] said when he woke up this morning, and it was because apparently I locked the door when I went to bed".³⁷ She denied she said "apparently" because the appellant had told her she had locked the door and she had no memory of locking the door. The appellant had slept on the couch on a few occasions before. She had not previously locked the bedroom door.
- [107] The appellant's wife said that, after the appellant came home from the police station, the appellant first said he was not exactly sure what had happened but then said yes, they had had sex. He apologised to the appellant's wife. They had a rule that he was not to have sex with au pairs in their house. The appellant's wife said when the appellant had indicated to her that he was sexually interested in the complainant, she had said "well, you know, that's not going to happen. And he said "Yes".³⁸ There had been no issues with their previous au pairs.

Trial addresses

- [108] On 14 October 2019, an application to exclude the pretext telephone call from being led as evidence at trial was refused, in part, because "the appellant's comments are indicative of a guilty conscience and are capable of being interpreted as lies".³⁹
- [109] Consistent with that pre-trial ruling, the prosecutor, in closing address, relied on the contents of the pretext telephone call as lies indicative of a consciousness of guilt. Those lies were identified as lying when the appellant said he blanked out, lying

³⁶ AB411/35.

³⁷ AB419/40.

³⁸ AB422/25.

³⁹ AB180/38.

when he said the complainant told him before that she had woken up naked and lying to his wife after the pretext call, where he repeated that he did not remember what had happened that evening.

- [110] The prosecutor submitted to the jury that the appellant, in evidence, had admitted that those statements were lies and it was open to the jury to conclude the appellant had lied in a blatant attempt to reconstruct the events to excuse himself and that he had a guilty conscience, such that the lies represented separate circumstantial evidence of his guilt.
- [111] Defence counsel addressed the jury on the basis that the defendant admitted lies were not evidence of a guilty conscience. They were explained by his fear for his marriage if his wife, who was beside him during the pretext telephone call, found out what had happened that evening.

Summing up

- [112] In summing up, the trial Judge gave proper directions to the jury as to the burden and standard of proof; that there was no obligation on the defendant to give or call evidence; and that the fact the defendant had given and called evidence did not mean he assumed a responsibility of proving his innocence. The trial Judge also properly directed the jury that the prosecution case depended upon an acceptance of the truthfulness and accuracy of the complainant's account beyond reasonable doubt, despite the sworn evidence given by the defendant and his wife and the possibilities that may arise in the consideration of those matters.

- [113] After giving those comprehensive directions, the trial Judge directed the jury:

“Now I wanted to give you a direction on lies by the defendant in the pretext phone call and in the conversation with his wife ... immediately afterwards. The prosecution relies on what it says are lies told by the defendant as showing that he is guilty of the offence. That is the defendant claimed to have no recollection of having sex with the complainant on 11 March 2018.

Before you can use this evidence against the defendant, you must be satisfied of a number of matters. Unless you are satisfied of all of 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 finding that the person has lied. ... [I]n 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 are 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 or lies apart from the realisation of guilt. People sometimes have an innocent explanation for lying.

The defence, in this case, relies on the following explanation. The defendant gave evidence that he was uncomfortable talking to the complainant on the phone in the presence of his wife, given, in particular, their agreement that he would not have sex with their au pair. The same explanation applies to the defendant's conversation with his wife ... immediately after the phone call. If you accept that a reason of this kind is the explanation for the lie or the lies, then you cannot use it for them 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."⁴⁰

- [114] After the jury had retired to deliberate, the jury sought further directions, including a "... direction on lies during pretext phone call and with the wife".⁴¹ In response, the trial Judge repeated that aspect of the summing up set out above.

Appellant's submissions

- [115] The appellant submits that the appellant's false statements about his memory, in the pretext call and to his wife subsequently, should not have been left as an *Edwards* lie.⁴² The lies were relevant to the appellant's credit but were not capable of establishing a consciousness of guilt. The effect of the appellant's answers in the pretext telephone call and to his wife was that he did not have any memory of the preceding night, not that he was denying that he had sex with the complainant.
- [116] Further, the appellant gave an explanation for the falsity of his earlier accounts, namely, the consequence on his marriage and the context in which the telephone call took place. Those matters were not lies that revealed a knowledge of the offence or some aspect of it, told because the appellant knew that the truth would implicate him in the commission of the offence of rape.
- [117] The appellant further submits that, even if the appellant's lies could have been left at *Edwards* lies, the directions given to the jury were insufficient, and gave rise to a miscarriage of justice. A proper direction required a trial Judge to identify the circumstances of events that are said to indicate that the particular lie constitutes an admission against interest. That was not done in the directions given to the jury. The failure to do so deprived the appellant of a fair chance of acquittal.

Respondent's submissions

- [118] The respondent submits that the appellant's lies were properly left as evidence of consciousness of guilt. The issue for the jury was whether the admitted act of sexual intercourse between the appellant and the complainant was consensual. It was for the jury to resolve the competing reasons open for the lie. It was open to the jury to conclude that the lies were told because the appellant knew the truth would implicate him in having had sexual intercourse without the consent of the complainant.

⁴⁰ AB69/50 – AB70/35.

⁴¹ AB93/15.

⁴² *Edwards v The Queen* (1993) 178 CLR 193 at 211.

- [119] The respondent submits that, whilst the lies themselves did not constitute an outright denial or diametrically different factual assertion, the lies were concerned with a circumstance or event connected with the offence, namely, consent. The lies went to the appellant's state of knowledge. It was open to the jury to infer that admitting his true state of knowledge would implicate him in the unlawful penetration of the complainant without her consent.
- [120] The respondent further submits that the directions given to the jury were sufficient, having regard to the only issue in dispute at trial, namely, consent. In those circumstances, it was self-evident how the lies were concerned with a circumstantial event connected with the alleged rape. No redirection was sought by defence counsel at trial. In those circumstances, there was no miscarriage of justice as the appellant had not been denied a fair chance of acquittal.

Consideration

- [121] A lie can only be used as evidence of the appellant's guilt if it is open to the jury to find that the lie was "concerned with some circumstance or event connected with the offence", that is, that it related to a material issue and that the appellant told the lie because he knew that the truth of the matter about which he lied would implicate him in the offence.⁴³
- [122] As Philip McMurdo JA observed in *R v SCL; Ex parte Attorney-General (Qld)*⁴⁴:
- "It was what (if anything) the lie itself revealed about the appellant's mind which was critical. Did the lie reveal a consciousness by the appellant of his guilt? It could do so only if it revealed a knowledge of the offence or some aspect of it and a fear that the truth of the matter would implicate him. As Callaway JA (with the agreement of the other members of the Court) said in *R v Kondstandopoulos*: "It is the combination of knowledge and fear that evinces guilt"" (citations omitted)
- [123] The defendant's false assertions in the pretext telephone call and later to his wife, that he had no memory of the events of that night were not capable of constituting lies which would implicate him in the commission of the offence of rape. The truth, that is, that he did remember having sexual intercourse with the complainant would only implicate him in having had intercourse with the complainant.
- [124] By the time of trial, the appellant was admitting that an act of intercourse had taken place on that night. The sole issue for the jury was whether it occurred with the complainant's consent. A lie as to a lack of memory, in the circumstances of the case, was not capable of being used by the jury as evidence implicating him in the offence of having sexual intercourse with the complainant without her consent. It was relevant only to his creditworthiness.
- [125] Courts have consistently cautioned against a reliance by prosecuting counsel on lies by an accused person as evidence of consciousness of guilt. As McPherson JA observed in *R v Brennan*⁴⁵:

⁴³ *Edwards v The Queen* at 210, 211.

⁴⁴ [2017] 2 Qd R 401 at [61].

⁴⁵ [1999] 2 Qd R 529 at 530.

“As was decided in *Edwards v The Queen*, the telling of lies is something that in some instances is capable of being considered as circumstantial evidence amounting to an implied admission of guilt on the part of an accused person; but the directions needed in order to correctly explain the conditions in which it is available for that purpose are convoluted and not at all easy for a judge to give, or for a jury to understand. The result often is to obscure rather than to simplify the issue to be determined. That is particularly so in a case where, like this, the accused gave one account in his evidence at the trial, after having given another and contradictory statement at an earlier time. In circumstances like that, the prior inconsistent statement simply forms a basis for doubting the credibility of his testimony at trial. His admission in evidence that he had told a lie about it on a previous occasion is a factor to be considered by the jury in deciding whether his testimony at the trial is credible. It adds nothing to the process of assessing his credibility for the jury to be told, if the explanation given at the trial of the falsity of his earlier statement is itself a lie, it may demonstrate a consciousness of guilt on his part on that or an earlier occasion. If it was not itself a lie, it is no evidence at all of his guilt, which is the very question which the jury is asked to decide.” (citations omitted)

- [126] The leaving of the appellant’s lies for consideration by the jury on an erroneous basis deprived the appellant of the prospect of acquittal. The jury may have used those lies to impermissibly reason that the appellant was guilty of the offence of rape.
- [127] As the Crown conceded, there was not scope for the application of the proviso in the event that this Court found that the pre-trial Judge had erred in ruling that the applicant’s lies about the state of his memory were capable of constituting lies told with a consciousness of guilt. Accordingly, the appellant’s conviction had to be set aside and a retrial ordered.
- [128] In those circumstances, it was unnecessary to consider the appellant’s remaining ground of appeal.
- [129] **RYAN J:** I agree with Boddice J.