SUPREME COURT OF QUEENSLAND

CITATION:	*R v Thomson* [2002] QCA 548
PARTIES:	**R** **v** **THOMSON, Kevin James** (appellant)
FILE NO/S:	CA No 257 of 2002 DC No 2 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction and Sentence
ORIGINATING COURT:	District Court at Kingaroy
DELIVERED ON:	19 December 2002
DELIVERED AT:	Brisbane
HEARING DATE:	2 December 2002
JUDGES:	McMurdo P, Helman and Philippides JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed;** **2. Appellant's convictions quashed and orders made below set aside;** **3. New trial ordered;** **4. Appellant to be admitted to bail pending the new trial unless it can be shown when the decision of this court is handed down that there is a proper ground for refusing bail.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – WHERE GROUNDS FOR INTERFERENCE WITH VERDICT – PARTICULAR CASES – WHERE APPEAL ALLOWED – where appellant lodged business activity statements with the Australian Taxation Office containing false claims for GST allegedly paid – where alleged lies by appellant – where Crown case confined to 'credibility lies' – where trial judge's summing-up directed exclusively to 'probative lies' – where redirections sought on behalf of appellant were refused – whether a substantial miscarriage of justice occurred *Crimes Act* 1914 (Cth), s 7, s 29D

Criminal Code (Qld), s 668E(1A)

Edwards v R (1993) 178 CLR 193, discussed
R v Brennan [1999] QCA 522; [1999] 2 Qd R 529, referred to
R v Wehlow [2001] QCA 193, CA No 210 of 2000, 25 May 2001, referred to
Zoneff v The Queen (1993) 178 CLR 193, applied

COUNSEL: G P Long for the appellant
A J Rafter for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Commonwealth) for the respondent

[1] **McMURDO P:** I agree with the reasons for judgment of Helman J and with the orders proposed.

[2] **HELMAN J:** On 25 July 2002 the appellant, a disabled pensioner born on 11 December 1956 who conducted as a hobby a jewellery repairing and manufacturing business under the name Thomson & Thomson jewellers, was found guilty after a trial, which began on 22 July 2002 in the District Court at Kingaroy, on two counts of defrauding the Commonwealth and one of attempting to do so. Those offences are provided for in ss 7 and 29D of the *Crimes Act* 1914. The fraud alleged concerned the Commonwealth goods and services tax which was first imposed in July 2000. The learned trial judge sentenced him to imprisonment for three and a half years on each count, the sentences to be served concurrently. A non-parole period of fifteen months was set. His Honour also made a pecuniary penalty order requiring the appellant to pay $87,862.58 to the Commonwealth. The only ground specified in the notice of appeal against conviction was that the conviction is unsafe and unsatisfactory and contrary to law. That ground, and an application to appeal against the sentence imposed on the appellant, were abandoned, but at the hearing of the appeal leave was granted to the appellant to argue the following new ground of appeal against conviction:

> That a substantial miscarriage of justice has occurred due to the trial judge giving the jury directions of the type discussed in **Edwards v. R** (1993) 178 CLR 193, as to lies, when the crown had not presented its case upon that basis.

[3] The Crown case was that in 2000, beginning on 1 August 2000, the appellant had lodged with the Australian Taxation Office six, monthly, business activity statements for Thomson & Thomson jewellers which included three containing false claims for credit for the goods and services tax allegedly paid. The first three of the six contained no claims. The statements the subject of the charges were for the last three months of 2000: for October he claimed $174,143, for November $657,359, and for December $505,472. It was alleged in the indictment that the offence in each case had been committed on or about the date shown on the statement: 10 November 2000 for the October statement, 29 November 2000 for the November statement, and 26 December 2000 for the December statement. In each statement

the Australian business number of Thomson & Thomson jewellers, 41 343 951 530, was shown.

[4] The Australian taxation system relies on self-assessment of business activity statements and nothing unusual was initially detected about the statements for October and November so sums of $174,143 and $658,411.49 (the $657,359 together with interest for late payment by the Australian Taxation Office) were paid on 24 November 2000 and 27 December 2000 respectively by direct credits to a Commonwealth Bank 'streamline' account in the names of the appellant and his wife. In each case the transaction detail on the relevant part of the bank statement showed 'ATO41343951530R' and three more digits. An incorrect calculation was detected in the statement for December so that the sum claimed was not paid and the appellant's claims were then investigated.

[5] On 31 January 2001 the appellant was questioned by Mr John Hartley and Ms Linda Wright, officers of the Australian Taxation Office, and he produced documents: bank statements, a home loan summary statement, envelopes containing receipts, a red account book recording purchases, and a green account book recording sales. When asked whether he had received a cheque from the Australian Taxation Office the appellant replied that he had not. He agreed he had listed the details of his bank account on the business activity registration form; and then when asked if any money had been deposited into his bank account, he replied, 'So that's where the money came from'. On the same day the appellant gave the officers a bank cheque for $730,691.91 payable to the Australian Taxation Office. On 2 February 2001 a search warrant was executed at the appellant's residence at Kingaroy by Mr Michael Hawthorn, an officer of the Australian Federal Police, and two Australian Taxation Office investigators, and later the same day he was interviewed at the Kingaroy police station. The interview was electronically recorded.

[6] The only witnesses to give evidence at the trial were: Mr Hartley, Mr Hawthorn, three bank officers including Ms Kerry Rogers who is manager of the Kingaroy and Murgon branches of the Commonwealth Bank, and Ms Dianne Smith who is a former Commonwealth bank officer. The appellant did not call or give evidence.

[7] In the course of the interviews the appellant admitted that the jewellery business had an annual turnover of $500 to approximately $2,000 and produced an income of about $200 a year, and that he had filled out the business activity statements himself. He asserted that his claims were for '$174 and 143 cents' and '$657, point 359 cents'. The Crown evidence showed that following the payment of the $174,143, on 30 November 2000, the appellant withdrew $20,000 in cash, paid $7,260 ($2,800 and $4,460) to Mastercard, paid $43,962.02 to discharge a home loan debt, and transferred $100,000 to a Commonwealth Bank cash management call account in the names of the appellant and his wife opened that day. Before the credit of the $174,143 the streamline account showed a credit balance of only $695.63. Following the second payment (the $658,411.49) on 2 January 2001, another $600,000 was transferred to the cash management account from which $20,000 was withdrawn on 19 December 2000. Before the credit of the $658,411.49 the streamline account showed a credit balance of $971.35. Sums of $30,000 and $236 were deposited on 12 and 15 January 2001 respectively. The appellant explained that the $236, 'a pay amount', had been deposited 'because we wanted to start putting back some of the money we'd used'.

[8] The appellant's explanation for what had happened was that he had been foolish but honest and therefore his conduct had not been fraudulent: he had found that by some means or other his and his wife's bank account had, quite unexpectedly, had a large sum credited to it; he and his wife had made enquiries at his bank as to the source of this largesse and had been fobbed off by 'a girl teller', '[o]ne of the girls at the information desk', who told him it was against bank policy to reveal such a thing; he failed to deduce that the 'ATO' in the transaction detail ATO 41343951530R329 referable to the $174,143 in the credit column of his bank statement stood for Australian Taxation Office and the 41343951530 was the Australian business number of Thomson & Thomson jewellers, and a 'tax office gentleman', and not he, had circled those details on a list of transactions on a bank statement he obtained on 29 November 2000; he and his wife went to Centrelink 'and told them about the large sum of money' and 'they cancelled the pension' – the pension the appellant had received as a disabled person; and he, acting foolishly but honestly, then proceeded to draw upon the fruits of that unexpected and completely inexplicable windfall, and soon after to draw upon the fruits of a second bigger but equally unexpected and inexplicable stroke of good fortune. At the end of the interview on 2 February 2001 the appellant summarized his conduct in this way:

> Okay. I'm guilty of being stupid. I didn't fully understand the BAS statement. I didn't take the time to read the documentation on the BAS statement. I can give a number of excuses and reasons for that, but that's neither here nor there. I did not intentionally set out to defraud anybody or to steal any money. I thought I was doing the right thing by putting the bulk of the money into a cash management account so it wouldn't get eaten away, and hoped that somebody would claim the money. I thought I made reasonable attempts to find out where the money came from. I was still in confusion at the time about the money. Maybe that's why I didn't go as far as I should have done in finding out where it came from, or take other steps or measures to find out. At the same time, I was worried about losing the house, because we had no way of meeting the payments, because the pension had been stopped. I was making attempts to put back the money we had used, even though it was only a drop in the bucket, if you want to call it. I am prepared to make arrangements to find some way of paying back what I've used. Like I said, I'm just guilty of stupidity.

On the appellant's case it followed from that explanation that the jury should find that there was reasonable doubt about the appellant's guilt of the fraud alleged.

[9] The appellant, on the Crown case, lied about his enquiries with the bank and about the circling of the notation. The Crown asserted, relying on the evidence of Mss Smith and Rogers and Messrs Hartley and Hawthorn, that the appellant had not made the enquiries and had circled the notation.

[10] It was common ground at the hearing of the appeal that the Crown had confined its reliance on the evidence of lies to its effect on the credibility of the appellant's explanation to the investigating officers of what he had done after he had discovered the unexpected credits: if the appellant's honest-fool explanation could be rejected the circumstances more strongly suggested a deliberate fraud. The process of reasoning relied on by the Crown contemplated then two steps: elimination of the

appellant's explanations, and, following that, consideration of the circumstances of the case that had been satisfactorily established to determine whether the conclusion of guilt beyond reasonable doubt should be drawn.

[11] In directing the jury his Honour dwelt at some length on the alleged lies, and, although the Crown had not relied on those lies as 'probative lies' of the kind discussed in *Edwards v The Queen* (1993) 178 CLR 193, his Honour's directions were a version of the sort of directions discussed in that case. His Honour said that provided the members of the jury were satisfied that a statement was a deliberate lie and not a mistaken statement, that it concerned a material issue in the case, and that the motive for making the false statement was, as his Honour put it, a 'realization' of guilt and fear of the truth, the lies could be taken into account in deciding what inferences to draw. His Honour referred to other possible reasons for telling a lie: panic, the desire to bolster a just cause, and shame. So although the Crown case was that the lies if established were 'credibility lies' and no reliance was placed by the Crown on 'probative lies', his Honour put the case against the appellant on the subject of lies on the latter foundation. As to the distinction between the two categories of lies see *Zoneff v The Queen* (2000) 200 CLR 234 at p.258 per Kirby J. A probative lie is a species of admission by conduct: *Zoneff v The Queen*, at pp. 259-260 per Kirby J. It was common ground before us that at the trial there had been no discussion before his Honour summed up as to whether an *Edwards* direction should be given.

[12] Redirections on the use that could be made of evidence of lies were sought on behalf of the appellant: first, it was submitted that the *Edwards* directions should be withdrawn, and secondly that the possible reasons for telling lies other than realization of guilt and fear of the truth explained. His Honour refused both applications. It should be noted that it was not submitted at the trial or to us that there was any error in his Honour's *Edwards* directions as such.

[13] It is true, as Mr Rafter who appeared for the Crown at the trial and before us submitted, that his Honour's direction could be regarded as more favourable to the appellant than one based on that referred to by Gleeson CJ, Gaudron, Gummow, and Callinan JJ in *Zoneff v The Queen* at p.245, as Mr Long for the appellant asserted should have been given:

> You have heard a lot of questions, which attribute lies to the accused. You will make up your own mind about whether he was telling lies and if he was, whether he was doing so deliberately. It is for you to decide what significance those suggested lies have in relation to the issues in the case but I give you this warning: do 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.

His Honour's direction is more favourable because it suggested that a lie not proceeding from a realization of guilt and fear of the truth had no evidentiary value. If that were so it would follow that if for instance the jury concluded that the appellant had lied because he had panicked, that lie would have no bearing on their decision as to what their verdict should be, whereas on the Crown case the conclusion that the appellant had lied would eliminate the relevant part of his exculpatory explanation.

[14] While Mr Rafter's proposition may be accepted as true for those familiar with the subtle distinctions of reasoning drawn between the two categories of lies, it must also be accepted that after the jury had heard a Crown case directed exclusively to one category and a summing-up directed exclusively to the other it is likely that its members would have found that a firm grasp of the relevant issues was beyond them. Added to that discrepancy there remained of course the inherent difficulty in comprehending the *Edwards* directions. As McPherson JA, with whom Thomas J agreed, observed in *R v Brennan* [1999] 2 Qd R 529 at p.530:

> Finally, I wish to enter a caution against the persistent reliance by prosecuting counsel on the phenomenon of lies by the accused as evidence of a consciousness of guilt. As was decided in *Edwards v The Queen* (1993) 178 CLR 193, 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.

One may validly point out in this context that not the least difficulty in explaining the *Edwards* concept to a jury is to be found in the apparent circularity of reasoning, i.e., that the jury is invited to consider whether a lie was told because of guilt and then to decide whether the Crown case is strong enough to prove such guilt: see *Zoneff v The Queen* at pp.257 and 260 per Kirby J. That was the line of reasoning referred to by his Honour. It has been held, however, that the circularity is only apparent and not real (see *Edwards v The Queen* at pp.209-210 per Deane, Dawson, and Gaudron JJ), but the obstacles to clear exposition remain.

[15] The chief complaints made on behalf of the appellant concerning the course followed by his Honour were two: first, that the directions focussed on the appellant's state of mind concerning his actions after the $174,143 had been credited to the bank account whereas the Crown's case in each instance was framed as one of a fraud committed on or about the day the business activity statement was filled out (and presumably lodged); and secondly, that by giving an *Edwards* direction without warning his Honour deprived counsel for the appellant of the opportunity to make submissions to the jury in response to that analysis of the case.

[16] By focussing on the appellant's actions after the receipt of the first apparent windfall his Honour may have caused the jury to overlook the necessity to be satisfied that the case against the appellant was of dishonest conduct which began well before that. His Honour did, however, give this explanation of the relevance of the evidence of lies in the following passage:

> Well, ladies and gentlemen, if you, based on the evidence that you heard, concluded – I'm not suggesting that you will or you won't, it's all a matter for you to assess – but if you concluded that that was a lie told by the accused to the investigator, you conclude he didn't make such inquiry at all, you reject that explanation, then you'd need to consider whether, first of all, that was a deliberate lie and whether it related to a material issue. Well, you might think whether or not a

> person inquires where the money came from with the bank, you might think that a material issue to what you have to consider.
>
> You then have to consider whether you think the motive for telling that lie was a realisation of guilt and fear of the truth. In other words if he said, for example, 'Oh, yes, look I didn't make any inquiries about where the money came from' you might think, the ordinary person might think, 'Well, that sounds a bit strange, that's the behaviour of a guilty person, because he knows where it came from because he set it all up in the first place.' But it's all a matter for you to assess, ladies and gentlemen. So if you thought the realisation of his guilt, what he'd done, and he was fearful of telling the truth, in other words, 'I didn't inquire', and that was the motive for his lie and then if you're satisfied on the other evidence that you've heard, based on the other evidence, Smith and the others, that it was lie [*sic*], then that's something which you're entitled to take into account in deciding what inferences you draw, whether you draw guilty inferences or not from the whole of the circumstances.

That passage does I think partly meet the first complaint, but not entirely, because his Honour's focus was, as was submitted on behalf of the appellant, on a realization of guilt in relation to the appellant's actions after the first large credit to the bank account.

[17] *Zoneff v The Queen* was a case in which the Crown had placed no reliance upon an assertion of lies told out of a consciousness of guilt. It was held that it followed that it was unnecessary, indeed undesirable, that an *Edwards* direction be given in the circumstances of that case, such a direction having the possible effect of raising 'an issue or issues upon which the parties were not joined, and of highlighting issues of credibility so as to give them an undeserved prominence in the jury's mind to the prejudice of the appellant': p.245 per Gleeson CJ, Gaudron, Gummow, and Callinan JJ. That has been the effect of his Honour's directions in this case. This was not a case like *R v Wehlow* [2001] QCA 193 in which the Crown prosecutor's argument 'though not expressly directed to consciousness of guilt, came very close to that': para. 11 per Williams JA.

[18] Taking into account then the unnecessary complexity of the directions on lies, the possible confusion in the minds of the jurors as to the relevance of a realization of guilt concerning the appellant's actions after the first payment into the bank account, and - most important I think - the way in which counsel for the appellant was deprived of the opportunity to make submissions to the jury concerning probative lies, I conclude that the appellant's trial miscarried. I am not persuaded that this is a case for the application of s 668E(1A) of the *Criminal Code* because, although, as Mr Long conceded, the Crown case was of some strength, the appellant did, I think, lose a chance fairly open to him of being acquitted by reason of his counsel's being deprived of the opportunity to which I have referred.

[19] The appeal should be allowed, the appellant's convictions quashed, the orders made below set aside, and a new trial ordered. The appellant should be admitted to bail pending the new trial unless it can be shown when the decision of this court is handed down that there is a proper ground for refusing bail.

[20] **PHILIPPIDES J:** I agree with the reasons for judgment of Helman J and with the orders proposed.