SUPREME COURT OF QUEENSLAND

CITATION:	*R v Eaton* [2005] QCA 191
PARTIES:	**R** **v** **EATON, Warren Arthur** (appellant)
FILE NO/S:	CA No 239 of 2004 DC No 73 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court
DELIVERED ON:	6 June 2005
DELIVERED AT:	Brisbane
HEARING DATE:	20 April 2005
JUDGES:	McPherson and Jerrard JJA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed** **2. Conviction set aside** **3. Retrial ordered**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – appellant convicted of rape of 14 year old girl – appellant declined police interview when arrested – trial judge did not direct jury as to the right to silence of the accused – defence counsel did not request such a direction – whether a miscarriage of justice resulted from lack of direction CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – TESTS – WHETHER JURY WOULD HAVE RETURNED SAME VERDICT – MISDIRECTION AND NON-DIRECTION – Crown submission that appellant gave innocent explanation for the possible presence of semen on his clothing before even hearing detailed allegations against him was based on ambiguous evidence – trial judge summarised above submission in directing jury – prosecutor also made reference to DNA testing of the appellant's clothing – clothing was not

actually submitted for DNA testing – trial judge re-directed jury in terms that there was 'no clear evidence' whether appellant's shirt was submitted for DNA analysis – whether inaccurate submissions and directions had a material effect on the jury's verdict

Dhanhoa v R (2003) 199 ALR 547, cited
R v Coyne [1996] 1 Qd R 512, cited
R v Reeves (1992) 29 NSWLR 109, cited

COUNSEL: A J Glynn SC for the appellant
R G Martin SC for the respondent

SOLICITORS: Robertson O'Gorman for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McPHERSON JA:** I have read the reasons prepared by Jerrard JA and I agree with them. In particular, I agree that the statements to the jury concerning DNA testing, which were in some respects inaccurate, may in the circumstances have had a material influence on the verdict in this case.

[2] The appeal should be allowed and the conviction set aside, with an order for retrial of count 1 in the indictment.

[3] **JERRARD JA:** On 13 May 2004 Warren Eaton was convicted by a jury of the offence of raping Ms X on 29 July 2003. Ms X was a 14 year old school student, the daughter of a woman with whom Mr Eaton had been living in his home in a de facto relationship for several months. He was then aged 34, and he was sentenced to imprisonment for nine years for that offence. He has appealed against his conviction on a number of grounds, and has abandoned an application for leave to appeal against sentence.

Background matters

[4] Mr Eaton and Ms X's mother had lived in a de facto relationship since about March 2003. Ms X and her mother had at first been tenants of Mr Eaton's, living upstairs in his residence while he lived downstairs, but after some time a relationship developed between the two adults and he too moved upstairs. Ms X's mother worked in a hotel in the town, and on 29 July had started work there at 4.00 pm. Mr Eaton had played a game of pool in a competition held at that hotel, but after losing the game had gone home, and Ms X's mother did not return to the home from her work until about 1.30 am the next morning.

[5] Ms X's account of what happened that night was that at about 8.00 pm she had eaten her dinner and had a shower, dressing afterwards in underwear, a singlet, a long sleeved shirt with buttons, and shorts. She was watching television when Mr Eaton arrived home, and to her he appeared annoyed about something. Ms X told him she had not done the dishes and would do so when she had finished watching a show on the television, to which he replied with words to the effect that "Oh yeah that would be good if you'd get off your fat arse cause you don't do anything around the house". She was upset at that, and probably responded in like terms, but got up and did the dishes. She then went to her room. Mr Eaton had told her she

could either go to bed or read. She went into her bedroom, and began writing a letter to a friend. Mr Eaton later came in, told her that was a funny way of reading and that she should go to bed. So she threw the letter in the bin, shut the door, got into bed, and fell asleep.

[6] She was awoken by his re-entering her room and turning on the light. He came over and sat down on the bed beside her, stroked her hair and said he was sorry, and when she said that that was "okay", he lent over and hugged her. She wanted to go back to sleep and asked him to turn the light off, and he asked if he could turn on a small lamp. She said he could and although she wished he would leave the room, he continued stroking her hair. She recalled that he had shorts on but she did not think he had a shirt.

[7] Without any warning his mood changed and he pushed her onto her back, and told her that he was going to teach her a lesson. He then sat on top of her with his knees astride her body and put duct tape over her mouth. He ripped her shirt, tearing off some buttons, and pulled up her singlet so that her breasts were exposed. He told her she was beautiful and that he was going to teach her a lesson and find out if she was really a "goody two shoes", and added that if she screamed or tried to run that he would kill her and her mother. She noticed that his breath "stunk like alcohol".

[8] He had removed her shorts and panties, and he then moved down her body and pushed his finger into her vagina. By then the tape over her mouth felt as if it was burning or tingling, and she attempted to tell him that by moving, and Mr Eaton then removed the tape. After that he put a teddy bear, which had been beside her on the bed, into her mouth. Before he did that she had managed to say words to the effect "you promised you wouldn't hurt me".

[9] He then pried her legs apart and put his penis inside her, which hurt. When he stoped pushing it in, she looked down and saw that he was masturbating, and he ejaculated onto her stomach. He then told her to have a shower, and that if she told anyone what he had done he would kill her right there. She did shower and washed herself as much as she could wherever he had touched her, and she then returned to her room. She saw that he was in his bedroom. She got dressed and she could recall his coming in and apologising, and his saying that she would hate him for what had happened; and he gave her a hug. Later when she went to the toilet she saw him watching television and it appeared to her he was watching a pornographic movie. She returned to bed and cried herself to sleep.

[10] When her mother came home she asked her mother to come in and tuck her in, wanting her mother to stay with her for the night, but her mother did not. In the morning she had intended, when she had the opportunity, to tell her mother what happened, but Mr Eaton was in the kitchen when her mother was there, and she did not get the chance to complain. She did not eat breakfast and she walked to the school, and burst into tears when she was with another girl. That girl asked her what was wrong, and Ms X told her what had happened. After that she went to a teacher's office with that girl, but the office was closed and she then spoke to another friend of hers, telling her what had happened. That other friend contacted Ms X's mother, and "the office ladies" took Ms X and the friend who had contacted her mother down to her mother, who was at her place of employment at the hotel. Ms X then told her mother that Mr Eaton had raped her the previous night, and her mother rang the police.

[11] Mr Eaton gave evidence generally confirming the minor contretemps over the unwashed dishes, and over Ms X writing a letter when given permission to read or sleep, but denying all other matters she said had happened that night. He said that in fact he had been even more unpleasant to Ms X than she described, and swore that before she went to her bedroom she had told him that he was "an arsehole," and that later he had opened her door and turned on the light and had said to her "How's this for being an arsehole? You've got a week off television and as for the show, as far as I'm concerned, you can go by yourself." He was referring to the local show, to which he had promised to take her and purchase show bags; after withdrawing that promise he closed her door and did not see her for the rest of the night.

Grounds of appeal

[12] That outline of the evidence suffices to make sense of Mr Eaton's grounds of appeal. Ground 1 complains of a failure by the learned trial judge to direct the jury in relation to evidence of Mr Eaton's "refusal to participate in a Record of Interview with Police on the day of his arrest". As expressed, that ground implies some opposition or disagreement between Mr Eaton and the police officer about his participation in an interview, but the evidence did not come out in quite that fashion. The police officer who arrested Mr Eaton had described attending a little after 9.00 am on 30 July 2003 at the hotel where Ms X's mother was employed, speaking with her mother there and then with Ms X, and then taking them both to the local police station. After that Ms X and her mother were taken by another police officer to the Base Hospital at a nearby provincial city, where Ms X was medically examined.

[13] The arresting police officer had gone to Mr Eaton's home at about 10.00 am that day, where he met Mr Eaton and then searched the premises. He saw that the sheets had been stripped from all the beds and Mr Eaton said they were downstairs being washed, and directed the police to the laundry, where the police saw damp, freshly washed sheets. Those included the sheets from Ms X's bed.

[14] The arresting officer's evidence was that after completion of the search, Mr Eaton accompanied the police back to the local police station of his own free will, and that in conversation there Mr Eaton asked to contact a legal representative "which obviously, I gave him the opportunity after warning him of his rights". The officer's evidence continued "After contacting his legal adviser, he declined to be interviewed, and at that time, he was released, and just, after that, I made arrangements to take out a search warrant on the residence, in the possibility that we would need to go back there that day".[1]

[15] That evidence was given in response to questions from the prosecutor, apparently asked for the purpose of establishing that there had been more than one visit by police to the residence that day, the first being the visit at 10.00 am and the second at about 11.50 am. Mr Eaton had been released about 10.30 am. The point of the evidence of more than one visit was that on the occasion of the first police visit, there were no items strewn about in the backyard, but on the second visit the police saw personal property (of Ms X and her mother) strewn all over the backyard and underneath the back stairs. It had been put or thrown there by Mr Eaton, when he ultimately returned to the residence after leaving the police station. Mr Eaton was arrested by the police officers on that second visit, and one of the charges he faced

---

1 This evidence is all at AR 105

was the wilful and unlawful destruction of a quantity of photograph frames, owned by Ms X's mother, said by the Crown to have been destroyed when Mr Eaton threw them from an upstairs part of the residence down into the backyard.

[16] In answer to another question, apparently asked to clear up some confusion in the prosecutor's mind, the arresting officer repeated that Mr Eaton had voluntarily accompanied the police to the local station after their first visit there. The general tenor of the evidence, conveyed by reading it, was that the police had not been either surprised, disadvantaged, or in any way frustrated in their investigation of Ms X's complaint by Mr Eaton's declining to be interviewed. He was arrested within two hours, and on another charge as well. Mr Eaton's own evidence in chief was that he had declined to take part in a record of interview, and that the police had said he could go home, and had offered to drive him back there. He declined, and made his own way back, and had then thrown out Ms X's mother's things, and Ms X's, taking care not to damage them. His evidence, like the police officer's, implied that there was no ill will between the police and himself, or surprise, at his choice not to be interviewed.

[17] Mr Eaton's counsel did not ask for any directions or re-directions to the jury regarding the information volunteered by the arresting officer, and repeated by Mr Eaton, about his declining to be interviewed. Mr Glynn SC submitted that the learned trial judge ought to have given an immediate direction to the jury when that evidence came out, in accordance with the suggested directions in the *Queensland Supreme and District Courts Benchbook.* He also submitted that a direction should have been repeated in the summing up, referring to *Petty v R* (1991) 173 CLR 95 at 99, 101, 107, and 118; *R v Coyne* [1996] 1 Qd R 512 at 519, and *R v Vannatter* [1999] QCA 104 at [11]-[15]. Perhaps the clearest statement supporting his argument is in the joint judgment of de Jersey and Ambrose JJ in *Coyne* at Qd R 519, where their Honours wrote:

> "….a judge should direct the jury that no adverse inference may be drawn against an accused person on the ground that he has exercised his right to decline to answer questions put to him by police officers. It may be inferred from this that such evidence often given by a police officer is not therefore inadmissible. Indeed the very existence of the rule assumes that such evidence may be placed before the jury. We would adopt with respect the observations of Hunt CJ at CL in *Reeves* in this respect."

[18] That observation, in *R v Reeves* (1992) 29 NSWLR 109 at 115, was that:

> "However, where such evidence is given which discloses that the accused has exercised his right of silence, a direction should invariably be given – as soon as the evidence is given and, if necessary, again in the summing up – to make it clear to the jury that the accused had a fundamental right to remain silent and that his exercise of that right must not lead to any conclusion by them that he was guilty."

[19] The draft direction in the Benchbook is in these terms:

> "Some reference has been made to the defendant's being silent when being asked by the police about things. His silence is not evidence against him. Indeed, the warning given by the police to the defendant expressly advised him that he was entitled to remain silent.

> So it would be quite wrong to reason that because he was silent or refused to answer questions that he must have had something to hide or be guilty of some offence. Therefore, you cannot hold against him the fact that he took notice of the police caution and chose to remain silent."

[20] The authorities Mr Glynn SC quoted makes his complaint a good one, that certainly if asked the learned trial judge ought to have given the jurors a direction in the terms described in the cases cited or suggested in the *Benchbook*. But where a judge is not so asked, the critical question is whether a miscarriage of justice has resulted from that not having occurred. No miscarriage of justice will have occurred unless it is shown both that the direction should have been given, and that it is reasonably possible that the failure so to direct the jury may have affected the verdict.[2] Whether that direction should have been requested in the circumstances is a question to which the answer is not quite as categorical as the cited cases suggest, and it required an exercise of judgment by Mr Eaton's trial counsel. Having the trial judge give the direction would emphasise a matter that might otherwise have appeared of no moment at all in the trial. Choosing to let the matter rest was a justifiable forensic decision, and Mr Glynn had failed to establish that there was a reasonable possibility that the judge not giving such a direction might have affected the verdict. That ground of appeal should be dismissed.

Ground 4: Mr Eaton's clothes and semen stains

[21] Ground 4 complains that the trial miscarried because the learned judge misdirected the jury on the evidence in relation to whether or not clothing seized from Mr Eaton had been tested for the presence of semen. The facts making that ground relevant were that when police arrived at Mr Eaton's residence at about 10.00 am on the morning of 30 July 2003, they told him that they had been approached by Ms X, who had made a complaint of rape. The arresting officer swore at that point of his evidence that he could not recall providing any further details to Mr Eaton at that time, of the complaint the police had received[3]; but that same officer had given evidence earlier in chief that on arrival at the residence "we" did give Mr Eaton details of the allegations.[4] The relevance of Mr Eaton being given either fuller or more scanty details comes from the evidence of the arresting officer that after the nature of their visit had been explained, Mr Eaton had volunteered that he had masturbated just prior to the police arrival and had cleaned himself on some shorts, which he said was clothing that he had worn the night before and in which he had slept. The prosecution argued to the jury that volunteering that information before getting details of the allegations revealed knowledge that he would need to explain the presence of relatively recently ejaculated semen on those shorts. The submission was made:[5]

> "Why would he possibly – why would he possibly say something like that when he doesn't know the first thing about the nature of the allegations. It's my submission, members of the jury, that – that he knew what had gone on the night before and that he was getting in early in an attempt to explain what might be found on his clothing."

---

2 See *Dhanhoa v R* (2003) 199 ALR 547 at 555, at [38], judgment of McHugh and Gummow JJ

3 That evidence is at AR 108

4 That evidence is at AR 104

5 It is recorded at page 174 of the transcript in a Supplementary Record; the addresses of counsel are not part of the Appeal Record

[22] The prosecution evidence had not been quite so clear about what Mr Eaton had been told, when volunteering the statement the arresting officer remembered. That is, the officer's evidence was both that details of the allegations that had been provided, and also that all that was provided was that it was a complaint of rape, and no further detail. The ambiguity created a risk that an otherwise good submission by the prosecutor was unfair; it seems likely the police officer did explain at least that Mr Eaton's clothing from the night before was required, because of a complaint that he committed rape in that house on Ms X the night before. What the prosecutor suggested to the jury was that Mr Eaton had been asked only about the clothing he was wearing the night before without knowing any further detail than that "I'm investigating an allegation of rape against you".[6] If the information given to Mr Eaton also identified the alleged victim and the occasion, then Mr Eaton's response to it was much less a potentially good point for the prosecution.

[23] Mr Eaton's evidence was that while he could not recall hearing the evidence given by the police officer that Mr Eaton had volunteered that he had soiled some of his clothing as a result of masturbation,[7] he had said words to that effect to the officer; but said he was not speaking of the shorts, but of his T-shirt.[8] He said the police officers had asked whether he had "certain clothes on that night or had used certain clothes", and in response he had volunteered the information about masturbating on the T-shirt. That evidence was given in cross-examination; he had not given any evidence in chief on the topic. The cross-examination did not extract exactly what he said the police had told him about the complaint made by Ms X before asking questions about his clothes.

Ms X's clothing

[24] The investigating police officers had located Ms X's clothing, worn by her on the previous evening; unwashed and on top of the cane clothes basket. That was a pair of black panties, a pair of boxer shorts, and a green and white singlet top. Her evidence was that she had put the clothing she had been wearing before she was raped into the washing basket, after having had a shower following the rape.[9] She had located two buttons on the shirt which had been torn off during the rape[10], and she gave those to the police on 30 July 2003.[11] She identified a photograph of the clothes she was wearing,[12] which were the ones the police recovered.[13]

Admissions about DNA testing of clothes

[25] The prosecutor had proposed at the start of the trial, in the jury's absence, to make what was apparently intended as an admission by agreement,[14] namely that "there were some tests done to try and find DNA on clothing, also on swabs taken from the complainant's vagina," and that the prosecution conceded that the tests were done but no useful biological material was found on those items. Later, during his

---

6 That submission also appears in the transcript at 174, in the Supplementary Record
7 At AR 140
8 At AR 141
9 At AR 40
10 At AR 31
11 At AR 40
12 Exhibit 8 (AR 27)
13 AR 104 line 40
14 It appears at AR 9 and Supplementary Record 5. Section 644(2) of the *Code* provides for admissions by the Crown, with the agreement of the accused.

opening of the Crown case, the prosecutor made what he described as a formal admission in these terms:[15]

> "Members of the jury, the prosecution makes the concession that there was [sic] some items of clothing taken from the complainant, that swabs – medical swabs - were taken from her vagina area and that these were submitted for a DNA analysis and that there was no useful biological or DNA material located on those items. So there was no evidence located – on those items."

That admission apparently extended to, and was limited to, the complainant's clothing and the results of a DNA analysis of those and of vaginal swabs. Mr Eaton's counsel submitted to the jury that "DNA evidence tested for semen", and that it was quite sophisticated. His counsel stressed that her clothing had not been washed either by her or by Mr Eaton, but when tested for DNA no semen was found, and counsel submitted that that was very significant. The Crown Prosecutor's opening submission in his address in reply began by reminding the jury that

> "clothing that he said he had masturbated into were also taken and assessed and there was no DNA material found on there as well. Where, on the accused's own evidence, we know there should have been some there, but it wasn't detected. That was the admission I made at the beginning of the trial. So, we can see that it can be there and not be detected and not come to Court in the form of scientific evidence."[16]

[26] That was a good riposte for the Crown, if the facts justified the submission. But the formal admission the prosecutor had made had said nothing about any DNA testing of Mr Eaton's clothing, and there was no evidence, whether by admission or in any other form, that there had been any testing of any kind – DNA or otherwise – on any of his clothing. The prosecutor's submission in address clearly asked the jurors to accept that the prosecutor had earlier made an admission about DNA testing of Mr Eaton's clothing, which submission was wrong, and invited them to assume or accept that his earlier admission was intended to describe the fact of there having been DNA testing of the complainant's clothing as well.

[27] In fact, as the Court was informed by senior counsel appearing for the Crown on the appeal, the true position was that none of the clothing of either person had been submitted for DNA analysis,[17] with the result that the so called concession by the prosecution was incorrect to the extent that it purportedly described DNA testing of the complainant's clothing. The prosecutor's closing address therefore made an argument that was factually wrong in two ways. Senior counsel for the Crown told this Court that Mr Eaton's shorts had given a response on an acid phosphatase test the police administered, which was positive for semen, but no other tests were done and no evidence was put before the jury of the result of the acid phosphatase test. Whatever may have resulted from any DNA testing of the clothes, had any been done, the facts described to the jury were not based on the results of any DNA testing.

---

15 At Supplementary Record 5

16 Supplementary Record 171

17 Senior counsel remarked that there seemed to have been some rather unsatisfactory handling of the whole process of the admissions

[28] Unfortunately, the errors in the prosecutor's address to the jury were compounded when the learned trial judge reminded the jurors in the summing up of the Crown Prosecutor's submission as to the absence of DNA or biological evidence found on Mr Eaton's clothing, even where there was clear evidence of semen being there;[18] and the judge later directed the jurors in these terms when reminding them of the prosecutor's arguments:

> "He referred to the defendant's evidence that he told the police that he had masturbated into his T-shirt when at that stage he did not know the detail of the allegations against him and he argued that this shows that the defendant knew exactly what was alleged and that it was true and that he was trying to get in first to explain the presence of semen on his clothes, which he had been wearing the night before."[19]

[29] That direction, repeating the prosecutor's submission to the same effect, ran the risk that the jurors would be led into believing the evidence was clearer than it actually was as to the information to which Mr Eaton was responding when volunteering that he had wiped his penis with his T-shirt and deposited semen there. The learned judge had therefore been led into reminding the jurors in the summing up of two arguments capable of being given considerable weight by them, of which one may have been unfair and the other certainly was. The first was that his volunteering his masturbation revealed knowledge in advance of a circumstance he had to explain away, before grounds calling for that explanation had been given to him; the second argument apparently and inaccurately negatived conclusively what might otherwise have been a point for Mr Eaton, namely that none of his semen was detected on her clothing. That was the fact, whether it was because there was none, or because no tests were conducted, or because they were negative. Had it been given, the evidence of a positive reaction to a test for semen on his shorts could not answer the lack of evidence of his semen on her clothes, assuming any could be expected to be present, on her account of events.

[30] Mr Eaton's counsel did ask the learned judge for re-directions, and submitted (correctly) that there was no evidence that Mr Eaton's T-shirt had even been sent for DNA testing, but the prosecutor then informed the learned judge in reply that the prosecutor understood that both the complainant's clothing, and Mr Eaton's shorts and shirt, had been submitted for DNA analysis. That information was actually wrong, but the prosecutor also told the learned judge that he did not understand Mr Eaton's counsel to be disputing that the T-shirt and Mr Eaton's shorts had been submitted for DNA analysis; the prosecutor had simply not made his concession in respect of those.[20] That submission led the learned judge to ask whether, and to be told that, the case was that there was no clear evidence that the T-shirt specifically had been submitted for DNA analysis. The learned judge accordingly re-directed the jurors in those specific terms.

[31] That re-direction reflected the arguments made to the judge, which had included an innocent but inaccurate assurance that the T-shirt had been submitted for DNA analysis, but that that fact had not been included in the Crown's concession. True it had not been; but it should not have been. The learned judge's redirection that

---

18 At AR 186

19 At AR 188

20 It is obvious that counsel for the prosecution and defence were each honestly mistaken about the DNA testing: the discussion is at AR 197

"There is no clear evidence that his T-shirt was in fact submitted for DNA analysis"[21] conveyed - understandably enough – an implication that such evidence may have been available, whereas in fact it was not. In those circumstances I consider Mr Glynn's submission correct, that the jurors should have been directed there was no evidence that the shorts and T-shirt had been DNA tested, and they should disregard the submissions about that by the Crown Prosecutor. The implicit qualification in the redirection that was given was adverse to Mr Eaton, and I consider there is an unacceptable degree of risk that the apparently attractive arguments, made about the significance of the fact that Mr Eaton for no apparent reason volunteered that his T-shirt would demonstrate the presence of semen and the significance of the fact that it did not, may have influenced the jurors towards a verdict of guilty. One argument was groundless and one may have been; and the jury, the public, Ms X, and Mr Eaton, are all entitled to expect a verdict will be on the evidence. There is a risk that has not happened here, and I would uphold the appeal on this ground and set aside the conviction.

[32] That conclusion makes it unnecessary to rule upon Mr Eaton's other grounds of appeal, since those are specific complaints about the content of the summing up, considered in light of the prosecutor's arguments to the jury. The essence of the many complaints was that the prosecutor had effectively submitted to the jury that various aspects of Mr Eaton's conduct showed a consciousness of guilt by him, when that proposition had not been put to Mr Eaton in cross-examination in respect of any of that conduct, and he had accordingly been denied any chance to respond to the suggestion either in the witness box or in his own counsel's address. His counsel addressed the jury first, Mr Eaton having given evidence.[22]

[33] It suffices to say that on a retrial, if the prosecution continues to rely on Mr Eaton's volunteering that he had wiped his penis on his shorts (or T-shirt) after masturbating, and likewise to rely on his having washed the sheets on Ms X's bed, as circumstances indicative of guilt, those propositions should be put to him for his reply if he gives evidence again. Likewise, if it is suggested that his throwing Ms X's mother's property, and hers, out of the house, was an admission by conduct that he had been accurately exposed as a rapist, that too should be specifically put to him. If he does not give evidence he will know whether the Crown made those arguments; and he will be able to reply.

[34] Mr Glynn SC's other submissions perhaps amounted to the argument that where the prosecution relies on the conduct of a person charged after the commission of an alleged offence as circumstantial evidence revealing a consciousness of guilt, then a direction in accordance with *Edwards v R*[23] should be given about that conduct. It is unnecessary to decide whether that submission is correct; if it is, then in those circumstances in which a direction on circumstantial evidence in the terms of *Peacock v R* (1911) 13 CLR 619 is appropriate, an *Edwards* direction is now required too. That would mean that commonsense propositions advanced by the prosecution necessitate instruction by the judge about reasoning processes.

---

21 Given at AR 198

22 Section 619 of the *Code* has been treated as entitling counsel for a defendant who gives evidence to address the jury, and counsel for the Crown to reply to that address

23 (1993) 178 CLR 193; See too *R v Aboud*; *R v Stanley* [2003] QCA 499 at [11], [13]-[14]; and *R v Chang* [2003] 7 VR 236 at 253-254

[35] The prosecution case appeared a strong one. Ms X had made complaints to two school friends, her mother, the police, and to the doctor who examined her, and there was no challenge in her cross-examination suggesting that her accounts had been inconsistent. She provided an explanation for her not having made any immediate complaint to her mother, and she was described as distressed by her school friends, mother, and the examining doctor. That doctor reported that Ms X had a very inflamed vagina, which was extremely tender to touch and with redness throughout, and that there was a small tear on the fourchette a few millimetres in diameter. The doctor's opinion was that her observations were consistent with either trauma to the region or particularly rough consensual sexual intercourse; the doctor's preferred opinion was that it was the result of trauma. Further, there was no particular reason to assume or expect that there would be any of Mr Eaton's semen on Ms X's clothing, since she described having wiped the semen from her stomach with her hand. It is therefore regrettable that a retrial should have to be ordered, but that is the inevitable outcome of the manner in which the prosecution case was conducted before the jury. No doubt on a retrial the Crown case will be put to Mr Eaton, should he give evidence, and will be put accurately to the jury in any event.

[36] I would order that the conviction be set aside and there be a retrial.

[37] **PHILIPPIDES J:** I agree with the reasons of Jerrard JA that the appeal should be allowed and with the orders proposed.