SUPREME COURT OF QUEENSLAND

CITATION:	*R v Moore* [2010] QCA 116
PARTIES:	**R** **v** **MOORE, Donald Hubert** (appellant)
FILE NO/S:	CA No 23 of 2010 DC No 2031 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	Orders delivered ex tempore on 11 May 2010 Reasons delivered on 21 May 2010
DELIVERED AT:	Brisbane
HEARING DATE:	11 May 2010
JUDGES:	Holmes, Muir and Fraser JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Delivered ex tempore 11 May 2010** **1. The appeal is allowed** **2. The conviction is set aside** **3. A re-trial is ordered on count one of the indictment**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where appellant indicted on two counts of rape – where appellant convicted on count 1, but acquitted on count 2 – where details of count 1 but not count 2 had been included in preliminary complaints made to friends and family – where appellant admitted that some of the facts giving rise to count 1 occurred but maintained that the relevant sexual contact was consensual – where appellant denied the facts giving rise to count 2 – where the two counts were closely connected – whether a rational basis existed for the different verdicts – whether verdicts inconsistent – whether conviction unreasonable CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – PRESENTATION OF CROWN CASE – where appellant

convicted of one count of rape – where prosecutor relied on out of court statements made by the appellant as lies evidencing a consciousness of guilt – where no *Edwards* direction given by the learned trial judge – whether this failure amounted to an error of law – whether substantial miscarriage of justice occurred – whether a re-trial should be ordered

Criminal Code 1899 (Qld), s 668E(1A)

Edwards v The Queen (1993) 178 CLR 193; [1993] HCA 63, considered
Weiss v The Queen (2005) 224 CLR 300; [2005] HCA 81, cited
Zoneff v The Queen (2000) 200 CLR 234; [2000] HCA 28, considered

COUNSEL: J R Hunter SC for the appellant
M J Copley SC for the respondent

SOLICITORS: Bell Miller for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES JA:** On 11 May 2010, this court allowed the appellant's appeal against his conviction on one count of rape and ordered a new trial. What follows are the reasons for those orders.

[2] The appellant went to trial on two charges of rape. He was convicted on the first, which was particularised as fellatio, and acquitted on the second, which alleged digital vaginal penetration. The appeal against conviction was mounted on two grounds: the first, that the verdicts were inconsistent and consequently that the conviction was unreasonable; and the second, that in circumstances where the prosecutor relied upon lies as evidencing a consciousness of guilt, the learned judge erred in failing to direct the jury about the way in which it could rely upon lies to reach a conclusion of guilt or, alternatively, in failing to direct that the alleged lies were relevant only to credibility.

The Crown case

[3] The appellant was the assistant pastor of a church, while the complainant, M, a 27 year old woman, was a member of the church community. In September 2006, they became boyfriend and girlfriend. M, on her evidence, made it plain to the appellant that she did not want to engage in sexual activity; in particular she told him that she did not want him to touch her breasts or genital region and she would not touch his penis. As the appellant was aware, M had previously had a sexual relationship. The appellant increasingly expressed jealousy about it, and vacillated in his attitude to M. One evening, he expressed his desire to marry her; the following evening, he arrived at her house and returned all of her belongings that had been in his possession. She asked him to come into her house to talk. They discussed what she described as her "boundaries": those aspects of sexual activity in which she was unwilling to engage. Then the conversation reverted to her past sexual relationship, and the appellant made threats about what he would do to her previous boyfriend and his family.

[4] M told the appellant to leave. He apologised and pulled her into an embrace in which he kissed her while putting his hand on her breast, despite her efforts to remove it. He put his mouth on her nipple; she initially tried to push him away but gave up when he persisted. There was a tussle in which he tried to make her masturbate him and she pulled her hand away. M's account of what followed formed the basis of the two rape counts. She said that the appellant demanded that she take his penis in her mouth. She responded:

> "No, please. Not like this. It's not intimate. I don't want to do it. I don't want to ... it should only be done when we're both ready. I don't want to do it. Please don't make me."

Nonetheless, the appellant physically pushed her into position and told her she would be sorry if she did not comply. She opened her mouth and he made her perform fellatio, eventually ejaculating into her mouth. Then he pulled her into another hug and inserted his hand into her jeans and underpants. He put what felt to her like two fingers, but could have been one, into her vagina. That lasted for about 10 seconds. She squeezed her vaginal and leg muscles together in an attempt to resist the penetration. The appellant removed his hand, masturbated again and ejaculated on M's stomach. He masturbated once more shortly after and, it appeared to M, ejaculated again, this time into a towel.

[5] After those events, the appellant remained for the night in M's bedroom. When M's younger sister arrived home, she went into the room to see her sister looking stressed and tired, with her eyes red as if she had been weeping. The following morning, she went once more into the bedroom and saw the couple again. She asked her sister if she was alright. The appellant responded, "Don't worry, we didn't have sex". At some stage later, M told her that the appellant had "crossed her boundaries".

[6] M and the appellant spent the next couple of days in each other's company. The appellant promised not to do anything of the sort again. M was concerned about the appellant's state of mind; he appeared distressed and depressed. They spent time talking and praying. Two days later, M flew to Sydney to visit a friend. While she was there, the appellant telephoned her on a number of occasions, variously threatening suicide and demanding to have sex with her. During that visit, M informed one of her friends that the appellant had forced her to perform oral sex on him against her wishes; according to the friend, she appeared distressed when she spoke of the matter. In cross-examination, the friend conceded that M's statement might have been, "He pushed my boundaries and made me have oral sex with him". The appellant, unable to persuade M to speak to him, spoke to the friend on M's telephone. He told her repeatedly that he wanted to talk to M to make her understand that he was sorry and that he was not a bad man.

[7] On M's return to Brisbane, the appellant came with his mother to her house. In a conversation between the two of them, he apologised for what he had done. M's mother, some distance away, heard him say he was sorry on more than one occasion, although she did not hear the rest of the conversation. Afterwards her daughter confided in her to some extent, telling her that the appellant had coerced her into having oral contact with his penis; that she did not want to participate, but was afraid of the appellant's reaction.

[8] The relationship between M and the appellant ended at that time. In December 2006, however, the appellant helped M to shift house. The following month the two

travelled together by plane to Newcastle, in a trip which had previously been arranged, although they went their separate ways on reaching that city. In September 2007, M reported the sexual assaults to a married couple who were also members of the church to which she and the appellant belonged. She described the events to them essentially in the terms in which she gave evidence. Later, in February 2008, M made a complaint to the police.

[9] The appellant did not give evidence, but his version of events was before the jury in the form of a record of interview, taken by police in April 2008. He could recall the incident in which he had slept on the floor in M's bedroom. He said that he had touched M's breasts. M had her top off and they lay side by side. He was holding M's hand, which was moving on his penis; it was possible that he had directed it there. They began kissing and then M performed oral sex on him. He did not think he ejaculated in her mouth. He could recall what he described as "petting" M on the area of her vagina, but he could not remember putting his finger inside. In hindsight, he appreciated that M was upset during the events; she was quiet and her breathing was odd.

[10] The allegations in M's statement were put to the appellant. He agreed that he had sucked M's nipples and put her hand on his penis, but said that he had not done either by force. He agreed to having put his penis in her mouth, but again, not by force. He said he could not recall M saying "No, not like this", although he accepted she might have said it. He denied telling M that if she did not do it she would be sorry. He held her head but did not force it towards his groin. He said that he did not think he had put his fingers in her vagina. He had ejaculated only once, into a towel immediately after the episode of fellatio.

Inconsistent verdicts

[11] Counsel for the appellant, Mr Hunter SC, submitted that the acquittal in respect of count 2, that involving digital penetration, was inconsistent with the conviction on count 1 in relation to the allegation of fellatio, so that the conviction was unreasonable. The acquittal on count 2, he said, could only have been because the jury did not accept that digital penetration had been proved or, alternatively, because it did not consider that consent had been negatived. M was sexually experienced and would have known whether digital penetration had occurred or not. That offence and the act of fellatio were closely connected in her account. It was extraordinary that the jury would accept her evidence beyond reasonable doubt about the act of fellatio and the absence of consent to it, while rejecting what she said about the digital penetration.

[12] The fact that M had not mentioned the digital penetration in conversations in the days following the event, Mr Hunter said, was insufficient to explain the different conclusion in relation to it. Nor was it plausible that the jury had accepted the appellant's denials of digital penetration while rejecting his account of consent given to the oral penetration in respect of count 1. The factors which supported an acquittal on the second count – the unusual nature of the relationship, M's apparent preparedness to remain in the appellant's company immediately after and over the days following the alleged assaults, her apparent concern for his welfare, rather than outrage, after the event and the long delay in making a complaint to the police – applied equally in respect of count 1. The verdicts suggested a compromise.

[13] But there was, in my view, a rational basis for the different verdicts in this case. The forcing upon her of oral penetration clearly loomed large in M's mind from the time of the assault. The appellant's handling of her vaginal area was plainly a much less significant component of the physical encounter. It lasted only some 10 seconds and she was uncertain as to whether she had been penetrated by one finger or two. She did not, it appears, give any account of that event until almost a year later. The appellant, however, agreed to having touched M around the vaginal area but not to having penetrated her. Given the closeness of their accounts, the brevity of whatever had occurred and the relative insignificance of it in the larger context, the jury might well have thought that M's account of actual penetration was unreliable, though honest; or at least chosen to give the appellant the benefit of the doubt on that basis.

The failure to give an *Edwards* direction

[14] In the course of her address, the Crown prosecutor drew the jury's attention to the police interview and made the following comments:

> "What I'd ask you to think about is having seen the accused for three or more hours on that interview, particularly at the start, did he present as someone who was forthcoming in his account, willing to give a flowing detailed, truthful account. Or did he present as somewhat reluctant?
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> At the very start of the interview, page 19, he's asked, 'Well you said that things got a bit heavy, what happened?' And his reply is, 'Um, like, we – we began touching'. And then there's a really long pause. 'Um, um, I don't think I touched her inappropriately, inappropriately in her privates like I can't remember'. You might think that's an interesting answer when he's asked to account what had happened during the only sexual incident that ever took place.
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> Make allowance for the fact that it was 18 months prior and this is the first time he's had to talk about it. Make allowance for the fact that he's in a room with two women and he might feel a bit embarrassed, but does that present to you as a forthcoming, willing and truthful response.
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> On its own, you might think, okay, understandable. But it goes on – page 20, question, 'Have you' – 'Has she ever told you specifically that you remember, you know, places where she would or wouldn't be comfortable to touch?' And again, there's a long pause. 'Um, I – I can't remember, to tell you the truth. If – if – if she – I'm not saying she didn't, but I just can't remember'.
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> So these hard questions, ladies and gentlemen, the nitty gritty of the hard questions, and what do we see, but a long pause followed by an answer that he can't remember. And there's more; page 24. He's asked the question, 'Were you aroused? Were you aroused, Donald?' His answer is, 'Umm', and we get another long pause – 'Well, I mean, naturally when someone's touching you'.

Displays a bit of reluctance, you might think, to answer these hard questions. And it goes on and on; page 29 – he's asked, 'Now, when you say "She touched me on the outside of the shorts, on the penis", was that to her – to your knowledge, of her own volition, or did you move her hand there or did she just do it of her own accord?' And again, we see the long pause, and the answer, 'Umm, I - I can't remember, to tell you the truth'.

And the same thing, page 34, question, 'What about some oral sex?' And again, there's that long pause, and his answer is, 'Ah, umm', and it's – it's – it's said to him, 'Well, I think you'd remember that'. And his answer is, 'Yeah, umm, I don't think that came immediately after'.

He's not being forthcoming, ladies and gentlemen. This is the only sexual incident that ever took place with [M] and he can't remember what must have been significant details. *What the Crown says is that he can remember, but he's not being truthful and he's not being forthcoming and that this reluctance to tell you the truth, is because of what he knows, which is that she was not consenting*. She was not consenting to the acts and that he knew it at the time. He says he did not and I'll take you to that as well. He says he realises now, but he did not at the time.

Now, perhaps one thing importantly to raise before I do that, the one thing that you might find strange, is that there's nothing in his interview of any indignation, any surprise or vehement denial of any suggestion that [M] was not a willing participant in what took place.

When he's asked the question, page 41, 'Can you remember her begging you to stop, when she was, um, giving you oral sex?' Answer, 'No, I can't. I'. 'Do you remember her saying no at any stage, no, please, no, not like this, I don't want to do this?' And his answer is, 'I cannot recall the specific words'.

He's not saying, 'No, that never happened. Don't be stupid, don't be ridiculous, of course she wasn't saying no'. He's saying he can't recall the words. How is it possible, if she was saying 'No', she was saying, 'Please, no, don't', that you could not recall that.

So, if we just have a quick look at his belief and perhaps the best example, or one of the best examples, comes on page 42, because he clearly accepts in hindsight, that she was not. He's asked about the conversation on the front lawn on the Tuesday, 'Well, what words can you recollect?' So he was asked about what happened at the time of the incident.

'What words can you recollect?' – 'It was after when she spoke to me, when I ran around to her place, that when said she was cowering, then, I actually realised she was cowering'.

Then there's later examples. He says that he didn't perceive it, that she'd told him things like, 'I wish I had roared like a lion', or words to that effect, and he wished it had been that clear at the

> time. He said that she appeared upset and nervous and he says, in hindsight, he realises, but it wasn't clear to him at the time.
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> Well, how could it not be? Is there anything unclear, regardless of whether it's said with violence or with aggression, about, 'No, I don't want to. Please, no, don't make me'?
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> *It's for those reasons that you might think that he is not being entirely truthful in that interview.*
>
> Mr Harrison has pointed out that there was perhaps some aggressive questioning, and that may be the case. It may be that the reason that that was, you know, attempted and Madonna Norrish attempted to engage in that was because she saw, sitting there in front of him asking the questions, exactly what we can all see, which was that reluctance, that avoidance of telling the full story and the avoidance of telling the truth." (Italics added.)

[15] In *Edwards v The Queen*[1] the majority emphasised the need for any lies relied on to be precisely identified. Here there was no separate articulation by the prosecutor of the alleged lies, but it can be seen from the passages set out that there were five matters in respect of which, by implication or directly, the jury was invited to regard the appellant as being deliberately untruthful, because of a consciousness of guilt, when he said he could not remember details. They were in respect of whether he had touched M "inappropriately in her privates"; whether M had ever told him that there were places she would not wish him to touch; whether he was aroused during the events in question; whether M had touched his penis of her own accord; and whether oral sex had occurred.

[16] In his summing-up, the learned trial judge reminded the jury of counsel's submissions, including this:

> "There was this general reluctance to give a full account of what occurred and to tell the truth fully on [the prosecutor's] submission to you."

Later, summarising the respective cases, the learned judge said:

> "The prosecution says to you that the defendant presented in the record of interview in a manner that showed he was not forthcoming in his responses to questions about what occurred that evening and the reason he responded on many occasions in a hesitant manner, that he couldn't remember events, was that he could remember but he said he couldn't because he knows the complainant was not consenting to those acts and that on all of the evidence therefore, you should be satisfied, beyond a reasonable doubt, that the complainant is telling the truth and that you should therefore find the defendant guilty on both counts."

His Honour did not give any direction of the kind discussed in *Edwards* or *Zoneff v The Queen*[2].

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1 (1993) 178 CLR 193 at 210-211.
2 (2000) 200 CLR 234.

[17] Mr Copley SC for the Crown, with his usual frankness, conceded that an *Edwards* direction should have been given in this case, because the prosecutor had submitted that the appellant had told lies out of a consciousness of guilt. He invited the court, however, to conclude that no substantial miscarriage of justice had occurred and to dismiss the appeal pursuant to the proviso in s 668E(1A). He argued that the verdict of acquittal on the count based on digital penetration (as to which the appellant claimed a lack of memory) demonstrated that the jury had not reasoned from the alleged lies to a finding of guilt. The task for this court was to make its own independent assessment of the evidence to determine whether the guilt of the appellant was proved beyond reasonable doubt.[3] In performing that task, some assistance could be gained from the jury's verdict.

[18] Mr Copley's concession as to the necessity for an *Edwards* direction was, with respect, correctly made. The Crown prosecutor clearly put to the jury that the appellant's stated inability to recall details of what had happened in the encounter amounted to lies designed to conceal his knowledge that M was not consenting. In those circumstances, the jury should have been directed that it could not reason in that way unless it was satisfied that the appellant's apparent equivocations did indeed constitute deliberate lies, told out of a consciousness of guilt rather than for some other extraneous reason.

[19] This was a case in which the need for an *Edwards* direction was by no means a formal one. The interview took place some 18 months after the events in question. It was not fanciful to suppose that the appellant's recollection of the detail of what had happened in an encounter which, putting it as neutrally as possible, was one of heightened passion, might genuinely have faded with time. The appellant was interviewed over some hours by two female police officers. At the start of the interview, he made his embarrassment at being interviewed by women clear. They may have been for cultural reasons (he is from Papua New Guinea) or religious ones. The officers' questioning was aggressive, with gratuitous expressions of incredulity, and extended beyond the instance in question to more general inquiries about the appellant's sex life. There was a strong possibility that embarrassment, for cultural or religious reasons, contributed to his hesitation in answering and profession of inability to remember details. Alternatively, as counsel for the appellant suggested, there might have been an element of shame resulting from a post hoc realisation that M had not, in fact, consented. Those considerations ought to have been brought to the jury's attention.

[20] This was not a case for the application of the proviso, although Mr Copley argued that this court could draw comfort from the jury's verdict of guilt in circumstances where it had chosen to acquit on the second count. I do not think that one can place much weight on the suggested course of reasoning. There is, in my view, a real risk that although the jury hesitated to convict in respect of the digital penetration because of some doubt about the accuracy of M's recollection, when it came to the count based on fellatio it acted on her evidence that she was not consenting, and rejected the appellant's claim that he believed she was, because it found convincing the prosecutor's submission that his vague responses indicated a guilty mind.

[21] As to whether this court can properly reach a conclusion that no substantial miscarriage of justice has occurred, it is to be noted that the High Court in *Weiss*

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3 *Weiss v The Queen* (2005) 224 CLR 300 at 316.

described the task of assessing the evidence as qualified by the need to allow for "the natural limitations that exist in the case of any appellate court proceeding wholly or substantially on the record ..."[4] The limitations here are obvious. This was a credit case. Without the advantage of seeing M give her evidence this court could not properly reach a conclusion that the appellant was guilty beyond reasonable doubt. A re-trial is necessary.

[22] **MUIR JA:** I agree with the reasons of Holmes JA.

[23] **FRASER JA:** I agree with the reasons of Holmes JA.

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[4] At 316.