

SUPREME COURT OF QUEENSLAND

CITATION: *R v Sheppard* [2010] QCA 342

PARTIES: **R**
v
SHEPPARD, Christopher James Robin
(appellant)

FILE NO/S: CA No 151 of 2010
DC No 3496 of 2010

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 10 December 2010

DELIVERED AT: Brisbane

HEARING DATE: 24 November 2010

JUDGES: Margaret McMurdo P, Holmes JA and Daubney J
Separate reasons for judgment of each member of the Court,
each concurring as to the orders made

ORDERS: **1. Appeal against conviction is allowed.**
2. Conviction is set aside.
3. A retrial is ordered.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL –
MISCARRIAGE OF JUSTICE – PARTICULAR
CIRCUMSTANCES AMOUNTING TO MISCARRIAGE –
MISDIRECTION OR NON-DIRECTION – MIS-
DIRECTION – appellant convicted of rape – inconsistent
statements made to police – appellant first said he had not
been in complainant's room – appellant later accepted that he
had been in complainant's room but had not improperly
touched the complainant – prosecution encouraged jury to
treat lie as relevant to credit and as an attempt by the
appellant to 'distance himself' from the offence – learned trial
judge gave a *Zoneff* direction on lies – whether learned trial
judge erred in failing to give jury an *Edwards* direction –
whether misdirection resulted in a miscarriage of justice

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

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

Zoneff v The Queen (2000) 200 CLR 234; [2000] HCA 28,
distinguished

COUNSEL: T Glynn for the appellant
D L Meredith for the respondent

SOLICITORS: No appearance for the appellant
Director of Public Prosecutions (Qld) for the respondent

- [1] **MARGARET McMURDO P:** The appellant, Christopher James Robin Sheppard, was convicted after a three day jury trial of raping by digital penetration a 17 year old female Japanese home-stay student who was living in Brisbane and attending high school. He was sentenced to two and a half years imprisonment with an order that he be eligible to apply for parole on 9 September 2011. He originally appealed against his conviction and applied for leave to appeal against his sentence but his counsel made submissions only as to his appeal against conviction. The sole ground of appeal was that:

"the learned trial judge directed the jury with respect to lies (said to have been told by the appellant to police in the course of an interview) in such a way as to leave open the possibility that the jury may use the lies as evidence of consciousness of guilt. Her Honour did not, in those circumstances, give proper directions in accordance with the decision of the High Court in *The Queen v Edwards* (1993) 178 CLR 193."

The evidence at trial

- [2] The appellant was a guest at a party where the complainant was living with the female house-owner, a female Chinese home-stay high school student, and two female Korean home-stay high school students. The complainant and the appellant did not know each other before the party. The house-owner had previously met the appellant on a flight from Brisbane to Newcastle. She invited him to the party and, as he lived on the other side of Brisbane, agreed he could stay sleeping on her couch for the night. He fell asleep during the party in the house-owner's bed. Later, when the house-owner went to bed, she found him naked. He woke up and they had consensual sexual intercourse, during which she asked him to stop. He complied. He knocked over a bottle of water and left her bedroom to refill it. He was then either naked or wearing only a t-shirt. He walked into the complainant's bedroom which was adjacent to the house-owner's bedroom.
- [3] The complainant gave evidence that she was lying on top of the bedcovers. The light was off. She was woken by the sound of her bedroom door opening. The appellant said something like, "Do you want to enjoy with us?" He came close to her to "like try kiss or hug" her. She was wearing tight-fitting long sweat pants, underpants, bra and t-shirt. She tried to push him away but he pushed his hands inside her sweat pants and underpants and pushed his finger up to the second joint into her vagina three times.
- [4] Shortly afterwards, the complainant told the Chinese home-stay student that the man had put his finger in her "private part" and pointed to her vagina. She later made a series of complaints to a friend, to the house-owner (although the evidence of the house-owner and the complainant differed as to the content of the complaint), to another home-stay carer, and to the deputy principal and the international student coordinator at her school.

- [5] The house-owner gave evidence that, after the appellant left her bedroom, she heard the complainant's bedroom door knob squeak. She quickly dressed and went to the complainant's bedroom. She saw the appellant with one knee on the floor leaning over the complainant. The complainant was completely under the bed covers. When confronted, the appellant stated that he did not know it was the complainant's room. The house-owner grabbed his shoulder and pulled him from the room. She could not have done this without his cooperation. She directed him to leave the house. He did as he was told, but only after collecting his beer from the fridge.
- [6] Police conducted a video taped record of interview with the appellant (ex 7) on 30 March 2009, about seven weeks after the alleged offence. They stated that they were questioning him about an incident involving the complainant on Friday, 6 February 2009. The appellant agreed he had been at the house. He stayed for a few drinks; there were many students there; he had two or three beers and left; it was not his thing. He was drinking Tooheys Platinum, which had a higher alcohol content than his usual beer. He had about three beers but he was "a very light drunk". He did not know what time he left but there were still many people at the party. When asked if he went into any rooms in the house, he responded that he may have used the toilet, and he left his back pack in the house-owner's bedroom. He could not remember meeting the complainant at the party, although he might recognise her face: there were a lot of people at the party with names like hers. He could not remember speaking to the complainant during the night but he may have. He passed out in the house-owner's bed. He woke up later, said goodbye to the house-owner and left.
- [7] After police read him a portion of the house-owner's statement, he changed his version of events to the following. He was asleep on the house-owner's bed. She woke him up; she was naked. They had consensual sex for a short time. He felt weird because she looked like a boy. He left with his carton of beer.
- [8] Police read him the complainant's allegations. The appellant said he knew nothing about such matters. He did not enter the complainant's room and did not touch her private area.
- [9] The appellant did not make any formal admissions at trial. He did not give or call evidence but his counsel's cross-examination of prosecution witnesses made clear that his case was as follows. He accepted that he was in the complainant's bedroom, but denied improperly touching the complainant. The defence case challenged the reliability rather than the honesty of the complainant's evidence.

The judge's legal rulings before addresses

- [10] In the absence of the jury, the judge raised some matters of law with counsel before addresses commenced. Counsel agreed that, on the complainant's evidence, attempted rape was not open: the jury either accepted her evidence beyond reasonable doubt and convicted the appellant of rape, or they did not accept it beyond reasonable doubt and acquitted the appellant of rape.
- [11] The judge enquired whether the prosecution was relying on the appellant's statement to police that he was not in the complainant's bedroom as "an *Edwards* lie". The prosecutor stated that the appellant's lie demonstrated a consciousness of guilt. Defence counsel submitted it went only to credit. The judge determined that "out of an abundance of caution [she] would sum up to the jury on the basis that it was a lie as to credit and not an *Edwards* lie".

The prosecutor's addresses

- [12] During the address to the jury, the prosecutor referred to the appellant's account to police about the incident:

"... so in relation to the [appellant's] account of what happened, his account - or an account is put forward in the interview with police, and you saw that played yesterday. You have to look at that evidence and decide what you make of that. In my submission to you, the way he presented himself in that interview, the answers he gave paint him to be unreliable about what happened that night. He gave implausible scenarios about what occurred. He was untruthful about features of the night. He was downplaying what happened that night, and he was distancing himself from this allegation. He wasn't forthcoming to police through that interview. His account comes out bit by bit as other information is put to him.

So originally when he's asked about his attendance at the party he says, "Yeah, stayed a short time and left. Wasn't my scene. Had a couple of drinks. Might have stayed one hour, two hours, three hours". It was a very vague, almost dismissive account of what had happened.

He talks about how the arrangement came to be and he talks about meeting [the house-owner] on the plane and all of that, but as more information is given to him through the interview he changes his account, and quite markedly, you might think. It's layers of untruths that come out through that interview.

So his first version is, "Yeah, went for a bit and left. Wasn't my scene". He even talked about why he left earlier than he intended. He referred to a couple of dodgy looking people that were there that made him feel a bit edgy.

When it's put to him that he was seen passed out on a bed in the house, it's only then that he says, "Oh, yeah, I did pass out. That was between when I went to get my bag to leave and leaving".

On that second account when he accepts that he passed out he said, "heaps of people left at the party. The party was still going," and paints that sort of picture.

His third version of the offence - of the night is that he accepted he did have sex with [the house-owner]. [The house-owner's] account of that night is put to him. He makes some comments about that. He does come into that. He makes some differences, where he puts differences forward about how it all happened. It's really neither here nor there but he accepts that, "Oh, yes, that did happen," and that isn't something that he volunteered and nor was he forthcoming about to police. In fact, it goes right against his original account, stayed for a bit and choofed off.

Even then, when it's put to him that he - that sex did occur he says, "Yeah, that happened". Even then when he left he says there were

heaps of people left still at the party. So the impression is that he has this liaison with [the house-owner] while the party's still going and off he goes while people are still around.

When it's put to him what [the complainant's] allegation is he - it's a flats denial, total flat denial, and he totally denies that he was in her room and he denies the allegation that was put to him about penetrating her vagina.

Now, he clearly lies about being in her room because we know from [the house-owner] that he had to be pulled off [the complainant] to get out of the room.

It's simply - the versions that he puts forward, and ultimately his final version, just - you simply can't believe a word he says because he builds on these layers of untruths as he goes through.

You might recall that my learned friend put to [the complainant] that penetration didn't occur, the [appellant] didn't put his finger into her vagina, but it was suggested to her that he was in her room and that there was contact with her body by him but that was over the covers in her private part area. You might recall that - those questions to [the complainant] while she was being cross-examined.

Well, there's another different account put forward on his behalf. Now, she didn't accept that suggestion. She said he was in her room, yes, but he did put his finger in her vagina. But what I'm saying to you, again there appears to be another account of what happened that night.

Now, [the house-owner] does pull him away from [the complainant] he simply can't get around that. Her evidence in relation to that wasn't challenged, wasn't suggested that he was mistaken. Her evidence is that he was in that room and that's a given.

Now, in my submission, his account to police is just simply an effort to distance himself from this allegation that he did commit the offence as [the complainant] has outlined.

As I said, you would accept the evidence of [the complainant]. You have to weigh up the evidence, you have to apply your commonsense, but, in my submission, having accepted [the complainant's] evidence, you would find the [appellant] guilty of rape." (errors as in the original) (*my emphasis*)

Defence counsel's address

- [13] Defence counsel suggested to the jury that language difficulties may have resulted in the complainant giving an inaccurate version of events. The house-owner's version of events was more likely to be accurate. The complainant said she was on top of the covers, but she conceded in cross-examination that she did have some bedcovers over her. The complainant said that the appellant's hand was still in her pants when the house-owner came into the complainant's bedroom. But the house-

owner described the complainant as being under the covers. The complainant said her sweat pants were tight and were done up with a drawstring. It would not have been easy for the appellant to have put his finger into her pants. The house-owner was adamant that the complainant told her that the appellant did not touch her, although he tried to kiss her. The jury could not rule out the possibility that the complainant, having been frightened by a strange man stumbling into her bedroom and possibly touching her in some way in the middle of night, had panicked and given an inaccurate account. She was not dishonest but there was a breakdown in communication because of language and cultural differences: things got lost in translation, and this snowballed with each complaint in the series of complaints she made.

- [14] As to the appellant's interview with police, defence counsel submitted to the jury that the appellant was faced with a warrant alleging that he had raped someone whom he did not know, many weeks earlier. The police did not make it clear at the beginning of the interview, which commenced at about 9.30 pm, precisely what they were investigating. The appellant was likely to have been overwhelmed. Police questioned him about embarrassing personal matters: having sex with the house-owner. Only towards the end of the interview did police confront him with complainant's statement. He was disorientated, confused, and panicked when these serious allegations were put to him. Defence counsel continued:

"... he also denies going into [the complainant's] room. Well, he didn't know who [the complainant] was and he's been - also in that concept it's alleged to him that he's put his finger in her vagina. In that same paragraph it's read out to him those concepts are explored. He is physically ask, "Did you enter [the complainant's] room?" and he said, "No," but you might think that that again is the response of a man who's panicking about something that the police are alleging against him, and his first response is to deny it, particularly in circumstances where on the night he didn't know what room he was in and that seems clear from [the house-owner's] evidence.

So, look, ultimately, that interview - it's a matter for you what you make of it. Simply because he might have denied going into her room doesn't mean that he's committed the offence of rape. Now, you can't - that's not the step that you can take, in my submission, when you look at it in those circumstances.

And ultimately to able to convict this man of this offence you need to be satisfied of what [the complainant] says. You need to – focus needs to be onto what she says because ultimately that's the basis on which the Crown's asking you to convict him.

So whatever you think about [the appellant's] conduct in that interview, you need to put that aside, in my submission, because the focus should be on the evidence that the Crown's bringing against [the appellant], because it's up to the Crown to prove the case, it's not up to [the appellant], so you need to really be focused on [the complainant's] evidence and the inconsistencies that she has - that has come out of her evidence." (errors as in the original)

The judge's directions on lies

[15] The judge gave the following direction about the appellant's lie to police:

"Now, in that interview the [appellant] admits that he was at the house at the party that night. He initially says he left very early on but then he agreed he had sex with [the house-owner] and then the police put to him part of the statements and he denies that he went into the room of [the complainant] or that he touched her.

Now, it's a matter for you what you make of that interview, but the Crown relies on the admission that he was at the party and that he, in fact, passed out on the bed and had sex with [the house-owner] as proving that the person that was in [the complainant's] room, if you accept there was a person in [the complainant's] room, was, in fact, the [appellant] because obviously he wasn't anyone that [the complainant] knew well. But he admits that he was at the house, he did have sex with [the house-owner] and [the house-owner] says that the person she had sex with is the person that was in [the complainant's] room and that she pulled out of the room and told to go.

So you have to be - in relation to that evidence which is the admission that he was there, you have to be satisfied that he, in fact, did admit that he was there at the party and that that admission was true. He also gives - or says to the police that he didn't go into the room and that he didn't touch [the complainant]. Now, if you accept that or if that causes you to have reasonable doubt about [the complainant] and [the house-owner's] evidence, then obviously you would acquit.

The Crown says that that evidence that he didn't go into the room was a lie and that he knew that to be untrue when he said that to the police and they say because of that and the fact that he wasn't forthcoming about having sex with [the house-owner] until the statement was put to him, that you'd just dismiss anything that he said in the interview as being completely lacking in credit.

Obviously you make up your own mind about whether he was telling lies and, if so, whether he was doing that deliberately. It's for you to decide what significant those lies or the suggested lies have in relation to the issues in this case. You may decide that if you find the [appellant] has lied that that affects his credibility.

However, you should bear in mind this morning,¹ don't follow a process of reasoning to the effect that just because a person was shown to have told a lie about something that's evidence of guilt. The mere fact that a person tells a lie is not in itself evidence of guilt because someone can lie for many reasons. For example, to bolster a true case, to protect someone else, to conceal disgraceful conduct short of the commission of the offence or out of panic or confusion.

¹ This seems to be a mistranscription of 'warning'.

If you think that there is or may be some innocent explanation for his lies you should take no notice of them. But, in any event, if you do think that he has lied it only affects his credibility in relation to the version of events he's given to police." (errors as in the original) (*my emphasis*)

Conclusion

- [16] The appellant contends that the effect of the judge's direction left open the possibility for the jury to use the lie as evidence of consciousness of guilt, without the protection of an *Edwards* direction. In a finely balanced case like this, where the evidence allowed a properly instructed reasonable jury to either convict or acquit the appellant, there is a risk that the jury may have used the lie to improperly reason that the appellant had lied because he was guilty.
- [17] The "*Edwards* direction" referred to by the appellant and by the trial counsel and the judge is a shorthand reference to the following observations of Deane, Dawson and Gaudron JJ in that case. Their Honours noted that, ordinarily, the telling of a lie merely affects the credit of the person who tells it; but in some circumstances a lie told by an accused person may amount to conduct which is inconsistent with innocence and is an implied admission of guilt.² A lie can constitute an admission against interest only if it is concerned with some circumstance or event connected with the offence, that is, relating to a material issue, and if told by the accused in circumstances in which the explanation for the lie is that he knew that the truth would implicate him in the offence. Their Honours continued:

"Thus, in any case where a lie is relied upon to prove guilt, the lie should be precisely identified, as should the circumstances and events that are said to indicate that it constitutes an admission against interest. And the jury should be instructed that they may take the lie into account only if they are satisfied, having regard to those circumstances and events, that it reveals a knowledge of the offence or some aspect of it and that it was told because the accused knew that the truth of the matter about which he lied would implicate him in the offence, or, as was said in *Reg. v. Lucas* (Ruth), because of 'realization of guilt and a fear of the truth'.

Moreover, the jury should be instructed that there may be reasons for the telling of a lie apart from the realization of guilt. A lie may be told out of panic, to escape an unjust accusation, to protect some other person or to avoid a consequence extraneous to the offence. The jury should be told that, if they accept that a reason of that kind is the explanation for the lie, they cannot regard it as an admission. It should be recognized that there is a risk that, if the jury are invited to consider a lie told by an accused, they will reason that he lied simply because he is guilty unless they are appropriately instructed with respect to these matters. And in many cases where there appears to be a departure from the truth it may not be possible to say that a deliberate lie has been told. The accused may be confused. He may not recollect something which, upon his memory being jolted in cross-examination, he subsequently does recollect." (footnotes omitted)³

² (1993) 178 CLR 193, 208.

³ Above, 210-211.

- [18] In *Zoneff v The Queen*,⁴ the High Court (Gleeson CJ, Gaudron, Gummow and Callinan JJ, Kirby J dissenting) recognised that the *Edwards* direction has caused a degree of confusion in criminal trials.⁵ Where the prosecution does not rely upon the answers of an accused person as demonstrating a lie out of a consciousness of guilt, it was unnecessary and undesirable that an *Edwards* direction be given.⁶ In *Zoneff*,⁷ the prosecution did not submit that the lies of the accused person were indicative of a consciousness of guilt. Their Honours suggested an appropriate direction in that case.⁸ That suggested direction is recorded in the Queensland Supreme and District Courts Bench Book.⁹ It included the terms of the italicised portion of the primary judge's directions in the present case set out at [15] of these reasons.
- [19] The primary judge's discussion with counsel concerning the treatment of the appellant's lie to police before the commencement of final jury addresses suggested that her Honour considered the prosecution could have relied on the lie as demonstrating a consciousness of guilt warranting an *Edwards* direction. But "out of an abundance of caution", her Honour determined to limit her comments about lies as relevant only to credit and to instead give a *Zoneff* direction.
- [20] Unfortunately, whilst the prosecutor in the main encouraged the jury to treat the appellant's lie to police as relevant to credit, the prosecutor also submitted to the jury that "his account to police is just simply an effort to distance himself from this allegation that he did commit the offence as [the complainant] has outlined". That appears to me to be a clear suggestion to the jury that the appellant lied to police out of a consciousness of guilt. The prosecutor's submission meant that the jury should have been given the authoritative *Edwards* direction which instructs juries not to use the lie as evidence against an accused person until satisfied of the matters specified in *Edwards*.¹⁰ The prosecutor's submission meant that a *Zoneff* direction was neither adequate nor appropriate.
- [21] Further, consistently with *Zoneff*, the judge's direction included the statement for the jury "It's for you to decide what significan[ce] those lies or the suggested lies have in relation to the issues in this case". That direction must have been apposite in *Zoneff*. But in the present case, the prosecutor encouraged the jury to find the appellant's lie was an effort to distance himself from the complainant's allegation. In the context of that submission, the jury may well have been encouraged by the judge's direction to the jury "to decide what significan[ce] these lies ... have in relation to the issues in this case" to reason, without first considering the matters authoritatively listed in *Edwards*, that the appellant lied to police out of a consciousness of guilt. The failure to give the *Edwards* direction in this case could not be sufficiently remedied by the judge's final sentence in the direction that if the jury considered the appellant had lied it only affected his credibility in relation to the version of events he had given to police. The judge's direction as to the lie, in light of the prosecutor's submission in respect of it, gave unclear, mixed messages to the jury.

⁴ (2000) 200 CLR 234.

⁵ Above, [15].

⁶ Above, [16]-[17].

⁷ Above, [18], [23].

⁸ *Zoneff* [23].

⁹ See Bench Book 39.2, first three paragraphs.

¹⁰ At 211, set out at [17] of these reasons.

- [22] In my opinion, the judge's misdirection on how to treat the lie requires that the appeal against conviction be allowed (s 668E(1)). In this finely balanced case, where a properly instructed reasonable jury could have either convicted or acquitted the appellant, there is a real possibility that the misdirection may have resulted in the jury treating the appellant's lie to police as evidence of his consciousness of guilt in seeking to distance himself from the crime. I consider that amounts to a miscarriage of justice under s 668E(1). It is therefore unnecessary to consider s 668E(1A) *Criminal Code*.
- [23] It follows that the appeal against conviction must be allowed, the conviction set aside and a retrial ordered.
- [24] **HOLMES JA:** I agree with the reasons of Margaret McMurdo P and with the orders she proposes.
- [25] **DAUBNEY J:** I respectfully agree with the reasons for judgment of the President and with the orders proposed by her.