SUPREME COURT OF QUEENSLAND

CITATION:	*R v Corcoran* [2013] QCA 148
PARTIES:	**R** **v** **CORCORAN, William Arthur** (appellant/applicant)
FILE NO/S:	CA No 260 of 2012 DC No 332 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	14 June 2013
DELIVERED AT:	Brisbane
HEARING DATE:	8 May 2013
JUDGES:	Holmes JA and Philippides and Boddice JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal against conviction is dismissed.** **2. The application for leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – OTHER IRREGULARITIES – where the appellant was convicted of fraud in relation to an insurance claim for the contents of a stolen motor vehicle – where police conducting a search on the appellant's property found items that were the subject of the contents insurance claim – where the appellant alleged he had informed the insurer that he had found those items, and that he had not received a payout in respect of them – where on appeal, the appellant alleged bias on the part of the trial judge in the form of apparent prejudgment of his case – where the trial judge's intervention occurred in the absence of the jury and sought merely to establish what evidence the Crown proposed to rely on and what guidance should be given to the jury in respect of it – where the appellant complained that the trial judge's summing up was unbalanced, referring repeatedly to his having lied but failing to mention what he said were lies of the Crown witnesses – where the trial judge gave the appropriate *Edwards* and *Zoneff* directions in relation to

statements capable of being regarded as lies – where the evidence of the Crown witnesses was largely unchallenged and supported by documentary and recorded evidence – where the appellant alleged that his barrister was incompetent in not pursuing the alleged lies by Crown witnesses and in advising him against giving evidence – whether a miscarriage of justice occurred

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted of insurance fraud and fined $1,200 to be paid within 12 months, in default two months imprisonment, and was ordered to pay compensation to the defrauded insurer – where the applicant's application for leave to appeal against sentence is based on his assertion that he was wrongly convicted, and that his wife received a less harsh penalty – where the applicant's wife pleaded guilty to a less serious offence – whether the sentence was manifestly excessive

Criminal Code 1899 (Qld), s 668E

Edwards v The Queen (1993) 178 CLR 193; [1993] HCA 63, cited
Johnson v Johnson (2000) 201 CLR 488; [2000] HCA 48, cited
MJD v R [2006] NSWCCA 151, considered
R v Mohammadi (2011) 112 SASR 17; [2011] SASCFC 154, considered
Zoneff v The Queen (2000) 200 CLR 234; [2000] HCA 28, cited

COUNSEL: The appellant/applicant appeared on his own behalf
D Boyle for the respondent

SOLICITORS: The appellant/applicant appeared on his on behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES JA**: The appellant appeals against his conviction by a jury of fraud. He was fined $1,200, to be paid within 12 months, in default two months imprisonment, and was also ordered to pay $837 by way of compensation to QBE Insurance (Australia) Limited, from which he was said to have dishonestly obtained that amount. A conviction was recorded.

[2] The notice of appeal against conviction contains the following grounds:

> "1. The learned trial Judge overly assisted the Crown in the presentation of the Crown's case.
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> 2. The learned trial Judge's summing[-]up was unbalanced in favour of the Crown.
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> 3. The learned trial Judge misstated the defence submissions.

4. The learned trial Judge erred in giving an "Edwards" Direction in relation to the consciousness of guilty – lies.

5. That my barrister was incompetent."

The appellant also seeks leave to appeal against his sentence on the ground that it is manifestly excessive.

The Crown case

[3] The appellant formally admitted at the trial that on 6 August 2008, he had made an insurance claim by telephone in relation to a motor vehicle stolen the previous night. On 13 August 2008, an investigator for QBE Insurance, Mr Preo, arrived at his house to interview him and his wife about the claim. Among other things, the appellant informed Mr Preo that his golf clubs, worth $1,600, were in the boot of the vehicle when it was taken. The outline of the claim given to the investigator included the following handwritten statement:

> "I put my set of Greg Norman golf clubs [and] Black Callaway bag & shoes in the boot when I came home from work on 5th Tuesday to play golf at Emerald Lakes on Wednesday."

Mr Preo's evidence that the appellant wrote that sentence was not challenged. Mr Preo also obtained from the appellant and his wife a list they had completed of the property which was in the stolen vehicle. It included a video recorder (a camera) and sets of eyeglasses said to be owned by the appellant's wife, as well the appellant's golf clubs.

[4] On 18 August 2008, the appellant lodged a claim by telephone in relation to the missing contents of the vehicle. There was a limit of $1,000 on the amount which could be claimed in this regard. The appellant indicated that he would get a quote for the golf clubs, and duly sent it to the insurance company. Dated 25 August 2008, it valued the clubs at $995 and was received by facsimile on 27 August 2008. Later the same day QBE Insurance paid the appellant $1,000. (The appellant admitted receipt of the payment.) A claims manager with the company, Mr Kneipp, explained that although the list of items relevant to the contents claim included the camera owned by Mrs Corcoran, once quotes had been received for her stolen glasses and the appellant's golf clubs, the limit of $1,000 was reached, so the other items claimed had no bearing on the pay-out.

[5] On 11 June 2009, two police officers, Detective Sergeant Antonaglia and Senior Constable Ciric, executed a search warrant at the appellant's home. In the course of searching the house, Sergeant Antonaglia found a golf bag with golf clubs in it; there was no dispute as to his finding of the clubs, or that they were the subject of the appellant's insurance claim. Constable Ciric said that the appellant informed her during the search that he had already told the insurance company that he had located the clubs thought to be stolen. In his evidence, Mr Kneipp said that if the appellant had advised QBE Insurance that he had located the golf clubs, that information would be documented in the company's case notes system. There was no such record. He conceded, however, that although the practice was that any contact with a client was to be noted, he could not say that all conversations were recorded in the company's case notes system.

[6] The appellant was interviewed by the two police officers later on the day of the search. In the record of interview, he said that he always kept his clubs in the boot

of the car and never out of it. He had simply assumed they were in the car when it was taken. But his wife had moved them at the time in question, without his knowledge, to make room in the boot. He said that he rang up the insurance company "and told the girl" the clubs were still in his possession; that might have been "a week later". The appellant at one stage of the interview said that the insurance company had not paid out on the clubs; although in a subsequent answer he said that he thought the insurer might have paid "maybe $200" to cover something. He reiterated that he had advised the insurer that the golf clubs were located. It took him a week to pass on that information because he had not realised that they were not in the boot. He agreed that the golf clubs located at his house were those for which he had claimed.

[7] The appellant was asked about the statement that he had placed the clubs in the boot of the car when he arrived home from work on 5 August because he was due to play golf the following day, and answered

> "I don't remember that, I don't know. I mean that, that was when, I mean they're always in the car, I don't know what the particular question was. Was that the last time I looked at them or what, I don't know."

He said that it depended how the question was asked. He did not know why that answer had been put in; perhaps he did put the golf clubs in the car.

The trial judge's comments

[8] The appellant did not appeal on the ground of bias, but the assertion that the trial judge's conduct exhibited bias in the form of apparent prejudgment of his case underpinned a number of his submissions. The test for whether the appearance of bias requires a judge's disqualification is

> "whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide".[1]

On an appeal against conviction under s 668E, an additional question arises: whether a miscarriage of justice has occurred in consequence of any such appearance of bias.

[9] It was evident, the appellant said, that the judge had taken an adverse view of him from the outset of the case. That began when her Honour, in discussion with counsel before arraignment, questioned why the case was in the District Court rather than the Magistrates Court. The appellant's counsel explained that the appellant could not obtain legal aid if it were dealt with in the Magistrates Court. The trial judge remarked that it was a waste of community resources, a comment which the appellant took to be dismissive of him. There is no reason to suppose, however, that the remark was meant as any reflection on the appellant, as opposed to the situation which had brought about his defending the matter in the District Court.

[10] The appellant also relied on a statement made by her Honour in discussion with counsel, in the absence of the jury, as to what the $1,000 pay-out had represented. The prosecutor explained that the appellant's wife had been convicted of an offence

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1 *Johnson v Johnson* (2000) 201 CLR 488 at 492.

relating to the camera, and suggested that it was not a legitimate part of the claim. Her Honour pointed out that the offence relating to the camera was not exposed until after the claim was made. In that context, she said, "It was a dodgy claim, but it was made." Those statements, the appellant said, indicated the judge's view that he was guilty and that she had determined his claim as "dodgy" in advance.

[11] The discussion about the camera, however, concerned the appellant's wife, not him. The trial judge had also observed it was irrelevant to the Crown case whether or not the appellant knew about the false claim in relation to the camera, the point being whether Mr Kneipp's evidence established that the money was paid out on the basis of the golf club claim. Her Honour went on, in fact, to say that the Crown had no evidence to show that the appellant knew about any fraud associated with his wife's claim and it could not have any bearing in relation to the case of dishonesty against him in relation to the golf clubs.

[12] In the context of a "no case" submission, there was again some passing reference to the camera, the trial judge saying, "The camera that was bought after the theft?" Counsel responded by saying that, at that point, the camera claim was perceived as genuine and it was only 12 months later some issues arose in relation to it. Her Honour observed that it was extraordinary that "they could get away with that for that amount of time". She did not expand on whom she was referring to when she said "they"; whether it was a generic reference to those responsible and whether it included the appellant. The latter seems inconsistent with her previous observation that there was no evidence of the appellant's knowledge of any fraud. In any event, the comment was incidental and inconsequential. Certainly, nothing was ever made of the camera issue, nor was anything said about it to the jury.

The trial judge's interventions

[13] As to evidence of what he said were the trial judge's interventions in favour of the prosecutor, the appellant pointed to a number of passages in which her Honour discussed with both counsel the case which was to be left to the jury. It was in one of those discussions that the judge pointed out that unless the prosecutor could show some knowledge on the part of the appellant that the claim in relation to the camera was false, it was irrelevant. She then raised with the prosecutor something said in the opening, to the effect that the appellant had claimed to have told the private investigator that he had found the clubs, and expressed the view that the transcript on the point was ambiguous. Next, her Honour referred to the prosecutor's earlier expressed intention to rely on lies as going to credit and pointed out that if there were a lie about whether the appellant had informed the insurer of the finding of the clubs, it would, potentially, go to consciousness of guilt of dishonesty.

[14] The prosecutor said she had some concerns about whether she could prove that the statement was a lie and, if so, whether it was deliberate. The judge suggested that to prove dishonesty, the prosecutor would have to prove actual knowledge on the appellant's part that his claim in relation to the golf clubs being in the boot of the stolen car was false when the claim was made, as opposed to at some point later. Unless the prosecutor could rely on the interview pointing to a consciousness of guilt, she would have difficulty in doing so. Her Honour said,

> "I mean, on its face this case is a very strong case, but it seems to me that the investigation hasn't been as good as it could be and as the Prosecutor you really need to focus on the detail of what you must prove... [a]nd how you can do that."

She went on to say that the prosecutor would need to know, by the following day, what evidence she relied on for proof of dishonesty. The appellant relied on that passage as showing that the judge was endeavouring to lead the prosecutor "in the direction of looking for lies" in order to discredit him.

[15] On the following morning, the prosecutor said that she intended to argue that there was an *Edwards*[2] lie in the appellant's claim to have contacted the insurer to say that he had found the clubs. The trial judge then asked whether the prosecutor was relying on the fact that the appellant said to the police officers that the insurer had not paid him for the clubs, although the payout came within minutes of his having sent the quote for them. The prosecutor said she was not pressing for an *Edwards* direction in that respect, but raised as a lie what she said was the appellant's statement in the interview that he had not provided a quote. The trial judge said that the interview did not support the appellant's having said that; nor did its content bear out the prosecutor's assertion in her opening that the appellant claimed to have disclosed the finding of the clubs to the investigator.

[16] After the trial judge had dealt with a "no case" submission (to which I will return), her Honour pointed out to the prosecutor that it was necessary to prove that the appellant knew the golf clubs were at his house before he received the pay-out, and that there might be some unfairness in relying on his statement that he had discovered the clubs "about a week later", when the relevant interview had taken place 10 months after the events. The question was whether the case could be based on proof that the appellant had lied in saying that he had contacted the insurer to advise it of the finding of the clubs. The prosecutor asked for a short adjournment.

[17] After about an hour, court resumed. The trial judge raised with the prosecutor the discrepancy between the appellant's written statement to the investigator that he had put the clubs in the car boot for a game the following day, and his subsequent explanation to the police that the clubs were always kept in the vehicle but were unexpectedly removed from it, the first of which might amount to evidence of consciousness of guilt at the time the claim was made. Her Honour asked the prosecutor whether she agreed that if the appellant's original statement on the point had been a lie, it would put the Crown case "in a more strident form"; showing that there was an awareness of the falsity of the claim from the beginning. The prosecutor agreed.

[18] The trial judge then asked defence counsel for his position. He responded by saying that the two versions of why the appellant had supposed the clubs to be in the boot were not so different as to amount to lies, particularly given the lapse of time between the conversation with the investigator and the police interview. Her Honour pointed out that it was a question for the jury whether it assessed the first statement as a lie; what she sought was a submission as to whether if it were a lie, it would be capable of showing a consciousness of guilt. Defence counsel maintained his position that there was insufficient evidence that there was a lie at all. Again, the appellant relied on those passages as showing that the trial judge had moved into a prosecutorial role.

[19] In *R v Mohammadi*[3] Gray and Sulan JJ provided this helpful summary of matters relevant in considering whether there has been undue judicial intervention in a trial:

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2 *Edwards v The Queen* (1993) 178 CLR 193.

3 (2011) 112 SASR 17.

> "Many authorities have discussed the approach taken to suggested undue interference by judges in the course of criminal trials. A number of those observations can be conveniently summarised as follows:
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> - The role of a judge in a trial is to ensure the propriety and fairness of the trial and to instruct the jury as to the relevant law. The judge is to take no part in the contest between the prosecution and the accused.
> - Excessive interference or involvement by a judge during the trial may constitute such a departure from the due and orderly processes of a fair trial as to result in a miscarriage of justice.
> - Departure from the due and orderly processes of a fair trial may infringe the principle that criminal justice must not only be done but must also appear to be done.
> - To determine whether a judge has inappropriately intervened, one must ask whether the judge's intervention has created a real danger that the trial was unfair. To decide this, the appellate court must consider whether the judge's interventions "indicate that a fair trial has been denied to a litigant because the judge has closed his or her mind to further persuasion, moved into counsel's shoes and 'into the perils of self-persuasion'".
> - When deciding whether the judicial intervention has reached the point of unfairness, one must look to the number, length, terms and circumstances of the interventions and must consider the interventions in the context of the trial as a whole. The point at which the intervention occurs is also relevant.
> - Active participation of a judge in the conduct of cases has become more common. However, the judge is under more stringent requirements in respect of the conduct of criminal trials, particularly those with a jury. Greater latitude of intervention by a judge through questioning and comment will be accepted when a judge is sitting alone without a jury."[4]
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> (Citations omitted.)

[20] The earlier parts of the discussions between the trial judge and counsel set out above were patently directed to establishing what the prosecutor proposed to rely on, and to ensure, as was fair to the appellant, that she did not put submissions to the jury without proper foundation in the evidence. Towards the end of her exchanges with counsel, the trial judge raised the appellant's differing claims about why he believed the clubs to be in the car's boot. That aspect had not been identified by the prosecutor, but it did not mean that the jury would not have been alive to it. This was not a situation in which the trial judge interfered in any way in the adducing of evidence in the Crown case. The evidence was before the jury; the question was what guidance should be given in relation to it.

[21] It was necessary for the trial judge to discuss with counsel, and to decide, how statements capable of being regarded as lies should be characterised in her summing-up. The discrepancy between the very specific description of the appellant's having put the clubs in the boot one night for the express purpose of

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4 At 22.

playing golf the following day and his later claim that the clubs were invariably in the boot as part of his usual practice was an obvious one. It was proper for her Honour to raise, first, the existence of those inconsistent statements, and, second, how they should be dealt with by way of direction. She sought and received submissions from both counsel. Defence counsel confined his submission to argument about whether a lie was demonstrated, something which was plainly for the jury to resolve.

[22] As to whether any unfairness could have been produced by the judge's interventions, it must first be said that none of the discussion in question took place in the jury's presence. It would be preferable if her Honour had not gone to the extent of explaining to the prosecutor the significance of the appellant's original statement about putting the clubs in the boot in showing, if the jury took it to be a lie, an awareness of the claim's falsity from its beginning. That is so simply because it gave the appearance of advising the prosecutor about her case; and clearly it made an unfortunate impression on the appellant. But in saying that the statement would, if accepted as untrue, have that significance, her Honour was merely stating the obvious, which the prosecutor, on reflection, must have realised. With that possible exception, the interventions were appropriate; and that exception, such as it was, produced no unfairness to the appellant.

The "no case" submission

[23] The appellant's counsel at trial made a "no case" submission, arguing that the Crown had failed to adduce evidence of the insurance policy or to show that there were continuing disclosure obligations, and had not established the element of dishonesty. In discussion with counsel, the trial judge pointed out that the absence of a policy document could not be fatal on the question of dishonesty, and it would be open to the jury, if they found that the appellant knew the golf clubs were not stolen prior to the insurance pay-out, and took no steps to disclose that fact, to conclude that he had acted dishonestly in obtaining a payment. Defence counsel agreed with that proposition (as seems inevitable, in circumstances where payment followed immediately on the appellant's provision of the quote for the clubs).

[24] The appellant's counsel also asserted that, since a claim had been made for a large number of items, there was no evidence that the payment related to the golf clubs, as opposed to the camera, which was worth $1,070. In that connection, her Honour pointed out firstly, that the claim had been paid out immediately after the quote for the clubs was received; and in any event, that the prosecution did not have to prove that the golf club claim was the only reason money was paid, simply that it resulted in some payment. And the evidence of Mr Kneipp was that the insurer in fact made the payment in respect of the golf clubs. Asked by her Honour whether he was saying that it was not open to the jury to conclude that the quote sent in for the golf clubs contributed to the pay-out, counsel, not surprisingly, resiled from the point.

[25] The appellant said that discussion amounted to the trial judge's giving assistance to the prosecutor. It was, rather, an entirely proper exchange with defence counsel to test the strength of his argument and to point out its evident flaws, in order to obtain his responses. There was nothing untoward in that process, and her Honour's reasons for rejecting the "no case" submission were entirely sound. There plainly was evidence on which the jury could properly convict.

The summing-up

[26] The learned judge gave the conventional directions about the standard of proof and the proper approach to a circumstantial case. She reminded the jury of the prosecutor's submissions as to the appellant's police interview, which were that, apart from two admissions against interest (that the golf clubs found at the house were those the subject of the claim and that he knew within a short time of claiming for them that they were not stolen), the interview was, by reason of the lies contained in it, unreliable.

[27] The trial judge went to explain the difference between lies going to consciousness of guilt and those going to credibility. In the former category, if the jury found them to be lies, were the explanations given to the investigator and the police about why the appellant believed the clubs to have been in the car when it was stolen; her Honour gave an *Edwards* direction in respect of them. In respect of other statements capable of being regarded as lies going to credit, she gave a *Zoneff*[5]-type direction, explaining that if the appellant were shown to be unreliable it did not establish his guilt or advance the prosecution case. In that category, her Honour identified the appellant's claim that he had not received a pay-out in respect of the golf clubs and his assertion that he had reported his finding of the clubs to the insurance company.

[28] In relation to the statements the subject of the *Edwards* direction, her Honour reminded the jury of the defence submission that there was no real significance in the different accounts. The defendant had always said he believed the clubs were in the car and some allowance ought to be made for the passage of time of 10 months, giving rise to the possibility of a simple failure of memory when the appellant spoke to the police. Even if there had been a deliberate untruth, it was possibly the result of an innocent man's being panicked into saying something to the police.

[29] As to the lie about whether the appellant had received a pay-out in respect of the clubs, defence counsel had submitted that the evidence was too vague to establish a deliberate untruth. The appellant might not have appreciated that the pay-out included the golf clubs or might have forgotten when he was asked about it 10 months later. As to the question of whether the appellant had lied in saying that he had informed the insurer of the finding of the clubs, defence counsel had pointed out that Mr Kneipp said that he could not speak for all of the insurer's employees, but was merely going from the case notes. The possibility existed that someone had failed to write down the conversation in the case notes, which were no more than brief summaries.

[30] More generally, the trial judge reminded the jury of the defence submission that the Crown had not proved that the appellant had acted dishonestly. The interview with police was 10 months after the claim was made. The claim itself was for a number of items, not just the golf clubs. The appellant had explained, in the police interview, why he thought the golf clubs were in the car and that he had told the insurer they were found. It could not now be known exactly when he found the clubs. It was clear that he was only guessing when he estimated to the police that it was about a week after the claim was made. Consequently, defence counsel submitted, there was, at least, a reasonable doubt about his conduct. That was the note on which the trial judge ended the summing-up.

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5 *Zoneff v The Queen* (2000) 200 CLR 234.

[31] There were two grounds of appeal in relation to the summing-up in respect of which the appellant did not seek to advance any submissions: that the trial judge had misstated the defence submissions and that she had erred in giving the *Edwards* direction. He said that his then counsel had drawn those grounds and he had nothing to say about them. Certainly, it is not possible to discern from the summing-up any reference to the defence submissions which is at odds with what was being put through the course of the trial. The varying statements about why the appellant believed the clubs to be in the boot of the car were obviously capable of being regarded by the jury as demonstrating a consciousness of guilt and properly attracted the *Edwards* direction. These appeal grounds can be put to one side as without substance.

[32] The appellant asserted that the trial judge exhibited bias through the emphasis she placed in her summing-up on words such as "liar", "cheat" and "committed fraud". That might be a compelling submission if those terms had been used, but they are not actually to be found in the summing-up. More generally he complained that the summing-up was unbalanced because the trial judge had repeatedly referred to his having lied, but failed to mention what he said were the lies of the Crown witnesses. It is necessary to explore in some detail what the appellant claimed in that regard.

[33] The appellant took issue with Mr Kneipp's evidence, asserting that a QBE Insurance case note for 21 August 2008, which read "OK to accept and arrange settlement", related to the contents claim and indicated its approval before the golf club quote had been received. It followed, he said, that his claim for the clubs had no bearing on the insurance payment. That is simply incorrect. Mr Kneipp, in his evidence, made it clear which case notes related to the motor vehicle claim, payment of which was approved on 21 August 2008, and which to the contents, for which payment was approved on 27 August 2008; and what is contained in the notes themselves bears out his evidence.

[34] It was put to Sergeant Antonaglia in cross-examination that when he located the clubs, the appellant told him that he had already informed the insurance company that they had been located. Sergeant Antonaglia said that was not so; he had not had any conversation with the appellant, but had, instead, informed Senior Constable Ciric that the golf clubs had been located. Constable Ciric, in cross-examination, said that during the course of the search, the appellant told her that he had reported the location of the golf clubs to the insurance company. The appellant asserted that this meant that Antonaglia must have been lying when he said that he had not been told the same thing. The logic of saying that if one officer were told, the other must have been, is not obvious. But in any event, the appellant did not point to any reason why the credit of Sergeant Antonaglia was relevant. His evidence went only to the finding of the golf clubs at the house, and that was not in issue. Counsel had elicited from Constable Ciric what was important to the appellant's case: that when the clubs came to light on the search, he had promptly said that he had previously reported their finding to the insurer.

[35] A recording of Constable Ciric's interview with the appellant was played to the jury. The Crown prosecutor asked Constable Ciric if she accepted that that was the interview she had conducted with the appellant. Constable Ciric replied, "Yes, that was conversation from then." The appellant criticised her answer, saying that Constable Ciric must have known that it was not the full interview. Although nothing appears from the transcript or recording as to whether any part of the

interview was excised, it seems highly probable that if it were, indeed edited, it was by agreement between the Crown and defence. Asked here what he said was missing, the appellant said that there was more questioning about the issue of the car theft. Since it would hardly have benefited him to have the police officers' doubt about the authenticity of his claim in relation to the stealing of the car itself explored before the jury, it seems unlikely that he has anything to complain about in that regard. In any event, the police officer's answer to the question she was asked was accurate. Indeed, its careful phrasing was probably designed to ensure that there was no prejudice to the appellant by any hint that there was more to the interview than was before the jury.

[36] In his cross-examination, Mr Preo was asked whether he had suggested to the appellant that he obtain a quote for the golf clubs. He said he might have done so, although he could not particularly recall. The appellant submitted that the investigator's failure to answer directly that he had given that advice demonstrated his hostility. The submission is patently nonsense, and even if there were any basis to suppose that the investigator was "hostile", it was not explained how it could have affected the Crown case against the appellant.

[37] The evidence of the Crown witnesses was largely unchallenged and was supported by the documentary and recorded evidence. The appellant has not demonstrated anything in their oral testimony which warranted adverse comment by the judge. There were, on the other hand, a number of statements by the appellant, written and oral, which the jury could very reasonably have regarded as lies. They were important, on the Crown case, because they either were such as would warrant the jury's disregarding as unreliable any statements which might be thought to be exculpatory in the appellant's record of interview, or, in the case of the statements about why the appellant believed the clubs to be in the boot, actually went to prove the Crown case. Her Honour had inevitably to deal with them in the summing-up. The appellant did not give evidence, so her Honour was confined in summarising the defence case to reminding the jury of counsel's arguments, which she did fairly and properly. The summing-up was not unbalanced.

The allegation of bias generally

[38] In *MJD v R*[6], Hodgson JA, with whose judgment the other members of the court agreed, said this:

> "… the objective test referred to in *Johnson* should be applied in the light of everything that happened in the trial, both before and after the comments complained of; and consistently with *Johnson*, the reasonable lay observer would take into account the circumstances in which the comments were made, the circumstance that the trial judge was a professional judge whose training, tradition and oath or affirmation required him to discard the irrelevant, the immaterial and the prejudicial, the circumstance that there was no request to the judge to disqualify himself, and the circumstance of a summing[-]up that was generally favourable to the appellant."[7]

[39] Taking into account in this case the circumstances in which her Honour's comments and discussions with counsel occurred, the fact that her Honour was at pains to

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6 [2006] NSWCCA 151.

7 At 45.

make sure that the prosecutor did not unfairly put propositions to the jury, the fact that the summing-up was properly balanced and the absence of any complaint by the appellant's counsel, no reasonable lay observer would reach the conclusion of bias on the part of the trial judge.

The incompetence ground

[40] The appellant asserted that his counsel was incompetent. He did not provide any affidavit as to his dealings with his barrister, nor did he seek any affidavit from him. One of the bases on which he made that assertion, he said, was that his counsel had failed to refute lies and misleading statements by Crown witnesses. The "lies" identified by the appellant have already been dealt with; it can be seen that it would not have been to the appellant's advantage had his counsel pursued them.

[41] Secondly, the appellant said, his barrister had not told him what the significance of an *Edwards* direction was; had he known, he would have given evidence. Instead, his counsel had advised his against doing so. But the issue of whether some of his statements showed a consciousness of guilt was discussed at length in front of the appellant during the trial and it is difficult to credit that he did not appreciate what was entailed. Given the various inconsistent statements he had made and his propensity as exhibited here to attribute the existence of the case against him to the "lies" of others, the advice against giving evidence is entirely explicable. Counsel may reasonably have thought, for example, that the appellant's evidence as to why he gave two different accounts of how the clubs came to be in the boot of his car would not have improved matters. Nothing suggests that the appellant's barrister acted other than competently.

The sentence application

[42] The appellant's application for leave to appeal against his sentence was principally based on his assertion that he was wrongly convicted, and to that extent requires no further consideration. He also adverted to the fact that his wife, who was dealt with in the Magistrates Court, was placed on a good behaviour bond without the recording of a conviction. However, since it seems that Mrs Corcoran was dealt with on a less serious offence (possession of property suspected of being stolen) and was being sentenced after a guilty plea, no issue of disparity arises. The fine imposed on the appellant, with an extended period for payment, the order for compensation and the recording of the conviction against him did not constitute a manifestly excessive sentence.

Orders

[43] None of the grounds in the appeal against conviction has any substance, and there is no prospect of success in an appeal against sentence. I would dismiss the appeal against conviction and refuse leave to appeal against sentence.

[44] **PHILIPPIDES J:** I agree with the judgment of Holmes JA and with the orders proposed.

[45] **BODDICE J:** I have read the reasons for judgment of Holmes JA. I agree with those reasons and the proposed orders.