# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Sweeney* [2005] QCA 380 |
| PARTIES: | **R**<br>**v**<br>**SWEENEY, Mark Andrew**<br>(applicant/appellant) |
| FILE NO/S: | CA No 412 of 2004<br>DC No 2576 of 2004 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Appeal against Conviction & Sentence |
| ORIGINATING COURT: | District Court at Brisbane |
| DELIVERED ON: | 14 October 2005 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 23 September 2005 |
| JUDGES: | McPherson JA, and Cullinane and Jones JJ<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made |
| ORDER: | **1. Appeal against conviction dismissed**<br>**2. Application for leave to appeal against sentence dismissed** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AGAINST CONVICTION – where appellant convicted on ten counts of dishonestly obtaining property from seven different complainants – where appellant told certain lies to two complainants but not others – where trial judge gave jury direction concerning the use of the lies to show a consciousness of guilt – where direction apparently applied to charges in relation to all complainants – appellant appealed against conviction and sentence – whether direction relating to the lies denied appellant a fair trial – the appellant's dishonesty was central issue at trial, and the lies were admissible as circumstances going to appellant's state of mind whenever he made representations to any of the complainants<br><br>*Edwards v The Queen* (1993) 178 CLR 193, considered<br>*Hoch v The Queen* (1988) 165 CLR 292, considered<br>*Pfennig v The Queen* (1995) 182 CLR 461, applied<br>*R v O'Keefe* [1999] QCA 50; (2000) 1 Qd R 564, applied |

*Zoneff v The Queen* (2000) 200 CLR 234, considered

COUNSEL: A J Glynn SC for the applicant/appellant
A J MacSporran for the respondent

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

[1] **McPHERSON JA:** I have read the reasons of Jones J for dismissing this appeal, and I agree with them.

[2] The appellant was charged in ten counts with dishonestly obtaining money totalling $2 and a half million or more from seven different complainants by representing to them that the money would be invested in profitable projects in China. In fact there were no such projects and the money was diverted to members of the Ho family or a trust which they controlled. At the trial there was no issue that the money was obtained and, although there was some dispute about the precise terms of the representations in each case, the critical question was whether, at the time the representations were made by the appellant, he knew that they were untrue. The appellant's dishonesty thus consisted of misrepresenting the state of his intention or mind about what was going to be done with the money he obtained.

[3] There was ample evidence on which the jury were entitled to base their finding that the money was obtained dishonestly in this sense. Where it is said the trial judge went wrong was that her Honour gave the jury a direction in accordance with *Edwards v The Queen* (1993) 178 CLR 193 about the use of evidence of lies as showing a consciousness of guilt on the part of the appellant. It was submitted on the authority of *Zoneff v The Queen* (2000) 200 CLR 234, 245, that such a direction had the effect of raising an issue upon which the parties were not joined, and of highlighting questions of credibility so as to give them an undeserved prominence in the minds of the jury to the prejudice of the appellant.

[4] The limits of the trial judge's duty to direct on the subject of lies as demonstrative of a consciousness of guilt does not seem to me, with respect, to have become clearer as a result of the decision in *Zoneff*. There is a real risk now that the judge will be wrong if the direction is given, and wrong if the direction is not given. In the present case, however, counsel for the prosecution specifically asked for the direction to be given in this case. It was thus an issue on which the parties were joined. That is the first respect in which this case differs from *Zoneff*. The second is whether an *Edwards* direction here invested the matter of lies with an undeserved prominence to the prejudice of the appellant in the minds of the jury.

[5] In this context, the lies put forward by the prosecution were the facts or circumstances from which the jury were asked to infer that the appellant knew that the representations he was making were false at the time he made them. This seems to me to be precisely the same issue as the jury had to determine in order to decide whether or not the money was obtained dishonestly. To that extent, this aspect of *Zoneff* is present, which may suggest that the *Edwards* direction should not have been given. But the operation of the *Zoneff* requirement is satisfied only if the direction highlights issues of credit so as to give them undeserved prominence to the

prejudice of the accused. That cannot be said to have been so here because the issue of the appellant's credibility was the critical matter in the present case. The question for the jury was whether the appellant was to be believed when he said, as he did in giving evidence at the trial, that he believed the money obtained from the complainants was going to be applied in the way he represented. More accurately, the question was whether the prosecution had proved beyond reasonable doubt that he knew or believed that they would not be so applied.

[6] The jury by their verdicts found this element of dishonesty proved. If giving the *Edwards* direction had the effect of highlighting that credibility issue, it cannot be said to have been prejudicial to the appellant. It was in the end the only real issue at the trial. Adding to its prominence could not have prejudiced the appellant but only served to direct the jury to the central issue, which was whether the appellant knew the representations he made about his state of mind or intention were false when he made them. If anything, the addition of the *Edwards* direction therefore added another hurdle for the prosecution to surmount in order to secure a verdict or verdicts of guilty. That cannot be said to have been prejudicial to the appellant at the trial of the charges against him.

[7] I agree with what Jones J has written. The other grounds and the application to appeal against sentence were not pursued at the hearing before this Court. They should be dismissed together with this appeal against conviction.

[8] **CULLINANE J:** I agree with the reasons of Jones J and the order he proposes in this matter.

[9] **JONES J:** The appellant was convicted of ten counts of dishonestly obtaining property from seven different complainants. In each instance the property was a sum of money exceeding $5,000. In fact the individual amounts ranged between $10,000 - $500,000 and the total amount obtained was approximately 2.6 million dollars.

[10] The appellant appeals against these convictions contending that he was denied a fair trial because the learned trial judge erred in directing the jury that, after following the steps set out in *Edwards v The Queen*[1], they may treat evidence of certain statements to two individual complainants if found to be lies, as evidence tending to prove his guilt of the offences.

[11] In respect of each count the appellant solicited from the complainant the sum of money on the basis that the money was to be invested in one or other of two projects undertaken in the Republic of China by the Bo Long International Development Company Pty Ltd (hereinafter "BLI"). The complainants were promised substantial returns on their investments ranging between 70 per cent - 120 per cent per annum. Each of the investors believed the funds provided would be used for the stated investments projects. No funds were in fact so used.

[12] BLI was under the control of certain members of the Ho family who may be identified for the purposes of this appeal as David Ho, his son Henry Ho and his daughter Donna Ho.

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1 (1993) 178 CLR 193

[13] The so-called investment funds were, in relation to seven of the counts, paid initially into bank accounts operated by the appellant or his company Gur Pty Ltd, and in the remaining three instances (counts 7, 8 and 10) paid directly to BLI. Thereafter the funds were variously distributed to other accounts and used principally for the private purposes of members of the Ho family. The payment of the investment funds, the movement of monies through various accounts and their ultimate use in the purchase of private assets, were the subject of admissions[2] and were illustrated in agreed flow charts.[3] Thus all the elements of each offence, other than the question of the appellant's dishonesty, were admitted. The relevant dishonesty was that the appellant either knew or believed that the funds would not be used for the stated projects.

[14] The Crown case was entirely circumstantial. The Crown relied particularly upon propositions that, with the appellant's background as a commercial lending manager in the banking industry it was unlikely he would have accepted, without checking, the extravagant claims made by members of the Ho family. Secondly, it was highly unlikely in his capacity as Chief Executive Officer of BLI that he would have no knowledge of how the funds received by that company were distributed. Thirdly, his actions in paying the large amounts received by him from investors into the accounts of Donna Ho and a corporate entity other than BLI was irregular. Fourthly, he used investor funds to pay out purported returns to earlier investors, which actions were both irregular and inconsistent with the representations made to the complainant investors. Finally, he made certain false statements to which detailed reference is made below.

[15] The appellant gave evidence that he honestly believed that funds would be used for the stated projects because he was told by members of the Ho family that this is what would happen. He denied making the statements which were demonstrably, and conceded to be, false.

[16] It is in this context that the question arises of what use could be made of the false statements if the jury found them to have been made by the appellant. Ten statements were identified as allegedly made. Nine were alleged to have been made by the appellant to the complainant Mr Coote in the course of two meetings. The meetings were in the presence of Ms Pears who on one such occasion took notes and was able to recall the most significant statements. That conversation took place on 23 September 1997[4]. On different occasions the appellant recounted two of the statements to the complainant Mr Fuller. These occasions were on or about November 1998[5] and some time after June 2001[6]. The appellant's position in respect of these statements was simply that he did not make them. It was accepted that their terms were indeed false.

[17] The topics were identified in her Honour's summing up in the following passage prior to giving the evidence direction which gives rise to this appeal. She said:-

> "Part of the prosecution case, you will remember, you have just heard from Mr MacSporran, is the reliance on <u>lies the Crown says were told by the accused</u>. Now the Crown says to you that those lies

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2 Ex 37 record at p 545
3 Exs 3, 16, 23, 30 and 34
4 Record p 40/40
5 Record p 110/40
6 Record p 115/20

> show guilt. In order for that to be so, there are various tests which the law requires before you can use lies in that manner and I will go through those.
>
> But, firstly, to go through the lies that the Crown says to you are capable of implicating the defendant in the commission of fraud. The first is that he had been to China. I will be going through the evidence in respect of each of these in the morning. There are a number of them. These are the lies. When I say they are the lies, we are talking here now about factual matters. These are matters for you to assess whether these are in fact lies. There may be others that I don't canvas you think of. That he had been to China. That he had inspected factories. That he had seen books of account. That he had sighted documents which supported the security of the investments, and related to that, that he could vouch for the deployment of the money. That he had traced money. That he had taken investors to China. That he was a factory manager. That he had a 50 per cent share in one of the factories as payment for his services. That he was responsible for production. Before you can use this evidence of lies against the defendant, you must be satisfied of a number of matters. Unless you are satisfied of them you cannot use the evidence against the defendant."[7]

[18] The learned trial judge then gave directions of the kind discussed in *Edwards v The Queen.* There was no error in the terms of the *Edwards* direction as such; this appeal only questions whether such a direction should have been given and whether it was relevant to all counts in the indictment.

[19] Her Honour concluded the directions with the following words:

> "You must be satisfied that the lie was told because the defendant knew the truth of the matter would implicate him in the commission of the offence. This is what we call consciousness of guilt. The defendant must be lying because he is conscious that the lie could convict him. There may be reasons for the lie apart from a realisation of guilt. People sometimes have an innocent explanation for lying. You will appreciate here that what the defence is saying to you is that there were no deliberate lies."[8]

[20] Towards the end of the summing up on the following day the learned trial judge added to those allegations the claim by Mr Coote that he was asked by the appellant to lie to other investors about his visiting factories in China. That allegation was also disputed but her Honour made the point that if accepted it could also be considered as conveying a consciousness of guilt.[9]

[21] The above directions were given as part of the general instructions on matters of law. They followed directions as to the nature of circumstantial evidence and preceded directions about good character. The directions did not make specific reference to any particular count. When later canvassing the evidence referrable to

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7 Record p 351/30-352/40
8 Record p 353/40
9 Record p 425/30

the specific counts in the indictment, her Honour did not make direct reference to the use of lies in the consideration of the specific counts. So the directions were left simply as general instructions.

[22] The core issue for the jury was whether the appellant was speaking honestly or dishonestly when he represented to the respective complainants that the funds obtained would be invested in the stated projects. This single issue was clearly joined in respect of each of the counts. The representation was essentially the same for each case. Thus the terms of the representation, the circumstances of its making and the state of the appellant's mind at the time were cross admissible in all counts as relevant circumstances.

[23] The false statements had no probative value unless the jury accepted that they had been made. The jury had to determine this fact as a credit issue between the appellant on the one hand and the witnesses Coote, Pears and Fuller on the other. If the statements were found to have been made their content and their relationship to the core issue was such that it provided cogent evidence of the element of dishonesty. In the circumstances it was unnecessary, and perhaps even undesirable, that an *Edwards* direction be given. Doing so might provoke the criticism raised in the majority judgment in *Zoneff v The Queen*[10] where the comment was made that "such a direction might have the effect of raising an issue or issues upon which the parties were not joined and of highlighting issues of credibility so as to give them an undeserved prominence in the jury's mind to the prejudice the appellant" (per Gleeson CJ, Gaudron, Gummow and Callinane JJ).[11] To similar effect is the decision of the Court of Appeal in *R v Thomson*.[12]

[24] Though (as submitted by counsel for the prosecution) the lies may be characterised as collateral to the core issue, the direction could have, and in my view should have, been left in the terms suggested by *Zoneff*. However, in the circumstances of this case there is really little difference in the outcome between approaches other than making the use of the lies in an adverse way to the appellant more difficult. But the appellant's concern is elsewhere.

[25] Mr Glynn of Senior Counsel for the appellant, argued that any suggestion of consciousness of guilt as a result of a finding of his telling lies could relate only to the three counts concerning Mr Coote and the two counts concerning Mr Fuller. Yet her Honour by summing up only in general terms allowed the lies to be used in all charges and this was not permissible in respect of the other five counts. The basis of these submissions seems to be that, even though the same dishonest solicitation was made to the other complainants, the lies could not be used on the other counts to show that the investment projects did not exist.

[26] This argument, in my view, misconstrues the true issue. The issue is not whether the projects did exist but whether the appellant acted honestly or dishonestly in obtaining the money. For example, the offences which were the subject of counts 1, 2 and 3 were committed in July 1997, well before the representations were made to Mr Coote or Mr Fuller. As representations they had no impact on the decision of the complainants to hand over their money. Those complainants were not

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10 (2000) 200 CLR 234

11 Ibid at p 245

12 (2002) QCA 548

concerned to know whether the appellant had seen the factories in China or had sighted documents. They invested the funds following the appellant's representation that funds would be used in the stated projects.

[27] The evidence of the lies in September 1997, if the jury so found them to have been told, is a circumstance relevant to the assessment of the appellant's state of mind when obtaining money from Mr Coote. His state of mind then was a relevant circumstance in assessing his state of mind when he engaged in the same solicitation for the same purpose in the previous July when obtaining monies from complainants Warlow, Salmon and Verhagen. The lies were thus admissible as circumstances going to the appellant's state of mind whenever he made the representations. This is so because the focus on each count was on the appellant's dishonesty. The "criterion of admissibility [of evidence of dishonesty] is the strength of its probative force"[13]. Or, as explained in *Pfennig v The Queen*[14], "the objective improbability of its having some innocent explanation". In *R v O'Keefe*[15] Thomas JA identified the test for admissibility (at 573) as "requiring the trial judge to address two questions:-

(a) Is the propensity evidence of such calibre that there is no reasonable view of it other than as supporting an inference that the accused is guilty of the offence charged? …

(b) If the propensity evidence is admitted, is the evidence as a whole reasonably capable of excluding all innocent hypotheses?..."

[28] I note that the question of the admissibility of the lies evidence in the five counts other than those concerning Mr Coote and Mr Fuller, was not a topic of discussion during the course of the trial nor was any redirection sought as to the general terms in which the learned trial judge's directions were couched.

[29] Here there is, in the evidence taken as a whole, an inherent improbability of the appellant's same conduct of soliciting money being undertaken honestly on some occasions and dishonestly on others. The only reasonable view of the false statements, if found to have been made, is that they support an inference of dishonesty when making the same representation. Further, the whole of the evidence in relation to each count including the false statements, if found to have been made, was reasonably capable of excluding any innocent hypothesis. Thus the false statements were circumstances relevant to and admissible on all counts.

[30] In my view it was not necessary for the learned trial judge to isolate the use of the lies evidence to those complaints concerning Messrs Coote and Fuller. I am satisfied that the directions on this issue, though couched in general terms, did not give rise to any unfairness to the appellant. I would therefore dismiss the appeal.

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13 *Hoch v The Queen* (1988) 165 CLR 292 at 294

14 (1995) 182 CLR 461 at 481-2

15 (2000) 1 QdR 564