SUPREME COURT OF QUEENSLAND

CITATION:	*R v Coyne* [2021] QCA 110
PARTIES:	**R** **v** **COYNE, Andrew Thomas** (appellant)
FILE NO/S:	CA No 60 of 2020 DC No 217 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Rockhampton – Date of Conviction: 24 February 2020 (Burnett DCJ)
DELIVERED ON:	18 May 2021
DELIVERED AT:	Brisbane
HEARING DATE:	12 August 2020
JUDGES:	Sofronoff P and Fraser JA and North J
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – where the appellant was found guilty by a jury of one count of rape – where the appellant submits the trial judge erred in directing the jury by failing to precisely identify the lies (and the circumstances or events relied on to show that they were admissions) which were relied on by the prosecution as told out of a consciousness of guilt – where the appellant submits that that failure occasioned a miscarriage of justice – where no re-direction was sought at trial – whether, in all the circumstances, there was a miscarriage of justice *Dhanhoa v The Queen* (2003) 217 CLR 1; [2003] HCA 40, cited *Edwards v The Queen* (1993) 178 CLR 193; [1993] HCA 63, cited
COUNSEL:	M J Copley QC for the appellant S J Farnden for the respondent
SOLICITORS:	Howden Saggers Lawyers for the appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** I agree with the reasons of Fraser JA and with the order proposed by his Honour.

[2] **FRASER JA:** The appellant was found guilty by a jury of one count of rape. He appeals against his conviction upon the sole ground that a miscarriage of justice was occasioned by a failure to precisely identify the lies (and the circumstances or events relied on to show that they were admissions) which were relied on by the prosecution as told out of a consciousness of guilt.

[3] No re-direction was sought at the trial. As senior counsel for the appellant acknowledged at the hearing of the appeal, the appellant can rely upon the failure to give the directions the appellant now contends were required only if that failure constituted a miscarriage of justice. No such miscarriage of justice will have occurred unless the appellant establishes both that the directions submitted to have been required should have been given and it is reasonably possible that the failure to give the directions may have affected the verdict.[1] For the following reasons, my conclusion is that, whilst there were deficiencies in the directions about lies told out of a consciousness of guilt, it is not reasonably possible that the failure to give the directions submitted to have been required may have affected the verdict, so that no miscarriage of justice has occurred.

[4] The complainant gave evidence that she and her boyfriend were staying overnight in a hotel room in Rockhampton. Her boyfriend's sister, and the sister's boyfriend, were staying in a different room at the hotel. They went to other places where they socialised and drank together with some friends of the complainant's boyfriend's sister. That night the four of them returned to the room occupied by the complainant and her boyfriend. Whilst they were there, other people staying in the hotel came in and out of the room at various times. The appellant, with whom the complainant had not had any interaction before that night, came into the room at one point, left again, and returned. Eventually he fell asleep on the floor of the hotel room.

[5] The complainant gave evidence that she and her boyfriend went to sleep in the bed whilst the appellant was asleep on the floor, after the other people had left the room. During the night the complainant awoke to discover that she was lying on her back, her knees had been pulled up so they were closer to her chest with her legs bent. She felt a weight on top of her and a penis inside her vagina. She put her hands up and realised that the man on top of her was not her boyfriend. She pushed the man off and opened the hotel room door so that light would come into the room. She saw the appellant lying on the bed. The bathroom light was on and she realised that her boyfriend was in the shower. The complainant went to the bathroom, knocked on the door, and screamed that "he raped me". The complainant said that she did not consent to the appellant having sex with her.

[6] The appellant's solicitor cross-examined the complainant, focussing upon her credibility and the reliability of her evidence. The complainant denied the suggestion that, after she awoke to find the appellant in her bed she engaged in a quite brief consensual sexual exchange with him, culminating in sexual intercourse.

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1 *Dhanhoa v The Queen* (2003) 217 CLR 1 at [38]; *Graham v The Queen* (2016) 333 ALR 447 at [51], [60], [69].

[7] The complainant's boyfriend gave evidence that when he went to the bathroom to shower he was aware that the appellant was in the room and he believed the appellant to be asleep on the floor. After the complainant screamed and came into the bathroom, she told him that the appellant had just raped her. The complainant was hysterical. The complainant's boyfriend left the bathroom. He saw the appellant lying on the bed. He woke his sister.

[8] The complainant's boyfriend's sister gave evidence that her brother came running into her room crying and screaming that "he raped her". She got out of bed and ran into the other room where she saw the appellant lying face down on the bed. The complainant had run out to the front of the hotel. The complainant was distraught, screaming and crying, and rocking backwards and forwards. The complainant said she didn't want to be touched and she felt disgusting. That witnesses' partner gave evidence to similar effect.

[9] A scientist employed to conduct forensic DNA analyses gave evidence that spermatozoa was detected on a swab taken from the complainant's cervix. Based upon a statical analysis it was estimated that the DNA profile of the spermatozoa was approximately 2,600 times more likely to have occurred if the appellant had contributed DNA than if he had not. A swab from the high vaginal area revealed the presence of epithelial or skin cells, the DNA profile of which was approximately 250,000 times more likely to have occurred if the appellant had contributed DNA than if he had not.

[10] Of the other evidence it is necessary here to refer only to two records of police interviews with the appellant. The offence was alleged to have occurred early on 10 June 2018. The first police interview commenced at 6 pm on that day. The appellant said he remembered walking into the hotel room and seeing the complainant's boyfriend, the complainant's boyfriend's sister, and some other people. The appellant remembered falling asleep in a recliner, which he subsequently described as a single armchair. He must have got up at some point and got into the bed. He did not know who else was in the room when he got into the bed. The next thing he recalled was being woken up and accused of raping a lady. The appellant said he was fairly intoxicated and he wouldn't have done it. The police officer told the appellant the complainant had made the allegation of rape and as a result she had obviously been forensically examined. There followed this exchange:

> "Are we going to find your DNA inside her? No.
>
> Okay. Um, did you have sex with her? No, I didn't."

[11] The appellant agreed that he was happy with what he had told the police in that interview. The police officer who had conducted the interview with the appellant gave evidence that after that interview he obtained a sample of the appellant's DNA, with the appellant's consent, and he made the appellant aware that he was taking a sample for a comparison of the appellant's DNA with swabs that were taken from the complainant.

[12] On 13 June 2018, the appellant presented himself to the front counter of the police station and asked to speak with a police officer. The appellant said he "just wanted to come in and clarify a few things". He had had "time to actually be able to remember" and he wanted "to clear it all up …". In this interview the appellant made

statements set out in the following extract from the trial judge's summing up to the jury:

> "He said there were hazy details at the end of the night before the whole incident occurred:
>
> *…of whether myself and [the complainant] had actually engaged in some sort of contact*.
>
> The constable says, "Yep", and he says:
>
> *And we did*.
>
> He is asked:
>
> *Well, what do you mean by contact?*
>
> He says:
>
> *I – like I said in my last statement, there was a single, like, armchair couch. I passed out on that, had been pretty – had been a pretty big night. Yep.*
>
> He continued:
>
> *And then I'd gotten up at some point and laid on the bed, not realising there was someone there – someone in there.*
>
> The constable says, "Yep". He continues:
>
> *And I said that – and I did say that in my statement.*
>
> Constable Keable: "Yep". Defendant:
>
> *And yes –*
>
> And there's an indistinct:
>
> *…blanket. It was cold.*
>
> Constable: "Yep". Defendant:
>
> *And then, at some point, there are – at some point there I remember being woken by [the complainant]*.
>
> Constable Keable: "Yep". And defendant:
>
> *And somewhere along the line we made out*.
>
> Constable Keable:
>
> *Did you say [the complainant] woke you?*
>
> Defendant: "Yep". Constable Keable:
>
> *How long were you making out for?*
>
> Defendant:
>
> *Oh, it's a bit hazy exactly how long, but –*
>
> Constable Keable: "Yep". Defendant:

…it would've been for a good few minutes.

Constable Keable:

Yep. Yep. What happened next?

Defendant:

I remember putting her leg over me – her leg over me.

Constable Keable:

Yep. What happened next? Yep.

Defendant:

And she proceeded to rub my crotch.

And there is some discussion about what he was wearing, and he continued:

And at any point –

Constable Keable:

At any point did any of your clothing come off?

Defendant:

None of my clothing come off. I think at some point she undid my zipper.

Constable Keable: "Yep". Defendant:

And I'm sure she wasn't actually wearing any pants.

Constable Keable:

Well, what happened next, after she's unzipped – or your zipper? What happened?

Defendant:

Um, she sort of, like, rolled. I was on top.

Constable Keable:

Yep. What happened next?

Defendant:

I'm sure – I'm unsure of whether we actually did, like, have sex at – at that point.

Constable Keable: "Okay". The defendant continued:

But I remember that there was a noise from behind me, like, someone had sort of walked out or walked out of some room, and I sort of remember her just hearing that, as well, and freaking, like, someone had walked in.

Constable Keable: "Mmm". Defendant:

And she just bounced up.

And Constable Keable said:

You don't know if there was any penetration or anything?

Defendant:

Um, no, I honestly don't, but I guess –

And there's an indistinct – "so". Constable Keable:

So she's heard the noise, as well.

The defendant:

Yep, and it seems like she's heard it and she's half freaked about it.

Constable Keable:

What happened next? She's just jumped up and run in. I don't know whether she's thinking her boyfriend had walked in and run with the – and run – walked in and run with the allegation.

A little later on, he was asked questions about kissing. He said:

It was like – it was a very, very two-way street, not just me forcing and kissing, like, some return in that.

At this time, Constable Spriggy asks, "Okay", and the defendant continues:

A French kiss.

Spriggy continues:

Okay. Right.

The defendant says:

Very serious back and forth.

And a little later on, in further questions by Constable Spriggy, the defendant says:

I'm pretty sure I grabbed her on the leg during that.

Spriggy: "Mmm". The defendant says:

Mmm. Other than that and her rubbing on the crotch –

Spriggy says, "Okay". The defendant continues:

…and unzipping my jeans, there was nothing other than that."

[13] Upon the evidence there were three issues at the trial. The first issue was whether the prosecution proved beyond reasonable doubt that the appellant's penis penetrated the complainant's vagina. In the appellant's first police interview he denied this by answering "no" to the questions whether his DNA would be found inside the complainant and whether he had sex with the complainant. In the appellant's second police interview he endorsed those denials, by saying that everything in his first statement was true. He went on to describe "a few details at the end of night that I'd like to add". The appellant admitted having engaged in

"some sort of contact" and they had "made out", but he did not distinctly admit that he had sexual intercourse with the complainant. Rather he said that he was "unsure", he "don't know", and he guessed so. By the term "made out" he meant kissing, the complainant's leg going over the appellant's body, his grabbing of her leg, her rubbing him on his crotch, her unzipping his jeans, and nothing other than that.

[14] The Crown had a powerful case upon the first issue. After the prosecutor had addressed the jury, the appellant's solicitor submitted to the jury that the DNA evidence almost proved conclusively that the appellant had penile intercourse with the complainant, that was "almost a certainty", and clearly it did occur.

[15] The second issue was whether the prosecution proved beyond reasonable doubt that the complainant did not give her consent to the appellant having carnal knowledge of her. In relation to this issue, the most significant evidence upon which the appellant relied at the trial comprised statements made by the appellant in his second police interview to the effect that the complainant woke him and actively participated in sexual activity, which may have comprehended sexual intercourse.

[16] The third issue arose if the jury were persuaded beyond reasonable doubt to accept the Crown case upon the first two issues. In that event, the issue was whether the prosecution proved beyond reasonable doubt that the appellant penetrated the complainant's vagina with his penis under an honest and reasonable but mistaken belief that the complainant had given her consent to that act. The evidence upon which the appellant relied in relation to the second issue was also significant for the resolution of the third issue.

[17] Before the commencement of addresses, the prosecutor and the appellant's solicitor made submissions to the trial judge upon the question whether lies allegedly told by the appellant in his police interviews were of a kind that could constitute an admission against his interest. The trial judge indicated that, having heard the second interview, there should be an "*Edwards*' direction" based upon what was arguably a false denial, but it was necessary to look closely to see whether there was an inconsistency between the first interview and something said in the second interview, or whether there was an addition in the second interview. The reference to an *Edwards*' direction was to a direction in accordance with *Edwards v The Queen*:[2]

> "A lie can constitute an admission against interest only if it is concerned with some circumstance or event connected with the offence (i.e. it relates to a material issue) and if it was 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. 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

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2 (1993) 178 CLR 193, 210 – 211 (Deane, Dawson and Gaudron JJ).

> was said in *Reg. v. Lucas (Ruth)*, because of "a realization of guilt and a fear of the truth".
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> Moreover, the jury should be instructed that there may be reasons for the telling of a lie apart from the realization of guilt … 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." (footnotes omitted)

[18] The prosecutor submitted that "it is still an Edwards lie from the first [police interview]"; the appellant denied penetration in the first interview and was equivocal about penetration in the second interview, and there was objective DNA evidence.[3] Defence counsel submitted that the jury could not follow that reasoning. In relation to the second police interview, defence counsel submitted that it demonstrated merely that, because the appellant had been intoxicated at the relevant time he could not be sure whether or not penetration had occurred. After further submissions were made, consideration of the issue was deferred.[4]

[19] After the evidence concluded, defence counsel conceded that an "*Edwards*' lie" was open in respect of the appellant's denial that he had sex with the complainant. There followed submissions about the directions that should be made in that respect. On the following day the trial judge indicated that, subject to what was said in the course of submissions, the trial judge anticipated giving a direction that the Crown "particularly rely upon the initial denial of the defendant that his DNA would not be found in the complainant, but, after having the DNA sample taken by police, he later changed his story to contend there was a consensual encounter between he and the complainant. The Crown contends that was a lie that goes to show he is guilty of the offence".[5] The topic was left in that inconclusive state.

[20] The prosecutor submitted to the jury that the appellant had given numerous versions and they involved what the Crown said were lies told by the appellant during his police interviews. After reminding the jury that the appellant had exercised his right not to give evidence, he did not have to prove his innocence or anything, and the obligation was upon the prosecutor as a representative of the Crown to prove his guilt upon reasonable doubt, the prosecutor submitted that the appellant had lied in both of his police interviews.

[21] In relation to the first police interview, the prosecutor first reminded the jury of statements by the appellant to the effect that at that time he was not feeling the effects of alcohol, he was not too tired to take part, and what he was telling police was the truth. The prosecutor also submitted that the jury might think from their own observations that the appellant then appeared to be in a stable condition and to have no problems answering questions from police. The prosecutor then made the following submissions:

> "So, ladies and gentlemen, can I suggest that unchallenged objective DNA evidence completely contradicts what the defendant told police in that first interview. Now, I accept that the expert didn't say that that DNA was definitely the defendant's DNA; however, I suggest that the enticing inference to draw in the circumstances of this case,

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3 Transcript, 21 February 2020, 3 – 39 to 3 – 40.
4 Transcript, 21 February 2020, 3 – 76.
5 Transcript, 24 February 2020 4 – 4.

ladies and gentlemen, when you consider all of the evidence, is that it was the defendant's DNA and that it was transferred by inserting his penis into her vagina. So, ladies and gentlemen, I suggest that this DNA evidence shows that he was deliberately lying to police in that first interview when he said that his DNA would not be located and that he didn't have sex with [the complainant], and I suggest that he told that deliberate lie because he knew the truth would implicate him in the commission of the crime.

Now, I just wanted to pause for a moment, ladies and gentlemen, and remind you that after that first interview on the 10th of June 2018, the defendant consensually provided a sample of his DNA to police, and when he did that, he was told the exact reason why that sample was being taken, for a comparison with the swabs taken from [the complainant's] vagina, and then you will recall that, conveniently, he comes back three days later, and remarkably, he has remembered a few more things which remarkably, again, attempt to excuse him from the commission of this crime. You will recall what he said at the start of that second interview. Now, I suggest that the evidence does support the fact that he consumed a considerable amount of alcohol that night, but you will recall what he said about his capacity to take part in that first interview, and you will note that that seemingly only changed once his DNA was taken and he'd had time to consider that. Now, you may think that he provided somewhat of a watery version of events to police in that second interview, where he was unsure about penetration and lied further, I suggest, when his responses are viewed in light of the DNA evidence.

He was also dancing around the point, you may think, when he was saying that he didn't take his clothes off, he thought that she undid his zipper, he wasn't sure whether she was wearing pants, and he was unsure as to whether they actually had sex. You may just think that he made this story up to cover himself because he knew that after the first interview, a forensic test was being conducted, and it was likely that his DNA would be located in [the complainant]. And also you will recall in the interview what he said about the reason for why they stopped, and that was there was a noise behind them, like someone walking out of the room. Well, ladies and gentlemen, I suggest that that statement is inconsistent with the evidence of all the relevant Crown witnesses, and quite importantly, the unchallenged evidence of [the complainant's boyfriend] that he was still in the bathroom when [the complainant] burst in.

I suggest that the defendant was attempting to desperately and artificially distance himself from the complaint made by [the complainant], and then after what the Crown says are the lies told in these interviews, Mr Winning put a further version of events to [the complainant] during cross-examination, and that was that they definitely had consensual sex, and it only stopped when [the complainant's boyfriend] was walking out of the bathroom, which, as you will recall, [the complainant] strongly and emphatically rejected, and you will also recall what his Honour said at the start of the trial,

> that suggestions by counsel aren't evidence unless they are accepted by the witness."

[22] The effect of that submission was follows:

(a) The appellant told lies during both police interviews.

(b) In the first police interview the appellant lied when he said that his DNA would not be located and he did not have sex with the complainant. The lie was established by the DNA evidence considered in the context of all of the evidence. The lie was told because the appellant knew the truth would implicate him in the commission of the crime.

(c) In relation to the second police interview:

(i) The appellant lied by making statements to the effect that he was unsure about penetration and whether they actually had sex, the appellant didn't take his clothes off, he thought the complainant undid his zipper, he wasn't sure whether she was wearing pants, and they stopped because of a noise they heard behind them like someone walking into the room.

(ii) That these statements were lies was to be inferred from the evidence that the appellant knew that a forensic test was being conducted so it was likely that the appellant's DNA would be located in the complainant, and from other evidence in the Crown case, including the unchallenged evidence of the complainant's boyfriend that he was still in the bathroom when the complainant burst in.

(iii) The appellant told those lies in an attempt to avoid being held responsible for the crime he had committed against the complainant. The appellant "made this story up to cover himself because he knew that after the first interview, a forensic test was being conducted, and it was likely that his DNA would be located in the complainant" and he "was attempting to desperately and artificially distance himself from the complaint made by [the complainant]".

[23] In relation to the alleged lie in the first police interview to the effect that the appellant's DNA would not be located and he did not have sex with the complainant, the prosecutor submitted that the appellant told the lie because he knew that the truth would implicate him in the commission of the crime. The appellant disavowed any complaint about the directions the trial judge gave about the use of that lie as an "*Edwards*' lie" amounting to an admission by the appellant. The appellant's arguments in this appeal concern what the prosecutor submitted were lies told in the second police interview.

[24] Although the prosecutor did not submit in terms that the lies allegedly told in the second police interview were told out of a consciousness of guilt, up to this point in the address the jury might reasonably have understood that to be the effect of the prosecutor's submissions about those lies. If the prosecutor's immediately following submissions were disregarded, the trial judge should have made directions about the lies in the second police interview in accordance with *Edwards*. In the immediately following submissions, however, after the prosecutor argued that the appellant did not have an honest and reasonable mistaken belief that the

complainant was consenting to sex, the prosecutor returned to the topic of the alleged lies and submitted:

> "…after you've seen the defendant's interviews and considered the discussion that I've just had, **I suggest you will have accepted that he has, in fact, lied to police, and you'll** also accept that [the complainant] rejected the suggestions put to her. So you'll completely disregard those suggestions, **you'll completely disregard the defendant's interviews with police, you'll put them to one side, and then you'll return to the remaining evidence in this case;** however, that's not the end of it.
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> **Even though you have rejected the defendant's version of events, you still need to be satisfied that [the complainant] is a credible and reliable witness before you can reach a finding of guilt,** and also if you accept her evidence, you will accept that she was asleep at the time of penetration, and you will accept that any belief on the part of the defendant that she was consenting would not be a belief, I suggest, based on reasonable grounds….
>
> **So now that you've rejected the defence case and put it to one side, let's go back now and consider the remainder of the Crown evidence in this case, which, as you would know, revolves around the evidence of [the complainant].**"

The prosecutor then developed an argument that the complainant was a credible and reliable witness whose evidence in its entirety should be accepted. In this submission the prosecutor referred to what was submitted to be support found in other Crown evidence, including the DNA evidence and the evidence of immediate complaint and the complainant's stressed condition.

[25] In the result, the effect of the prosecutor's submissions about the significance of the alleged lies in the second police interview was that, if the jury concluded that the appellant had lied in his police interviews, they should put the police interviews aside and scrutinize the evidence in the Crown case to decide whether the prosecution had proved the appellant's guilt beyond reasonable doubt. Those submissions were derived from *Liberato v The Queen*,[6] which concerned directions designed to avoid a jury incorrectly jumping to a conclusion that an accused person is guilty merely because the jury prefers the evidence of a complainant to the evidence of the accused person or the jury rejects the evidence of the accused person. Directions of that kind are not designed to preclude a jury from relying upon an implied admission by an accused person derived from lies of the kind described in *Edwards*. In this case, however, the prosecutor's submission left no room for the jury to rely upon a lie told by the appellant in his second police interview as evidence that he was guilty of the offence.

[26] In addressing the jury, the appellant's solicitor expressed agreement with the prosecutor that in a substantial sense the case depended upon the truthfulness of the complainant's account. The appellant's solicitor submitted that in the first police interview the appellant was "less than honest" and acknowledged that the jury might think that the appellant had lied. The appellant's solicitor referred to fear and embarrassment as reasons for telling lies and to statements by the appellant that he

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6 (1985) 159 CLR 507.

had not slept since he had left the room early in the morning and he had been seriously affected by alcohol. The appellant's solicitor acknowledged that the appellant might have reasoned that the DNA could produce adverse findings for him, but the appellant's solicitor argued that the account given by the appellant in the second police interview was not implausible. The appellant's solicitor submitted that the jury should not convict the appellant merely because they preferred the complainant's account:

> "That's not the way it works. It's not a tie breaker. It's not a who's got the better account. **What you have to do, even if the defendant's evidence is unconvincing to your … minds … you have to go back and consider the prosecution case to see if the shadow of reasonable doubt is cast across the prosecution evidence**."

[27] The appellant's solicitor developed an argument that aspects of the complainant's evidence were improbable and inconsistencies within the evidence in the Crown case demonstrated that there was a reasonable doubt about the appellant's guilt.

[28] Towards the beginning of the trial judge's summing up, the trial judge gave conventional directions about the presumption of innocence, the burden upon the prosecution of proving that the appellant was guilty of the offence charged, and the necessity for the prosecution to discharge the burden of proving beyond reasonable doubt that the appellant was guilty of the offence. Immediately before the trial judge discussed the statements made by the appellant in his police interviews, the trial judge referred to evidence adduced in cross-examination of a police officer that the appellant had no criminal record. The trial judge stated that the evidence was relevant both in considering whether a person with such a reputation would do the acts alleged by the prosecution and in considering the credibility of the appellant's evidence (including his statements in the police interviews). The trial judge reminded the jury that the defendant was entitled to insist that the prosecution prove their case, that the prosecution bore the burden of proving the guilt of the defendant beyond a reasonable doubt, and the fact that he did not give evidence was no evidence against him.

[29] The trial judge referred to the prosecution's reliance upon parts of the first police interview as evidence supporting the Crown case against him. The trial judge gave the jury directions about statements in the first police interview that the jury might view as indicating his innocence. The trial judge referred to the appellant's negative answers to the question whether DNA would be found in the complainant and whether the appellant had sex with her, and to the appellant making an "addendum statement" a few days later, in which he expanded upon matters. The trial judge then set out the significant parts of the second police interview (see [12] of these reasons).

[30] After directing the jury to the effect that it was entirely up to the jury what they made of the appellant's statement in the second police interview and what weight if any should be given to any particular answer, the trial judge gave directions in relation to the reliance by the Crown on what were submitted to be lies in the police interviews. For ease of reference I have numbered passages in those directions:

> "[1] Now, in respect of that second interview, the Crown in particular relies upon the differences or some particular

differences. **Here, the Crown particularly relies upon the initial denial by the defendant that his DNA would not be found in the complainant,** but that after a DNA sample taken by police he later gave a further statement to police and told them that there was this consensual encounter between he and the complainant. I have just related those events to you, as you will recall. **Now, the Crown submits that the defendant's original evidence, including his statement, as he did say, at the end of his evidence – at the end of his record of interview, that he was happy with what he had told police on the first occasion, that is, when – there was no mention made of this later exculpatory evidence – those – that matter was a lie that goes to showing he is guilty of the offence.**

[2] **But before you can use this evidence against the defendant, you must be satisfied of a number of matters.** Unless you are satisfied of all of these matters, you cannot use this evidence against the defendant. First, you must be satisfied that **the defendant told a deliberate untruth.** [The trial judge gave additional directions that are not in issue, including a direction reminding the jury of reasons that would prevent the jury from finding that the appellant had deliberately told an untruth].

[3] Secondly, you must be satisfied that **the lie** is concerned with some circumstance or event connected with the offence. You can use a lie against the defendant if you are satisfied, having regard to those circumstances and events, that it reveals a knowledge of the offence or some aspect of it. In this case, of course, the issue is that of the absence of consent. [The trial judge made other directions to that effect.] And so you might think that that matter reveals knowledge of that absence of consent.

[4] Thirdly, you might be satisfied that **the lie** was told because the defendant knew that the truth of the matter would implicate him in the commission of the offence. The defendant must be lying because he is conscious that the truth would convict him. There may be many reasons for the lie apart from a realisation of guilt. People sometimes have an innocent explanation for lying. **For instance, here the defendant may have lied about not having sex with the complainant** out of a wish to conceal embarrassing or disgraceful behaviour because he had a sexual – he had had a consensual – consensual sex with the complainant unexpectedly whilst her boyfriend was in the shower, or perhaps it was because he lied to escape an unjust accusation in circumstances where he believed that he had the consent of the complainant even if he was mistaken as to that matter.

[5] Now, if you accept that … a reason for this kind of explanation for **the lie**, then, of course, you cannot use it, that is, the alleged lie, against the defendant. You can only use it against

the defendant if you are satisfied that he lied out of a realisation that the truth would implicate him in the offence."

[31] The trial judge's immediately following directions reinforced the prosecutor's submission that, if the jury concluded that the appellant had lied to police the jury should completely disregard and put the police interviews to one side:

> "[6] **So often enough, members of the jury, cases such as these can be described as ones of word against word. Here that is not strictly the case, as here you have sworn testimony of the complainant and the other Crown witnesses on the one hand and the unsworn and untested statements made to police by the defendant on the other.**
>
> [7] **But you need to understand that in a criminal trial it is not a question of you making a binary choice between the evidence of the Prosecution's principal witness or witnesses and the statement of the defendant. The proper approach is to understand that the Prosecution case depends upon you, the jury, accepting that the evidence of the Prosecution's principal witness and witnesses was true and accurate beyond reasonable doubt, and that is despite the defendant's statement. So you would not have to believe that the defendant is telling the truth before he is entitled to be found not guilty.**
>
> [8] Where, as here, there is defence evidence, usually one of three possible results will follow. First, you might think that the defence evidence is credible and reliable and that it provides a satisfying answer to the Prosecution's case. If that is the position you reach, then, of course, your verdict would be one of not guilty. Or you might think that although the defence evidence is not convincing it leaves you in a state of reasonable doubt about what the true position was, and, again, if that is the position, your verdict would be not guilty.
>
> [9] **Or you might think that the defence evidence should not be accepted; however, if that is your view, be careful not to jump from that view to the automatic conclusion of guilt. If you find the defence evidence unconvincing, well, just set it to one side and go back to the rest of the evidence and ask yourself whether, upon a consideration of such evidence as you do accept, you are satisfied beyond reasonable doubt that the Prosecution has proved each of the elements of the offence in question.**"

[32] Furthermore, the trial judge summarised the prosecutor's submissions about alleged lies told by the appellant in terms which focussed upon the lie said to implicate the appellant in the offence, that DNA would not be found inside the complainant, and endorsed the prosecutor's submission that the appellant could not be found guilty unless the jury found the complainant's evidence to be credible and reliable:

> "He then took you to the defendant's versions of the evidence and says that the defendant told lies during his interviews with police and

> the purpose of lie was, of course, to seek to avoid giving inculpatory or making statements that were against his own interest. **Indeed, the statement that his DNA would not be found inside her was put a lie to by the later evidence, and it is submitted the only inference you could draw from the evidence is that the defendant's DNA was – found its way into the complainant's vagina by him inserting his penis into her vagina. It was submitted this was evidence of a deliberate lie, and it was told because it would implicate him in the crime.** In particular, the Crown drew your attention to the fact that his later statement, the one that contains the exculpatory statements, is something that came three days after he had been required to produce or required to provide a DNA sample. He had time to consider his position before seeking that second interview. In doing so, he sought to distance himself from the offending.
>
> It was submitted that in response to the anticipated argument that the defence would seek to maintain that there – if there was an absence of consent, then it was induced by a mistake of fact that that submission has no support in the objective evidence. The only evidence to support the assertion of mistake of fact is to be found in the defendant's evidence. **The defendant is someone whom the defence – whom the Crown says cannot be relied upon except – and the Crown says if that is the position, then you go back to the balance of the evidence. It accepts you need to accept the complainant as a witness of truth and credit – credit and reliability before you can find the defendant guilty, but it submitted you would accept what she said, that is, that she was asleep, and, on that basis, any belief that the defendant had that she was consenting could not be a belief that he honestly held and it could not be one which was a belief by the defendant to be held on reasonable grounds**."

[33] Thereafter the trial judge made the following statements about the submission upon the topic by the appellant's solicitor:

> "As he submitted, the issue of the absence of consent is central, and if the Crown cannot satisfy you of this absence of consent to a standard of proof beyond reasonable doubt, then, of course, the charge fails. But then he proceeded on to remind you that if – even if you – even if they do, that is, if the Crown does prove an absence of consent, then you need to move on and consider the issue of mistake. Again, the Crown must disprove this particular matter. **He submitted to you that he agreed with the Crown's submission that his case depends upon the truthfulness of the complainant's account and that you have to accept her beyond reasonable doubt on these critical matters before you can find the defendant guilty.** He submitted that while the complainant may have convinced her boyfriend of how she saw events, he submitted the complainant would not have convinced you."

[34] Although the first passage in the trial judge's directions about the alleged lies in police interviews (see [30] of these reasons) is, with respect, somewhat confusing, that passage conveyed that the prosecutor relied upon "a deliberate untruth" by the appellant in his first police interview ("the defendant's original evidence"), being "the initial denial" that the appellant's DNA would not be found in the complainant. So far as is relevant to the present issue, that denial did not materially differ from the immediately succeeding denial by the appellant that he had sex with the complainant, upon which the prosecutor had also relied. The prosecutor's submission had treated the two denials as one lie: "this DNA evidence shows that he was deliberately lying to police in that first interview when he said that his DNA would not be located and that he didn't have sex with [the complainant]". In this context, the directions in the second and third passages of the directions about lies conveyed that they were applicable in relation to both aspects of the alleged lie in the first police interview. Those directions accorded with the requirements described in *Edwards*. As I have indicated, the appellant did not complain that the trial judge's directions about that alleged lie were inappropriate or insufficient.

[35] The second police interview is discussed in the second passage of the directions but, having regard also to the first and third passages, the trial judge's directions did not convey that the prosecution relied upon any alleged lie in the second police interview as a lie that could be used against the appellant. Furthermore, the trial judge's directions set out in [31] of these reasons, like the prosecutor's submissions set out in [24] of these reasons, were not qualified by a proposition that lies told by the appellant in his second police interview might in some way be used as evidence supporting the Crown case. That such an approach should not be adopted by the jury had clearly been conveyed by the prosecutor's submission that, if the jury accepted that the appellant had lied to police, the jury should completely disregard the appellant's police interviews, put them to one side, and return to the remaining evidence.

[36] It may nevertheless be arguable that the prosecutor's submissions set out in [24] of these reasons did not necessarily erase the impact of the prosecutor's submission that the appellant deliberately lied in the first interview by saying that his DNA would not be found and he didn't have sex with the complainant. That is so because of the combined effect of various matters: the strength and simplicity of the Crown case that the DNA evidence demonstrated that this was a deliberate lie, the prosecutor's express submission that the appellant knew that the truth would implicate him in the commission of the crime, the repeated references by the prosecutor to the significance of the DNA evidence, the substantial acknowledgment that the appellant did lie in this respect in the address to the jury by the appellant's solicitor, and the initial treatment of that lie in the trial judge's summing up to the jury. (see [30] of these reasons)

[37] In relation to the lies allegedly told by the appellant in the second police interview, however, there is no basis for disregarding the prosecutor's repeated exhortations to the jury that, if the jury accepted that the appellant had lied in his police interviews so that they rejected his version of events, the jury should put those police interviews aside and consider only the remaining evidence in the Crown case. That approach was substantially endorsed in the trial judge's directions. In the context of the addresses at the trial and the summing up as a whole, the overall effect of the trial judge's directions was to preclude the jury from using what it found to be any lie told by the appellant in the second interview as evidence against the appellant.

[38] There being no reasonable possibility that the jury used alleged lies in the second police interview to the disadvantage of the appellant, the trial judge's omission to give directions in accordance with *Edwards* about those alleged lies did not occasion any miscarriage of justice.

[39] I would dismiss the appeal.

[40] **NORTH J:** I have read the reasons of Fraser JA. In uttering what was submitted a lie in the first interview[7] augmented by his assurance that he was happy with what he had told the police[8] the appellant dug for himself a big hole. The jury might well have thought what he said at the second interview three days later was a desperate attempt to dig himself out of that hole.[9]

[41] There is no challenge to the direction given with respect to the alleged lie in the first interview. As Fraser JA has pointed out the "Edwards direction" concerning that alleged lie was appropriate and conventional.

[42] In the way in which the prosecutor addressed the jury concerning the second interview and the trial judge directed the jury a considerable justice was done to the appellant. As Fraser JA has pointed out the jury was encouraged by the prosecutor and directed by the trial judge that if they were inclined to reject the account the appellant gave to the police officers at the second interview they were to focus upon the evidence of the complainant and the other prosecution witnesses and consider whether the prosecution case had been proven to their satisfaction beyond reasonable doubt.

[43] For the reasons given by Fraser JA I agree with the order proposed by his Honour.

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7 Reasons of Fraser JA at [10].
8 Reasons of Fraser JA at [11].
9 Reasons of Fraser JA at [12].