HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, GUMMOW, KIRBY AND CALLINAN JJ

IVAN ZONEFF APPELLANT

AND

THE QUEEN RESPONDENT

Zoneff v The Queen [2000] HCA 28
Date of Order: 7 March 2000
Date of Publication of Reasons: 25 May 2000
A23/1999

ORDER

1. *Appeal allowed.*

2. *Set aside the orders of the Court of Criminal Appeal of South Australia made on 1 December 1998 and in place thereof order that:*

   i) the appeal to that Court be allowed;

   ii) the convictions on counts 2-7 in the Information be quashed; and

   iii) there be a retrial.

On appeal from the Supreme Court of South Australia

Representation:

T A Gray QC with G J S Mancini for the appellant (instructed by George Mancini & Co)

W J Abraham QC with S McDonald for the respondent (instructed by Director of Public Prosecutions (South Australia))

CATCHWORDS

Zoneff v The Queen

Criminal Law – Lies – Whether going to credibility or indicating guilt – Direction to jury – Proviso – Circumstances for application in strong Crown case.

Words and phrases – "consciousness of guilt".

1 GLEESON CJ, GAUDRON, GUMMOW AND CALLINAN JJ. This case is concerned with the correctness of a direction given by a judge of the District Court of South Australia in a criminal trial with respect to evidence of the appellant in his trial which the jury could have inferred to be false.

The Trial

2 The appellant was tried in the District Court on an information containing seven counts, four of which charged him with false pretences and three with fraudulent conversion. The jury returned a verdict of not guilty on the first count and found him guilty of the other six. The first charge was an alternative charge to one of fraudulent conversion.

3 The prosecution case was that the appellant took advantage of five people. One of them, Ms Sneath, had been referred to in the first and second counts. The other four were Mr McKinnon, Mr and Mrs Dik and Ms Phillips. All met the appellant when they went to purchase furniture from the Le Cornu Furniture Centre where he worked as a salesperson. The prosecution alleged that the appellant ingratiated himself with these people in order to obtain money from them by false pretences.

4 Ms Sneath and Mr McKinnon said that the appellant persuaded them to pay the amount outstanding on their purchases to him, so that they could obtain the benefit of bonus points to which he was entitled as part of his conditions of employment with Le Cornu. The appellant said that an additional discount of $720 would be available if they were to send the money they owed Le Cornu directly to him. Ms Sneath's and Mr McKinnon's evidence was that they agreed to the appellant's proposal, believing that he was acting in his capacity as an employee of Le Cornu and that he had authority to do what he claimed. Ms Sneath said that she paid $4,068 into the appellant's account with a building society, being the amount she and Mr McKinnon owed Le Cornu, less the discount the appellant had offered them. The evidence also established that the $4,068 deposited by Ms Sneath in the appellant's account was used by him to pay his personal debts.

5 The other five charges were not alleged in the alternative. Mr and Mrs Dik were the victims of four of these. After they visited Le Cornu in June 1992 to buy furniture for a house they were building the appellant kept in contact with them. He told them of a substantial discount he could obtain if they paid their money directly to him. Their evidence was that they agreed with this suggestion and that, in the course of his telephone conversations with them, he also suggested that the three enter into a business venture to build two home units as an investment. An arrangement was accordingly made. Mr and Mrs Dik went with the appellant to inspect land at Brooklyn Park which was to be the site of the units. Mr and Mrs Dik then borrowed $84,000 on the security of their own home. Part of the loan was used to extinguish an existing mortgage. Their

evidence was that the balance was used to pay half the cost of the land and the cost of the foundations for the units. Two of the cheques were the subject of the fraudulent conversion charges on the third and fourth counts. The evidence disclosed that again the appellant used the money for his own purposes to satisfy some personal debts.

6 The fifth and sixth counts were charges of false pretences. The evidence was that after Mr and Mrs Dik had given the appellant the funds referred to in the third and fourth counts for the land and foundations, there were discussions about the building plans, in the course of which the appellant told them of problems he was having in relation to his finances: that one of his bank accounts had been frozen because of some other financial difficulties, and that this was preventing him from obtaining access to his half of the money required for their joint venture. The prosecution evidence was that the appellant sought and obtained from Mr and Mrs Dik a further $16,600 to enable him to gain access to this bank account. The appellant again spoke to Mr and Mrs Dik of continuing difficulties with his account. He sought and obtained a further sum of $6,440 from them. This was the amount referred to in the sixth count. There was evidence at the trial that the appellant had no bank account at the bank that he identified as his bank. There was a further false pretence alleged, that until funds were released to him the appellant would be unable to continue with the plan to build the units.

7 The remaining count in the information named Ms Phillips as the victim. She first met the appellant at Le Cornu in 1993. She decided to buy furniture worth some $7,700. Her evidence was that the appellant raised with her the possibility of a discount by allowing her access to his entitlements to bonus points as an employee of Le Cornu. Ms Phillips was reluctant to agree. The appellant said that she could receive a discount of $720 on the basis of his entitlements. The points to which he was entitled were in fact worth no more than about $42 and not anything like $720. Ms Phillips gave the appellant a cheque for $5,210 in response to his representations to her. Subsequently the appellant asked Ms Phillips to lend him some money. The jury was told that Ms Phillips then lent the appellant a substantial sum on the promise of high interest, but that she had not been repaid any of it. This last transaction was not the subject of any charge.

8 In evidence at the trial at which he represented himself, the appellant denied any false pretence. He claimed that the complainants were aware of the personal purpose to which their money was to be applied. He insisted that he had no intention of fraudulently denying to them the benefit of the money they provided to him. Throughout, he maintained, he held a bona fide belief that he was entitled to deal with the money in the way in which he did. In the cases of Ms Sneath, Mr McKinnon and Ms Phillips, the cheques they gave him, were, he

swore, to be applied to assist with the settlement of a contract for the purchase of units by the appellant from his father. As compensation for the making of the loan of their money he intended to provide them with a discount on their purchases at Le Cornu and to assume liability for the balance of their accounts. The appellant emphasised that these people did not require their furniture immediately, so that by lending money, they would obtain furniture, when required, at a reduced price.

9 As for Mr and Mrs Dik, he accepted that they had entered into a partnership with him to purchase land at Brooklyn Park and to build units upon it. But he said that the money they gave him was also to be used to purchase units from his father.

10 The appellant conducted his own defence at the trial. The Crown Prosecutor's cross-examination of him included the following:

> "Q: I suggest it's just a nonsense that a bank couldn't fund you with less than $2,000 on those occasions you went and asked for them.
> A: The Co-op is not a bank, it's a Building Society.
> Q: I accept this. I suggest it's just not true.
> A: That's fine.
>
> …
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> Q: Who are these salesmen who according to you also entered into such arrangements.
> A: I am not going to name names. They may still be working there. They may have been fired. They may have changed their ways. I do not know, the higher volume salesmen that had other practices similar to that arrangement.
> Q: Is it not the reason that you do not want to name names, the reason for that is because these people do not exist.
>
> …
>
> Q: You only had about $12 of bonus points at this stage.
> A: You might have thousands of bonus points or you might have heaps of bonus points. He mentioned a figure of 1,000 the bottom line is it relates back to what discount they get.
> Q: Isn't the bottom line really if you said that you had thousands of dollars of bonus points that was a lie.
> A: Yes, it would have been.

…

"Q: You admitted that [it] was a lie to suggest you had a lot of bonus points.
A: Poetic licence. All salesmen exaggerate.
Q: You brought them up again when you mentioned them in relation to discussing a discount.
A: That's correct.
Q: You knew you didn't have enough bonus points to give them bonus points at that stage.
A: Depending on what discounts you give.
Q: You had 25, as the table shows, and you were offering $1,000.
A: We are always earning bonus points though.
Q: I am suggesting to you that you knew when you phoned Mr McKinnon and Ms Sneath that you didn't have sufficient bonus points to give them 1,300 points off their account, do you agree with that.
A: If you look at the figures that would have been the case, yes.

…

Q: You told her [that] you had about $9,000 worth of [bonus] points.
A: I could have said that.
Q: You told her that in the Le Cornu's store.
A: Well, she'd have a better recollection because, as I said, she's a one-off sale. I do many sales.
Q: You accept that you told her, in the store, you had about $9,000 worth of bonus points.
A: I can't accept that. I can't remember 100 per cent the figure I said. I can only say it could have been.
Q: You accept you didn't have $9,000 worth of bonus points.
A: Absolutely.

…

Q: You see you went on to say a bit more about Mr McKinnon in that letter, didn't you. You said, in this letter, you and Mr McKinnon had quite a few business dealings.
A: That's correct.
Q: 'We have known each other for many years.'
A: That's correct.
Q: 'And had quite a few business dealings.'
A: That's correct.
Q: That was a barefaced lie.

A: That's the agreement Mr McKinnon and I had. When I spoke to him he said 'Well, tell them you've known me for a while. We want the account paid.'
Q: You are making this up as you go along.
A: No, you can have that inference. That's fine. That's what I said.

…

Q: I am asking you what did you tell them the $16,600 was for, it is a lot of money.
A: I would have said it was to assist me in the interim while I was waiting for the units to settle.
Q: Didn't they query what you meant by assist.
A: Not really. They were fairly happy to go along with my request. They did not have any, they did not seem to have any doubts because if it got to specifics I would have said to Sally 'Look, do a loan agreement in writing. Get it all out.' And they said 'No, we do not need that.'
Q: They said that.
A: Yes.
Q: That is not another detail you have made up as we have gone along.
A: The receipts speak for themselves. It is very simple, and that would have been the time to be more specific about what the money was I would imagine."

11 It was presumably on the basis of these exchanges that the trial judge gave a direction on lies which is set out in a passage from the reasons of Prior J in the Court of Criminal Appeal which we will quote. No application was made for redirection.

Court of Criminal Appeal

12 Several grounds of appeal were advanced in the Court of Criminal Appeal (Cox, Prior and Olsson JJ). Only one of those is a ground of appeal which falls for consideration by this Court. Prior J with whom Cox J agreed said this of the ground which is relevant[1]:

"This leaves the complaint about the direction given by the trial judge with respect to lies. It is complained that the direction given was not appropriate and that it could have prejudiced the appellant, whose

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1 *R v Zoneff* [1998] SASC 6977 at [19], [21]-[22].

credibility was crucial to his defence. In the trial, the prosecutor put to the appellant that in relation to certain aspects of his dealings with the alleged victims he had lied. It was also suggested to him that a number of his answers in the witness box, explanatory of what he said to the alleged victims, were lies. The prosecutor did not address the jury. It should have been obvious to the trial judge that the prosecution was not relying upon particular lies to prove guilt or add something to the case presented against the appellant. His credibility was being attacked. Early in his summing-up, the trial judge said:

> 'There have been some questions put to the accused that in fact he lied. At times it can be put to you by the Crown that if a person lies, really, it is out of what we call a consciousness of guilt. In effect, they are guilty and they are covering up, but I have to remind you, of course, that there are many, many reasons why people at times lie. Many of them, of course, not consistent with guilt.
>
> They can do it out of panic. They can do it perhaps because they are covering up for someone and, indeed, there are many other reasons.
>
> However, I think it important to look at whether a person is being deliberately untruthful. Of course, if you find they have, it may naturally affect that person's credit, whether you believe what they are saying, but in all of these situations you have to look at the manner that that was put and what was said but, bearing in mind, of course, if perhaps some person has been misled. For instance, I think Mr Zoneff was very open about how salesmen do mislead people because what they have in mind is the ultimate sale. Consequently it can be seen in that light.
>
> However, it does not detract you from looking at the Crown's obligation, really, in each case, in each of these charges, to prove it; and, as to what was said by the accused, really is a matter for you to assess and, indeed, whether that goes to his credit, perhaps not to the question of his guilt.'
>
> …

The nature of the prosecutor's cross-examination of the appellant in this case did not call for a lies direction. However, I do not think that the trial judge's direction was of such a nature as to prejudice the appellant. Nor do I think it led the jury towards improper reasoning processes. The

effect of the direction was to alert the jury to the fact that there are many reasons why people lie and, that if they found the accused was lying in the evidence given, that did not necessarily mean that the accused was guilty. To convict the appellant they had to disbelieve him in his denials. The directions given did not do the appellant's case any harm. The directions were not of such a nature as to prejudice the accused or lead the jury towards improper reasoning processes.

I would dismiss the second ground of appeal. No miscarriage of justice has resulted from the imperfections in the trial judge's directions."

13 Olsson J dissented on this issue. His Honour relevantly said this[2]:

"However, I have the misfortune to disagree with regard to the issue raised by ground 2.

In my view it was most unfortunate that the learned trial judge introduced the topic of the possibility of lies constituting evidence of consciousness of guilt. This had not been raised by the Crown.

Having raised the issue it was encumbent on the learned trial judge both to identify the lies about which he was speaking and then give a full direction in accordance with *Edwards v The Queen*[3]. In particular it was essential that the jury be told that any lie could only be taken into account as exhibiting consciousness of guilt if they were satisfied, having regard to identified circumstances and events, that it revealed a knowledge of the offences or some aspect of them and that it was told because the accused knew that the truth of the matter about which he had lied would implicate him in the offences; and because of a realisation of guilt and a fear of the truth. It was also a requirement that attention be directed to specific aspects of the evidence (if any) which might indicate a reason for lying.

The problem in the instant case is that, the learned trial judge having raised the topic, it was largely left up in the air. There was a serious danger that the jury might, themselves, seek to identify relevant lies and then draw adverse conclusions from them in an uninformed and impermissible

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2 *R v Zoneff* [1998] SASC 6977 at [26]-[30].

3 (1993) 178 CLR 193.

manner. The directions given fell far short of those mandated in *Edwards v The Queen*.

This situation necessarily gave rise to a mistrial. Despite what was, plainly, a very strong case against the appellant it seems to me that this court is bound to allow the appeal, set aside the convictions recorded and direct a retrial. I would order accordingly."

The Appeal to this Court

14 In this Court the appellant puts his case in the alternative: that the trial judge should not have embarked in his summing up upon the topic of possible lies at all; or, if his Honour was entitled or bound to give directions on the topic, he should have given them in accordance with the judgment of this Court in *Edwards v The Queen*.

15 The meaning of the phrase "consciousness of guilt", the risk that its use by the trial judge may itself suggest guilt, which circumstances call for the giving of an *Edwards*-type direction, and the difficulty in distinguishing between lies going to credibility and those indicating guilt have been matters of some controversy. The Court of Appeal in Victoria in a series of cases, *R v Morgan*[4], *R v Renzella*[5], *R v Laz*[6], *R v Erdei*[7], *R v Cervelli*[8] and *R v Konstandopoulos*[9] has sought to grapple with the problems. But as Hayne JA in *Morgan*[10] suggests, rigid prescriptive rules as to when and in what precise terms an *Edwards*-type direction should be given cannot be comprehensively stated.

16 There may be cases in which the risk of misunderstanding on the part of a jury as to the use to which they may put lies might be such that a judge should

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4 Unreported, 13 August 1996.

5 [1997] 2 VR 88.

6 [1998] 1 VR 453.

7 [1998] 2 VR 606.

8 [1998] 3 VR 776.

9 [1998] 4 VR 381.

10 *R v Morgan* unreported, Court of Appeal of Victoria, 13 August 1996 at 4.

give an *Edwards*-type direction notwithstanding that the prosecutor has not put that a lie has been told out of consciousness of guilt. As a general rule, however, an *Edwards*-type direction should only be given if the prosecution contends that a lie is evidence of guilt, in the sense that it was told because, in the language of Deane, Dawson and Gaudron JJ in *Edwards*[11], "the accused knew that the truth ... would implicate him in [*the commission of*] the offence" and if, in fact, the lie in question is capable of bearing that character. (The words in italics are ours and, for the sake of clarity, should be included in the statement of principle.)

17 Moreover, if there is a risk of confusion or doubt as to the way in which the prosecution puts its case, the trial judge should inquire of the prosecution whether it contends that lies may constitute evidence of consciousness of guilt and, if so, he or she should require identification of the lie or lies in issue and the basis on which they are said to be capable of implicating the accused in the commission of the offence charged[12].

18 This was an unusual case. The prosecutor did not, during cross-examination, in terms, or in our view, by implication, suggest that any answer given was a lie, told out of consciousness of guilt (a phrase we use for convenience). Moreover, as the prosecutor did not address the jury, no such suggestion was made at any later stage of the trial.

19 In this Court the respondent prosecutor reiterates that no reliance was, in the courts below, or is here, placed upon the answers given to found a submission that the appellant lied, out of a consciousness of guilt.

20 It follows in our opinion that it was unnecessary, indeed undesirable, that a direction of the kind with which *Edwards* was concerned be given in the circumstances of this case. In order to give it in this case the trial judge would have had to decide which of the appellant's answers were or were not capable of being regarded as lies indicative of a consciousness of guilt. Such a direction here could have had 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 of the appellant.

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11 (1993) 178 CLR 193 at 211.

12 See *Osland v The Queen* (1998) 73 ALJR 173 at 183 per Gaudron and Gummow JJ; 159 ALR 170 at 182.

21 Because the Crown did not put, either in cross-examination or in any submission at the trial that there was any material capable of being regarded as a lie stemming from a consciousness of guilt, the direction that the majority in the Court of Criminal Appeal quoted and which is set out above, should not have been given.

22 The trial judge was evidently concerned that, having regard to some of the cross-examination, there was a serious risk that the jury might engage in an impermissible process of reasoning in relation to the matter of lies. Unfortunately, his response was to give a direction which, as Olsson J observed, raised the topic and then left it largely up in the air.

23 A direction which might have appropriately been given and which would have allayed any concerns which the trial judge may have had, in this unusual case, in which the issues may not have been defined as they might have been had the prosecutor made a speech to the jury, is one in these terms:

> "You have heard a lot of questions, which attribute lies to the accused. You will make up your own mind about whether he was telling lies and if he was, whether he was doing so deliberately. It is for you to decide what significance those suggested lies have in relation to the issues in the case but I give you this warning: do not follow a process of reasoning to the effect that just because a person is shown to have told a lie about something, that is evidence of guilt."

24 A direction in such terms may well be adaptable to other cases in which there is a risk of a misunderstanding about the significance of possible lies even though the prosecution has not suggested that the accused told certain lies because he or she knew the truth would implicate him or her in the commission of the offence.

25 For the trial judge here to refer to, indeed raise, on his own initiative in the way in which his Honour did, the possibility of a consciousness of guilt without any identification of relevant answers, and without any further explanation, was to invite the jury to infer that the alleged lies might be indicative of a consciousness of guilt, a proposition for which the prosecution has not contended, and does not now contend.

26 The only remaining question is whether, because the Crown case was a strong case, there has been no substantial miscarriage of justice. On this matter, we find ourselves in agreement with Olsson J that there should be a retrial. In a case of false pretences there is obviously much scope for misunderstanding by a jury with respect to the issues of dishonesty. We cannot be satisfied that a

relevant misunderstanding may not have infected the minds of the jury on the basis of the direction which was given.

27 We would allow the appeal and in place of the orders made by the Court of Criminal Appeal order that the appeal to that Court be allowed, the convictions on counts 2 - 7 in the Information be quashed and that there be a retrial.

28 KIRBY J. Lies are the subject of this appeal. Lies and how (if at all) a judge presiding at a jury trial should instruct the jury concerning the way they may use a conclusion that the accused has lied.

29 Lies, or suggested lies, are no strangers to criminal trials. The very nature of such proceedings makes it common, particularly where the accused gives evidence, that claims and counterclaims about lies will arise for the jury's consideration[13]. This has long been so. But the subject of lies has recently acquired a certain "mystique" in the law[14]. Now the case books, in this country[15] and overseas[16] are full of suggestions that trials have miscarried for erroneous or inadequate jury directions about lies. Academic writers and legal practitioners have found the topic a fertile one[17]. Many a lengthy trial has ultimately failed because of perceived errors in judicial directions about lies[18].

30 As is its wont, the law has tended to complicate needlessly a subject that calls upon the jury's reserves of common sense. This result sends appellate courts in search of responses. These may include the provision of guidelines or standard directions which will help render the judge's charge to the jury appeal-

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13 *Harris v The Queen* (1990) 55 SASR 321 at 323 per King CJ.

14 *R v Toia* [1982] 1 NZLR 555 at 559.

15 The leading Australian cases include: *Edwards v The Queen* (1993) 178 CLR 193; *Osland v The Queen* (1998) 73 ALJR 173; 159 ALR 170; *R v Heyde* (1990) 20 NSWLR 234; *R v Renzella* [1997] 2 VR 88; *Harris v The Queen* (1990) 55 SASR 321; *Buck* (1982) 8 A Crim R 208 at 214; *Lonergan v The Queen* [1963] Tas SR 158 at 160.

16 In England: *R v Lucas* [1981] QB 720; *R v Richens* [1993] 4 All ER 877; Canada: *R v Marinaro* [1996] 1 SCR 462; *R v White* (1998) 125 CCC (3d) 385; New Zealand: *R v Dehar* [1969] NZLR 763; *R v Gibbons* [1973] 1 NZLR 376; *R v Collings* [1976] 2 NZLR 104; *R v Toia* [1982] 1 NZLR 555; Privy Council: *Broadhurst v The Queen* [1964] AC 441.

17 For example Mathias, "Lies directions", [1995] *New Zealand Law Journal* 307 (hereafter "Mathias"); Palmer, "Guilt and the Consciousness of Guilt: The Use of Lies, Flight and Other 'Guilty Behaviour' in the Investigation and Prosecution of Crime", (1997) 21 *Melbourne University Law Review* 95 (hereafter "Palmer"); Flatman and Bagaric, "Juries Peers or Puppets – The Need to Curtail Jury Instructions", (1998) 22 *Criminal Law Journal* 207 (hereafter "Flatman and Bagaric").

18 Wood, "Criminal Law Update: Court of Criminal Appeal", (1999) 4 *The Judicial Review* 217 at 238.

proof[19]. Or it may result in a conclusion that the law has become needlessly complex and that judicial directions should be simplified and confined to a minimum[20]. In some cases (such as the present), it requires an appellate court to consider "the proviso"[21] and to treat any "imperfections in the trial judge's directions"[22] as insubstantial when that court is convinced that no relevant miscarriage of justice has resulted.

The facts

31 Mr Ivan Zoneff ("the appellant") was convicted in the District Court of South Australia following a trial by jury. The jury found him guilty on six of seven counts of an information charging him with offences of false pretences and fraudulent conversion. On all but one of the counts, the verdict was by majority. The count on which he was found not guilty (count 1), was alternative to a count on which he was found guilty (count 2). So the effect of the verdicts was that the jury found the appellant guilty of an offence in respect of each of the dealings relied on. The total amount of money involved in the offences was about $73,000. The presiding judge (Lowrie DCJ), sentenced the appellant separately in respect of each of the counts on which he was convicted. The sentences totalled seven years and six months imprisonment. Because the offences had been committed whilst the appellant was on parole following earlier convictions and a sentence for similar offences[23], he was ordered to serve a total sentence of ten years nine months and 26 days imprisonment. A non-parole period of six years was fixed.

32 The appellant appealed against the convictions and sentence to the Court of Criminal Appeal of South Australia. That Court, by majority[24], dismissed the appeals against the convictions. It unanimously upheld the appeal against

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19 A list of twelve "principal points to be borne in mind" appears in *R v Renzella* [1997] 2 VR 88 at 91-92. In Victoria there is no invariable rule of practice to give a direction concerning lies where the lies are judged to "go only to credit". See *R v Morgan*, unreported, Court of Appeal, 13 August 1996 noted in *Renzella*, at 91.

20 cf New Zealand Law Commission, *Juries in Criminal Trials* (Pt 2), Preliminary Paper No 37, (1999), vol 2 (hereafter "New Zealand Law Commission") at par 7.34.

21 *Criminal Law Consolidation Act* 1935 (SA), s 353 (1).

22 *R v Zoneff* [1998] SASC 6977 at [22] per Prior J.

23 *R v Zoneff* [1998] SASC 6977 at [23] per Prior J.

24 Cox and Prior JJ; Olsson J dissenting.

sentence. It reduced the appellant's total sentence[25]. By special leave, the appellant appeals to this Court against his convictions. The sole ground upon which special leave was granted concerns the point on which the Court of Criminal Appeal divided. The appellant complains about the direction given to the jury by the trial judge concerning lies. He asserts that the judge should have given a full direction in accordance with the principles set out in *Edwards v The Queen*[26].

33 The charges against the appellant had a common theme. Each related to representations alleged to have been made by the appellant to customers of Le Cornu Furniture Centre ("the centre") in suburban Adelaide where the appellant was then working as a salesman. According to the prosecution, the appellant ingratiated himself with customers, fostered their friendship, procured the payment to him of moneys, mostly for furniture ordered by them, and then betrayed their trust by dishonestly dealing with such moneys otherwise than as promised[27]. Relevantly, five customers were involved. To explain and justify the conclusions to which I come, different from the majority, it is necessary to set out in some detail the facts as disclosed in the evidence at trial. I regard the evidence as presenting a compelling, indeed overwhelming, case against the appellant.

34 The first two customers were Ms Sneath and Mr McKinnon (counts 1 and 2). The prosecution case was that the appellant had persuaded them to pay him an amount which was outstanding on their furniture purchases from the centre. The inducement was that they would thereby secure the benefit of certain bonus points to which he represented himself to be entitled as part of his employment conditions. It was alleged that the appellant offered an additional discount of $720 if the couple sent the money owing to the centre directly to him. Because they stated that they believed that the appellant was acting in his capacity as an employee and had authority to do as he suggested, Ms Sneath and Mr McKinnon went along with the proposal. The former paid $4,068 into the appellant's account with a building society. That was the sum in which she and Mr McKinnon were then indebted to the centre, less the discount which the appellant had offered. The evidence established that the sum deposited into the appellant's account was used by him to pay personal debts. Although the jury found the appellant not guilty of a charge of false pretences (first count)[28], it

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25 To seven years, three months and 26 days with a non-parole period of five years pursuant to the *Criminal Law (Sentencing) Act* 1988 (SA), s 32(2).

26 (1993) 178 CLR 193.

27 *R v Zoneff* [1998] SASC 6977 at [5] per Prior J.

28 Pursuant to *Criminal Law Consolidation Act* 1935 (SA), s 195(1)(a).

convicted him of the count of fraudulent conversion[29] in respect of the amount of $4,068 paid to him by Ms Sneath.

35 The remaining five charges were not expressed to be in the alternative. Four of them related to a second couple, Mr and Mrs Dik. They had purchased furniture from the centre in June 1992. Following their purchase, the appellant telephoned them from time to time. Eventually, he told them that they could secure a substantial discount if they paid their money to him, rather than to the centre. They agreed. In the course of subsequent telephone conversations, the appellant also proposed that they should together enter a business venture with him to build two home units. They went with the appellant to inspect land at Brooklyn Park in Adelaide. When they agreed to the appellant's proposal, they borrowed $84,000 by raising a mortgage over their home. Their understanding was that the funds (less an amount to discharge an existing mortgage) would be used to finance half the cost of the land at Brooklyn Park and the initial building costs for the home units. Two of the cheques paid to the appellant were the subject of the third and fourth counts in the information. The evidence called at the trial showed clearly that once the appellant had banked the cheques, he used the funds to pay personal debts.

36 Mr and Mrs Dik gave further evidence that following these payments, the appellant informed them of problems that he was having in raising the finance necessary to make his contribution to the joint venture. He told them that his bank account had been frozen. He sought and obtained from them a further $16,600 which he represented as necessary to free up his bank account. Soon afterwards, the appellant told Mr and Mrs Dik of continuing difficulties he was having with his bank. He sought and obtained from them a further sum of $6,440 which they paid by cheque. These payments were the subjects of the fifth and sixth counts. The gist of the offences alleged was the representation made by the appellant to Mr and Mrs Dik at a time when there was no account at the bank which he had identified at which his funds were said to have been frozen. According to the prosecution case at trial, the appellant was never in a financial position to fulfil his part in the enterprise into which he had induced Mr and Mrs Dik to enter.

37 The seventh count related to an offence of false pretences allegedly involving Ms Doreen Phillips. She too had been a customer of the centre. In 1993 she had purchased a large amount of furniture worth $7,700. In her case, the appellant raised the subject of her obtaining a discount by taking advantage of his employee bonus points. At first Ms Phillips was disinclined to agree to this unconventional proposal. However, the appellant called on her at her home. He proposed that she could have a discount of $720 because of the bonus points he

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29 Pursuant to *Criminal Law Consolidation Act* 1935 (SA), s 184.

then had in a staff incentive scheme operated by the centre. The prosecution called evidence that the points available to the appellant under the scheme were worth approximately $42. This was well short of the amount represented. Ms Phillips gave the appellant a cheque for $5,210, accepting his representation that he was authorised to receive the cheque and to provide her with the discount stated. The evidence demonstrated that he was not. Subsequently, the appellant made further contact with Ms Phillips and asked to borrow money from her. It seems that she agreed and lent him a sum which was not repaid. However, this was not the subject of a count in the information.

38 The appellant elected to represent himself at his trial. He gave evidence. He alleged that the customers were aware of the personal purposes to which he intended to put the moneys that they paid him. He denied any fraudulent intention. He claimed a genuine and bona fide belief that he was entitled to deal with the moneys paid to him in the way that he did. In essence, he contended that the customers, who did not require their furniture immediately, made loans to him to assist him in the eventual purchase from his father of home units. In return for the loan of their moneys, the appellant said he would take over the customers' liability for the balance of their accounts with the centre, provide them with a discount and ensure that when they required it, they would receive their furniture at a reduced price. As for the special arrangement with Mr and Mrs Dik, the appellant claimed that they had entered into a partnership with him and that they knew that the money they gave him would be used to assist in purchasing the home units from his father.

39 The prosecution case against the appellant had four essential elements. The first was the inherent unlikelihood and irregularity of the representations made by the appellant to the customers of his employer. The second was the *modus operandi* of the appellant which portrayed marked similarities in the people from whom he chose to borrow. The third were the representations which the appellant made that he had authority to act as he did and that he would expend the moneys received in particular ways. The fourth was the representation that the appellant could procure discounts and, in the case of Ms Phillips, the provision to her of bonus points far beyond those that stood to his credit in the staff incentive scheme. Whatever differences existed between the assertions of the several customers, with their recurring themes, and the denials and claims of the appellant, the prosecution case rested substantially on objective facts. The appellant had no authority to deal with customers of his employer in the ways he did when he procured the payments from them. The bank records showed that those funds were expended to reduce personal debts. The appellant's bank records proved that at the time each of the payments was obtained, the appellant had very little money to his credit. Within days of their deposit the funds were largely dissipated. They were typically withdrawn in a series of relatively small amounts, often from a number of different branches on the same day.

The alleged lies

40 In conformity with Crown practice in South Australia, because the appellant was not legally represented at his trial, the prosecutor elected not to address the jury. For this reason the precise way in which the prosecution subjectively intended to use any alleged lies which it had exposed in cross-examination of the appellant was not explained, either to the judge or to the jury[30]. It is therefore necessary to draw inferences from the passages in the transcript in which it appears that the prosecutor was suggesting to the appellant that the evidence he had given was false.

41 In a case where the prosecutor addresses the jury, a trial judge is entitled to require the prosecutor to make clear the way in which it is being suggested that lies, allegedly told out of court or during evidence, should be used by the jury in performing their functions[31]. Where, as here, there was no address but simply the testimony of the accused, the purpose of the prosecutor, objectively ascertained, had to be extracted from the questioning, its relevance to the issues and its context.

42 In cross-examining the appellant about his arrangements with Ms Sneath and Mr McKinnon, the prosecutor asked him whether other salesmen at the centre where he was employed had used the "bonus point" technique. The following exchanges ensued:

> "Q. Isn't it the case when you were at Le Cornus with Mr McKinnon and Ms Sneath you were already intending to do some deal with them to get access to their money.
> A. I doubt it, I would have been far too [busy] to think about it at that time.
> Q. You have heard them say that whilst you were at Le Cornus you introduced the topic of the bonus points. Why did you introduce that.
> A. Everybody knows that it is a common practice with larger sales, you offer incentive discount.
> Q. Everybody, who are these salesmen who do it, name them.
> A. I am not going to name them. They are the high producers who do it. I am not going to name them.
> Q. Why not.

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30 At the end of his charge, the trial judge asked the prosecutor whether she wished him to correct anything he had said or to redirect the jury. He received a negative answer.

31 *Osland v The Queen* (1998) 73 ALJR 173 at 183 per Gaudron and Gummow JJ; 159 ALR 170 at 182.

A. I am not going to put them in a position where they could get into trouble.
Q. Presumably, according to you, if they had not been ripping the customer off - unless they are ripping the customers off, presumably, they are not going to get into any problems of entering into this transaction because it is all above board.
A. I know when I left there was a lot of change of policy, even Mr Casey said that they had changed the points system in Le Cornus since this time. I think that indicates that there may have been an abuse of it.
Q. There certainly was, you did not pay into customers' account.
A. That is correct.
Q. Who are these salesmen who according to you also entered into such arrangements.
A. I am not going to name names. They may still be working there. They may have been fired. They may have changed their ways. I do not know, the higher volume salesmen that had other practices similar to that arrangement.
Q. Is it not the reason that you do not want to name names, the reason for that is because these people do not exist."

43 Subsequently, in relation to his dealings with Mr McKinnon and Ms Sneath, the appellant admitted that he had lied:

"Q. You only had about $12 of bonus points at this stage.
A. You might have thousands of bonus points or you might have heaps of bonus points. He mentioned a figure of 1,000 the bottom line is it relates back to what discount they get.
Q. Isn't the bottom line really if you said that you had thousands of dollars of bonus points that was a lie.
A. Yes, it would have been."

44 In further cross-examination, it was put directly to the appellant that his evidence concerning his relationship with Mr McKinnon had been a "barefaced lie":

"Q. You see you went on to say a bit more about Mr McKinnon in that letter, didn't you. You said, in this letter, you and Mr McKinnon had quite a few business dealings.
A. That's correct.
Q. 'We have known each other for many years.'
A. That's correct.
Q. 'And had quite a few business dealings.'
A. That's correct.
Q. That was a barefaced lie.

A. That's the agreement Mr McKinnon and I had. When I spoke to him he said 'Well, tell them you've known me for a while. We want the account paid.'
Q. You are making this up as you go along.
A. No, you can have that inference. That's fine. That's what I said."

45 In relation to the appellant's dealings with Mr and Mrs Dik, he was asked questions concerning his bank withdrawals:

"Q. To get this quite clear: Is it your evidence that the reason, on occasions, over 18 February and 19 February, you've taken out lesser amounts than $2,000 in cash, is because the bank didn't have the money.
A. I would say possibly, or I might have gone to an odd amount for something else, but generally they did not always have the amount that you wanted, but other than that, I can't offer you a logical explanation.
Q. I suggest it's just a nonsense that a bank couldn't fund you with less than $2,000 on those occasions you went and asked for them.
A. The Co-op is not a bank, it's a Building Society.
Q. I accept this. I suggest it's just not true.
A. That's fine."

46 It was in this connection that the appellant was urged to tell the jury the truth, implying that he had not earlier done so:

"Q. You just said a moment ago, bearing in mind the 16,000 went into your account – 16,600 – on 24 February, it was around about that day or period that you told the Diks you couldn't settle, is that right.
A. You know, I am only going on hypotheticals here. I can't say for sure.
Q. How about we leave hypotheticals alone and you start to tell the ladies and gentlemen the truth. When did you tell Mr and Mrs Dik that you were going to have difficulties meeting settlement day.
A. If you want me to be honest, I cannot remember, but it would have been some time in February."

47 The appellant was questioned concerning his representations to Mr and Mrs Dik:

"Q. Is your evidence that right from the outset when you met Mr and Mrs Dik you were completely honest and frank with them in all of the dealings that you had with them.
A. Absolutely.

..."

Q. You said you had a builder's licence.
A. I didn't.
Q. In 1985.
A. That is incorrect. I said that I was a licensed builder. At no time did I state to them that I had a current licence because I did not renew it in the 80s. But, I had access to one if I wanted to.
Q. You have had a builder's licence since 1985.
A. Yes, but I let it lapse. You can renew your licence if you wish, you can apply.
Q. You told them that you were giving them discount via the employee bonus scheme.
A. I did not question them on that.
Q. That was a lie.
A. I honestly cannot remember doing any form of discount with the Diks.
Q. They are lying about the discount.
A. I am saying I personally cannot remember that because there was no need for it. That was very usual in 1990 early in 1992, I think."

48 In relation to his transactions with Ms Phillips, the appellant admitted that he had lied about the number of bonus points that he had to his credit:

"Q. You told her you had about $9,000 worth of points.
A. I could have said that.
Q. You told her that in the Le Cornu's store.
A. Well, she'd have a better recollection because, as I said, she's a one-off sale. I do many sales.
Q. You accept that you told her, in the store, you had about $9,000 worth of bonus points.
A. I can't accept that. I can't remember 100 per cent the figure I said. I can only say it could have been.
Q. You accept you didn't have $9,000 worth of bonus points.
A. Absolutely."

49 In most criminal trials where the accused gives evidence, and in virtually all trials involving charges of fraudulent conversion and false pretences, what the accused says will contradict, in important respects, the testimony of other witnesses such as the alleged victims. In such circumstances it will commonly be suggested (as it was here) that the evidence of the accused is false. Rules of law and of practice may require this to be done[32]. Traditionally, it was left to the jury to determine the version of events (if any) to be accepted. With proper instruction and warnings, it is for the jury to decide whether the prosecution has established its case to the requisite standard.

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32 *Browne v Dunn* (1893) 6 R 67; *E* (1995) 89 A Crim R 325 at 331.

The trial judge's direction

50 Because of the limited grant of special leave, only one relatively short passage in the trial judge's charge to the jury is of concern to this Court. It relates to the direction which the judge gave concerning the issue of lies and how the jury should approach that issue. The trial had lasted seven days. The charge began late on the morning of the seventh day of the hearing. It was relatively brief. It concluded just before lunch. The direction complained of occurred early in the charge. It is set out in the majority's reasons and I will not repeat it. It was amongst a number of general directions which the judge gave. As it appears in the transcript, Lowrie DCJ also said[33]:

> "Some people have good memories, some people have not as good a memory. Some people's memories and observations are awful, and you look at that evidence and you say 'Well, what is this evidence?'
>
> Sometimes there may be inconsistencies in that evidence which you feel you can say 'Well, that person is endeavouring to tell the truth although there are some inconsistencies. I do not necessarily reject that evidence, I think they are doing their best to tell the truth.'
>
> Even sometimes those inconsistencies may well be major. You may well think 'Well, I think they are endeavouring to tell the truth and I accept their evidence.' You may get to a stage where, because of inconsistencies, they are too much, and you say 'Well, that evidence is unreliable, I am not prepared to act on it' or, indeed, the final stage where you say 'Well, I believe that person is wrong' and eventually that is the case and you would not accept their evidence."

The Court of Criminal Appeal's decision

51 In the Court of Criminal Appeal all of the judges considered that this direction suffered from "imperfections"[34]. The majority (Prior J with Cox J concurring) did not accept that, in the questions asked, the prosecution had been presented as one in which the jury would be entitled to convict the appellant on the basis that any lies found would be ground enough for an inference of guilt of the particular charges which the appellant faced. The majority were not convinced that any miscarriage of justice had resulted from the defects in the judge's directions. On the contrary, they concluded that the directions had not caused the appellant's case any harm; that they did not lead the jury towards

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33 *R v Zoneff* unreported, District Court of South Australia, 16 April 1997 at 3-4.

34 *R v Zoneff* [1998] SASC 6977 at [22] per Prior J.

improper reasoning; and that their effect was to alert the jury, correctly, to the fact that a finding that the appellant had lied did not necessarily mean that he was guilty as charged[35].

52 The dissenting judge (Olsson J)[36], on the other hand, considered that it was "most unfortunate" that the trial judge had introduced the possibility of lies constituting "evidence of consciousness of guilt". He said that this had not been raised by the Crown. Once it was raised by the judge he had a duty to give what he described as a "full direction" in accordance with the decision of this Court in *Edwards*[37]. This would have required identification of "specific aspects of the evidence ... which might indicate a reason for lying" and specification of the preconditions necessary to reaching a conclusion that a finding that the appellant had lied on a particular occasion constituted "consciousness of guilt" of a particular offence[38].

53 In this Court, the appellant supported the approach of the dissenting judge. The Crown submitted that, read in context and in its entirety, the charge was not so defective as to require appellate intervention. If it was, the Crown argued that the majority had been correct to dismiss the appeal on the basis of the proviso[39].

Criteria for judicial directions on lies

54 There are a number of considerations which apply to a review by this Court of judicial directions to a jury. I do not attempt an exhaustive list. Some of the considerations are relevant generally. Some of them are particularly applicable to directions concerning the subject of lies.

55 First, the overriding principle is that the trial judge must ensure, to the best of his or her ability, that the accused secures a fair trial, held in accordance with law[40]. This is why it is always important to consider the judicial directions complained about in the context of the issues that were fought at the trial, the addresses that have preceded it and the requests (if any) for redirection. There could be few developments more destructive to the character of a jury trial, as it

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35 *R v Zoneff* [1998] SASC 6977 at [21] per Prior J.

36 *R v Zoneff* [1998] SASC 6977 at [27]-[28] per Olsson J.

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

38 *R v Zoneff* [1998] SASC 6977 at [28] per Olsson J.

39 *Criminal Law Consolidation Act* 1935 (SA), s 353(1).

40 *Longman v The Queen* (1989) 168 CLR 79 at 86.

has been conducted for centuries, than a minute and pernickety attention to the words of the judge's charge, divorced from their context and expressed purposes. Legal accuracy is demanded. But in most cases, particular verbal formulae are not[41]. The judge is speaking to a jury. The regurgitation of a fixed form of words, read out to render the directions appeal-proof, would significantly alter the character of a jury trial. It would distort effective oral communication with the jury.

56 Secondly, it is unnecessary for a judge to tell a jury more than they must know to guide them to the decision on the issues in the case which are legally relevant[42]. Because of the possible significance of some general issues and their recurring importance in criminal trials and appeals, it is sometimes suggested that good practice will oblige the judge to lend the authority of the judicial office to appropriate directions on such matters[43]. Obviously, directions on the onus and standard of proof and on the respective functions of the jury, the judge and the parties or their advocates must be given. Beyond that there is often room for difference of opinion as to what may be left to judicial discretion having regard to the circumstances of the particular case and the desirability of avoiding needless appeals[44]. Even where a direction is required, the appellate court is concerned with its substantial accuracy; not with its elegance or verbal felicity as such.

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41 There are exceptions such as the rule against explaining the meaning of "beyond reasonable doubt". See eg *Hicks v The King* (1920) 28 CLR 36; *Thomas v The Queen* (1960) 102 CLR 584 at 593, 595, 604; *Dawson v The Queen* (1961) 106 CLR 1 at 18; *La Fontaine v The Queen* (1976) 136 CLR 62; cf *Brown v The King* (1913) 17 CLR 570 at 595-596; *Chedzey* (1987) 30 A Crim R 451; New Zealand Law Commission, at par 7.16 where it is suggested that there may be surprising misunderstandings concerning this instruction.

42 *Alford v Magee* (1952) 85 CLR 437 at 466; *Melbourne v The Queen* (1999) 73 ALJR 1097 at 1125; 164 ALR 465 at 503.

43 Such as the good reputation or character of the accused person; cf *R v Aziz* [1996] AC 41; *R v Falealili* [1996] 3 NZLR 664; *Melbourne v The Queen* (1999) 73 ALJR 1097; 164 ALR 465.

44 *Melbourne v The Queen* (1999) 73 ALJR 1097; 164 ALR 465 was such a case. The majority of the Court concluded that there was no general obligation to give the jury a direction on the way in which evidence of good character might be used. See also *Simic v The Queen* (1980) 144 CLR 319 at 332; cf *Melbourne v The Queen* (1999) 73 ALJR 1097 at 1119-1122; 164 ALR 465 at 495-498; and the holdings of the Court of Appeal of New Zealand in *R v Falealili* [1996] 3 NZLR 664 and of the House of Lords in *R v Aziz* [1996] AC 41.

57 Thirdly, when it comes to lies, or alleged or suspected lies, there is a general consideration which will ordinarily need to be taken into account by a judge in deciding whether directions of some kind are necessary to discharge the judge's primary function. I refer to the concern expressed in the well known decision of the Privy Council in *Broadhurst v The Queen*[45], delivered by Lord Devlin:

> "It is very important that a jury should be carefully directed upon the effect of a conclusion, if they reach it, that the accused is lying. There is a natural tendency for a jury to think that if an accused is lying, it must be because he is guilty, and accordingly to convict him without more ado. It is the duty of the judge to make it clear to them that this is not so. Save in one respect, a case in which an accused gives untruthful evidence is no different from one in which he gives no evidence at all. In either case the burden remains on the prosecution to prove the guilt of the accused. But if upon the proved facts … inferences may be drawn about the accused's conduct or state of mind, his untruthfulness is a factor which the jury can properly take into account as strengthening the inference of guilt. What strength it adds depends, of course, on all the circumstances and especially on whether there are reasons other than guilt that might account for untruthfulness."

58 Although this passage has sometimes been criticised as exhibiting "circular reasoning"[46], its essential point displays a great deal of common sense. The jurors are discharging functions that are onerous, formal and commonly unfamiliar to them. It would be relatively easy for them to fall into the error of attaching excessive or irrelevant significance to a conclusion that the accused (or an important witness in the accused's case) has told a lie. A warning of the *Broadhurst* kind, given with judicial authority, might be a healthy corrective to this kind of reasoning. Its general character and practical wisdom are precisely the kind of assistance which a judge might be expected to give to the jury where the suggestion of lying has been made by questioning or by submissions. I believe that this is what this Court meant in *Edwards* when the majority stated that "the jury should be instructed that there may be reasons for the telling of a lie

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45 [1964] AC 441 at 457; cf *Harris v The Queen* (1990) 55 SASR 321 at 323 per King CJ.

46 Mathias, at 308, ie that the jury might be invited to consider whether a lie was told because of guilt and then to decide whether the Crown case became strong enough to prove such guilt; cf *R v Dehar* [1969] NZLR 763 at 765-766; *Edwards v The Queen* (1993) 178 CLR 193 at 209.

apart from the realization of guilt" and should be informed what those reasons are[47].

59 Fourthly, legal analysis has gone beyond the foregoing generalities. Leaving aside irrelevant or inconsequential lies, a distinction has been drawn between so-called "credibility lies" and "probative lies"[48]. The former are said to be those which, according to their content, affect the credibility of the accused's evidence and thus the weight which the jury may give to other testimony of the accused. In this sense, a conclusion that the accused has lied upon one matter, even peripheral to the offence charged, may make the jury scrutinise with more care (perhaps scepticism) other testimony given by the accused. It might, in this way, contribute *indirectly* to the rejection of the accused's version of critical events and the acceptance of that propounded by the prosecution.

60 Probative lies, on the other hand, are those "which naturally indicate guilt ... a hard test to satisfy"[49]. This is a "hard test" precisely because it is rare that a lie about a particular matter will be so crucial as, of itself, if proved, to establish *directly* guilt beyond reasonable doubt of a criminal offence. It could happen if, for example, the lie related to an object indisputably linked to the offence. Take a handkerchief with bloodstains proved by DNA evidence to be that of the victim but falsely attributed by the accused to a nosebleed. It is testimony of this kind that has been explained as evidencing a "consciousness of guilt"[50]. It is said to be such a lie because the accused tells it knowing that telling the truth would necessarily, and without more, establish guilt of the offence charged.

61 This explanation (and the phrase which it has engendered) can probably be traced to early psychological suggestions, picked up in the writings of Wigmore, that the commission of a crime somehow leaves "mental traces" on the criminal which show themselves just as surely as "indelible traces of blood, wounds or rent clothing, which point back to the deed as done by him"[51]. According to this psychological theory, the "traces" will ultimately find their outlet in the criminal's conduct. They will permit a jury to conclude that the accused is guilty

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47 (1993) 178 CLR 193 at 211-213.

48 Mathias, at 307.

49 cf *R v Toia* [1982] 1 NZLR 555 at 559.

50 *Edwards v The Queen* (1993) 178 CLR 193 at 210.

51 *Wigmore on Evidence*, 3rd ed (1940), vol 1 at §172 discussed in Palmer, at 105-106. See also Freud, "Fragment of an Analysis of a Case of Hysteria" in Strachey (ed), *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, (1953), vol 7 at 78 noted in Palmer, at 114.

of the offence because it elicits the manifestation of such "traces". They are thus equivalent to a confession or admission of guilt. There are illustrations of this theory in literature from Shakespeare[52] to Dostoyevsky[53].

62 The process of reasoning that is postulated in the notion of "consciousness of guilt" is well explained by Windeyer J in *Woon v The Queen*[54]. His Honour there drew attention to an obvious defect in the theory, namely that some evidence propounded to amount to probative lies (because manifesting a suggested "consciousness of guilt") may prove no more than that the accused had some connection with the wrong-doing but one which fell far short of demonstration of guilt of "the crime alleged, in manner and form alleged"[55]. Thus in the case of the blood-stained handkerchief it might have been handed to the accused by a family member or lover whom he or she wished to protect. In *Woon*, Kitto J unconsciously disclosed the source of this theory by using, as though they were interchangeable, the phrases "consciousness" of guilt and "guilty conscience"[56]. Other authors have pointed to additional flaws in the theory. Some offenders, undoubtedly *conscious* of their guilt, may suffer from no *feelings* of guilt whatever[57]. The scientific underpinning of the notion of "consciousness of guilt" seems highly dubious, to say the least.

63 Recently, in *R v White*[58] the Supreme Court of Canada expressed a view about "consciousness of guilt evidence", with which I agree. It said that the "label is somewhat misleading and its use should be discouraged". In its place that Court has proposed[59] what it describes as a more "general description" using "more neutral language" such as "evidence of post-offence conduct". At least

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52 *Macbeth*, II.2.31-32 noted in Palmer, at 136. See also his reference to Claudius' inability to pray in *Hamlet*, III.3.40 observing "My stronger guilt defeats my strong intent".

53 *Crime and Punishment*, (translation by Gilbert) (1951) at 348 cited in Palmer, at 105.

54 (1964) 109 CLR 529 at 541-542.

55 (1964) 109 CLR 529 at 542.

56 (1964) 109 CLR 529 at 535.

57 Palmer, at 106.

58 (1998) 125 CCC (3d) 385 at 398 per Major J for the Court.

59 Following the opinion of the Court of Appeal of Ontario in *R v Peavoy* (1997) 117 CCC (3d) 226 at 238.

two considerations support this change. First, it adopts an objective classification. It concentrates on the significance of such conduct (including lies). It postulates no necessary psychological well-springs ("mental traces") for lies. It merely measures any suggested lies against other evidence of the accused's involvement in the crime. Secondly, as the Canadian court points out, the words "consciousness of guilt" suggest a conclusion about the conduct in question which tends to undermine the presumption of innocence[60]. The expression may prejudice the accused in the eyes of the jury. This is the "circularity" to which reference has earlier been made. It should be avoided in any direction about the use that may be made of a juror's belief that the accused has lied in or out of court. That is the law in Canada. It should be accepted as the law in Australia.

The requirement of comprehensibility

64 The phrase "consciousness of guilt" is also extremely opaque. It is difficult for those trained in the law to keep clearly in mind the distinction between evidence going to "credibility" (on the one hand) and evidence going to "consciousness of guilt" (on the other). This brings me to a consideration that goes beyond mere nomenclature.

65 Instructions to a jury should be comprehensible. They should avoid the unrealistic imposition on a jury of over-subtle distinctions and the imposition on judges of a duty to give directions that may actually be counter-productive to the end sought. Where matters are tried by jury, our legal system operates on an assumption that jurors will obey the judge's directions concerning matters of law and other matters upon which the judge has authority to speak. It is realised that sometimes jurors are likely to be "dumbfounded" by judicial statements about the law[61]. Judges probably accept that there is an element of sophistry in the presumption that juries always follow their instructions. But the presumption "is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant"[62].

66 Because of legal constraints and longstanding conventions of secrecy in juror deliberations, there has, until recently, been little empirical research about the operation of judicial instructions upon the decision-making of actual jurors.

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60 Stewart, "Towards a Principled Approach to Consciousness of Guilt: A Comment on White and Côté", (1999) 43 *Criminal Law Quarterly* 17 at 20, 33.

61 Lord Devlin, *The Judge*, (1979) at 147.

62 *Richardson v Marsh* 481 US 200 at 211 (1987).

In the United States, such investigations of the realities of jury deliberations[63] indicate the close attention which jurors typically pay to what the judge says; their earnest endeavour to perform their functions as they take to be expected of them[64]; the relatively low rate of comprehension of concepts which lawyers assume to be central to the performance of their duties[65]; and their lack of comprehension of subtle directions requiring conditional acceptance of evidence for one but not another purpose[66].

67 The law presumes that triers of fact are able to disregard the prejudicial aspects of testimony and adjust appropriately the weight to be attached to such evidence on the basis of its "probative value"[67]. However, such empirical studies as have been performed on jurors' abilities to follow judicial instructions, and to

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63 Wrightsman, "The Legal System's Assumptions Versus the Psychological Realities of Jury Functioning: How Changes in Judicial Instructions Might Improve Jury Decision-Making", (1987) 8 *Bridgeport Law Review* 315.

64 Steele and Thornburg, "Jury Instructions: A Persistent Failure to Communicate", (1988) 67 *North Carolina Law Review* 77; Kramer and Koenig, "Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project", (1990) 23 *Journal of Law Reform* 401 at 402 (hereafter "Kramer and Koenig").

65 Kramer and Koenig at 429.

66 Charrow and Charrow, "Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions", (1979) 79 *Columbia Law Review* 1306; Severance, Greene and Loftus, "Toward Criminal Jury Instructions That Jurors Can Understand", (1984) 75 *Journal of Criminal Law & Criminology* 198; Sue, Smith and Caldwell, "Effects of Inadmissible Evidence on the Decisions of Simulated Jurors: A Moral Dilemma", (1973) 3 *Journal of Applied Social Psychology* 345; Broeder, "The University of Chicago Jury Project", (1959) 38 *Nebraska Law Review* 744; Oros and Elman, "Impact of Judge's Instructions Upon Jurors' Decisions: The 'Cautionary Charge' in Rape Trials", (1979) 10 *Representative Research in Social Psychology* 28 at 32; Tanford, "The Law and Psychology of Jury Instructions", (1990) 69 *Nebraska Law Review* 71 at 86; Doob and Kirshenbaum, "Some Empirical Evidence on the Effect of s 12 of the Canada Evidence Act Upon an Accused" (1972) 15 *Criminal Law Quarterly* 88; Wissler and Saks, "On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide On Guilt", (1985) 9 *Law and Human Behavior* 37 at 41-44; Young, Tinsley and Cameron, "The Effectiveness and Efficiency of Jury Decision-making", (2000) 24 *Criminal Law Journal* 89 at 97-98.

67 Schaefer and Hansen, "Similar Fact Evidence and Limited Use Instructions: An Empirical Investigation", (1990) 14 *Criminal Law Journal* 157 at 159.

divide and sanitise their minds concerning impermissible uses of evidence, have yielded results which are substantially consistent. They cast doubt on the assumption that jurors can act in this way[68]. Indeed, there is some empirical evidence which suggests that instruction about such matters will sometimes be counter-productive. The purpose may be to require a mental distinction to be drawn between the use of evidence for permissible, and the rejection of the same evidence for impermissible, purposes. Yet the result of the direction may be to underline in the jury's mind the significance of the issue, precisely because of the judge's attention to it[69]. Lengthy directions about lies run the risk of emphasising the lies and their importance.

68 The foregoing do not represent reasons for overthrowing the strictures in the case law concerning directions to juries about lies or any other topic. At least at this stage of our knowledge about such matters, it is inappropriate to cast aside conventional wisdom that has endured so long. No party urged this Court to reconsider *Edwards*[70]; still less to question the basic presuppositions upon which the jury system operates in Australia. Nor do such considerations afford reasons to delete instructions to juries about the use of lies altogether. It is not the law in Australia that such matters can be safely left to the common sense of the jury and the role they have in deciding whether the accused is or is not guilty of the offence charged[71]. Whilst it is true that there are already several inbuilt protections for the accused, in the matter of evidence of lies, there are also special risks of illogical intuitive reasoning. It remains the judicial duty to caution the jury about the risks. Nevertheless, the foregoing considerations may suggest the need to avoid over-elaboration, unnecessary subtlety and instruction upon excessively sophisticated distinctions, unlikely to be understood.

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68 A good example may be the distinction drawn between inferential reasoning leading to the conclusion of consent as opposed to credibility in the use of evidence of 'recent complaint' in sexual offences. See eg *Crofts v The Queen* (1996) 186 CLR 427 at 448-451 which accepted *Kilby v The Queen* (1973) 129 CLR 460 at 472 as stating the applicable law.

69 Schaefer and Hansen, "Similar Fact Evidence and Limited Use Instructions: An Empirical Investigation", (1990) 14 *Criminal Law Journal* 157 at 166.

70 (1993) 178 CLR 193.

71 cf Flatman and Bagaric, at 209-210.

The *Edwards* direction on lies

69 The key passage in the majority opinion in *Edwards*, which the appellant invoked in this appeal, is this[72]:

> "A lie can constitute an admission against interest only if it is concerned with some circumstance or event connected with the offence (ie 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 that it was told because the accused knew that the truth of the matter about which he lied would implicate him in the offence, or, as was said in *Reg v Lucas (Ruth)*, because of 'a realisation of guilt and a fear of the truth' ... If the telling of a lie by an accused is relied upon, not merely to strengthen the prosecution case, but as corroboration of some other evidence, the untruthfulness of the relevant statement must be established otherwise than through the evidence of the witness whose evidence is to be corroborated. If a witness required to be corroborated is believed in preference to the accused and this alone establishes the lie on the part of the accused, reliance upon the lie for corroboration would amount to the witness corroborating himself. That is a contradiction in terms."

70 Experienced trial judges have noted the difficulty presented by the *Edwards* principles[73], the practical difficulties which they present at trial and the "fertile ground for appeal" which they provide[74]. In the attempt to avoid appeals, prosecutors can be urged to restrain their eagerness to rely in their submissions on suggested lies on the part of the accused to prove guilt ("consciousness of guilt")[75]. But their questions may already have left a trail. Trial judges can

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72 (1993) 178 CLR 193 at 210-211. Footnotes omitted.

73 Wood, "Criminal Law Update: Court of Criminal Appeal", (1999) 4 *The Judicial Review* 217 at 238.

74 Vincent, "The High Court v The Trial Judge?", *28th Australian Legal Convention*, (1993), vol 2 at 263.

75 *R v Sutton* (1986) 5 NSWLR 697 at 701; *R v Heyde* (1990) 20 NSWLR 234 at 236; *Zheng* (1995) 83 A Crim R 572 at 577-578.

require a prosecutor to identify, with precision, any lie or lies relied upon for that purpose[76]. But there remain at least two problems.

71 The first problem is that it cannot ultimately depend upon the intention or subjective purpose of the prosecutor as to whether or not a judicial direction to a jury about that subject of lies must be given. The criterion must be the way the jury might use the evidence not the subjective purpose of the prosecutor in eliciting the evidence or relying upon it. That is why, in *Edwards*, the majority judges referred to "where a lie is relied upon to prove guilt"[77]. That expression must be given meaning according to objective standards. There is a lot of loose talk in the cases about the prosecutor's intention. I regard that as irrelevant except so far as it helps to identify what the jury might have made of the questioning or evidence.

72 The present appeal illustrates this point clearly. Because the prosecutor did not address the jury, no propositions about the use of the evidence of lies were put to the jury by way of attempted persuasion. But in deciding what *Edwards* required of his charge to the jury, it remained for the judge to determine the way that the prosecutor had "relied upon" the questions suggesting that the appellant had lied.

73 The second problem is that of needlessly complex and elaborated instruction to the jury. Some judges may not be concerned about this. They will follow mechanically rules that will help to avoid a successful appeal[78]. But this is also an undesirable course. It shows an unjustifiable lack of confidence in the collective capacity of the jury "to identify unsafe and precarious paths of reasoning and avoid illogical conclusions", in their consideration of most disputed matters of fact[79].

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76 Wood, "Criminal Law Update: Court of Criminal Appeal", (1999) 4 *The Judicial Review* 217 at 238.

77 *Edwards v The Queen* (1993) 178 CLR 193 at 210-211.

78 *Osland v The Queen* (1998) 73 ALJR 173 at 183 per Gaudron and Gummow JJ; 159 ALR 170 at 182.

79 Flatman and Bagaric, at 209.

Lies in the present case

74 If, in default of an address to the jury by the prosecutor in the present case, regard is to be had to the questions asked of the appellant at the trial, I do not believe that it can be said that those questions elicit answers that would prove *directly* the guilt of the appellant of any of the several charges which he faced. This is not to say that the lies were irrelevant to the question of his guilt of such charges. Or that they were not relied upon *indirectly* to prove that guilt, by demonstrating that the appellant was a person of dubious credibility when he protested his innocence and deposed to the consensual dealings with the customers from whom he procured moneys. If the classification of probative lies ("consciousness of guilt") and credibility lies ("credibility") is accepted as established by current legal authority in Australia, this was a case which clearly lay within the latter and not the former category. Here, there was no answer by the appellant which, of itself and without more, directly proved (if accepted by the jury) his guilt of one of the offences in the counts charged. Instead, as in most trials where an accused gives evidence, there was a suggestion of particular falsehoods. It remained for the jury to decide, in the light of all of the evidence, whether that suggestion was made good and, if it was, how the damaged credibility of the appellant affected the issues to be decided before verdicts could be returned upon the charges.

75 In the Court of Criminal Appeal[80] all of the judges agreed that a detailed direction in accordance with *Edwards* was not required by the evidence or the cross-examination of the appellant[81]. But then they divided. Prior J, for the majority, said that "the nature of the prosecutor's cross-examination of the appellant ... did not call for a lies direction"[82], that is to say *any* such direction. Olsson J, in his dissenting opinion, confined his conclusion to the fact that, having introduced "the possibility of lies constituting evidence of consciousness of guilt"[83] (although this had not been raised by the Crown) the judge was then bound to identify such lies and to give a "full direction" in accordance with *Edwards*[84].

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80 *R v Zoneff* [1998] SASC 6977 at [28] per Olsson J, [21] per Prior J, with whom Cox J agreed at [1].

81 *R v Zoneff* [1998] SASC 6977 at [21].

82 *R v Zoneff* [1998] SASC 6977 at [21].

83 *R v Zoneff* [1998] SASC 6977 at [27].

84 *R v Zoneff* [1998] SASC 6977 at [28].

76 This clash of opinion presents the first question which this Court has to decide. If it is made good there remains the second question involving the proviso.

A general direction on lies

77 With respect, I do not agree with either of the opinions expressed in the Court of Criminal Appeal. In my view, having regard to the way in which the appellant was cross-examined to suggest that he had lied both to the customers and in his evidence in court, it did become necessary for the trial judge (and was incontestably open to him) to give what I would describe as a general direction about lies. This would include assistance to the jury about the use which they might make of the fact that, in or out of court, the accused was guilty of relevant falsehoods (if that was the jury's conclusion).

78 Sometimes such a general direction about lies is described as a *Broadhurst*[85] direction on lies. It could as easily now be described as a *Richens* direction, with acknowledgment to the more recent decision of the English Court of Appeal in a case of that name[86]. In that case, Lord Taylor of Gosforth CJ, delivering the judgment of the court, reiterated the general rule as to the desirability of a warning to a jury, confronted with suggested evidence of lying by the accused, that not all lies are probative, directly or indirectly, of the accused's guilt of the offence in question. There may sometimes be other explanations for lies. Cases where the general warning should be given are not restricted to those where the jury are expressly invited by the prosecution to reason to guilt of the offences charged by reference to lies told by the defendant. They also exist where there is a danger that the jury might indirectly reason in that way. *Broadhurst*[87] was cited with approval in *Richens*, as it has been in many cases before and since. So was a "specimen direction" which was published by the Judicial Studies Board in England. This states relevantly[88]:

> "The mere fact that the defendant tells a lie is not in itself evidence of guilt. A defendant may lie for many reasons, for example: to bolster a true defence, to protect someone else, to conceal disgraceful conduct of his, short of the commission of the offence, or out of panic or confusion. If you

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85 [1964] AC 441.

86 [1993] 4 All ER 877 at 886-887.

87 [1964] AC 441 at 457.

88 [1993] 4 All ER 877 at 886. His Lordship acknowledged that it would be necessary to modify the direction according to the particular facts.

think that there is, or may be, some innocent explanation for his lies, then you should take no notice of them ...".

79 There is nothing in *Edwards* which is inconsistent with the provision of a warning of this general kind. On the contrary, I regard *Edwards*[89] as wholly consistent with this course and I believe that it states the law to be followed in Australia.

80 Did the trial judge in this case do anything more than give a *Broadhurst* or *Richens* direction? The only persons who would understand the trial judge's direction in this case as going beyond such a general warning would be a lawyer or perhaps an historian of past psychological theories. Indeed, in my respectful view, only that sub-category of lawyer who was aware of the precious discourse about so-called "consciousness of guilt" would react to that obscure phrase. It is only the use of that phrase, near the beginning of the judge's charge, that gives rise to complaint. Yet for the ordinary citizen (and I venture to suggest even the most uninstructed lawyers) the expression "consciousness of guilt" would mean little if anything.

81 The judge told this jury that it was a phrase by which "we" (meaning judges and lawyers) describe lying by people who "are guilty and ... covering up"[90]. There was no further elaboration of the expression. It is only because it is a phrase of ancient legal, and dubious psychological, lineage that for lawyers it rings the bell of *Edwards* and the possible necessity for the elaborate instructions which *Edwards* requires. With all respect, this is not the way a judicial charge to a jury is to be read by this Court or any other appellate court. Rather it must be read by the presumed meaning that it would have to the jurors who were listening to it.

82 After the fleeting and unelaborated reference to this curious expression which "we" use, the judge went on to give a general warning about lies. In light of the prosecution questions of the appellant which I have collected and set out in these reasons, I regard the provision of such a warning as entirely consistent with authority. In the context of this particular trial it was desirable, if not essential, especially because the appellant was not legally represented.

83 At the end of his charge, the judge, after reminding the jury once again about the onus of proof and the necessity to remember what the appellant had said, returned to the differentiation between the assessment of any lies which they might find. He declared that they should decide "whether that goes to his

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89 (1993) 178 CLR 193 at 212-213.

90 *R v Zoneff* unreported, District Court of South Australia, 16 April 1997 at 4.

credit, perhaps not to the question of his guilt"[91]. In fact, this was a direction unduly favourable to the accused. Evidence going to "credit" will sometimes indeed be relevant to the question of the accused's guilt, although indirectly. The central issue in any criminal trial is whether the prosecutor has proved the accused's guilt. Evidence which "goes to credit" will only be admitted if it is in some way relevant to that issue. It cannot be relevant if it is wholly unconnected with the central issue of the trial.

84 The trial judge's instruction is not without its imperfections, it is true. The mention of "consciousness of guilt" is one of them. It would hardly have had significance or meaning to a lay jury. But in the context, I regard the reference to this enigmatic notion as completely insignificant. The central message in the passage in question is that innocent people sometimes lie out of panic and various other reasons. The conclusion that the appellant had done so would "go to his credit" but not necessarily establish "his guilt" of the particular offences charged. This was a general (*Broadhurst*/*Richens*) direction on lies. Nothing more was given. Nothing more was required.

Application of the proviso in an overwhelming case

85 If, contrary to the foregoing, the use by the trial judge of the phrase "consciousness of guilt" (and the words which immediately followed it) are deemed misleading to the jury, so as to amount to error rather than insubstantial infelicity, I would certainly agree with the opinion in the majority of the Court of Criminal Appeal that no miscarriage of justice resulted and that the appeal should be dismissed[92]. Every accused is entitled to have a trial conducted in accordance with law and free from significant error in the direction given by a judge to a jury. Sometimes it is difficult to distinguish the case where a general direction on lies will suffice or where the more detailed *Edwards* direction is required. Sometimes, as here, the trial judge will enjoy only imperfect assistance – and especially where an accused is poorly represented or not legally represented at all. Sometimes the classification of particular lies as "going to" credit (on the one hand) or directly to the guilt of the accused (on the other), will be a matter of controversy. In these circumstances it is little wonder that so many appeals have been brought on the issue of judicial directions about lies.

86 The proviso represents another "reasonable practical accommodation of the interests of the state and the defendant"[93]. It recognises the imperfections

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91 *R v Zoneff* unreported, District Court of South Australia, 16 April 1997 at 5.

92 *R v Zoneff* [1998] SASC 6977 at [21]-[22].

93 *Richardson v Marsh* 481 US 200 at 211 (1987).

inherent in any human system of justice. It invokes a judgment on the part of the appellate court as to whether error, if it be established, is only of a technical kind and is not one that results in a substantial risk of a miscarriage of justice. In a sense, even minor technical errors that rise above mere infelicity of expression constitute a miscarriage of justice, at least to some degree. That is why it is necessary to consider whether the error propounded has deprived the appellant of a real chance of acquittal[94]. It is not every case where an imperfect direction about lies will result in a conviction being quashed[95].

87 I accept that the test for the application of the proviso is a stringent one[96]. However, with the majority in the Court of Criminal Appeal, I believe that this was a case where any error in the judge's directions called forth its provisions. The appellant admitted obtaining the money the subject of the charges from the customers who complained of losing their money. The use to which the appellant put the money after he received it was proved by the undisputed evidence of his banking records. The customers were otherwise strangers to the appellant. It was inherently unlikely that, without inducement of some kind, they would provide him with their money which he could then use, as the evidence indicated, to discharge a multitude of his private debts. Even on his own evidence, the appellant conceded that he did not use the money he had obtained for the purposes for which he said he obtained it. In the case of counts 2 and 7 he did not use it to pay for furniture which had been purchased from the centre by which he was employed. In the case of count 3 he did not use it towards the cost of the purchase of land at Brooklyn Park. In the case of count 4 he did not use it towards the initial building of the units at Brooklyn Park. In the case of counts 5 and 6 he did not use it to free up the identified bank account. Nor did the appellant use the moneys he obtained from each of the victims towards the purchase of units which he said he was acquiring from his father. Those units were purchased and ultimately financed by bank loans. So far as count 7 was concerned, the appellant objectively lacked the bonus points in the staff incentive scheme which he represented as the means of attracting Ms Phillips to her imprudent trust in him.

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94 *Wilde v The Queen* (1988) 164 CLR 365 at 371-372; *Glennon v The Queen* (1994) 179 CLR 1 at 8-9, 11-13; *Green v The Queen* (1997) 191 CLR 334 at 346, 371-372, 387; *KBT v The Queen* (1997) 191 CLR 417 at 423-424; *Farrell v The Queen* (1998) 194 CLR 286 at 293-294, 326.

95 *R v Pahuja (No 2)* (1989) 50 SASR 551 at 557-559; *R v Renzella* [1997] 2 VR 88 at 92; *R v Konstandopoulos* [1998] 4 VR 381 at 388-392.

96 *Mraz v The Queen* (1955) 93 CLR 493 at 514.

88 The appellant relied upon the fact that on all but one of the counts of which he was convicted (count 3) the jury verdicts were reached by majority decision. However, that was true also of the count (count 1) of which he was found not guilty. It is a matter of speculation as to why the verdicts were reached by majority. In those jurisdictions of Australia where majority verdicts exist and are lawful, they represent the verdict of the jury. They do not represent some lesser, qualified or suspect outcome of a criminal trial. Nothing turns, therefore, on this consideration. In my view this was a very strong Crown case. The "imperfections" in the judge's direction were not such as to have resulted in a miscarriage of justice, in the sense of depriving the appellant of a real chance of acquittal that was fairly open to him[97].

89 This conclusion can be tested thus. The judge said very little about lies and the way the jury should use them if they were convinced that the appellant had lied. Most of what he said was in the nature of a general warning. The gist and substance of that warning was most certainly favourable to the accused. The passage appeared in the course of the judge's general remarks and warnings. If these convictions fall they do so because of a transient allusion by the judge to what "we call" a "consciousness of guilt". This is a phrase of such Delphic quality as to be most unlikely, in the large issues of this case, to have reverberated in the jury's collective mind for more than the passing moment once they were uttered[98].

Orders

90 There was infelicity; not error. If there was error, it was immaterial. If it was legally material, it occasioned no substantial risk of a miscarriage of justice. If there was miscarriage of justice of a purely technical kind, it did not deprive the appellant of any real chance of an acquittal. I was of the opinion that the appeal should be dismissed. The foregoing are my reasons.

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97 *R v Storey* (1978) 140 CLR 364 at 376; *Wilde v The Queen* (1988) 164 CLR 365 at 371.

98 Young, Tinsley and Cameron, "The Effectiveness and Efficiency of Jury Decision-making", (2000) 24 *Criminal Law Journal* 89 at 97-98.