HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW AND CALLINAN JJ

GRAEME WILLIAM GREEN APPELLANT

AND

THE QUEEN RESPONDENT

Green v The Queen (P27-1998) [1999] HCA 13
14 April 1999

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Western Australia

Representation:

D Grace QC with M A Hardham for the appellant (instructed by the Office of David Grace QC)

J R McKechnie QC with J A Girdham for the respondent (instructed by Director of Public Prosecutions (Western Australia))

CATCHWORDS

Green v The Queen

Criminal law – Conspiracy to murder – Alleged lies told by accused – Lies as corroboration – Direction to jury – Failure to direct that lies could not be used as corroboration of witness where evidence of same witness is used to establish the lie – Other evidence upon which jury could conclude accused was telling lies – No substantial miscarriage of justice – Application of proviso.

Edwards v The Queen (1993) 178 CLR 193.

1 GLEESON CJ, GUMMOW AND CALLINAN JJ. Following a trial in the District Court of Western Australia, before Healy DCJ and a jury, the appellant was convicted of conspiring with Steven Craig Radalj to murder Sydney James Chesson. He was sentenced to a substantial term of imprisonment.

2 The appellant appealed to the Court of Criminal Appeal (Malcolm CJ, Steytler and Parker JJ) against his conviction. The appeal was dismissed. A number of grounds of appeal were argued in the Court of Criminal Appeal, but only one is the subject of special leave to appeal to this Court. The ground of appeal argued in this Court was expressed as follows:

> "The Court of Criminal Appeal of the Supreme Court of Western Australia erred in law in failing to find that the Learned Trial Judge erred in law such as to give rise to a substantial miscarriage of justice, in relation to his failure to properly direct the jury in accordance with the relevant law in relation to the alleged lies told by the applicant concerning his involvement in the Virginia Standardbreds Syndicate."

3 The alleged conspiracy between the appellant and Mr Radalj to murder Mr Chesson was said to have been entered into between July and September 1993. The appellant, his father, and Mr Chesson, had been associated for a number of years in business ventures which involved, amongst other things, the holding of property unit trusts, the assets of which included shopping centres in Perth. The ventures were unsuccessful, and this gave rise to a deal of tension, and acrimony, between the participants. It is unnecessary for present purposes to go into the details, except to mention that, on the Crown case, there was an incident involving a suggestion made by the appellant's father to Mr Chesson that a shopping centre should be destroyed by fire in order to collect insurance money. It was claimed that a record made by Mr Chesson of that suggestion had been used by him in such a way as to give the appellant a motive to injure him. There was civil litigation between the participants in the business ventures which remained unresolved at the time of the appellant's trial.

4 The Crown alleged that in mid 1993 the appellant spoke to Mr Radalj, who was a close friend, and expressed a desire to arrange to have Mr Chesson assaulted. This developed into a proposition that the appellant wanted to make arrangements for someone to kill Mr Chesson. Mr Radalj had connections in the racing industry. The appellant asked him if he knew anyone who could get rid of Mr Chesson, and how much it would cost. Mr Radalj approached a man named Steven Lun and told him of an unidentified person who wanted a job done by way of bashing or getting rid of Mr Chesson. He asked Mr Lun how much it would cost. Mr Lun said he would make inquiries. Mr Lun then contacted the police and told them of the approach that had been made to him. The police arranged for an undercover police officer to pose as a killer for hire.

5 The undercover police officer and Mr Radalj had a number of meetings and discussions in relation to the proposal to kill Mr Chesson. According to Mr Radalj, on each occasion he reported back to the appellant the progress of the matter. His reports included information about the arrangements for payment that were being made with the person who was believed to be a contract killer. The undercover police officer secretly tape recorded his conversations with Mr Radalj.

6 On one occasion the undercover police officer told Mr Radalj that he wished to speak to the person on whose behalf Mr Radalj was dealing. It was agreed that the communication would take place by telephone. Mr Radalj arranged with the undercover police officer to call his office telephone number at exactly noon on 5 August 1993. The arrangement was that Mr Radalj would pick up the receiver and pass it on to his principal so that the undercover police officer could speak to him. According to Mr Radalj, he informed the appellant of the arrangement. As a result a police surveillance team was sent in to watch the office building where Mr Radalj worked. This surveillance was unknown to Mr Radalj, who believed he was dealing with a real contract killer. Just before noon on 5 August the appellant was observed going into the building. He was photographed. The telephone rang at noon. Mr Radalj picked up the telephone and, according to him, handed it to the appellant. That was the only time the appellant spoke directly to the undercover police officer.

7 On the Crown case, Mr Radalj and the appellant agreed that Mr Radalj would pay the murder contract money direct to the killer, and would be reimbursed by the appellant. It was considered important that the money should not be able to be traced to the appellant. The mechanism on which they agreed was that the appellant would pay money, purportedly by way of investment, to a racing syndicate, known as "Virginia Standardbreds Racing Syndicate" in which Mr Radalj was a member and of which he was the manager. That syndicate had no current activity at the time. In August 1993 the appellant paid $16,000 into the syndicate bank account which was controlled by Mr Radalj. The bank account was opened by Mr Radalj shortly before the payment was made. The other syndicate members knew nothing about the payment. A document was brought into existence purporting to record a sale to the appellant by Mr Radalj of a share in the syndicate horses. The Crown alleged that the sale was bogus, and was designed to cover the payment to Mr Radalj by the appellant.

8 The police alerted Mr Chesson to the plan to kill him, and arrested Mr Radalj and the appellant. Mr Radalj pleaded guilty to a charge of conspiracy to murder. He was a Crown witness at the trial of the appellant.

9 The alleged lies referred to in the ground of appeal relate to statements made by the appellant to the police, and to evidence given by the appellant at his trial, concerning the payment of money to the racing syndicate. The Crown prosecutor

argued at the trial that the appellant's explanation of his dealings with Mr Radalj concerning the payment of money to the syndicate was false and that the lies he told reflected a consciousness of guilt.

10 In the Court of Criminal Appeal three complaints were made about the way the trial judge directed the jury on the matter of the alleged lies. The first two of those complaints were considered and rejected by the Court of Criminal Appeal. It was contended that the trial judge failed sufficiently to identify the lies relied upon by the prosecution and failed properly to instruct the jury as to the possibility that there were other reasons why the appellant might lie apart from a consciousness of guilt. Those contentions were rejected, and are not pursued in this Court. However, there was a third contention with which the Court of Criminal Appeal agreed. It arose out of a direction given concerning the use of lies as corroboration. It was argued that the trial judge failed to warn the jury, that they could not treat the alleged lies as corroborative of the evidence of Mr Radalj if they were relying on the evidence of Mr Radalj to conclude that the statements made by the appellant were untrue.

11 The principle underlying this contention was expressed in *Edwards v The Queen*[1] by Deane, Dawson and Gaudron JJ as follows:

> "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." (emphasis added).

12 Malcolm CJ, with whose reasons the other members of the Court agreed, acknowledged that the summing up of the trial judge failed to draw this principle to the attention of the jury. However, his Honour dealt with the point as follows:

> "In my opinion, quite apart from the issue of lies, there was ample corroboration of Mr Radalj's evidence in other respects, including the compelling evidence of the telephone conversation between the appellant and the undercover officer when the appellant was seen to enter the office building immediately before and leave immediately afterwards.

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1 (1993) 178 CLR 193 at 211.

It was not a fundamental error of a kind which would exclude the application of the proviso. In the result, I am not satisfied that any deficiency in the direction resulted in any substantial miscarriage of justice."

13 Before turning to the actual directions given by the trial judge on the point now in issue, and the application of the proviso to s 689 (1) of the *Criminal Code* (WA), which is the subject of the ground of appeal in this Court, it is necessary to refer in more detail to certain aspects of the evidence.

14 The trial judge gave the jury a strongly worded direction as to the importance to the Crown case of the evidence of Mr Radalj, the fact that he was an accomplice, and the danger of convicting on the evidence of an accomplice in the absence of corroboration.

15 As Malcom CJ pointed out, quite apart from the matter of the payment to the racing syndicate and the alleged lies told about it, there was other evidence which corroborated Mr Radalj. It concerned the undoubted fact of the appellant's presence in Mr Radalj's office building at noon on 5 August 1993 when, by pre-arrangement with the man believed by Mr Radalj (and, on the Crown case, the appellant) to be a contract killer, the man rang Mr Radalj's office and spoke on the telephone to a person represented to be Mr Radalj's principal. The appellant did not, and could not, deny his presence in the building. The evidence of the surveillance team was uncontested. He arrived at about 5 minutes to 12 and left at about 11 minutes past, in the company of Mr Radalj. The undercover police officer's evidence of his conversation with Mr Radalj, and then with a man represented to be Mr Radalj's principal, which was in its terms a conversation in furtherance of a conspiracy to murder, was not challenged. The appellant denied he was party to any such conversation. On the defence case, either his presence at the critical time was a coincidence (the appellant said he had routine business to discuss with Mr Radalj about electrical work he was doing for Mr Radalj) or it was procured by Mr Radalj. Why would Mr Radalj procure the appellant's presence if he was not intending that he should speak to the supposed contract killer? He did not know of the surveillance. He would have been achieving nothing merely by having the appellant in the building at the time of the phone call, unless his purpose was (as the Crown alleged) to make the appellant a party to the conversation.

16 The trial judge directed the jury, correctly, that the presence of the appellant in Mr Radalj's office building at the time of the pre-arranged telephone call at noon on 5 August 1993 corroborated Mr Radalj. No criticism was, or is, made of that direction.

17 Nor was any complaint made by trial counsel about the directions which are the subject of the present appeal. They were in the following terms:

"You can see from that rather lengthy recital of the evidence that the evidence in relation to the conspiracy almost entirely revolves around the evidence of Radalj and to accept and to be able to use his evidence bear in mind the warning that I gave you about him being an accomplice and the interest that he might have in implicating another person for his, Radalj's, own benefit, and also the careful scrutiny you should give his evidence before relying upon it. The Crown says that that evidence is corroborated to the extent of the telephone call which occurred on 5 August.

If you accept that the person speaking on the telephone was Green because there could be no stronger corroboration of Radalj's evidence than if you find that it was in fact Green who spoke to the undercover officer on that day. If it was Green that spoke to the officer and you are satisfied beyond reasonable doubt that it was him and that it was nobody else, there was no other explanation for the undercover officer's evidence other than that he spoke to Green then that would be very strong corroboration of the evidence of Radalj, that this agreement had been reached and that these actions were carried out to arrange the hit man and to make the payments at the behest of Green.

The Crown says not only can you rely upon that as corroboration but if you find that the evidence in relation to Mr Green and the Virginia Standardbreds syndicate was evidence of a sham and that the real purpose of that was to hide the trail, then Mr Green spoke to the police about that. He was telling them lies because he knew that that was a sham and not a legitimate transaction and was a sham adopted to hide the money [trail] from himself to Radalj for the payment of the contract killer. In relation to the matter of lies and the use of lies in corroboration, you must be very careful because this is a criminal trial and because Mr Green is presumed to be innocent of this offence in using and deciding that the lies can be used to corroborate the evidence.

When you are dealing with the question of lies, there are various matters that you should be aware of and take into account in making your assessments of that evidence. Before you can - a person can't be and shouldn't be convicted, there must be more than telling lies before a man can be convicted of a crime, especially a crime as serious as this and the lie that the Crown relies upon is in relation, as I said, to the evidence of Mr Green in relation to the investment in the Virginia Standardbreds syndicate. Before you can use that lie as indicating a consciousness of Mr Green's guilt, that if the truth came out it would point the finger directly at him, you must be very careful that the statement is in your assessment false and that when Mr Green told the police the story about the investment, he knew that it was false. It must be relevant to the offence with which he is charged and the Crown says that it is because it goes to the hiding of the money trail.

> You must take into account that when he spoke to the police about it he was not giving evidence to them on oath. He was giving it without the sanction of an oath and you must take account as to whether there could be any other reason for him lying in relation to that other than a knowledge that he was guilty, such as there was some other explanation for him telling the detectives the story that he did. You should not allow that lie in relation - if you find it to be a lie in relation to the Virginia Standardbreds syndicate, to influence your verdict unless you are satisfied beyond reasonable doubt that the motive for telling the lie was a realisation of guilt and a fear of the truth. In the circumstances of this case, [counsel for the appellant] has pointed out to you that in fact what he told the police men was the truth because he did have an interest in that syndicate which he was taking over on behalf of Mr Radalj to help Mr Radalj out with his difficulties after his suspension.
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> [Counsel for the Crown] has pointed out to you in his address that if that is the case, why was the money paid to the Virginia Standardbred syndicate? Why wasn't it paid to Mr Radalj himself? These are matters for you to consider and make your assessments of."

18 Senior counsel for the appellant makes three criticisms of those directions as to the matter of lies. First, they tell the jury that a conclusion that the appellant was lying about the payment of $16,000 affected his credibility. That seems obvious. Second, they tell the jury, with due warning, that they might conclude that the lies reflect a consciousness of guilt. That is unsurprising. Third, and most important for present purposes, they fail to warn the jury that the lies cannot be treated as corroborative of Mr Radalj if, to use the language of *Edwards*, it is the evidence of Mr Radalj which alone established the falsity of what the appellant was saying. With that last point the Court of Criminal Appeal agreed; and applied the proviso.

19 The proviso as it appears in s 689(1) states:

> "Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

20 It is submitted for the appellant that, in the circumstances, it cannot legitimately be concluded otherwise than that the appellant may have lost a chance which was fairly open to him of being acquitted. Conviction of the appellant was

not inevitable. Thus, the appellant contends, it cannot be concluded that "no substantial miscarriage of justice actually occurred."[2].

21 This is not said to be a case in which there was such a fundamental flaw in the conduct of the trial that there has been no trial according to law and, of necessity, a miscarriage of justice[3]. However, it is argued that the possibility that the jury followed an erroneous line of reasoning, involving the error identified in *Edwards,* and that the appellant thereby lost the chance of an acquittal, cannot be denied.

22 As Malcolm CJ demonstrated in his analysis of the evidence, the Crown did not rely solely, or even mainly, upon the evidence of Mr Radalj to convince the jury that the appellant's evidence about the payment of $16,000 should be rejected. The Crown argued that it was inherently implausible in a number of respects. The appellant paid the money into the syndicate's bank account, which was controlled by Mr Radalj, on 20 August 1993. There was no evidence of any activity on the part of the syndicate after the business name was registered in February 1993. There was no bank account until one was opened on 17 August 1993. Other members of the syndicate had no knowledge of the appellant's "investment". At the trial the appellant said he was purchasing Mr Radalj's 32 per cent share in the syndicate because Mr Radalj had been suspended from racing for five years. He also referred to some unexplained tax benefits. He was not interested in racing and gave no explanation of how he could have regarded $16,000 as a fair price for what he was acquiring. He elaborated upon what he had earlier told the police by saying that there was also a re-purchase arrangement under which Mr Radalj in effect indemnified him against any loss. If the appellant was purchasing Mr Radalj's interest, it would have been expected that he would pay Mr Radalj, not the syndicate. When asked why he did not pay Mr Radalj direct he said it was because Mr Radalj was a gambler. Why that constituted an explanation does not appear. In short, there were various aspects of the payment for which the appellant gave no plausible explanation, and which the jury were entitled to regard as unworthy of credence.

23 The most likely explanation of trial counsel's failure to complain of the absence from the directions of a warning of the kind now in question is that the trial was not conducted on the basis that the Crown relied on the evidence of Mr Radalj to persuade the jury that what the appellant was saying about the

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2 *Mraz v The Queen* (1955) 93 CLR 493 at 502; *Glennon v The Queen* (1994) 179 CLR 1.

3 cf *Wilde v The Queen* (1988) 164 CLR 365 at 372-373; *Krakouer v The Queen* (1998) 72 ALJR 1229 at 1241-1242; 155 ALR 586 at 603.

payment of $16,000 was untrue. The appellant was cross-examined effectively about a number of aspects of what he told the police, and later the jury, about his "investment" and the jury were entitled to conclude that his story was an implausible fabrication. They were not invited to conclude that he was telling lies because Mr Radalj said so. They were invited to reach that conclusion, and they were entitled to reach that conclusion, because of the objective improbability of what he was saying and because of his inability, when challenged, to offer a satisfactory explanation of features of the transaction which, if left unexplained, justified the inference that it did not bear the character he sought to give it. However, as Malcolm CJ said: "The difficulty is that the trial Judge did not specifically direct the jury that in determining whether the appellant had lied they could not rely on Mr Radalj's evidence. That point must be accepted."

24 The evidence about the appellant's presence in Mr Radalj's office building at the critical time on 5 August 1993 when the supposed contract killer, by pre-arrangement, phoned to speak to Mr Radalj's principal provided powerful support for Mr Radalj. The inference that it was the appellant who spoke to the undercover police officer on the phone was overwhelming. As the trial judge told the jury "there could be no stronger corroboration" of Mr Radalj's evidence. The case as to lies was put to the jury on the basis that they were invited to reject the appellant's explanation of the payment of $16,000, not on the basis of what Mr Radalj said, but on the basis of its inherent implausibility and the appellant's inability to explain certain features of the transaction.

25 The case was a proper one for the application of the proviso.

26 The appeal should be dismissed.

27 GAUDRON J. The facts relevant to this appeal are set out in the joint judgment of Gleeson CJ, Gummow and Callinan JJ. I shall repeat them only to the extent necessary to make clear my reasons for concluding that the appeal should be dismissed.

28 The prosecution case against the appellant relied substantially on the evidence of his alleged co-conspirator, Mr Radalj. The trial judge instructed the jury that it was dangerous to convict on his evidence "unless that evidence [was] corroborated in some material way which [implicated] the accused".

29 The prosecution relied on two separate strands of evidence to corroborate the account given by Mr Radalj. The first was a telephone conversation between an undercover police officer and a person other than Mr Radalj on the general office number of the shipping company by which Mr Radalj was employed. That conversation took place on 5 August 1993 very shortly after the appellant was seen to enter the company's premises. The second was the allegedly false account given by the appellant to the police of his payment of $16,000 to Mr Radalj to purchase the latter's interest in the Virginia Standardbreds Racing Syndicate ("the Syndicate").

30 So far as concerns the phone call with the undercover officer, the trial judge instructed the jury that "there could be no stronger corroboration of Radalj's evidence than if you find that it was in fact Green who spoke to the undercover officer on that day". Strictly, the trial judge should have identified the appellant's presence in the building of Mr Radalj's employer when the phone call was made as evidence capable of constituting corroboration.

31 So far as concerns the payment of money to the Syndicate, the trial judge instructed the jury as follows:

> " The crown says not only can you rely upon [the evidence relating to the telephone call] as corroboration but if you find that the evidence in relation to [the appellant] and the Virginia Standardbreds syndicate was evidence of a sham and that the real purpose of that was to hide the trail, then Mr Green spoke to the police about that. He was telling them lies because he knew that that was a sham and not a legitimate transaction and was a sham adopted to hide the money trail from himself to Radalj for the payment of the contract killer."

32 It was not in issue that the appellant paid $16,000 into the account of the Syndicate. He told the investigating police, as he deposed at his trial, that the money was paid to buy out Mr Radalj's interest, Mr Radalj having been disqualified from all racing activities for five years. On the other hand, Mr Radalj gave evidence that the money was paid into the account of the Syndicate by the appellant to conceal the fact that it was to pay for a hit man to kill Mr Chesson. There were matters which pointed to the implausibility of the account given by the

appellant, but the only evidence of the purpose of the payment made by him was that of Mr Radalj. Thus, a finding that the appellant lied to the police necessarily involved acceptance of the latter's evidence.

33 The appellant complains that, so far as concerns the Syndicate, the trial judge erred in failing to instruct the jury, in accordance with *Edwards v The Queen*[4], that they could not use the appellant's lie in that regard as corroboration unless the lie was established by evidence other than that of Mr Radalj. Certainly, *Edwards* establishes that such a warning must be given where lies are relied upon to corroborate the evidence of an accomplice[5]. As already pointed out, however, the only evidence that could establish that the appellant lied was that of Mr Radalj. Thus, in the circumstances, the error was not in failing to give an *Edwards* direction, but in leaving the jury with the impression that the evidence of what the appellant told the police, if it were a lie, could be used to corroborate the evidence of Mr Radalj. The question is whether that misdirection resulted in a miscarriage of justice.

34 It will be noted, both as to the telephone call and the account given by the appellant as to the payment of money to the Syndicate, that the jury were instructed that the corroboration on which the prosecution relied was not the evidence in that regard, but their findings with respect to those matters. In the case of the telephone call, it was their finding "that it was in fact Green who spoke to the undercover officer on that day"; in the case of the payment, it was their finding that it was "a sham and that the real purpose ... was to hide the trail".

35 The appellant's presence at the office of Mr Radalj's employer at the time the undercover officer rang its general office number is pivotal in this case. Unless the jury found that it was the appellant who spoke to the undercover officer on the telephone, they would be unlikely to convict. Conversely, if they found that it was the appellant, that would, in the circumstances, be tantamount to a finding of guilt.

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4 (1993) 178 CLR 193.

5 (1993) 178 CLR 193 at 211 where it was said per Deane, Dawson and Gaudron JJ:

> " 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."

And that finding would make it unnecessary for the jury to consider whether Mr Radalj's account was corroborated in any material respect.

36 The trial judge described the evidence of the appellant's presence at the office of Mr Radalj's employer at the time the undercover officer rang its general office number and the evidence with respect to certain other matters as circumstantial evidence. He then instructed the jury that "before [they] could say that those circumstances pointed towards the guilt of [the appellant] ... [they must] be satisfied the facts were inconsistent with any other [sic] rational conclusion other than that [the appellant] was in [the] conspiracy [with Mr Radalj]".

37 So far as concerns evidence other than that relating to the appellant's presence when the phone call was made, the direction with respect to what was described as "circumstantial evidence" was unduly favourable to the accused. In the circumstances of this case, however, the jury had to be satisfied beyond reasonable doubt that it was the appellant who spoke to the undercover officer when he rang the general office number of Mr Radalj's employer. Thus, as the trial judge indicated, they had to be satisfied that there was no rational explanation for the appellant's presence at the premises at the time of that call other than his being party to the conspiracy charged.

38 Given the instruction the jury received with respect to the appellant's presence at the office of Mr Radalj's employer when the phone call was made by the undercover officer and given that a finding that he, in fact, spoke to the undercover officer was, for all practical purposes, conclusive of his participation in the conspiracy, the trial judge's failure to properly direct the jury with respect to corroboration could not have affected their deliberations. Accordingly, there was no miscarriage of justice.

39 The appeal should be dismissed.

40 McHUGH J. The facts of this matter are set out in the joint judgment of Gleeson CJ, Gummow and Callinan JJ. I agree that the appeal should be dismissed.

41 There was abundant evidence upon which the jury could conclude that the appellant had lied about the reasons for his payment of money to the Virginia Standardbreds Racing Syndicate. If the jury found that he had lied about the matter, they could conclude that he did so because he knew that it tended to prove that he was guilty of arranging to kill Mr Chesson. Furthermore, if the jury found that the appellant lied about the reasons for the payment, they could regard the lie as corroborating the evidence of Mr Radalj in so far as he asserted that the appellant had asked him to hire someone to kill Mr Chesson. However, the jury could not use the lie as corroboration of Mr Radalj's evidence if they had to rely on his evidence to conclude that the appellant had in fact lied about the matter. As Deane, Dawson and Gaudron JJ pointed out in *Edwards v The Queen*[6]:

> "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."

42 In the present case, there is a passage in the trial judge's summing up which, by reason of its context, may have led the jury to believe that the appellant's lies about the reasons for the payment to the Virginia Standardbreds syndicate were capable of being corroboration of Mr Radalj's evidence. His Honour had told the jury that, if they found that the appellant was the person who had spoken on the telephone to the undercover agent, they could use that finding as corroboration of Mr Radalj's evidence. His Honour then went on to say:

> "The crown says not only can you rely upon that as corroboration but if you find that the evidence in relation to [the appellant] and the Virginia Standardbreds syndicate was evidence of a sham and that the real purpose of that was to hide the trail, then [the appellant] spoke to the police about that. He was telling them lies because he knew that that was a sham and not a legitimate transaction and was a sham adopted to hide the money [trail] from himself to Radalj for the payment of the contract killer. In relation to the matter of lies and the use of lies in corroboration, you must be very careful because this is a criminal trial and because [the appellant] is presumed to be innocent of this offence in using and deciding that the lies can be used to corroborate the evidence."

43 The meaning of this passage is not clear. If it accurately records what his Honour said, it appears likely that he lost his train of thought after commencing it.

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6 (1993) 178 CLR 193 at 211.

However, he did not expressly inform the jury that they could use lies about the Virginia Standardbreds syndicate as corroboration of Mr Radalj's evidence. Moreover, immediately after this direction, his Honour dealt with the question of lies concerning investment in the Virginia Standardbreds syndicate in more detail and did not direct the jury that any lie about that matter was capable of constituting corroboration of Mr Radalj's evidence. When the summing up on the evidence concerning the payment to the syndicate is read as a whole, it seems likely that his Honour intended to direct the jury that they could "use that lie as indicating a consciousness of [the appellant's] guilt", and not as evidence of corroboration.

44 The summing up is, however, ambiguous. It is quite possible that the jury may have understood the judge's directions in the above passage as meaning that they could use lies about the reasons for the payment of money to the Virginia Standardbreds syndicate not only as evidence of a consciousness of guilt but also as corroboration of Mr Radalj's evidence. Because there is a real possibility that the jury used the lies about the reasons for the payment to the syndicate as corroboration, the fairest course is to assume in favour of the appellant that they did. Upon that assumption, the trial judge erred in failing to direct the jury that they could not use Mr Radalj's evidence to conclude that the appellant had lied and then treat the lie as corroboration of Mr Radalj's evidence.

45 Nevertheless, even upon the assumption that the failure to so direct the jury amounted to an error, I am satisfied that the Court of Criminal Appeal was correct in holding that the failure to give a fuller direction concerning the use of lies as corroboration did not constitute a miscarriage of justice.

46 In further discussing the question of the appellant's lies concerning the reasons for the payment, the learned trial judge told the jury:

> "Before you can use that lie as indicating a consciousness of [the appellant's] guilt, that if the truth came out it would point the finger directly at him, you must be very careful that the statement is in your assessment false and that when [the appellant] told the police the story about the investment, he knew that it was false. It must be relevant to the offence with which he is charged and the crown says that it is because it goes to the hiding of the money trail.
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> You must take into account that when he spoke to the police about it he was not giving evidence to them on oath. He was giving it without the sanction of an oath and you must take account as to whether there could be any other reason for him lying in relation to that other than a knowledge that he was guilty, such as there was some other explanation for him telling the detectives the story that he did. You should not allow that lie in relation - if you find it to be a lie in relation to the Virginia Standardbreds syndicate, to influence your verdict unless you are satisfied beyond reasonable doubt that the motive for telling the lie was a realisation of guilt and a fear of the truth. In the circumstances of this case, [counsel for the appellant] has pointed out

> to you that in fact what he told the police men was the truth because he did have an interest in that syndicate which he was taking over on behalf of Mr Radalj to help Mr Radalj out with his difficulties after his suspension.
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> [Counsel for the Crown] has pointed out to you in his address that if that is the case, why was the money paid to the Virginia Standardbreds syndicate? Why wasn't it paid to Mr Radalj himself? These are matters for you to consider and make your assessments of."

47 This passage suggests that the Crown was not inviting the jury to rely on Mr Radalj's evidence to prove that the appellant had lied to the police. Rather, it suggests that the jury were invited to reject the appellant's explanation for the payment of $16,000 to the syndicate on the basis of objective improbability rather than the evidence of Mr Radalj. Given the summing up and the apparent conduct of the case, the probability that the jury used Mr Radalj's evidence to conclude that the appellant had lied about this matter must be low. Nevertheless, the probability is not so small that it can be disregarded.

48 It is impossible however, to believe that what may have made the difference between conviction and acquittal was the finding that the appellant had lied about his involvement with the Virginia Standardbreds syndicate. The most powerful piece of corroborative evidence in the case arose from the appellant's presence in Mr Radalj's office building at the time when the undercover agent – who was the supposed contract killer – phoned to speak to Mr Radalj's principal. The appellant admitted his presence in the building at the critical time. He arrived about five minutes to twelve and left about eleven minutes past twelve in the company of Mr Radalj. The evidence of the surveillance officers to that effect was uncontested. So was the undercover police officer's evidence of his conversations with Mr Radalj and the man who was plainly Mr Radalj's principal.

49 If the appellant was the person who spoke to the undercover officer, it was the strongest corroboration of Mr Radalj's evidence that the appellant had asked him to hire somebody to kill Mr Chesson. The person who spoke to that police officer at that time was plainly the hirer of the contract killer. It would be an extraordinary coincidence if the appellant, though not the principal, went to the building to meet Mr Radalj at the very time that Mr Radalj had arranged for the contract killer to phone and speak to the principal. At that time, Mr Radalj believed the undercover agent was what he professed to be – a contract killer. He was unaware of the true identity of the "hit man". So there can be no suggestion that Mr Radalj set up the appellant by luring him into the building. The appellant either met Mr Radalj at that time by coincidence or he was Mr Radalj's principal. If coincidence is rejected as the explanation of the appellant's presence in the building at the critical time of the phone call, the only rational explanation for Mr Radalj arranging to meet the appellant in Mr Radalj's office at the very time that the contract killer was to phone is that the appellant was the principal who was paying for the killing.

50 In convicting the appellant, the jury clearly accepted the evidence of Mr Radalj. In doing so, they must have found that the appellant was the person who spoke to the undercover agent. It is impossible to believe that, although the jury convicted him, they were nevertheless not prepared to find that he was the person who spoke to the undercover agent. That being so, the issue of whether the jury treated the lie about the payment of money as corroboration is unimportant. It is not a rational possibility that, if his Honour had directed the jury that they could not use Mr Radalj's evidence to hold that the appellant had lied about the payment to the syndicate and then use that finding as corroboration, the jury might have *rejected* Mr Radalj's evidence that it was the appellant who spoke to the undercover officer notwithstanding that they *accepted* Mr Radalj's evidence concerning the circumstances of that payment. It cannot be rationally supposed that the jury were prepared to accept Mr Radalj's evidence concerning the payment but that, without that evidence as corroboration, they would not have accepted his evidence concerning the appellant speaking to the undercover officer. Thus, even if the jury did rely on Mr Radalj's evidence to conclude that he lied about the payment to the syndicate, it did not affect his chance of acquittal once the jury found, as they must have, that the appellant was the person who spoke on the phone to the undercover agent. If it was the appellant who spoke on the phone to the undercover officer, he was plainly guilty of the charge. The Court of Criminal Appeal therefore correctly concluded that the trial judge's "error" did not deprive the appellant of a real chance of acquittal.