

Lies Told By The Defendant (Consciousness of Guilt)

Commentary

As a general rule an *Edwards* direction should only be given if the prosecution contends that a lie is evidence of guilt, in the sense that it was told because “the accused knew that the truth would implicate him in (the commission) of the offence”.¹

In *R v Nash* [2020] QCA 127, Boddice J (with whom Sofronoff P and Ryan J agreed) clarified that a lie can only be used as evidence of the accused’s guilt if it would be open to the jury to find that it “related to a material issue and that the [accused] told the lie because he knew that the truth of the matter... would implicate him in the offence”. Boddice J went on to cite McMurdo JA’s observations in *R v SCL; Ex parte Attorney-General (Qld)* [2017] 2 Qd R 401 at [61] that:

“It was what (if anything) the lie itself revealed about the appellant’s mind which was critical. Did the lie reveal a consciousness by the appellant of his guilt? It could do so only if it revealed a knowledge of the offence or some aspect of it and a fear that the truth of the matter would implicate him. As Callaway JA (with the agreement of the other members of the court) said in *R v Kondstandopoulos*: “It is the combination of knowledge and fear that evinces guilt” (citations omitted)”.

Courts of Appeal have warned of the need for circumspection and care in the use of this direction.² See *R v Chang* (2003) 7 VR 236 as to the circumstances in which an *Edwards* direction should be given concerning post offence conduct, particularly flight and concealment, where that conduct is relied upon by the prosecution as evidence of guilt or is likely to be used by the jury as such.³

An *Edwards* direction may be required if there is a risk of misunderstanding on the part of the jury as to the use of lies notwithstanding that the prosecution has not relied on the lie as showing a consciousness of guilt.⁴ If there is a risk of confusion as to the way the prosecution puts its case, the trial Judge should inquire of the prosecutor as to the way the case is being

¹ *R v Edwards* (1993) 178 CLR 193 at 211, 363, as explained in *Zoneff v The Queen* (2000) 200 CLR 234 at [17]. See also *R v Hennig* [2010] QCA 244 and *R v Sheppard* [2010] QCA 342.

² *Brennan* [1999] 2 Qd R 529, 531; *R v Walton and Harman* [2001] QCA 309 at [61]; *R v Dykstra* [2011] QCA 175 [13]

³ See Direction No. 48.

⁴ *Zoneff* at 244 [16].

put.⁵ However, an *Edwards* direction will only be required in these circumstances where there is a real danger that the jury will wrongly conclude that the lie is evidence of guilt.⁶

Alternative charges

The jury may only use a defendant's lie as evidence of consciousness of guilt if they are satisfied that the lie was told because the defendant knew that the truth of the matter would implicate him in the commission of *the* offence, and *not of some lesser offence*.

See the case of *Meko* ([2004](#)) [146 A Crim R 131](#) in which the WA Court of Criminal Appeal discussed possible directions where a lie reveals consciousness of guilt in respect of only one of the number of alternative charges.

See also *R v Mitchell* ([2008](#)) [2 Qd R 142](#); ([2007](#)) [QCA 267](#) per Keane JA at [48], [50] and the comments of Williams JA at [31]:

“where, as here, murder is the offence charged and manslaughter is available as an alternative verdict, it is incumbent upon the trial judge, if an *Edwards* direction is given, to indicate the element of the offence that is said to be admitted by the telling of the lie in question. If that element is merely the implication of the accused in the killing then the jury should be instructed that the admission is so limited. If the admission is said to establish the element of intent then the jury should be so instructed and they should be warned that they ought not simply infer from the fact that the accused was implicated in the killing that he had the requisite intention.”

Sample Direction

The prosecution relies on what it says are lies told by the defendant as showing that he is guilty of the offence.

[Here identify precisely the lies relied upon by the prosecution together with the basis on which they are said to be capable of implicating the defendant in the commission of the offence charged and not of some lesser offence⁷].⁸

⁵ *Zoneff* at 244 [17], *R v Frank* ([2010](#)) [QCA 150](#) at [41]

⁶ *Danhua v The Queen* ([2003](#)) [217 CLR 1](#).

⁷ *R v Richens* ([1993](#)) [4 All ER 877](#) at 886.

⁸ *Osland v The Queen* ([1998](#)) [197 CLR 316](#), *Zoneff* at [17]

Before you can use this evidence against the defendant, you must be satisfied of a number of matters. Unless you are satisfied of all these matters, then you cannot use the evidence against the defendant.

First, you must be satisfied that the defendant has told a deliberate untruth. There is a difference between the mere rejection of a person's account of events and a finding that the person has lied. In many cases, where there appears to be a departure from the truth, it may not be possible to say that a deliberate lie has been told. The defendant may have been confused; or there may be other reasons which would prevent you from finding that he has deliberately told an untruth.

Secondly, you must be satisfied that the lie is concerned with some circumstance or event connected with the offence. You can only use a lie against the defendant if you are satisfied, having regard to those circumstances and events, that it reveals a knowledge of the offence or some aspect of it.

Thirdly, you must be satisfied that the lie was told because the defendant knew that the truth of the matter would implicate him in the commission of the offence [and not of some lesser offence]. The defendant must be lying because he is conscious that the truth could convict him. There may be reasons for the lie apart from a realisation of guilt. People sometimes have an innocent explanation for lying.

[The judge should direct attention to any innocent explanation that may account for the telling of a lie. For example; a lie may be told in an attempt to bolster up a just cause, or out of shame, or out of a wish to conceal embarrassing or disgraceful behaviour. A lie may be told out of panic, or confusion, or to escape an unjust accusation; to protect some other person or to avoid a consequence extraneous to the offence.

If a lesser offence is open or charged then the judge should tell the jury that the lie cannot be used as consciousness of guilt of the offence if the lie was told to conceal involvement in the lesser offence.]⁹

If you accept that a reason of this kind is the explanation for the lie, then you cannot use it against the defendant. You can only use it against the defendant if you are satisfied that he lied out of a realisation that the truth would implicate him in the offence.

[If the lie is relied upon to materially support (corroborate) the evidence of a particular witness, e.g. an accomplice, a prison informant etc., the jury should be directed that the

⁹ *R v Box & Martin* [2001] QCA 272 at [8]; *R v Wehlow* (2001) 122 A Crim R 63; [2001] QCA 193 at [5], [33].

statement must be clearly shown to be a lie by evidence other than that of the evidence to be corroborated.¹⁰ In such an eventuality the judge should precisely identify the evidence (independent of the witness whose evidence is said to be supported by the lie) which shows that the defendant has lied.]

Where the alleged lie is the only evidence against the defendant, or is a critical fact

[If the lie relied upon by the prosecution is the only evidence against the defendant, or is an indispensable link in a chain of evidence necessary to prove guilt then the following direction must be given.]¹¹

Finally, in this case the alleged lie is the only evidence against the defendant [or is a critical fact in the prosecution’s circumstantial case against him]. Before you can use the lie against the defendant, you must be satisfied beyond reasonable doubt not only that he lied but also that he lied because he realised that the truth would implicate him in the offence.

¹⁰ *Edwards* at 211, 363.

¹¹ *Edwards* at 210, 362.