

Lies Told by the Defendant (Consciousness of Guilt)

Commentary

In *R v Smart* [\[2023\] QCA 222](#), Boddice J (with whom Dalton and Flanagan JJA agreed) outlined the law in this area as follows (citations and footnotes omitted):

[84] As was observed by the majority in *Edwards v The Queen*, the telling of a lie would ordinarily merely affect the credit of a witness who tells it. However, a lie told by an accused may go further. In limited circumstances, the telling of a lie by an accused may constitute evidence, as it amounts to conduct which is inconsistent with innocence and an implied admission of guilt. The majority cautioned:

“But not every lie told by an accused provides evidence probative of guilt. It is only if the accused is telling a lie because he perceives that the truth is inconsistent with his innocence that the telling of the lie may constitute evidence against him. In other words, in telling the lie the accused must be acting as if he were guilty. It must be a lie which an innocent person would not tell. That is why the lie must be deliberate. Telling an untruth inadvertently cannot be indicative of guilt. And the lie must relate to a material issue because the telling of it must be explicable only on the basis that the truth would implicate the accused in the offence with which he is charged. It must be for that reason that he tells the lie.”

[85] The requirement that the lie relates to a material issue necessitates that the lie be precisely identified, as should the circumstances and events relied upon to constitute an admission against interest. Further, a jury must be instructed that they may take the lie “into account only if they are satisfied, having regard to those circumstances and events, that it reveals a knowledge of the offence or some aspect of it and that it was told because the accused knew that the truth of the matter about which he lied would implicate him in the offence ... because of ‘a realization of guilt and a fear of the truth’”.

[86] As McMurdo JA explained in *R v SCL* [\[2017\] 2 Qd R 401](#) at 417 [61]:

“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”.

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”: see *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.

In *R v Nash* [2020] QCA 127, Boddice J (as his Honour then was) (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”.

In *R v WBS* [2022] QCA 180, Dalton JA said at [20], citing *R v Wildy* (2011) 111 SASR 189, 195 [20]:

It is not all inculpatory post-offence conduct which will attract the need for an *Edwards*-type direction. When the concern is with statements, it is only deliberately untrue statements which will attract an *Edwards* direction, and then, only statements which are capable of being probative of guilt because they might show that the accused lied because he “knew that the truth of the matter would implicate him in the offence”. In a similar vein it is “deceitful acts” or conduct “designed to paint a false picture” or perhaps conduct which is “inherently discreditable” which is conduct capable of attracting an *Edwards*-type direction. In the extract from *R v Watt* [(1905) 20 Cox CC 852] [in para [19] of her Honour’s judgment] the conduct was characterised as conduct “such as to lead to the reasonable inference that [the defendant] disbelieves his own case.

Courts of Appeal have warned of the need for circumspection and care in the use of this direction (see *Brennan* [1999] 2 Qd R 529, 531; *R v Walton and Harman* [2001] QCA 309 at [61]; *R v Dykstra* [2011] QCA 175 [13]).

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. (See chapter 50 of this Benchbook)

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: see *Zoneff* at 144 [16].

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 put: see *Zoneff* at 244 [17], *R v Frank* [\[2010\] QCA 150](#) at [41]. 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: *Dhanhoa v The Queen* [\(2003\) 217 CLR 1](#).

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 Box & Martin* [\[2001\] QCA 272](#) at [7] and [8]; and *R v Wehlow* [\(2001\) 122 A Crim R 63](#); [\[2001\] QCA 193](#) at [5], [33].

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] as follows:

“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.”

It is necessary to identify precisely the lies upon which the prosecution relies: *R v Richens* [\[1993\] 4 All ER 877](#) at 886. *Osland v The Queen* [\(1998\) 197 CLR 316](#), *Zoneff* at [17].

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 offence.]

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.]

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 statement must be clearly shown to be a lie by evidence other than that of the evidence to be corroborated.¹ 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.]

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.

¹ *Edwards* at 211, 363.