CITATION:	*McDonough v The Queen* [2021] NTCCA 9
PARTIES:	McDONOUGH, Robert James v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL from the SUPREME COURT exercising Territory jurisdiction
FILE NO:	CA 15 of 2020 (21925281)
DELIVERED:	10 December 2021
HEARING DATE:	26 February 2021
JUDGMENT OF:	Grant CJ, Barr and Brownhill JJ

CATCHWORDS:

CRIME – Appeals – Appeal against conviction – Unreasonable verdict

Applicant found guilty of three counts of sexual intercourse with a person who was not an adult following trial by jury – Whether verdicts unreasonable and not supported by evidence at trial – Purported inconsistencies, discrepancies and inadequacies in complainant's evidence asserted by appellant did not lead to a satisfaction that the jury, acting rationally, ought to have entertained a reasonable doubt as to proof of guilt.

BCM v The Queen (2013) 303 ALR 387, *BG v The Queen* (2012) 221 A Crim R 215, *Cabot (a pseudonym) v The Queen (No 2)* [2018] NSWCCA 107, *FN v The Queen* [2021] NTCCA 5, *Foster v The Queen* [2021] NTCCA 8, *GAX v The Queen* (2017) 344 ALR 489, *Jarrett v The Queen* (2014) 86 NSWLR

623, *Kassab (a pseudonym) v R* [2021] NSWCCA 46, *Liberato v The Queen* (1985) 159 CLR 507, *Libke v The Queen* (2017) 230 CLR 559, *Longman v The Queen* (1989) 168 CLR 79, *Lynch v The Queen* [2020] NTCCA 6, *M v The Queen* (1994) 181 CLR 487, *Pell v The Queen* [2020] HCA 12, *R v M, WJ* [2004] SASC 345, *RC v R; R v RC* [2020] NSWCCA 76, *SKA v The Queen* (2011) 243 CLR 400, *Tyrell v The Queen* [2019] VSCA 52, referred to.

Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report, Vol 4, 'Identifying and disclosing child sexual abuse'.

CRIME – Appeals – Appeal against conviction – Miscarriage of justice

Whether Crown address improper – Whether error to allow prosecutor to address jury that evidence given by appellant was a lie exhibiting consciousness of guilt – Appellant's conflicting statements capable of characterisation as a deliberate lie – Statements capable of demonstrating consciousness of guilt – Existence of other possible explanations a matter for the jury – No miscarriage of justice.

Benbrika v The Queen (2010) 29 VR 593, *Edwards v The Queen* (1993) 178 CLR 193, *MWL v The Queen* [2016] NTCCA 6, *Zoneff v The Queen* (2000) 200 CLR 234, referred to.

REPRESENTATION:

Counsel:

Appellant:	D Grace QC
Respondent:	S Geary

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Number of pages:	36

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

McDonough v The Queen [2021] NTCCA 9
CA 15 of 2020 (21925281)

BETWEEN:
ROBERT JAMES McDONOUGH
Appellant
AND:
THE QUEEN
Respondent

CORAM: GRANT CJ, BARR and BROWNHILL JJ

REASONS FOR JUDGMENT
(Delivered 10 December 2021)

THE COURT:

[1] Following a trial by jury, the appellant was found guilty of three counts of having sexual intercourse with the complainant ('KP'), a male who was not an adult, contrary to s 128 of the *Criminal Code 1983* (NT), as that section stood at the material times in 1997 and 1998. The appellant has appealed against those convictions on the grounds that:

(a) the verdicts were unreasonable and not supported by the evidence given significant inconsistencies, discrepancies and other inadequacies in KP's evidence; and

(b) the trial judge allowed the prosecutor to submit to the jury that evidence given by the appellant as to the existence of a beaded curtain at his home was capable of amounting to a lie exhibiting consciousness of guilt, and directed the jury on the basis that they might consider the evidence capable of amounting to such a lie, resulting in a miscarriage of justice.[1]

Background

[2] During the course of 1997 and 1998, KP was 15 and 16 years old and a student at a secondary school where the appellant taught Drama and Indonesian language. At the relevant times, KP was in Years 10 and 11. KP left school at the end of Year 11 when he was 17 years old.

[3] The amended indictment charged three offences. As to count 1, the prosecution alleged that, when KP was in Year 10 or Year 11, the appellant asked KP to help him with something in the drama room at the school during recess or lunch, KP went to the drama room, the appellant approached him, fondled his buttocks and genitals, pulled down his shorts and performed fellatio on him. As to count 3, the prosecution alleged that, when KP was in Year 11, the appellant asked KP to help him collect some props for a school play from his home in Hare Street, Moil, where he lived in a downstairs granny flat with his parents, who lived upstairs. After school and before that evening's play performance, the appellant drove KP from school to his

1 The content of the direction is not in issue; the appeal ground relates to the anterior step taken by the trial judge of ruling that the prosecutor's submission was permissible and such a direction was appropriate.

home, took KP into his bedroom, took off KP's shorts and performed fellatio on him, then drove KP back to school before the play performance. As to count 2, the prosecution alleged that, sometime after that school play, the appellant again took KP from school to his home during recess or lunch, took him into his bedroom and performed fellatio on him.

[4] At the trial, the prosecution led evidence from KP, three witnesses (family members and a friend) to whom KP had complained about the offending when he was an adult, and a Police officer ('Kidney') in relation to that officer's unsuccessful attempts to obtain a statement from KP about the offending in 2006 and 2007.

[5] The prosecution also led evidence from a Police officer ('Cronin') who had obtained a floor plan and photographs taken in 2004 of the appellant's home in Hare Street. The photographs were obtained from the people who bought the home from the appellant. Cronin had also spoken to those buyers about the interior of the home when they bought it. Cronin's evidence was led because, in his statement to Police, KP had described the interior of the appellant's home as having an archway leading into the hall with a beaded curtain hanging from it, and it was the prosecution's case that KP had not been to that home as an adult. Cronin gave evidence that, when he asked the buyers whether there had been any beaded curtains in the home when they purchased it in 2004, their answer was: 'Not that they could recall.'

[6] At the trial, the appellant gave evidence. He denied that any of the alleged offending had occurred. He gave evidence that he did not engage in any kind of sexual activity with KP until 2002, when KP, who was then an adult (19 years old), and the appellant, who was then living in Driver, met up and thereafter commenced a sexual relationship. The appellant gave evidence that they met up some 'half a dozen or more times', during which the appellant would perform oral sex on KP. The appellant returned to live in the Hare Street home in 2003 and the home was sold in 2004. The appellant gave evidence that KP never came to his home in Hare Street when KP was at school, but had been there a number of times as an adult in the context of their sexual relationship, after the appellant moved back to Hare Street in 2003.

Unreasonable verdicts

[7] The principles governing the first ground of appeal were recently reviewed by this Court in *Lynch v The Queen*[2] and *FN v The Queen*,[3] and we largely repeat that review for ease of reference. In *M v The Queen*, the High Court stated:

> Where a court of criminal appeal sets aside a verdict on the ground that it is unreasonable or cannot be supported having regard to the evidence, it frequently does so expressing its conclusion in terms of a verdict which is unsafe or unsatisfactory. Other terms may be used such as 'unjust or unsafe' or 'dangerous or unsafe'. In reaching such a conclusion, the court does not consider as a question of law whether there is evidence to support the verdict. Questions of law are separately

2 *Lynch v The Queen* [2020] NTCCA 6 at [16]-[22] per Grant CJ, Blokland and Hiley JJ.

3 *FN v The Queen* [2021] NTCCA 5 at [15]-[21] per Grant CJ, Brownhill J and Hiley AJ.

> dealt with by s 6(1). The question is one of fact which the court must decide by making its own independent assessment of the evidence and determining whether, notwithstanding that there is evidence upon which a jury might convict, 'none the less it would be dangerous in all the circumstances to allow the verdict of guilty to stand'.
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> …
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> Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe and unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regards to those considerations.[4]

[8] The test in *M v The Queen* has been affirmed in subsequent decisions of the High Court.[5] An appeal of this kind requires an appellate court to make its own independent assessment of the whole of the evidence, and to determine whether, having full regard to any advantages the jury had, it holds a reasonable doubt about the guilt of the appellant. The task of conducting an independent assessment of the evidence requires an appellate court to weigh any competing evidence that might tend against the verdicts reached by the jury.[6]

[9] In considering convictions for sexual offences, where it may be assumed that the jury assessed the complainant's evidence as credible and reliable, there may be countervailing evidence which nonetheless required the jury,

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4 *M v The Queen* (1994) 181 CLR 487 at 492-493 per Mason CJ, Deane, Dawson and Toohey JJ.

5 *SKA v The Queen* (2011) 243 CLR 400 at [11]-[14]; *GAX v The Queen* (2017) 344 ALR 489 at [25]; *Pell v The Queen* (2020) 268 CLR 123.

6 *SKA v The Queen* (2011) 243 CLR 400 at [24] per French CJ, Gummow and Kiefel JJ.

acting rationally, to have entertained a reasonable doubt as to guilt. The High Court has explained the process in the following terms:

> The court examines the record to see whether, notwithstanding that assessment – either by reason of inconsistencies, discrepancies, or other inadequacy; or in the light of other evidence – the court is satisfied that the jury, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt.[7]

[10] In terms of resolving any doubt held by an appellate court, the majority in *M v The Queen* said:

> In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred.[8]

[11] In *Libke v The Queen,* Hayne J expressed the process of reasoning as follows (footnotes omitted):

> But the question for an appellate court is whether it was *open* to the jury to be satisfied of guilt beyond reasonable doubt, which is to say whether the jury *must*, as distinct from *might*, have entertained a doubt about the appellant's guilt.[9]

[12] This formulation does not impose a stricter test than was laid down in *M v The Queen*. In *Pell v The Queen*, the High Court confirmed that the

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7 *Pell v The Queen* (2020) 268 CLR 123 at [39].

8 *M v The Queen* (1994) 181 CLR 487 at 494 per Mason CJ, Deane, Dawson and Toohey JJ.

9 *Libke v The Queen* [2007] HCA 30; 230 CLR 559 at [113].

statement from *Libke* extracted above was consistent with what was said by the majority in *M v The Queen*.[10]

[13] The matters which an appeal court may take into account in determining whether it was open to the jury, on the evidence, to be satisfied of guilt beyond reasonable doubt cannot be exhaustively catalogued. Matters which might give rise to a reasonable doubt include: whether a lengthy delay in making complaint requires particular caution; whether there are material inconsistencies between the initial complaint and the evidence given at trial; whether the surrounding circumstances suggest some ulterior purpose for a complainant's account; whether a complainant's testimony should be considered unreliable due to intoxication or some impairment of memory or suggestibility; whether there is a real possibility that the complainant's account was a reconstruction; whether collusion between a complainant and some other interested party cannot be excluded beyond reasonable doubt; or whether there are internal inconsistencies in the complainant's evidence, or inconsistencies with other evidence, which necessarily give rise to a reasonable doubt.

[14] Where it is asserted on appeal that a complainant's evidence contained discrepancies, displayed inaccuracies, or otherwise lacked probative force that should lead to the conclusion, after making full allowance for the advantages enjoyed by the jury, that a jury, acting rationally, must have

10 *Pell v The Queen* (2020) 268 CLR 123 at [44]-[45]; see also *Tyrell v The Queen* [2019] VSCA 52 at [70].

entertained a reasonable doubt as to guilt, the determination by the appellate court involves a two stage process.[11] The first stage involves determining whether each of the discrepancies and inaccuracies asserted by the appellant were in fact present in the evidence. The second stage involves determining whether such discrepancies and inaccuracies as there were, when taken either individually or in combination, go to the essential features of the complainant's account of the offences;[12] and, if so, whether they necessarily give rise to reasonable doubt or whether they 'were explicable in a manner that did not provide a basis for them to reflect on [the complainant's] credit'.[13]

Ground 1: Inconsistencies, discrepancies and other inadequacies in KP's evidence

[15] KP gave his evidence in the courtroom before the jury on the first day of the trial. His evidence took less than a day to complete. The appellant relied on the following matters in asserting that KP's evidence contained discrepancies, displayed inaccuracies, and otherwise lacked probative force:[14]

(a) the implausibility of KP resuming an adult sexual relationship with the appellant, a much older man, after being sexually assaulted by him when KP was 15 or 16 years old;

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11 *Foster v The Queen* [2021] NTCCA 8 at [4] per Grant CJ, Kelly and Brownhill JJ.

12 See *Lynch v The Queen* [2020] NTCCA 6 at [38], citing *BCM v The Queen* [2013] HCA 48; 303 ALR 387.

13 See *Lynch v The Queen* [2020] NTCCA 6 at [38], citing *R v M, WJ* [2004] SASC 345.

14 See Outline of Submissions on behalf of the Appellant at [22]-[23].

(b) the reasonable possibility that KP transposed the acts that occurred when he was an adult to his time as a student;

(c) the failure by KP to tell those he complained to in 2006 that he had been in a consensual sexual relationship with the appellant when KP was an adult, and the implausibility of KP's explanation for his failure to tell his family about the adult sexual relationship, namely embarrassment;

(d) the failure of KP to pursue the complaint to Police in 2006 and 2007, despite repeated attempts by Police to obtain a statement from him;

(e) KP's vagueness or uncertainty about dates and events, particularly:

(i) his uncertainty about when the alleged offending in count 2 occurred (resulting in amendment of the indictment on the third day of the trial);

(ii) his vagueness as to where he was living and when; and

(iii) his difficulties recalling that the appellant had taught him Indonesian language in Year 8 and Drama in Year 10;

(f) KP's descriptions of the sexual acts were made in the words of an adult rather than those of a schoolboy;

(g) KP's lack of resistance to any of the appellant's acts, including KP's evidence that, after the first incident in the drama room, KP left the room and spent the rest of recess on the school oval with his friends;

KP's lack of any apparent trauma; and KP's failure to tell his friends or family at the time; and

(h) the implausibility of the appellant needing to collect equipment for the school play production immediately prior to the production, which was a major event on the school oval.

[16] Counsel for the appellant submitted that these features of KP's evidence, when considered in conjunction with other evidence received during the course of the trial, particularly the appellant's evidence and the complaint evidence, necessarily gave rise to a reasonable doubt.

Sexual relationship as an adult

[17] KP gave evidence that he was contacted by the appellant after he had left school, and subsequently went to the appellant's residence on a number of occasions and engaged in oral sex with him.[15] KP's evidence was that these interactions ended around the time he was 18 or 19, but he agreed that they could have continued into his early 20s.[16] Asked if the adult sexual relationship was a consensual thing he was enjoying, he said: 'It was a physical thing that felt good at the time and then I immediately regretted it.'[17] He also said he would not call it a 'relationship', because there was 'no intimacy, and it was not like [he] was attracted to' the appellant.[18] Asked if

15 Transcript, p 51: Appeal Book ('AB') 67.

16 Transcript, p 50: AB 66.

17 Transcript, p 52: AB 68.

18 Transcript, p 52: AB 68.

he enjoyed the fellatio, he said: 'It was a warm mouth and it felt good at the time' and the appellant 'was good at what he did'.[19] In re-examination, KP said that he had sexual interactions with the appellant as an adult on 'maybe five or six' occasions.[20]

[18] This evidence credibly explains why KP would engage in a consensual sexual 'relationship' with the appellant as a young adult after having been subject to the alleged offending whilst he was a 15 or 16 year old student. Moreover, appellate courts are disinclined to draw conclusions about the possibility of false complaint based on stereotypical expectations or generalisations about behaviour in the aftermath of sexual offending.[21] The question whether there was any necessary inconsistency between KP's account of the appellant's dealings with him when he was a child, and KP's subsequent determination to have further sexual dealings with the appellant as an adult, was a matter properly within the province of the jury in the application of its collective experience and common sense.

KP 'transposed' acts as an adult

[19] In argument on the appeal, counsel for the appellant made it clear that, in this submission, the term 'transposed' was not being used in the sense of the psychological phenomenon of subconscious memory transference or transposition, which is usually the subject of expert psychological

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19 Transcript, p 53: AB 69.

20 Transcript, p 54: AB 70.

21 *RC v R; R v RC* [2020] NSWCCA 76, [147], [153], [161]; *Kassab (a pseudonym) v R* [2021] NSWCCA 46, [256].

evidence,[22] but in a sense of deliberately using details of the sexual acts that occurred with the appellant as an adult to lie about sexual acts having occurred with the appellant when KP was at school.[23]

[20] In cross-examination, KP denied that he had transposed his sexual relationship with the appellant as an adult to what occurred at school, saying: 'I felt that I finally decided to come forward about the fact that it happened at school when I was there at school grounds and I was underage.'[24] In effect, what was put to KP was that he was lying about the alleged offending, and he denied that he was.[25]

[21] We do not accept that this evidence, or the fact of the sexual 'relationship' with the appellant when he was an adult, necessarily raised the reasonable possibility that KP deliberately lied about the alleged offending by transposing the details of his sexual encounters with the appellant as an adult to the allegations of the offending when he was a child. This was not a matter which must necessarily have caused the jury to entertain a reasonable doubt about the appellant's guilt.

Failure to tell others about the adult sexual relationship and the explanation

[22] KP gave evidence that the first person he complained to about the alleged offending was his best friend, RF, which he did when he was about 19 years

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22 See, for example, *The Queen v GH (No 2)* [2018] NTSC 23 at [10], [29]-[35], esp [30(b)] per Grant CJ.

23 Transcript, p 17.

24 Transcript, p 52: AB 68.

25 See also his denials to the propositions that none of the offending ever happened at Transcript, pp 44, 49, 51: AB 60, 65, 67.

old.[26] KP gave evidence that, about 10 years after the alleged offending, he told another of his close friends (who gave evidence at the trial) and members of his family including his father (who also gave evidence at the trial).[27] One of those people, GB, was a teacher who reported KP's disclosure to Police in 2006, which was what led to Kidney's interactions with KP.

[23] KP agreed in cross-examination that he did not tell the people to whom he made complaint about the adult sexual relationship with the appellant.[28] He said that he had made the complaint to RF before he began the adult sexual relationship with the appellant.[29] He also said he did not tell his family because he was 'rather embarrassed', and he 'felt embarrassed and ashamed and didn't want to tell anybody'.[30] He conceded that he was embarrassed about his relationship with the appellant.[31] KP also gave evidence that he had had a discussion with the appellant about 'feeling pretty disappointed in' himself because he had been 'raised in a Christian family, Christian upbringing' and 'had a guilty conscience about what was going on and what was happening'.[32]

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26 Transcript, p 37: AB 53.

27 Transcript, p 38: AB 54.

28 Transcript, p 50-51: AB 66-67.

29 Transcript, pp 51, 52: AB 67, 68.

30 Transcript, p 51: AB 67.

31 Transcript, p 52: AB 68. KP was unable to say whether this discussion occurred before or after he left school.

32 Transcript, p 32: AB 48.

[24] It was no doubt open to the jury to find that KP's failure to tell those to whom he made complaint about the adult sexual relationship was credibly explained by this evidence.

Failure to pursue the complaint to Police in 2006 and 2007

[25] Kidney's evidence was that, on 6 September 2006, GB contacted Police and reported the complaint which had been made by KP. Kidney then spoke to KP, who gave an account which Kidney did not record in any document because he was waiting to take it by way of a formal statement. Kidney subsequently made numerous attempts to arrange a time to obtain a formal statement from KP, but they were unsuccessful.[33] Going only from his memory, Kidney said that KP's initial account was that during times when he was asked to remain after class, he would have oral sex with the teacher.[34] Kidney also recalled being told by KP that this continued for several years after KP left school.[35] Kidney gave evidence that, in March 2007, KP told Kidney that he was not going to pursue the matter any further at that stage.[36]

[26] Delay in making a complaint by a person who has been the victim of a sexual offence is not uncommon. As the mandated direction to juries about complaint evidence makes clear, there may be good reasons why a victim of sexual offending may hesitate in making, or refrain from making, a

33 Transcript, pp 88-89: AB 104-105.

34 Transcript, p 90: AB 106.

35 Transcript, p 90: AB 106.

36 Transcript, p 90: AB 106.

complaint about it.[37] It is also well recognised that delay in making a complaint is common in the case of child sexual offending.[38] The Royal Commission into Institutional Responses to Child Sexual Abuse found that it took, on average, 23.9 years to disclose abuse, with men taking longer to disclose than women.[39]

[27] One recognised explanation for delay is that the victim may be continuing in a sexual relationship with the offender.[40] Other reasons include feelings of shame and embarrassment, fear of a negative response, including fear of not being believed, fear of being stigmatised or viewed differently and gender identity and sexuality.[41]

[28] Other than confirming that he had a discussion with Kidney about 10 years after the alleged offending,[42] KP was not cross-examined about why he decided not to pursue this initial complaint or why he waited until 2019 to make a formal complaint to Police. Defence counsel did not mention the failure to do so in his closing address, but the trial judge's summing up

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37 Section 4(5)(b), *Sexual Offences (Evidence and Procedure) Act 1983* (NT). See also, for example, Criminal Trial Courts Bench Book, New South Wales: [2-570], [2-620]; Criminal Charge Book, Victoria: [4.8.1], [43]-[51].

38 See, for example, *Jarrett v The Queen* (2014) 86 NSWLR 623 at [37] per Basten JA, citing *M v The Queen* (1994) 181 CLR 487 at 515 per Gaudron J; *Cabot (a pseudonym) v The Queen (No 2)* [2018] NSWCCA 107 at [45] per Basten JA (Johnson and Campbell JJ agreeing); *BG v The Queen* (2012) 221 A Crim R 215 at [55] per Adamson J. See also the Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report, Vol 4, 'Identifying and disclosing child sexual abuse', Section 4, pp 77 et seq.

39 Final Report, Vol 4, 'Identifying and disclosing child sexual abuse', Section 2.3, p 30.

40 Criminal Charge Book, Victoria: [4.8.1], [46], 5th dot point.

41 See the Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report, Vol 4, 'Identifying and disclosing child sexual abuse', Section 4, pp 77 et seq.

42 Transcript, p 38: AB 54.

included a *Longman* direction[43] about the disadvantages to the appellant caused by the delay, and an acknowledgement that there was no explanation given by KP for the delay. The trial judge also noted that it was not put to KP in cross-examination that the reason he delayed was because the allegations were false.[44]

[29] Kidney's evidence was that KP told him KP was still seeing the appellant after he completed secondary school.[45] KP's evidence was that his adult sexual relationship with the appellant ended around the time he was 18 or 19, but he agreed that it could have gone into his early 20s.[46] KP's interactions with Kidney about making a complaint, and his ultimate determination not to proceed with a formal complaint at that stage, took place when KP was 24 and 25 years old.

[30] The fact that KP had entered into and relatively recently concluded a sexual relationship with the appellant provides one plausible reason for KP's failure to pursue a complaint at that time. As already described above, that was a matter of some shame and embarrassment to him. KP's evidence was that the reason he eventually made a formal complaint to Police in 2019 was that he had become a father of two children.[47] Having regard to those matters, it was open to the jury to conclude that the failure to pursue the

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43 See *Longman v The Queen* (1989) 168 CLR 79.

44 Transcript, pp 255-256: AB 338-339.

45 Transcript, pp 90, 91-92: AB 106, 107-108.

46 Transcript, p 50: AB 66.

47 Transcript, p 52: AB 68.

complaint to Police at that time did not bear adversely on the credibility of KP's evidence.

Vagueness or uncertainty

[31] After giving evidence-in-chief about the alleged offending at Hare Street which is the subject of count 3, KP gave evidence that he recalled going to Hare Street 'at least a couple more times on either a recess or a lunchbreak … for that to happen'.[48] He could not recall anything else about the timing of these other occasions at Hare Street.[49] Later, he said he could recall going to Hare Street on a lunchbreak with the appellant 'for the purposes of being away from the school grounds … to perform oral sex'.[50] He could recall that oral sex took place; that it was the appellant who performed oral sex on him; that the appellant drove them there in his car; that on arrival things happened much as they had on the first occasion, namely they went through the archway and into the back area of the home; that the appellant told KP his parents were home but it would be fine because they would not hear them; that he and the appellant were there for about 5 or 10 minutes; and that it was a school day and afterwards they went back to school for the next lesson.[51] KP was not sure whether this occasion was when he was in Year 10 or Year 11.[52] In cross-examination, all that was put to KP in relation to the

48 Transcript, p 28: AB 44.

49 Transcript, p 28: AB 44.

50 Transcript, p 30: AB 46.

51 Transcript, p 30: AB 46.

52 Transcript, p 30: AB 46.

allegations in count 2[53] was that it was a 'recess or lunchbreak incident' (to which KP agreed), and that he did not resist the appellant on that occasion (to which KP also agreed).[54]

[32] As to the submission that KP's evidence was 'vague' about where he was living and when, no specific passages of his evidence were referred to in the appellant's written or oral submissions. KP's evidence-in-chief about where he lived was that he lived at a specified Driver address whilst he was at school. He could only remember that he lived in Milner (but not the address) before then, which was a home he lived in until his parents separated when he was nine years old.[55] Given that KP was a child at the time, there is no particular vagueness about this evidence.

[33] As to what subjects KP was taught by the appellant and when, KP's evidence-in-chief was that the appellant taught him Drama in Years 10 and 11 and was a substitute teacher for Indonesian, which KP took in Years 8 to 11.[56] KP said the appellant was a substitute teacher for him in Indonesian at least half a dozen times across those four years.[57] Documents in evidence showed that the appellant was KP's Indonesian teacher in Year 8, the appellant was KP's Drama teacher, but not KP's Indonesian teacher, in the

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53 Defence counsel referred to 'count 3' but that appears to be a mistaken reference to count 2.

54 Transcript, p 49: AB 65.

55 Transcript, p 17: AB 33. See also cross-examination at Transcript, p 39: AB 55, which does not disclose any vagueness about where he was living and when.

56 Transcript, p 17: AB 33.

57 Transcript, pp 17-18: AB 33-34.

second half of Year 10, and the appellant was a Drama teacher in 1998.[58] In cross-examination, KP agreed that the appellant may have taught him Indonesian a lot more than half a dozen times.[59]

[34] These matters are not 'inconsistencies' or discrepancies in the sense considered by this Court in *FN v The Queen*[60], namely inconsistencies in the complainant's evidence which go to the essential features of KP's account of the offences for which the appellant was convicted. In any event, they are explicable in a manner that does not provide a basis for them to reflect on KP's credit. In cross-examination, KP agreed that he did not have much of a memory for dates and things because the events took place over 20 years ago.[61] He also said he did not recall 'very minor details. It was a long time ago and I'm a bit foggy with specifics'.[62] That is not unusual. As juries are routinely directed, memory is a process in which details can be lost or misremembered over time, even when a person is being completely honest and doing his or her best to tell the truth as the person remembers it. For that reason, a perfect recollection of the ancillary details surrounding an event many years after it has taken place may well provide greater cause for comment and scrutiny than an inability to remember some matters of detail.

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58 AB 205-209, 221.

59 Transcript, p 39: AB 55.

60 [2021] NTCCA 5.

61 Transcript, p 40: AB 56.

62 Transcript, p 49: AB 65.

Description of the sexual acts in the words of an adult

[35] KP was 37 years old when he gave evidence. It is entirely unsurprising that he would describe the offending in the words of an adult.

Lack of resistance or trauma and delay in complaining to friends and family

[36] The issue of delay in complaining about sexual offending is addressed in paragraphs [25] to [30] above. Again, KP was not cross-examined about why he did not complain to his family for about 10 years after the alleged offending.

[37] Lack of consent was not an element of the charged offences. KP's evidence was that he did not resist or pull away from the appellant during any of the three incidents. In relation to the first, he said: 'I pretty much froze. I was in a bit of shock, but I knew what was happening.'[63] Asked if the appellant forced KP to do anything whilst at school, KP said: 'Not physically… I wasn't raped, if that's what you're asking… I just felt brainwashed and that I didn't have any other options.'[64] He also said that after the first incident took place, the appellant told him that he had wanted to do that since KP was in Grade 8 and that he would see KP in the next class, and KP 'went out to just catch up with friends on the oval and just have the rest of the recess break'.[65]

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63 Transcript, p 20: AB 36.

64 Transcript, p 51: AB 67.

65 Transcript, p 20: AB 36.

[38] The appellant's submission assumes that a child who is the subject of sexual offending will respond to it in a particular way. In addressing emotional indicators of sexual abuse in children, the Royal Commission into Institutional Responses to Child Sexual Abuse observed (footnotes omitted):[66]

> There is no single emotional or behavioural sign that clearly indicates a child has been, or is being, sexually abused. And, much like physical indicators …, many children (as many as 40 per cent) may not show any changes to their behaviour.

[39] Bearing this observation in mind, KP's youth and his evidence about being shocked at what occurred on that first occasion provides a plausible explanation for both his lack of resistance and the continuation of his 'normal' routine immediately after the abuse occurred.

Appellant collecting equipment for the school play

[40] KP's evidence about count 3 was that the appellant asked him if he would go to the appellant's home in Hare Street to help collect some lighting equipment, props and heavy gear which the appellant needed an extra set of hands to help carry.[67] He said they went to the appellant's home at dusk, around 6.30pm.[68] He said the alleged offending took 'no more than five minutes', the appellant got some tissues for KP 'to clean up' and they put the gear (some stage lights and 'stuff in boxes') in the car and left.[69] In

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66 Final Report: Volume 4, 'Identifying and disclosing child sexual abuse', Section 3.2.3, p 60.

67 Transcript, p 25, AB: 41.

68 Transcript, p 25, AB: 41.

69 Transcript, p 27, AB: 43.

cross-examination, KP said he thought the play started at 7.00pm, and agreed that documents in evidence showed that there were preview performances of the play on two nights at 7.00pm, as well as actual performances on two other school nights at 7.00pm.[70] He said he had been helping set things up for the play beforehand and then went to get the props from the appellant's home.[71] He said he helped some others put some lights up in the trees with extension cords.[72] The implausibility of the appellant leaving the pre-production set up of 'this big production' to take KP to his home for oral sex was put to KP, but he maintained his evidence that the offending occurred.[73]

[41] The appellant described the play as a 'big, professional production' which involved him warming up with the actors in the last hour before the show, checking on the lighting crew and the band, and supervising 'a hundred people' for 'two, three hours before the show'.[74] In cross-examination, the appellant denied that he would have had the opportunity, on any of the nights of the play's performance, to get away for half an hour for a brief sexual encounter. He said that each night 'quite a massive operation' was required to set up the play because much of the equipment had to be taken

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70 Transcript, p 48, AB: 64.

71 Transcript, p 48, AB: 64.

72 Transcript, pp 48-49, AB: 64-65.

73 Transcript, p 49, AB: 65.

74 Transcript, pp 136-137, AB: 152-153.

down each night, and he did a warm up with the student actors which took about one to one-and-a-half hours each night.[75]

[42] This evidence is not of the same character or quality as the evidence considered by the High Court in *Pell* (at [119] and [127]) to conclude that the jury, acting rationally, ought to have entertained a reasonable doubt as to proof of guilt. Here, the evidence said to raise a doubt about the opportunity to commit the offending alleged by count 3 came from the appellant himself, and was not confirmed by any independent or objective evidence. In *Pell*, the unchallenged evidence of the opportunity witnesses was inconsistent with the complainant's account, in that at the time the conduct was alleged to have taken place the accused would have been greeting congregants near the Cathedral steps and was at all times accompanied by an acolyte, and the place in which the conduct was alleged to have taken place would have been subject to the continuous traffic of people in and out. Having regard to that evidence and the direct inconsistency, there must have remained a reasonable possibility that the offending had not taken place, and consequently there ought to have been a reasonable doubt as to guilt. In the present case, there was no countervailing opportunity evidence of that type. The jury was entitled to reject the appellant's evidence on this point, particularly if they formed the view that the appellant lied in his testimony and was not a truthful witness.[76] If that was their assessment, it was open to

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75 Transcript, pp 178-179, AB: 194-195.

76 This 'lie' is the subject of ground 2, considered below.

the jury having regard to the whole of the evidence called by the Crown, and consistent with *Liberato*,[77] to be satisfied of the appellant's guilt beyond reasonable doubt.

Appellant's evidence

[43] The same can be said about the appellant's evidence that he could not leave school at lunchtime or recess because he needed to be there for his son who had a medical condition and often needed his clothes to be changed. Initially, the appellant said his son 'was with [him] 24/7 for the 17 years [he] was' at the school and 'was virtually never out of' the appellant's sight because 'he had a medical situation where really he needed to be close to me all the time'.[78] In cross-examination, the appellant said: 'I'm not saying exactly 24/7 okay but pretty well most of the time he was with me'. The appellant agreed his son was not with him 'when [he] was teaching in the classroom and [his son] was in another class room'.[79] He also agreed his son was not with him every lunchtime for the whole of 1997 and 1998, saying 'but frequently lunchtime and recess he would come for a change of clothes [so] I had to be at least on call'.[80] He said he 'never went home' in case he would be needed.[81] The conclusions reached in paragraph [42] above apply equally to this evidence.

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77 *Liberato v The Queen* (1985) 159 CLR 507.

78 Transcript, p 142, AB: 158.

79 Transcript, p 169, AB: 185.

80 Transcript, p 170, AB: 186.

81 Transcript, p 170, AB: 186.

[44] Those same conclusions also apply to the appellant's evidence of his relationship with KP in the aftermath of the offending. KP gave evidence that: after the offending, the appellant 'favoured' him more than other students and he felt like 'the teacher's pet', which manifested in KP's misbehaviour in school being ignored by the appellant; the appellant allowed KP to borrow his car 'a couple of times'; and KP washed the vehicle on the school grounds on one occasion for $20.[82] The appellant denied KP was a favourite student,[83] denied lending KP or any student his car because of the insurance issues associated with drivers under the age of 25,[84] and denied that he paid KP to wash his car. In that latter respect, the appellant said that he did pay $20 for KP to wash his car as part of a school fundraising event.[85] This variance between the evidence of KP and the appellant is largely immaterial to the essential elements of the offences. They are peripheral matters which do not necessarily give rise to a doubt in circumstances where the jury could reasonably have rejected the appellant as a credible witness.

Conclusions

[45] Having reviewed the evidence we are satisfied that it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of the charges of which he was convicted. Ground 1 is not made out.

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82 Transcript, p 31, AB: 47.

83 Transcript, p 134, AB: 150.

84 Transcript, p 147, AB: 163.

85 Transcript, pp 144-145, AB: 160-161.

Ground 2: Lie disclosing consciousness of guilt

[46] This ground asserts a miscarriage of justice arising because the trial judge allowed the prosecutor to submit to the jury that evidence given by the appellant as to the existence of a beaded curtain at his home was capable of amounting to a lie exhibiting consciousness of guilt, and had directed the jury on the basis that they might consider the evidence capable of amounting to such a lie.

[47] In the appellant's examination-in-chief, he gave evidence that he hung the beaded curtain in the Hare Street home, and that he did so on the advice of the real estate agent in order to make the place look better for its sale in 2004.[86] He said that one of the things the real estate agent suggested was 'putting up some beading'.[87] He said the beaded curtain was not present at the time of the alleged offending in 1997 and 1998.[88] That evidence was given before the luncheon adjournment.

[48] The importance of the appellant's evidence on this point was, on the defence case, that the reason KP knew about the beaded curtain in the home in Hare Street was not because KP had been there when he was a student (thereby demonstrating the opportunity to commit the alleged offending in counts 2 and 3), but because KP had been there when he was an adult in the context of their then sexual relationship. This was not put to KP in cross-

86 Transcript, p 145, AB: 161.

87 Transcript, p 145, AB: 161.

88 Transcript, p 145, AB: 161.

examination, but KP's evidence was that: (a) the first time he went to the Hare Street home was the occasion of the alleged offending in count 1;[89] (b) he had never gone to the Hare Street home on an occasion that did not involve sexual activity with the appellant;[90] and (c) the last time he was at the Hare Street home was when he was still at school.[91]

[49] After the lunch adjournment, the appellant gave evidence in cross-examination that hanging the beaded curtain was something he did before the real estate agent came, and she took one look and told him to take 'those rotten things down'.[92] During the course of that cross-examination, the appellant agreed that he had to explain how KP knew about the beaded curtain other than seeing it at the time of the alleged offending in 1997 and 1998. However, he denied that he had realised that Cronin's evidence was that the new owners did not see any beaded curtain at the time of the sale in 2004, and for that reason had fabricated the account given after lunch about the real estate agent telling him to take the curtain down prior to the sale.[93]

[50] After the close of evidence in the trial, the prosecutor indicated to the trial judge[94] that he intended to submit to the jury that the appellant's evidence

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89 Transcript, p 24, AB: 40.

90 Transcript, p 28, AB: 44.

91 Transcript, p 32, AB: 48.

92 Transcript, p 176, AB: 192.

93 Transcript, p 177, AB: 193.

94 Transcript, p 192, AB: 259.

about the beaded curtain was a lie demonstrating consciousness of guilt[95], and sought a direction from the trial judge about such reasoning ('*Edwards* lies direction'). Defence counsel objected, arguing that the appellant's evidence about the beaded curtain was not demonstrably a lie evidencing consciousness of guilt.[96] The trial judge expressed the view that the appellant's evidence was capable of being seen to be such a lie, and ruled that whether it was such a lie was a matter for the jury[97] and that an *Edwards* lies direction would be given.[98] The prosecution submitted to the jury as indicated,[99] the defence made a contrary submission,[100] and the trial judge gave an orthodox *Edwards* lies direction.[101]

[51] Counsel for the appellant submitted that the appellant's evidence could not have amounted to a lie because there was no other evidence by which it could be shown to be a lie, and even if it was a lie, it could not have amounted to one told by the appellant in circumstances where the only explanation for it was that the appellant knew that the truth about the beaded curtain would implicate him in the charges on the indictment, ie it was told as a result of realisation of guilt and fear of the truth. The appellant submitted that, in such circumstances, there was an obligation on the trial

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95 As explained in *Edwards v The Queen* (1993) 178 CLR 193 at 208-209 per Deane, Dawson and Gaudron JJ.

96 Transcript, p 192, AB: 259.

97 Transcript, p 193, AB: 260.

98 Transcript, p 194, AB: 261.

99 Transcript, pp 217-219, AB: 284-286.

100 Transcript, pp 4-5, AB: 310-311.

101 Transcript, pp 247-248, AB: 330-331.

judge to prevent the prosecution from submitting to the jury that the evidence was a lie which affected the appellant's credibility[102] or a lie which demonstrated consciousness of guilt.[103] The prosecution's submission was only that the evidence was a lie which demonstrated consciousness of guilt, and the reasons which follow are confined to the appellant's complaint in that respect.

[52] In *Edwards*, Deane, Dawson and Gaudron JJ observed as follows (footnotes omitted):

> Ordinarily, the telling of a lie will merely affect the credit of the witness who tells it. A lie told by an accused may go further and, in limited circumstances, amount to conduct which is inconsistent with innocence, and amount therefore to an implied admission of guilt. In this way the telling of a lie may constitute evidence. When it does so, it may amount to corroboration provided that it is not necessary to rely upon the evidence to be corroborated to establish the lie. At one time it was thought that only a lie told out of court could amount to an implied admission, but the distinction is not logically supportable and is no longer drawn. When the telling of a lie by an accused amounts to an implied admission, the prosecution may rely upon it as independent evidence to 'convert what would otherwise have been insufficient into sufficient evidence of guilt' or as corroborative evidence.
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> 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. To say that the lie must spring from a

102 In the sense considered in *Zoneff v The Queen* (2000) 200 CLR 234 ('*Zoneff*') at [23] per Gleeson CJ, Gaudron, Gummow and Callinan J.

103 In the sense considered in *Edwards*.

> realisation or consciousness of guilt is really another way of saying the same thing. It is to say that the accused must be lying because he is conscious that 'if he tells the truth, the truth will convict him'.[104]

[53] By this passage, the majority of the High Court set out what comprises a lie demonstrating consciousness of guilt and how it results in an implied admission of guilt which may constitute (relevantly for this appeal) independent evidence of guilt to be taken into account with the other evidence of guilt. To be such an admission, there must be a lie (ie a false statement deliberately made with the intention of avoiding the truth), which relates to a material issue, and which is told for the reason that the truth would implicate the accused in the charged offence.

[54] Their Honours went on to observe as follows (footnotes omitted):

> 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 the jury should be instructed that they may take the lie into account only if they are satisfied, having regard to those circumstances and events, that it reveals a knowledge of the offence or some aspect of it and that it was told because the accused knew that the truth of the matter about which he lied would implicate him in the offence, or [in other words] because of 'a realisation of guilt and fear of the truth'.
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> Moreover, the jury should be instructed that there may be reasons for the telling of a lie apart from the realisation of guilt. A lie may be told out of panic, to escape an unjust accusation, to protect some other person or to avoid a consequence extraneous to the offence. The jury should be told that, if they accept that a reason of that kind is the

104 *Edwards v The Queen* (1993) 178 CLR 193 at 208-209.

> explanation for the lie, they cannot regard it as an admission. It should be recognised that there is a risk that, if the jury are invited to consider a lie told by the accused, they will reason that he lied simply because he is guilty unless they are appropriately instructed with respect to these matters. And 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 accused may be confused. He may not recollect something which, upon his memory being jolted in cross-examination, he subsequently does not recollect.[105]

[55] This passage makes clear that a statement which may or may not be a lie, and a lie which has more than one possible explanation for its telling, may be put to the jury, with the jury (properly directed) to decide whether the statement is a lie and/or whether it is a lie amounting to an implied admission of guilt.

[56] Their Honours found (at 211-212) that it was difficult, if not impossible, to regard the appellant's evidence-in-chief as involving a deliberate lie. Their Honours also held (at 212) that, even if it was a lie, the evidence was not a lie with any probative value (ie it was not a lie about a material issue) because it went, not to the appellant's alleged offending, but to what the appellant saw and heard of certain acts of violence by others and who, to the appellant's knowledge, had participated in them. Their Honours held (at 212) that it was at most a lie which went to his credit and nothing else. Furthermore, their Honours noted (at 212) that the appellant's evidence (or lack of candour in giving it) was explicable because he had been in custody and did not want to inculpate others who were in custody with him. Their Honours concluded that:

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

> Whilst in many cases it must be a question for the jury whether a lie was told because the truth was perceived to be inconsistent with innocence or for some other reason, if it was established that there was a deliberate lie in this case about a material matter (and we do not think that it was), the innocent explanation for that lie was so plausible that the lie could not have been probative of guilt. Quite apart from our concerns about the existence of the lie and its materiality, this should have prevented the trial judge from concluding that the telling of the lie was capable of amounting to corroboration of the complainant's evidence.
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> …
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> [The jury] should not have been invited to use the evidence of the appellant either as independent evidence of guilt or as evidence corroborating the account given by Williams. In the circumstances, there was a serious miscarriage of justice. The appeal must be allowed and the conviction quashed.[106]

[57] This passage indicates that there may be cases in which the issue of whether a lie demonstrates consciousness of guilt amounting to an implied admission should not be put to the jury, specifically where the innocent explanation for the lie is so plausible that it could not have been probative of guilt.

[58] In *Zoneff*, the trial judge had given an *Edwards* lies direction in circumstances where the prosecution did not put a submission that the accused's lies amounted to evidence of consciousness of guilt. Gleeson CJ, Gaudron, Gummow and Callinan JJ held (at [16]) that 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 give an *Edwards*

106 *Edwards v The Queen* (1993) 178 CLR 193 at 212-213.

lies direction notwithstanding that the prosecutor has not put that a lie was told out of consciousness of guilt.[107] Their Honours went on to say:

> 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 … '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.[108]

[59] While there is nothing to suggest that part of the trial judge's function is to prevent the Crown from making a submission that a lie told by the accused may demonstrate consciousness of guilt, this passage does indicate that, before giving an *Edwards* lies direction, some assessment is required by the trial judge as to whether a lie is capable of bearing the character of a lie evidencing guilt, and the direction should not be given if the lie is not so capable. It must follow that, if a trial judge were to conclude from that assessment that an *Edwards* lies direction was not appropriate, a ruling that the direction will not be given would require and include a ruling that the prosecution may not make such a submission to the jury in the circumstances of the case.

[60] The appellant also relied on the observations of the Western Australian Court of Appeal in *Evans v Western Australia*,[109] in which Buss P, Mitchell

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107 In the sense considered in *Zoneff v The Queen* (2000) 200 CLR 234 ('*Zoneff*') at [23] per Gleeson CJ, Gaudron, Gummow and Callinan J.

108 *Zoneff v The Queen* (2000) 200 CLR 234 at [16].

109 It is well established that the ultimate criterion for an *Edwards* or *Zoneff* direction is not the prosecutor's intention, but whether there is an apprehension that there is a real or perceptible danger that the jury might use the lie(s) as evidence that the accused knew the truth would implicate him in the commission of the offences: *MWL v The Queen* [2016] NTCCA 6 at [59]

and Beech JJA said (at [119]) that reliance by the prosecution on lies as conduct providing evidence of guilt is fraught with the risk of miscarriage due to the complexity in directions and the jury's task, which warrants and demands particular care by trial judges when directing a jury on 'this notoriously difficult subject'.

[61] It follows from the above authorities that, in circumstances where the prosecution intends to put to the jury that the accused has told a lie demonstrating consciousness of guilt which may be used as evidence of guilt, the trial judge must consider whether the lie is capable of being found to be a lie and capable of being seen as an implied admission of guilt because it relates to a matter material to the offending and was told because the accused knew the truth would implicate him or her in the commission of the offence. If the evidence does not warrant that characterisation, the ruling must properly be both that the trial judge will not give the *Edwards* lies direction and that the prosecution may not put the submission. However, the existence of one or more possible innocent explanations will not suffice for a ruling that the lie cannot be put to the jury in that way. Such a ruling will be justified only if the lie has such a plausible innocent explanation that it has no probative value.

[62] To the extent that counsel for the appellant submitted that a statement by the accused can only be capable of being a lie if there is other evidence which

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per Southwood J, citing *Zoneff* at [71] per Kirby J and *Benbrika v The Queen* (2010) 29 VR 593 at [179].

shows that it is a lie, no authority was cited for the proposition. In any event, here, the appellant's evidence about putting up the beaded curtain was itself contradictory. The statement made before lunch (that he put up the beaded curtain at the real estate agent's suggestion, with the inference that it was there in 2004 when KP came to the home as an adult), was directly inconsistent with the statement made after lunch (that putting up the beaded curtain was his idea and the real estate agent told him to take it down, with the inference that it was not there in 2004 when the new owners bought the home). Both statements could not be true. In the circumstances of this case (particularly the way the appellant's evidence was given), that was sufficient to permit the appellant's evidence to be characterised as capable of amounting to a deliberate lie. In any event, there was also KP's evidence to the effect that he had only been to the home in Hare Street when he was at school and had seen the beaded curtain then. Credible evidence inconsistent with the evidence of the accused on the point is sufficient to permit its characterisation as capable of being a lie.

[63] As to its capacity to amount to a lie demonstrating consciousness of guilt, the presence of KP at the Hare Street home as an adult, rather than as a student, was a central matter in relation to the alleged offending. If he was not present as a student, the alleged offending in counts 2 and 3 could not have occurred. That is sufficient to enable its characterisation as capable of being a lie demonstrating consciousness of guilt. In such circumstances, the existence of other possible explanations for the telling of the lie are matters

for the jury and do not deny it that characterisation. In short, the appellant's evidence about the beaded curtain was capable of being characterised as a deliberate lie told by the appellant because he knew that the truth would implicate him in the commission of the alleged offending. It was properly treated as such by the trial judge and the prosecution. There was no miscarriage of justice and ground 2 is not made out.

Disposition

[64] The appeal is dismissed.
