

SUPREME COURT OF VICTORIA

COURT OF APPEAL

No. 386 of 2006

THE QUEEN

v

MICHAEL CARDAMONE

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JUDGES: WARREN CJ, NETTLE and NEAVE JJA  
WHERE HELD: WANGARATTA  
DATE OF HEARING: 28 March 2007  
DATE OF JUDGMENT: 3 May 2007  
MEDIUM NEUTRAL CITATION: [2007] VSCA 77

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CRIMINAL LAW - Rape - Indecent acts with child under age of 16 - Threats to kill - Threats to inflict serious injury - Evidence - Consciousness of guilt - Lies - Crown not contending lies bespoke evidence of guilt - Whether *Edwards* direction nevertheless necessary - Whether *Zoneff* direction adequate - Whether reasonable possibility of failure to give *Edwards* direction affecting verdict - *Edwards v The Queen* (1993) 178 CLR 193, *Zoneff v The Queen* (2000) 200 CLR 234, considered; *Dhanhoa v The Queen* (2003) 217 CLR 1, applied - Appeal dismissed.

CRIMINAL LAW - Sentencing - Cumulation - Error to cumulate sentences for threats with sentences for offences effected by means of threats - Appeal allowed - Re-sentenced to a total effective sentence of nine years with non-parole period of six years.

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<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Crown	Mr J D McArdle QC with Mrs C M Quin	Ms A Cannon Solicitor for Public Prosecutions
For the Respondent	Mr M J Croucher	Vaccaros

WARREN CJ:

1           The applicant seeks leave to appeal against his conviction in the County Court sitting at Wangaratta of threats to inflict serious injury and to kill, sexual penetration, permitting an indecent act with a child under 16 and rape. The applicant also seeks leave to appeal against sentence.

2           The applicant worked as a tobacco farmer with his parents near Myrtleford. The farm consisted of a house and sheds and two caravans to accommodate seasonal workers together with a toilet and bathroom facility located in a shed nearby. At the time of the offences the complainant, a 15 year old girl, lived with her boyfriend in one of the caravans. The complainant's boyfriend worked on the tobacco farm as did three other workers at the time. The complainant did not work there. The complainant and her boyfriend had lived at the farm for two months prior to the offending in one of the caravans. Whilst her boyfriend was working, the complainant would mostly stay in their caravan sleeping or playing electronic games. She was not entirely happy with that state of affairs and would argue with her boyfriend. She wanted to leave the tobacco farm and he wanted to stay. Sometimes in the evenings the applicant would join the workers and the complainant in the caravan and smoke marijuana.

3           On the evening of 17 March 2005 the applicant, the complainant, her boyfriend and other resident workers sat around in the caravan talking and smoking marijuana until the early hours of the next morning and went to bed very late. The applicant went home to his parents' house on the property. The next morning, at about 7:15am on 18 March 2005 the applicant returned to the caravans, started up a tractor with a trailer and called out to the workers sleeping in the caravans to get up and come to work. They did so and were taken by the applicant down to the paddocks to start their day's work, which they commenced at about 7:30am. The complainant stayed behind in the caravan dozing. She had gone to bed without undressing and thus was fully clothed.

4           The complainant gave evidence that as she lay dozing in the caravan she was woken by a pillow placed over her face and the applicant trying to smother her. She was a small girl, about 4ft 10 inches (147 cms) in height and of light build. The applicant was of about medium height and heavy build. The complainant said the applicant was standing beside her holding a 30cm wrench as if he would hit her and looking “really angry”. She backed up into the corner of the caravan bed. He told her to “shut up” and “take your clothes off, just strip for me, take your top off”. The complainant said she was crying and screaming. She refused and the applicant said “do it or I’ll kill you” and raised the wrench above his head. The complainant removed her upper clothing at the command of the applicant. He ripped away some of the clothing and pulled off the complainant’s jeans. The complainant continued to cry and scream and the applicant kept telling her to shut up or he would hit her with the wrench or kill her. The complainant said the applicant forced her to remove her underwear and said he just wanted to look at her. He started to touch her on the vagina and inserted his fingers moving them in and out. The complainant said the applicant told her to roll onto her stomach when he reinserted his fingers into her vagina and then inserted his fingers into the complainant’s anus, again moving them in and out. The complainant continued to cry and asked the applicant to leave.

5           The complainant said she told the applicant she wished to go to the toilet. She picked up a sleeping bag from the bed encased in a “Bart Simpson” cover. The sleeping bag could be unzipped to form a single cover and is hereafter described as a doona. The complainant said she had brought the “Bart Simpson” cover from her boyfriend’s family home only the day before. It had not been in the caravan previously and the complainant’s boyfriend confirmed that was so. The applicant grabbed the complainant around the wrist and walked the complainant, who covered herself up with the doona, to the toilet. He stood in the doorway, waited whilst the complainant went to the toilet and then walked her back to the caravan holding her wrist and the wrench.

6           The complainant sat on the bed and told the applicant to go. He told her to be

quiet and threatened oral sex. The complainant said the applicant told her she had two choices. Either to masturbate him or perform oral sex on him. The complainant cried and refused and the applicant ordered her to pull his shorts down, which she did a bit. She observed the colour of his underpants. The applicant told the complainant to perform oral sex on him. He threatened her so she opened her mouth and he inserted his erect penis. She noticed that the applicant had a wart on his groin. The complainant said she had no knowledge of the wart before the incident. The complainant started to choke, next, she said the applicant directed her to roll over and he rubbed himself on her back and ejaculated. The complainant said she rolled over afterwards and wrapped the doona around her. The complainant swore at the applicant and asked if he was going to leave and then covered her face with her hands. She said when she looked up the applicant was dressed. The complainant said there was a bowl of marijuana in the caravan. The applicant sat down and “packed himself a cone of that bowl and smoked it”.

7           A car pulled up in the yard outside and the complainant recognised the engine as that of the applicant’s father. She said the applicant looked out. He turned to her and said that if she told anyone or if her boyfriend noticed anything he would kill her and have her family killed. He said no-one would believe her and threatened to kill her if she told anyone. The complainant said the applicant then left, jumped on a tractor and drove to where the work was occurring, less than a kilometre away.

8           The complainant said she dressed and went to the bathroom to make a call on her mobile telephone. She passed the applicant’s father and said “hello”. The applicant’s father confirmed that this occurred and also said that the complainant was carrying a towel at the time. Inhibited by the echo in the bathroom the complainant returned to the caravan and telephoned and alerted her boyfriend’s sister and mother about what had occurred. The sister told the complainant not to shower and to grab anything that might have semen on it. She told the complainant to pack and leave. The complainant next telephoned a friend, Pam Rose, who lived nearby and told her what had happened. The woman, picked the complainant up

five minutes later and took the complainant to her house. The complainant told Rose “the fat wog came in and got her”. Rose gave evidence that the complainant was reluctant to go to the police. She told Rose that she might be able to get some money from what had occurred because of the means of the applicant. Rose said the complainant stated she would try and take the applicant for what she could. After the initial reluctance by the complainant, the police were alerted to the alleged events.

9           Initially, the police commenced a record of interview of the applicant at 12:40pm the same day. The full record of interview did not commence until about 6:20pm. The applicant admitted his knowledge that the complainant was 15 or 16. The complainant’s boyfriend gave evidence that he had told the applicant of her age. When asked about his movements at the beginning of the morning the applicant said he arrived at the complainant’s caravan to collect the workers at 7:15am and then drove them to the day’s worksite where they all arrived to start at 7:30am. The applicant said he returned to the shed at 8:15am where he was with his father. He said he helped his father with some loading until 8:35am. He said he was with his father the entire half-hour period, then he went to the house to collect refreshments for the workers called “smoko” and went down to the workers again. The applicant said he did not return until about 9:35am. The applicant said he had seen the complainant that morning when her boyfriend left for work.

10           Later on in the record of interview, the applicant said he remembered that when he was down at the paddock with the workers at 7:35am his father came down and he, the applicant, went back to the house to ascertain why two workers had not turned up for work. The applicant said he telephoned one of the worker’s partners and learned he was on his way. He said he made the telephone call from a nearby hotel. The applicant said he then travelled up and down the road looking for the worker. The applicant said he could not remember whether his father went down to the paddock early. Then he said he saw his father at the paddock and he, the applicant, went to the shed but he was not with his father. He believed his father

could have been down in the paddock at that time.

11           Again, later in the record of interview, the applicant described an arrangement whereby his father operated the local school bus and had a driver, David Chalmers. The school bus was kept in the sheds in the farmyard in the area of the caravans. The applicant said on the morning Mr Chalmers was at the property at 7:50am and left the sheds at about 8am. The applicant said he was at the sheds when Mr Chalmers arrived but he did not know where his father was at that time.

12           The evidence of the workers as to the applicant's movements was that he took them to the work location at about 7:30am, showed them the work to be done and left between 7:45am and 8:00am. The applicant did not return until "smoko" at about 9:30am. The bus driver, Mr Chalmers, gave evidence that at about 7:45am he saw the applicant's utility parked near one of the sheds. He saw the applicant and left at about 7:50am in the bus. When Mr Chalmers returned at 9:00am he did not see any vehicles. The applicant's father gave evidence that the applicant went to collect a worker at about 7:50am or 8:00am and returned at about 8:00 or 8:10am.

13           The applicant denied the complainant's allegations. When asked for an explanation as to the possible presence of semen on the body of the complainant, the applicant said he had engaged a prostitute from Albury to see him a few days before and he used the caravan for that purpose. He said the prostitute was called "Kelly" and came from a brothel in Albury called "Club 727" at a fee of \$150. The applicant said he had sex with the prostitute who he ejaculated "all over" in the caravan on the bed. He said he did not clean up the semen from the bed covers consisting of a blue doona cover, described by the applicant as "some sort of Simpsons or something". When asked about the presence of semen on the body of the complainant he explained that she had been sleeping in the bed where he, the applicant, had sex with the prostitute. When asked about the possible presence of semen in the mouth of the complainant, the applicant suggested she could have had her mouth on the bed where he had engaged in sex with the prostitute.

14           The prosecution called the owner of an Albury brothel who gave no record of a prostitute attending the applicant's area, and that, if one did, it would cost a minimum of \$350. The brothel owner said that at the time there were a number of agencies in Albury.

15           The forensic evidence as to DNA analysis disclosed that seminal stains, including spermatozoa, were found on the doona and the towel taken by the complainant to the bathroom. With respect to both items, the applicant and the complainant could not be excluded as a contributor to the DNA. Spermatozoa were detected on swabs taken of the complainant's back but there was insufficient spermatozoa or male DNA detected on swabs taken of the complainant's mouth. An anal swab taken from the complainant disclosed the presence of male DNA but there was insufficient material for a more specific result. No spermatozoa were detected elsewhere on the complainant's body.

16           The police also asked the applicant in the record of interview as to the complainant's knowledge of a wart on the side of his groin. He admitted he had such a wart and said he openly discussed it with the workers and joked about it. He said one of the workers may have told the complainant of its existence.

17           In the record of interview the applicant did not put forward any other version of events. In the opening address of defence counsel nothing was said to the jury about an alternative version of events. However, under cross-examination, counsel for the applicant put to the complainant that she was going across the yard for a shower at about 8am on the morning of the offending, wrapped in a doona, holding a towel when she saw the applicant. It was put that the complainant asked the applicant for a cigarette and followed him into the toilet. Next it was put that the complainant dropped the doona from around her revealing her nakedness, and offered to have sex with the applicant. Then it was put to the complainant that she placed her hands inside the applicant's shorts and commenced to masturbate him. It was put that the complainant offered to perform oral sex, then, when the applicant ejaculated the complainant wiped up with the towel she had. Next it was put to the

complainant that she said to the applicant “I want money or I’m going to cry rape” and demanded \$10,000 by lunchtime that day. It was put to the complainant that she had concocted her description of the offences. The complainant denied all these matters as put to her, generally described hereafter as “the puttage”. The applicant did not give evidence.

18           The closing addresses reflected the case focus of each side. The prosecutor focused on the credibility of the complainant. In order to persuade the jury that the complainant should be believed he had to deal with the record of interview. Importantly, the applicant did not give evidence. The record of interview formed part of the evidence and within it the applicant gave his version of events and his denials of the complainant’s allegations. Scrutiny of the closing address revealed that the prosecutor set about challenging the applicant’s version of events. This was necessary to enable the jury to accept the complainant’s version of events to the requisite standard. At the outset of his closing address the prosecutor confronted the puttage of the applicant concerning consensual sex in the bathroom and toilet shed. The prosecutor described it as “absolute and utter nonsense”. He then traversed the complainant’s evidence and came to her identification of the applicant’s underwear, the DNA evidence and the knowledge of the wart on the applicant’s groin. Having done that, the prosecutor moved directly to the record of interview and the puttage and challenged the applicant’s version of events as “a pack of lies”. Emphasis was placed on the failure of the applicant to take the opportunity to raise the version of events contained in the puttage during the record of interview or, at least, in the opening address. In the context of analysing and challenging the record of interview, the prosecutor put the credit of the applicant in issue as to the alibi of being with his father and the seizing upon the story of the involvement with the prostitute to explain his DNA on the doona. The prosecutor also challenged the credit of the applicant in the record of interview where he described going out to look for the worker, driving up and down the road and calling in at the local hotel to make a phone call. Emphasis was placed by the prosecutor on the evidence of the complainant and her boyfriend that the Bart Simpson doona cover was not brought

to the caravan until they came back from Albury, the day before the offending, compared with the applicant's version that he used the caravan and bed, including the doona, with the prostitute the weekend earlier. The prosecutor suggested the applicant proffered that explanation to explain the presence of his DNA on the doona. The prosecutor then moved to the knowledge of the wart and pointed to the evidence of a worker, Mr Sharp, that he did not know of the wart (whilst the applicant said in his interview that he openly joked about it with workers). The prosecutor, in the context of the record of interview, told the jury that the applicant's answer to the knowledge of the wart was made up. Turning to the puttage, the prosecutor emphasised that the version of events of consensual sex in the bathroom shed was used by the applicant as an answer to the knowledge of the wart. On this overall analysis, the prosecutor concluded the puttage was irreconcilable with the facts, the complainant's account of events, the independent evidence and the DNA evidence.

19 In his address the prosecutor put to the jury that the applicant was a liar. He relied upon 11 matters and articulated them thus: first, the complainant would have had to make up her version very quickly and then repeat it often and correctly "if this was all lies"; secondly, the applicant had to explain how the complainant knew the colour of his underwear and the existence of the wart, the presence of his DNA on the doona and the presence of his DNA on the towel; thirdly, the applicant was "thinking on his feet", "he's twisted the police up" and "[W]hen it gets to the detail of what happened with [the applicant] you can feel him closing in"; fourthly, the applicant wanted "to paint to you an innocent man"; fifthly, when confronted with the truth he tells a "cock and bull story"; sixthly, he had opportunity during the record of interview to tell the police what happened [i.e. the puttage] but instead he weaves a story; seventhly, when the applicant cannot hold his account together he produces a version in the puttage; eighthly, after the offending the applicant calmly went down to the paddock thinking about what he would say and what might happen; ninthly, the proper record of interview starts almost seven hours after his arrest so the applicant has time to construct his version, namely, lack of opportunity

and so he raises the alibi of his father and then the presence of the school bus driver; however, he in fact had opportunity and he picked his time; tenthly, when confronted with the DNA evidence, he makes up the story about the prostitute but is exposed by the fact the doona cover was not there at the time of that engagement; and finally, the applicant lied about where he made the phone call to the late worker from and then says it was one of three hotels.

20           The prosecutor then put to the jury that the account of the complainant was compelling and supported by the evidence, whereas on the applicant's side, the puttage was irreconcilable with the facts, the independent evidence and the evidence of the DNA. It was on that basis that the prosecutor put to the jury that the account of the complainant was truthful and honest and that they could be satisfied beyond reasonable doubt of the charges against the applicant.

21           The final address of the defence counsel squarely attacked the credit of the complainant. Principally by focussing on the unreality of the applicant acting spontaneously with the risk of being seen in the shed yard by his father or the school bus driver or others and of the complainant's screams being heard. Counsel also challenged the likelihood of the applicant marching the complainant across the shed yard to the toilet bearing the wrench, again risking being seen or heard by others. Conversely, so it was put, the complainant was a bored, moody 15 year old who wanted her boyfriend to leave the tobacco farm and who did not want to stay for the forthcoming picking season when more workers would get in the way of her being with her boyfriend. Emphasis was placed upon the complainant's parlous circumstances, her taking medication for depression and her desire to leave as providing the motive to tell lies about her encounter with the applicant. Counsel also attacked the complainant's reluctance and hesitation about going to the police as being demonstrative of her lack of credit. Defence counsel accepted that the Crown case was based on the complainant's evidence. Counsel described the case as "a one witness case". A careful analysis was embarked upon, more than once, to portray the complainant as a moody girl with the motive to lie. Virtually nothing was said in

the closing address by defence counsel about the record of interview. An important focus of the address was upon the presence of DNA on the towel and the evidence of the complainant in that regard.

22 In the charge, the trial judge directed the jury as follows:

“It is put by [the prosecutor] that it is evident that some of the answers which Mr Cardamone supplied in the interview were wrong and he says that you should reject them. He said the account about the prostitute, for example, you should reject. He says that if you find that you cannot accept or you cannot rely upon these answers, it tends to impact upon the credibility that you can give to Mr Michael Cardamone’s other answers in the interview itself.

But I caution you about taking it the next step, because it is one thing to reject the answer and therefore find that Mr Cardamone is unreliable. But if you find that the answers are inaccurate, that does not operate to prove the allegations that [the complainant] makes. In other words, if for whatever reason you find that the answer given in the interview by Mr Michael Cardamone is wrong, it is not the case that you can therefore conclude that [the complainant’s] account is correct. It does not bolster her account because you found something he said to be unreliable, because it raises an important legal issue and it concerns the onus of proof, and I have directed you about that. It is not a question of choosing between two accounts, that of [the complainant] and that of Mr Cardamone. Do not fall into that trap, tempting as it may appear, because it is not the law. The critical question in this case that requires your answer is are you satisfied beyond reasonable doubt of the guilt of the accused based upon all of the evidence. That onus is not satisfied by your selection of one account over another. The law places no onus whatsoever on the accused to satisfy you that his evidence is truthful. It is for the Crown to satisfy you of the guilt of the accused beyond reasonable doubt based upon all of the evidence.”

23 Later in the charge the judge said:

“[the prosecutor] places store, great store, on the account given by Mr Cardamone about the prostitute and the presence of the semen on the Bart Simpson bag, and I need not go into that any further.

Mr Cardamone, in the interview with the police, made a mention of that bag, and seemed to raise the possibility that it is possible that his semen got onto the bag by reason of the encounter with the prostitute.”

24 Both throughout the charge and at its end the trial judge provided opportunities for the taking of exceptions. None were taken. This was important for two reasons: first, the applicant was represented by very senior and experienced counsel; secondly, at the end of the prosecutor's address the trial judge raised with him that the lies in the record of interview and the puttage were not suggested to the jury as indicating consciousness of guilt.<sup>1</sup> The prosecutor said to the judge that he put the matters as going to credit. The judge specifically raised the primary authority of *R v Edwards*.<sup>2</sup> At the end of the discussion between the judge and prosecutor, an opportunity was extended directly to senior counsel for the applicant to comment. None was made.

25 The applicant seeks leave to challenge the conviction on the ground that the trial judge failed to give an *Edwards*<sup>3</sup> or similar direction on lies or consciousness of guilt.

26 For the applicant, Mr Croucher submitted that the direction was inadequate because it was not an *Edwards* or a *Zoneff*<sup>4</sup> direction. He described the prosecutor as putting to the jury that the applicant had lied in his record of interview and had first, attempted to create a false alibi, secondly, invented the liaison with the prostitute to explain the presence of his DNA on the sleeping bag, thirdly, invented a story that he had told others about the wart on his groin and, fourthly, had also lied in the puttage as to activities between the applicant and the complainant in the bathroom shed. It was submitted that the issue therefore arises whether the jury would have understood the raising of the lies as inferring consciousness of guilt. In my view they would not. His Honour gave, as already described, a *Zoneff*<sup>5</sup> type direction. Whilst the express words of that direction were not used ("...do not follow a process

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<sup>1</sup> See *Edwards v The Queen* (1993) 178 CLR 193; *R v Nguyen* (2000) 118 A Crim R 479; *R v Chang* (2003) 7 VR 236.

<sup>2</sup> *Edwards v The Queen* (1993) 178 CLR 193.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Zoneff v The Queen* (2000) 200 CLR 234, 245.

<sup>5</sup> *Ibid.*

of reasoning to the effect that just because a person is shown to have told a lie about something, that is evidence of guilt”<sup>6</sup>), close scrutiny of the language suggested by the High Court in *Zoneff* and the direction actually given by the trial judge here reveals sufficient application of the language in *Zoneff*. The case was one about credit, namely whether the complainant was to be believed. The trial judge in the direction addressed that factor squarely. As Nettle JA recently observed in *R v Cuenco*,<sup>7</sup> the general rule is that an *Edwards* direction should only be given if the prosecutor contends that a lie or post-offence conduct is evidence of consciousness of guilt and if in fact the lie or conduct is capable of bearing that in character.<sup>8</sup> Ordinarily, it is sufficient to warn the jury along the lines articulated in *Zoneff*.

27 Mr Croucher argued that the concurrence, acquiescence or even abrogation of responsibility by a defence counsel in these types of circumstances was not to the point, no matter how experienced or senior the counsel was. He argued that defence counsel in this matter made a mistake in not seeking an *Edwards* direction below as did the prosecutor and the judge. Reliance was placed upon the circumstances in *R v Chang*<sup>9</sup> and *R v Nguyen*<sup>10</sup> where experienced defence counsel (and prosecutor and trial judge) did not pursue an *Edwards* direction and the Court of Appeal held the failure could not be passed off as a “mere unfortunate oversight”.<sup>11</sup> In *Danhhoa v The Queen*,<sup>12</sup> decided before *Chang*, the High Court considered the position where a direction in relation to lies had not been given or sought at trials. Gleeson CJ and Hayne J held:<sup>13</sup>

“Where the prosecution does not contend that a lie is evidence of guilt,

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<sup>6</sup> Ibid.

<sup>7</sup> *R v Cuenco* [2007] VSCA 41 (Unreported, Maxwell P, Nettle and Redlich JJA, 13 March 2007).

<sup>8</sup> Ibid [15].

<sup>9</sup> (2003) 7 VR 236.

<sup>10</sup> (2001) 118 A Crim R 479.

<sup>11</sup> *R v Chang* (2003) 7 VR 236, [1] (Ormiston JA).

<sup>12</sup> (2003) 217 CLR 1.

<sup>13</sup> Ibid [34].

then, unless the judge apprehends that there is a real danger that the jury may apply such a process of reasoning, as a general rule it is unnecessary and inappropriate to give an *Edwards* direction.”

28           McHugh and Gummow JJ held such a direction was unnecessary whenever the prosecutor suggests an out of court statement by the accused is a lie and whilst it would have been better to have done so in that particular case, the appellant failed to establish that it was a reasonable possibility that the failure to direct the jury “may have affected the verdict”.<sup>14</sup> In *Nguyen*<sup>15</sup> the Court of Appeal held a fuller *Edwards* direction ought have been given as to immediate post offence conduct by the accused of concealment of the weapon accompanied by subsequent conduct of asserting that someone else shot the deceased.<sup>16</sup> It was held that the combination of concealment and pretence gave probative weight to the evidence.<sup>17</sup> In *Nguyen, Winneke P* held:<sup>18</sup>

“Post offence conduct, including lies, only becomes probative because it stems from a consciousness of guilt. The strength of its probative value, however, will depend upon its nature and the use which is sought to be made of it”

29           In *Chang*,<sup>19</sup> the Court of Appeal held that there was no basis for the prosecution to rely upon post offence conduct of the accused consisting of false enquiry as to the whereabouts of the deceased post death, concealment of the deceased’s body, the acquisition of materials to dispose of the body, attempts to disguise his identity and evasion of apprehension by police, together with lies in a record of interview “unless it were to show that the applicant had a guilty mind at the time the victim met her death”.<sup>20</sup> In *Chang*, the prosecutor raised from the outset the intention to demonstrate behaviour [the post offence conduct] that demonstrate

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<sup>14</sup>       Ibid [59-60].

<sup>15</sup>       *R v Nguyen* (2000) 118 A Crim R 479.

<sup>16</sup>       Ibid [18] (*Winneke P*).

<sup>17</sup>       Ibid.

<sup>18</sup>       Ibid.

<sup>19</sup>       *R v Chang* (2003) 7 VR 236.

<sup>20</sup>       Ibid [4] (*Ormiston JA*); See also [43] (*Charles JA*).

“an unanswerable case of guilt of murder”.<sup>21</sup> This was to be contrasted with a prosecution case where a different approach is taken, such as the present:

“if the evidence and its use by the prosecution is intended to show that such lies or other acts could not have been perpetrated unless the accused was implicitly admitting his or her guilt, then the need for the warning remains. If a lesser use of that evidence by the jury is intended and sought by the prosecution, then the absence of a warning would ordinarily cause no harm”.<sup>22</sup>

30 In *Chang*, the centrality of the post offence conduct and the lies of the accused to the prosecution case and the unequivocal reliance upon it led the Court of Appeal to the “certain” conclusion as to the real danger that the jury may have applied the unacceptable process of reasoning.<sup>23</sup>

31 In the present case, the circumstances were different and distinguishable. The case was one about the credit of the complainant. There was no separated or isolated case based upon the record of interview or the puttage matters. The lies of the applicant and the changes to his version of events were relied upon only as to the credit of the complainant. In any event, in view of the statements of the High Court in *Zoneff* and *Dhanhoa*, no more was necessary than the direction given. This conclusion is reached on five grounds: first, the central evidence for the prosecution was that of the complainant hence the statements and puttage of the accused required discrediting; secondly: experienced defence counsel at trial was evidently not concerned as to any risk of adverse reasoning by the jury, nor was the trial judge, save for the *Zoneff* direction given;<sup>24</sup> thirdly, defence counsel may be reasonably understood to have made a forensic decision not to seek an *Edwards* direction because, if given, it may have unduly prejudiced the case of the applicant at trial as it was run; fourthly, there was doubtless a commensurate risk if an *Edwards* direction

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<sup>21</sup> Ibid [6] (Ormiston JA); See also [47] (Charles JA).

<sup>22</sup> Ibid [5] (Ormiston JA).

<sup>23</sup> Ibid [48] (Charles JA).

<sup>24</sup> See *R v Kumar* (2006) 165 A Crim R 48, [34-35] (Eames JA) citing *R v Arundell* [1999] 2 VR 228, 247 -250; and *R v Spina* [2005] VSCA 319, [13]; further, this analysis is consistent with the approach in *Dhanhoa v The Queen* (2003) 217 CLR 1, [34] (Gleeson CJ and Hayne J) and [60] (McHugh and Gummow JJ).

was given that the answers in the record of interview and the puttage matters would have been elevated to indicators of consciousness of guilt whereas it was the defence case that the complainant was the one telling lies and who, indeed, had a motive to do so; fifthly, in *Nguyen and Chang* the only individual capable of directly contradicting the accused's version of events was the deceased whereas here the complainant gave evidence and the prosecution needed to explain the applicant's statements in order to ensure that the jury were satisfied as to the credibility of the complainant. I do not consider, therefore, that there was any risk to the reasoning process as identified in *Nguyen and Chang*. This case was quite different.

32 While on one view the applicant needed to demonstrate that there was a reasonable possibility that failure to give an *Edwards* direction may have affected the jury's verdict,<sup>25</sup> I consider the better view is to assess the purport of the prosecution case with the perceived apprehension of the trial judge<sup>26</sup> in the overall circumstances of the conduct of the case. Here, notwithstanding the strength of the prosecution case, it nevertheless turned on whether the jury believed the complainant or the applicant. It was a case centrally based on credit.

33 Next it was submitted that as there was no *Edwards* direction as to innocent reasons for the lies, the *Zoneff* direction conflated the concept of onus of proof. The direction given did not adequately address the issue of corroboration with respect to DNA found on the doona being mentioned with the lie concerning the prostitute.

34 In my view, the submission misconceives the task of the prosecution in this case. It was the applicant who gave his various versions of events in both the record of interview and the puttage. As already observed, the whole purpose of the prosecutor's address was to neutralise or dispose of those versions so as for the jury to reject them. In my view the jury would have understood the prosecutor's analysis of the evidence and, in particular, his analysis of the applicant's version of events.

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<sup>25</sup> *Danhhoa v The Queen* (2003) 217 CLR 1, [60] (McHugh and Gummow JJ).

<sup>26</sup> *Ibid* [13] (Gleeson CJ and Hayne J).

Common sense and ordinary experience dictates the same.<sup>27</sup> The prosecutor did not use the evidence concerning the doona, the presence of DNA on it and the circumstances relating to the prostitute to corroborate the complainant's evidence. Rather, the prosecutor set about answering the defence case. The judge did no more in the charge than summarise that case.

35 I would dismiss the application for leave to appeal against conviction for these reasons.

36 I turn then to the application for leave to appeal against sentence.

37 The applicant was sentenced, as follows:

Count 1 - Threat to inflict serious injury: one year's imprisonment with three months ordered to be served cumulatively on Count 5 (the head sentence).

Count 2 - Indecent act with a child under 16: two years and six months imprisonment.

Count 3 - Threat to kill: two years and six months' imprisonment with six months ordered to be served cumulatively on Count 5.

Count 4 - Rape: four years' imprisonment with one year ordered to be served cumulatively on Count 5.

Count 5 - Rape: six years' imprisonment.

Count 6 - Rape: six years' imprisonment with one year and six months ordered to be served cumulatively on Count 5.

Count 7 - Indecent act with a child under 16: two years and six months' imprisonment with six months ordered to be served cumulatively on Count 5.

Count 8 - Threat to kill: two years and six months' imprisonment with six months ordered to be served cumulatively on Count 5.

The total effective sentence imposed was ten years and three month's

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<sup>27</sup> *R v Brdarovski* [2006] VSCA 231, [5]-[16].

imprisonment and a non-parole period of seven years was fixed.

38 The judge received a Forensicare report by Dr S Robson (supervised by Dr G Lester). Dr Robson described the personal, sexual and psychological history of the applicant. He was the child of hardworking and industrious Italian immigrant parents. He worked very hard in the family's café and tobacco farm businesses all his life. As a consequence, he had little or no opportunity for youthful social development and normal contact with women. The applicant developed the practice of utilising the services of prostitutes weekly or monthly. He had a long history from his late teens onwards of drug problems, including use of heroin, amphetamines and cannabis. The applicant's psychological history included hospitalisation for drug and alcohol rehabilitation treatment and also psychosis. At the time of sentence the applicant was not ingesting any psychiatric medications or drugs.

39 The applicant had limited insight into his offending and placed responsibility for events on the complainant. The applicant admitted that his actions were wrong but regarded the acts as consensual.

40 Dr Robson diagnosed the applicant as suffering opiate, marijuana and amphetamine dependence. No psychotic, personality or sexual disorder was diagnosed. His personality was diagnosed by Dr Robson as showing "... features of impulsiveness, difficulty with interpersonal relationships, aggression, a tendency to blame others and a lack of remorse. Dr Robson believed that psychiatric care would be provided within the prison system, including ongoing counselling for drug and alcohol use. Additionally observations were made that the applicant was likely to benefit from ongoing rehabilitation for drug and alcohol use, including an opiate substitution program. He would also benefit from sexual counselling. The applicant was assessed as less likely to re-offend by cessation of drug use, altered attitudes towards women and the development of an appropriate heterosexual relationship.

41 The assessment of Dr Robson was confirmed by Mr T Watson-Munro, forensic

psychologist. A full medical history of the applicant was also available to the judge.

42           The applicant was well supported by his family and strong references of support were provided by family and business associates. The applicant had a prior criminal history of unlawful assault, various thefts, aggravated burglary and burglary, trafficking and using a drug of dependence and other matters.

43           Leave was sought on two grounds, manifest excess and totality and, secondly, error in cumulation.

44           It is convenient to deal with the second ground first, namely that concerning alleged error with respect to cumulation. Under the second ground it was submitted that there was error in the order for cumulation on the counts involving the threats<sup>28</sup> as they were the means by which the other offending was effected. Further, it was submitted that the offending constituted by the second indecent act<sup>29</sup> was subsumed in the second rape<sup>30</sup> or subsumed by the seriousness of the three rape counts.

45           I accept the submission with respect to cumulation in relation to the threat counts. They were part of the perpetration of the offending and in the context of the overall opportunism the judge on sentence, in my view, ought not have ordered cumulation with respect to those counts. However, the submission as to the subsuming of the second indecent act into the second rape is unpersuasive. The offending was clearly a separate act. Therefore, there was error in part under the second ground.

46           Turning next to the first ground which concerned manifest excess and totality, the judge found that the offending was opportunistic and partly a product of illicit drug taking by the applicant. The judge also took account of the lack of prior sexual offending of the applicant and the availability of familial support. For the applicant it was emphasised that there was no significant injury, internal ejaculation or risk of

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<sup>28</sup>       Counts 1, 3 and 7.

<sup>29</sup>       Count 7.

<sup>30</sup>       Count 6.

pregnancy or sexually transmitted disease and that this was a factor to be taken into account in the sentence of the applicant. In my view the latter submission was misplaced. It is difficult to accept that sexual offences of this type do not involve significant injury, notwithstanding the absence of pregnancy or disease. The victim impact statement of the complainant revealed that she continued to suffer depression, anxiety, guilt, anger, nausea and other physical symptoms some 18 months after the offending. The complainant was very young and physically small; she was attacked in her home (the caravan) by a man 22 years her senior bearing a weapon; the complainant had horrible and degrading acts perpetrated upon her; she was subjected to the committal and trial processes including accusations under cross-examination of the concoction of a dishonest version of events. There is also the apparent lack of remorse for serious offending by the applicant against such a young victim even to the extent of lack of insight and the allocation of blame upon the complainant.

47           It was submitted under the first ground that the individual sentences were heavy and outside the range. In particular, it was emphasised that substantial cumulation was ordered on all but one count despite the opportunism of the offending.

48           Clearly the applicant had a difficult social, drug and psychological history and was well supported by his family. However, when account is taken of those matters together with the prior history of non-sexual offending and the opportunism of the attack, the sentence is at the severe end of the range as acknowledged by Mr McArdle in submissions. Nevertheless, given the seriousness of the offending and the aggravating features already described I would not be persuaded that the sentence was manifestly excessive in all the circumstances of the offending and those of the applicant. I would not be persuaded as to Ground 1, subject to the remarks I have made with respect to cumulation.

49           It follows that error has been made out and accordingly I would grant the application for leave to appeal against sentence pursuant to Ground 2, treat the

appeal as heard *instanter* and allow the appeal. The applicant falls to be re-sentenced. The applicant upon conviction on Count 3, is to be treated as a serious sexual offender by virtue of s 6B(1) and (2) of the *Sentencing Act 1991*.<sup>31</sup> In re-sentencing the applicant a severe sentence is appropriate because of that requirement and because of the gravity of the offending and the serious aggravating features involved together with the complete lack of remorse demonstrated by the applicant. The sentences imposed on Counts 3, 4, 5, 6, 7 and 8 require recognition of the serious sexual offender status of the applicant and also require orders for cumulation pursuant to s 6E of the *Sentencing Act*. In all the circumstances, including the consideration of totality, I would order partial accumulation on Counts 4, 6 and 7. In my view the circumstances of the applicant and rehabilitative needs as assessed by Dr Radford should be taken into account in the fixing of the non-parole period. I would re-sentence the applicant as follows:

- Count 1 - One year's imprisonment.
- Count 2 - Two years and six months' imprisonment.
- Count 3 - Two years' imprisonment.
- Count 4 - Four years' imprisonment.
- Count 5 - Six years' imprisonment.
- Count 6 - Six years' imprisonment.
- Count 7 - Two years and six months' imprisonment.
- Count 8 - Two years and six months' imprisonment.

50 I would order that one year of the sentence on Count 4, one year and six months of the sentence on Count 6 and six months of the sentence on Count 7 be served cumulatively with the sentence on Count 5, making a total effective sentence

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<sup>31</sup> See Clause 2 of Schedule 1 to the Act whereby Count 3 (s 21 of the *Crimes Act 1958*, threat to inflict a serious injury) triggers the second category of serious sexual offender under s 6B(2) of the *Sentencing Act*; See also *R v Boxhall* (Unreported, Supreme Court of Victoria, Court of Appeal, Winneke P, Tadgell and Batt JJA, 3 July 1997)

of nine years' imprisonment. I would direct a non-parole period of six years be served.

NETTLE JA:

51 I have had the advantage of reading in draft the reasons for judgment of the Chief Justice and I agree with her Honour that the application for leave to appeal should be refused. I do so, however, for somewhat different reasons.

*Appeal against conviction*

52 As I apprehend the law as to the directions which a trial judge must give concerning evidence of consciousness of guilt, it may be expressed thus:

- 1) If the Crown relies upon a lie or other post-offence conduct as evidence of consciousness of guilt, the lie or other conduct must be precisely defined; the circumstances and events that are said to indicate that the lie or other conduct bespeaks consciousness of guilt must also be precisely defined; and the jury must be given an Edwards direction in respect of the use which they may make of the lie or other conduct.<sup>32</sup>
- 2) "As a general rule" if the Crown does not rely upon a lie or other post-offence conduct as evidence of consciousness of guilt, the jury should not be given an *Edwards* direction either in respect of any particular lie or other conduct or generally.<sup>33</sup>
- 3) If the Crown does not expressly rely upon a lie or other post-offence conduct as evidence of consciousness of guilt, but the judge is concerned that there is a serious risk that the jury might treat a lie or

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<sup>32</sup> *Edwards v The Queen* (1993) 178 CLR 193, 210-211; *R v Ciantar* [2006] VSCA 263, [74]-[76].

<sup>33</sup> *Zoneff v The Queen* (2000) 200 CLR 234, 245.

other conduct as evidence of consciousness of guilt, it is usually sufficient to guard against the risk of the jury engaging in an impermissible process of reasoning for the judge to give the jury a *Zoneff* direction.<sup>34</sup>

- 4) There are, however, some circumstances where, although the Crown does not expressly rely upon a lie or other post-offence conduct as evidence of consciousness of guilt, it is so likely that the jury will treat the lie or other conduct as evidence of consciousness of guilt that the jury should be given an *Edwards* direction in respect of the lie or other conduct.<sup>35</sup>
- 5) It is not possible to state comprehensively the circumstances in which it is necessary that a jury be given such an *Edwards* direction<sup>36</sup> but they have been said to include where an accused tells a lie related to an object indispensably linked to the offence charged (such as, for example, a handkerchief with bloodstains proved by DNA evidence to be the victims' blood but falsely attributed to a nosebleed),<sup>37</sup> an accused's out of court explanation being so patently false as self-evidently to bespeak consciousness of guilt;<sup>38</sup> and a significant change in the direction of the defence case after it is made to appear that the way in which the defence case was originally put was based on a lie.<sup>39</sup>

53 For the sake of brevity I gratefully adopt the Chief Justice's summary of the prosecutor's final address. But in order to convey what I perceive to have been the

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<sup>34</sup> *Zoneff v The Queen* (2000) 200 CLR 234, 245.

<sup>35</sup> *R v Nguyen* (2000) 118 A Crim R 479, 478 [17]-[21]; *R v Chang* (2003) 7 VR 236, 239[6] (Ormiston JA), 253 [43]-[48] (Charles JA); *Danhhoa v The Queen* (2003) 217 CLR 1, 17 [58]-[59] (McHugh and Gummow JJ), 27 [96]-[97], (Callinan J *in diss*).

<sup>36</sup> *Zoneff v The Queen* (2000) 200 CLR 234, 244 [16].

<sup>37</sup> *Ibid* 234 [63].

<sup>38</sup> *Danhhoa v The Queen* (2003) 217 CLR 1, 18 [62].

<sup>39</sup> *R v Ali* (No 2) (2005) 13 VR 241, 257 [35].

sting in the address, I add the following passages from it:

“ ... I want to deal with the record of interview, and then I’ll make a few closing remarks to you ... But when [you] listen to it ... You [can] see him thinking on his feet, and he’s twisted the police up in this account about where he was, who was where. He’s very self assured, except when the questioning moves to the detail of what happens with [the complainant]. When it gets to the detail of what happened with [the complainant] you can feel him closing in.

He becomes evasive, he becomes less confident.

[The complainant] runs off to the police, tells the police and the police come out and confront [the accused] with this and then he tells this cock and bull story. On his own account it’s all a pack of lies. He tells this cop, look, I’ll tell you what happened. This is what happened. No. Why? It goes to his credibility. He’s got no credibility ...

Instead he tries to weave this story, give himself alibis, give explanations for things that were inexplicable and then after he’d realised that his account to the police can’t hold together you get this final version which was given to you, which you heard from [defence counsel] on Monday ...

So the record of interview doesn’t start till 6.20 p.m., so he’s had plenty of time, there’s not panic here. This is a deliberate attempt by him to alibi himself, to construct a false account and you can feel the arrogance during the course of the interview ...

So, the Crown say that there was plenty of opportunities in that period of time for this to happen. And it can’t really be said [or] put that it wasn’t because, even on, what we say [was the accused’s] cockeyed lying version, there was sex, there was an opportunity for sex, so – so, there was opportunity all right.

Now, the record of interview, during the record of interview, the accused man was confronted with the possibility of DNA evidence. Remember it was in the record of interview, and we’ve got the transcript there. So, what’s he do? He makes up this story about the prostitute. Now, this had one serious flaw, and this is why the final version had to change, and you probably picked up what I said before, and it’s the doona. So, he said – he tells the story about [having sexual intercourse with a prostitute on the doona] ...

But the great hole in that story, the trouble with the doona story is that on his own account – and the uncontested evidence *is that the doona couldn’t have been there*. Because ... the doona ... wasn’t in the caravan *at the time he says he had sex with the prostitute* ...

[Q]uestion 601, he’s asked about the semen on the body [of the

complainant] ... can you explain how the semen got on the body? I don't know, well, she's sleeping in the bed that I had sex in [with the prostitute]. Then when he's confronted with the [complainant's evidence that she saw that the accused had a wart on his crotch], in the record of interview [he says that] everyone knows about it, I walk around the paddocks talking about. Now you might think again that's a load of nonsense." ...

So what you then finally have ... is the final version put to you in the [puttage] in court and you might think that that's been carefully constructed to give an account for all the different things; how she'll know the [colour of the underpants he was wearing], how she knows he's got the wart [on his crotch], [he's] got to come up with some explanation so the explanation - it's the only viable explanation, so what [does he do], [he says] well she had consensual sex .... you didn't hear a thing about it in the opening [of the defence case], you didn't hear about it until we got [the complainant] at the end of the cross-examination."

54           Although the prosecutor did not say in terms that he relied upon the accused's lies as evidence of consciousness of guilt, I consider that the manner in which the prosecutor emphasised the accused's lies and that the accused had changed his story on each occasion that it was exposed as lies, could have led the jury to infer consciousness of guilt. Furthermore, the accused's lie about how his DNA got onto the complainant's doona was patently false and indisputably linked to the offences charged. It was obvious that the accused kept changing his story, and changed the thrust of his defence after it was shown to be incredible. In my view, those things of themselves could have led a jury to infer consciousness of guilt.

55           On balance, therefore, I am persuaded that it would have been preferable if the judge in this case had given the jury an *Edwards* direction in relation to each of the lies to which the prosecutor made reference.

56           Counsel for the Crown points to the fact that the accused was represented at trial by very experienced senior defence counsel and that defence counsel did not request the judge to give an *Edwards* direction. Counsel submits that therein lies a powerful indicator that the jury in this case would not have been inclined to infer consciousness of guilt. His argument is based on observations of McHugh and Gummow JJ in *Dhanhoa* that, because defence counsel in that case had not sought an

*Edwards* direction, it was to be inferred that it did not occur to those present at the trial that the jury might think that the accused's lies were evidence of a consciousness of guilt.<sup>40</sup>

57 In this case, however, there is a difference. Unlike *Dhanhoa*, where the manner of presentation of the prosecution case meant that there was only a "very slender" possibility of the jury inferring that the accused lied to the police because he was guilty, in this case it seems to me that there was a more significant risk of the jury reasoning that the applicant lied to the police because he was guilty. Consequently, I doubt that defence counsel's failure to ask for an *Edwards* direction should be taken to mean that he did not perceive the same risk. In my view, his failure to ask for the direction was more probably the result of an informed tactical decision to take the risk (presumably because he considered that to have the judge focus on the issue of consciousness of guilt would be more likely do the applicant harm than good).

58 Counsel for the applicant did not seek to gainsay that it was an informed and rational tactical decision to eschew an *Edwards* direction, and he submitted that there was nothing amiss about defence counsel doing just that and the applicant later complaining that the judge's failure to give an *Edwards* direction was productive of a miscarriage of justice. But equally in my view that proposition cannot be accepted in the unqualified terms in which it was expressed. Defence counsel is just as responsible as the prosecutor to assist the trial judge in ensuring that the accused is afforded a fair trial, and it follows that if defence counsel perceives that there is a significant risk of the jury inferring consciousness of guilt from lies or other post-offence conduct he or she is duty bound to draw that to the judge's attention and to remind the judge of the law on *Edwards* directions.<sup>41</sup>

59 Counsel for the applicant submitted in the alternative that even if that be so, it was in the end irrelevant whether defence counsel's failure to request an *Edwards*

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<sup>40</sup> *Dhanhoa v The Queen* (2003) 217 CLR 1, 18 [60].

<sup>41</sup> *Gianarelli v Wraith* (1988) 165 CLR 543 578-80 (Brennan J).

direction was an informed tactical decision, because the law is that trial judges have no authority to dispense with the directions that the law requires them to give in criminal trials, and it is no answer to a failure to give such directions that the fact that the directions were not given may have afforded the accused a better chance of acquittal than if the directions were given.

60 I accept that submission up to a point. As at present advised, I take the law since *Pemble*<sup>42</sup> to be that whatever course defence counsel may see fit to take, even if bona fide for tactical reasons in what he or she considers to be the best interests of the client, a trial judge must be astute to secure for the accused a fair trial according to law. Further, and despite what has been said in recent times about the consequences of forensic decisions to acquiesce in the admission of evidence against which objection might properly have been taken, or to call or not call evidence which may have been relevant and admissible,<sup>43</sup> it may be that a fair trial according to law demands that the judge give the directions that the law requires to be given, even if failure to give them may result in a better chance of acquittal,<sup>44</sup> and indeed even if defence counsel requests that they not be given.<sup>45</sup>

61 But even if that is so, I do not regard that as being the end of the matter. For as McHugh and Gummow JJ also made clear in *Dhanhoa*, it is not enough to establish a miscarriage of justice to show that it would have been better if the trial judge had given an *Edwards* direction, or if there is a possibility that the jury may have reasoned that the accused was guilty because he had lied to the police. In order to succeed in an appeal against conviction based on a trial judge's failure to give an *Edwards* direction, the appellant must show that it is a "reasonable possibility" that

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<sup>42</sup> *Pemble v The Queen* (1971) 124 CLR 107, 117.

<sup>43</sup> *Suresh v The Queen* (1998) 153 ALR 145, 151 [22]-[23], 148 [12]-[13]; *Doggett v The Queen* (2001) 208 CLR 343, 346 [2]; *TKWJ v The Queen* (2002) 212 CLR 124, 149 [79]-[82]; *Ali v The Queen* (2005) 214 ALR 1, 4 [7].

<sup>44</sup> *BRS v The Queen* (1997) 191 CLR 275, 302 (Gaudron J), 306 (McHugh J); see also *R v Hartwick* (2005) 14 VR 125, 162 (5) and (6), 169 [105].

<sup>45</sup> *Gillard v The Queen* (2003) 219 CLR 1, 17 [39]-[41].

failure to give the direction “may have affected the verdict”.<sup>46</sup> In this case I am not persuaded that is so.

62 Put aside any inference of consciousness of guilt, the Crown case against the accused in this case was still a powerful case. As well as the complainant’s direct testimony, evidence of recent complaint and evidence of distress, there was as well opportunity and motive and the corroboration of the complainant’s testimony constituted of the presence of the applicant’s DNA on the complainant’s doona. Despite the puttage, there was no basis in the evidence for the defence suggestion that she seduced the applicant and had consensual sexual congress with him; because of her youth and appearance and his age and proportions it was inherently most improbable; and in any event it was directly contrary to the evidence comprised of his statements to the police in his records of interview. Given the strength of all that, and the incredibility of the defence, I am not persuaded that there is a reasonable possibility that an *Edwards* direction would have made any difference.

63 Of course, in *Dhanhoa* the lack of “reasonable possibility” was due to the manner of presentation of the prosecution case and the consequent “very slender” possibility of the jury reasoning that the accused’s lies and other post-offence conduct were evidence of consciousness of guilt, and, in this case, there was in my view a higher possibility of the jury reasoning that the applicant lied to the police because he was guilty. Consequently, I do not suggest that the reasoning in *Dhanhoa* is directly applicable. But in point of principle the decision in *Dhanhoa* is grounded in the lack of reasonable possibility and not the circumstances in which that may occur. Logic and common sense imply therefore that it was intended to be capable of more general application. I do not see why it cannot be extended to the facts of this case. It is on that basis that I would refuse the application.

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<sup>46</sup> *Dhanhoa v The Queen* (2003) 217 CLR 1, 18 [60].

### *Appeal against sentence*

64 As far as the application for leave to appeal against sentence is concerned, I respectfully agree with the Chief Justice as to the excessiveness of the sentence and with the re-sentencing disposition which her Honour proposes.

NEAVE JA:

65 I have had the advantage of reading in draft the reasons for judgment of the Chief Justice and of Nettle JA. I agree with their Honours that the application for leave to appeal against conviction should be refused, that the application for leave to appeal against sentence should be granted and that the applicant should be re-sentenced as the Chief Justice proposes.

66 I note Nettle JA's comments at [60] that a fair trial may require an *Edwards* direction to be given,<sup>47</sup> even if a failure to do so may give the accused a better chance of acquittal and even if defence counsel requests that the warning not be given. That proposition seems to me to be difficult to justify in the context of an adversarial system.<sup>48</sup>

67 The joint report on *Uniform Evidence Law* by the Australian Law Reform Commission, and the Victorian and New South Wales Law Reform Commissions identified this as an area where law reform was desirable. Rather than recommending specific reforms the report suggested that the matter should be

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<sup>47</sup> The principle may apply to other directions and warnings as well, see for example *Doggett v The Queen* (2001) 208 CLR 343.

<sup>48</sup> For discussion by this Court of the manner in which tactical decisions by counsel should be taken into account in determining whether there has been a miscarriage of justice see *R v Farouk Minaoui* [2004] VSCA 126, [66] (Eames JA); *R v Heinze* [2005] VSCA 124, [23]-[33] (Eames JA); *R v Zilm* (2006) 14 VR 11, 27 [68] (Eames JA). None of these cases are concerned with the failure of counsel to request an *Edwards* direction. In *R v Kumar* [2006] VSCA 182, [43] (Eames JA), the failure of counsel to seek a *Zoneff* direction was regarded as "a strong pointer to the fact that neither counsel discerned there to be the risk which the High Court addressed in that case".

considered in the context of an inquiry into juries, including a comprehensive review of jury directions.<sup>49</sup>

68 Even if the reference to the lies told by the accused in the prosecutor's final address required the judge to give an *Edwards* direction, I agree with Nettle JA, for the reasons he gives, that there was no "reasonable possibility" that the failure to give the direction "may have affected the verdict".<sup>50</sup>

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<sup>49</sup> ALRC, NSWLRC and VLRC, *Uniform Evidence Law Report*, ALRC Report 102, NSWLRC Report 112, VLRC Final Report (December 2005) 18.174-18.190.

<sup>50</sup> *Dhanhoa v The Queen* (2003) 217 CLR 1, 18 (McHugh and Gummow JJ).