SUPREME COURT OF QUEENSLAND

CITATION:	*R v Sudusinghe* [2020] QCA 74
PARTIES:	**R** **v** **SUDUSINGHE, Samitha Vernon** (appellant)
FILE NO/S:	CA No 36 of 2019 DC No 578 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 1 February 2019 (Rafter SC DCJ)
DELIVERED ON:	17 April 2020
DELIVERED AT:	Brisbane
HEARING DATE:	2 April 2020
JUDGES:	Sofronoff P, Mullins JA and Boddice J
ORDER:	**Appeal dismissed.**
CATCHWORDS:	APPEAL AND NEW TRIAL – NEW TRIAL – IN GENERAL AND PARTICULAR GROUNDS – PARTICULAR GROUNDS – MISDIRECTION OR NON-DIRECTION – DIRECTIONS AS TO PARTICULAR MATTERS – OTHER MATTERS – where the appellant was charged with one count of sexual assault, one count of rape, and one count of attempted rape – where the appellant was found guilty of sexual assault as an alternative to the count of rape and acquitted on the other counts – where the complainant complained to the appellant about inappropriate touching and covertly recorded the conversation – where the appellant when interviewed by the police denied receiving any complaint from a patient about inappropriate touching – where after being played the covert recording the appellant said he did remember the conversation – where the prosecution addressed the jury on the basis that the appellant's initial denial about receiving a complaint from a patient about inappropriate touching was a lie that went to the appellant's credit – whether the prosecution should have been allowed to address the jury on this asserted lie – whether trial judge's directions adequately directed the jury on how to use the asserted lie relied on by the prosecution in assessing the credit of the appellant in respect of the other statements he made in the record of interview APPEAL AND NEW TRIAL – NEW TRIAL – IN

GENERAL AND PARTICULAR GROUNDS – PARTICULAR GROUNDS – MISDIRECTION OR NON-DIRECTION – DIRECTIONS AS TO PARTICULAR MATTERS – OTHER MATTERS – where appellant was alleged to have made an admission as to inappropriate conduct towards the complainant – where the alleged admission did not contain specific reference to the acts charged – whether the trial judge's direction to the jury in respect of how they could use the admission (if they accepted that the appellant had made the admission) was adequate

HML v The Queen (2008) 235 CLR 334; [2008] HCA 16, cited
R v BDJ [2020] QCA 27, considered
R v IE [2013] QCA 291, cited
R v M [1995] 1 Qd R 213; [1994] QCA 7, cited
R v PV, ex parte Attorney-General [2005] 2 Qd R 325; [2004] QCA 494, cited
R v Sakail [1993] 1 Qd R 312, considered
Zoneff v The Queen (2000) 200 CLR 234; [2000] HCA 28 cited

COUNSEL: B J Power, with L M Dollar, for the appellant
D Balic for the respondent

SOLICITORS: George Criminal Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** I agree with Mullins JA.

[2] **MULLINS JA:** Dr Sudusinghe was convicted after a jury trial in the District Court of one count of sexual assault which was an alternative verdict open in respect of count 2 on the indictment. The jury returned not guilty verdicts in respect of counts 1 and 3 (respectively sexual assault and attempted rape) and the charge of rape which was count 2 on the indictment.

[3] Dr Sudusinghe now appeals against the verdict of guilty of sexual assault on the grounds that a miscarriage of justice was occasioned by:

(1) the prosecutor being permitted to address the jury in relation to lies;

(2) the directions given to the jury as to lies; and

(3) the failure to instruct the jury adequately about the use to be made of alleged admissions made during a conversation with the witness Ms S.

Summary of the relevant evidence

[4] The complainant for all counts consulted Dr Sudusinghe for medical appointments on 12 and 16 November 2015 in relation to her ongoing upper abdominal pain.

[5] Count 1 was based on the complainant's evidence that Dr Sudusinghe slapped her bottom, as she was about to leave the consultation on 12 November 2015. Count 2

was based on the complainant's evidence of touching by Dr Sudusinghe on the outside of her underwear, when she was lying on the examination table, during the consultation on 16 November 2015. The essence of her evidence was that Dr Sudusinghe pushed two fingers into her vulva by pressing with two fingers on top of her underwear. The complainant gave evidence that during the same consultation, Dr Sudusinghe had tried again to press his fingers into her vulva, but was not able to do so due to her closing her legs and expressing her dissent. That was the basis of count 3.

[6] The complainant made a complaint to police on 16 November 2015 and she was provided with a recording device. She returned for another appointment on 20 November 2015 and recorded her conversation with Dr Sudusinghe on that occasion. The covert recording was tendered at the trial. The relevant part of the recorded conversation was transcribed as follows:

> "COMPLAINANT: That's good. So I'm not worried too much with my, but anyway, Doctor Sam, remember I'm a little bit, what's this, a little bit not happy with the procedure that you done to me last Monday.
>
> SUDUSINGHE: What procedure?
>
> COMPLAINANT: When you touched my be-, between my legs.
>
> SUDUSINGHE: That's alright now, go home.
>
> COMPLAINANT: I said, oh, [INDISTINCT] Doctor Sam, why, why you been touching me without permission between my legs. I told you that's not the pain.
>
> SUDUSINGHE: Okay. I was just [INDISTINCT]
>
> COMPLAINANT: Because, you know, and you don't wear your gloves when you do that to me. I said, you see, [INDISTINCT]
>
> SUDUSINGHE: No. I w-, I was ah, I was tummy ah, checking your tummy. So we, we don't wear gloves when we [INDISTINCT]
>
> COMPLAINANT: But I was [INDISTINCT]
>
> SUDUSINGHE: Yeah.
>
> COMPLAINANT: Why
>
> SUDUSINGHE: [INDISTINCT]
>
> COMPLAINANT: [INDISTINCT] Why are you laughing?
>
> SUDUSINGHE: [INDISTINCT]
>
> COMPLAINANT: Why you laughing?
>
> SUDUSINGHE: [INDISTINCT] Yeah. I was crossing the borders, yes.
>
> COMPLAINANT: Okay. Anyway, Doctor Sam, thank you for this good result of my

SUDUSINGHE: I, I did the examination and I organised this that's it.

COMPLAINANT: Yeah. Doctor Sam, between my legs, is that right?

SUDUSINGHE: Yeah, yeah, yeah, I know."

[7] The prosecution case was that there was no denial by Dr Sudusinghe in response to the complainant's allegation that was recorded in the covert recording and that, in the circumstances where a specific proposition was put by the complainant, the absence of immediate denial followed by some sort of explanation, laughter, the statement "I was crossing the borders, yes", and then followed by "Yeah, yeah, yeah, I know" were argued to be an admission to the conduct the subject of counts 2 and 3.

[8] After receiving the covert recording from the complainant, the investigating officer, Senior Constable Melit, took no further action until he contacted Dr Sudusinghe almost two years later and an interview took place on 3 October 2017.

[9] The officer asked Dr Sudusinghe "have you ever had any patients come into you and um been dissatisfied with an examination that you've done on them?" Dr Sudusinghe said there had been some patients who had and he described a patient who he had seen about a month ago and was not satisfied, even after an MRI had been organised. The officer then asked "has anyone ever come into your surgery and um, you know um, you know, made a complaint to you in relation to being inappropriately touched?". Dr Sudusinghe said "No". The officer then played excerpts of the covert recording and asked questions between the excerpts.

[10] After playing the excerpt from the covert recording that is extracted above, the officer asked Dr Sudusinghe about what he meant by his response to the complainant, when he said that he was "crossing the borders". The following exchange occurred in the interview:

"SCON MELIT: She put it to you that you were touching her between the legs without permission and then you're laughing and then said, I shouldn't have crossed the border. What do you mean by, I shouldn't have crossed the border?

SUDUSINGHE: I, I'm pretty sure when I, some, I must have done ah, maybe lower abdominal examination when that, so perhaps she was sh-, showing here but maybe for the complete examination I must have done here. So that's the border so I was going down.

SCON MELIT: So where's the border?

SUDUSINGHE: I mean, that's, that's upper, upper [INDISTINCT] upper ah abdomen, there's the lower abdomen. So I was checking the lower abdomen.

SCON MELIT: Yep.

SUDUSINGHE: Um,

SCON MELIT: So where's the border?

SUDUSINGHE: Border is the navel."

[11] After playing the covert recording, the officer asked Dr Sudusinghe whether he remembered that actually happening (ie. the conversation with the complainant on 20 November 2015) and asked the specific question "Do you remember this conversation with this, this lady?" to which Dr Sudusinghe replied "I think I vaguely remember. Yeah.".

[12] The complainant had made a preliminary complaint to her friend Ms S on 16 November 2015. Ms S also knew Dr Sudusinghe, because he was one of the doctors at the medical practice where she attended. She was at the medical practice to see another doctor in February 2018, but went to have a cigarette in the car park whilst waiting. Dr Sudusinghe spoke to her and said he had a car accident. She could see the scar on his leg and his neck. She told him she felt sorry for him and gave him a hug. Dr Sudusinghe told her he had a problem with the court and mentioned Ms S's friend, the complainant, by name. Dr Sudusinghe addressed Ms S by name and said "Look at me now. I'm like this [indistinct] God punish me because I had been naughty to [the complainant's name].".

[13] Dr Sudusinghe did not call or give evidence.

Grounds 1 and 2

[14] As both grounds 1 and 2 relate to the issue of lies, it is convenient to deal with them together.

[15] The prosecutor addressed the jury on Dr Sudusinghe's statements in the record of interview, pointing out that he did not remember the complainant at the start of the interview or any complaint made by her, but then later in the interview after the recording was played, he said that he did remember the conversation he had with the complainant on 20 November 2015. In the course of his address, the prosecutor replayed the covert recording, submitting to the jury that Dr Sudusinghe did not make any initial denials when confronted by the complainant about what he did between her legs and instead told her to go home. The prosecutor then reminded the jury about Dr Sudusinghe's denial, when asked whether anyone had ever come into his surgery and made a complaint about being inappropriately touched. He also reminded the jury of Dr Sudusinghe's explanation, as to what he had meant when he said to the complainant he was "crossing the border". The prosecutor then addressed the jury in these terms:

> "So you might think that this is an example of him changing his story. You might think that Dr Sudusinghe initial statements to the police about not remembering [the complainant] and anyone coming to him of a complaint of inappropriate touching are lies – are lies that – and these are lies that you can take into account when you assess other statements he made. Statements such as 'Crossing the border' being a reference to the navel or that he didn't commit these offences. They're statements that could affect his credibility and your assessment of it in that interview more generally."

[16] Dr Sudusinghe's counsel at the trial (who was not the counsel who appeared for him on this appeal) addressed the jury in response to the prosecutor's submissions about lies in these terms:

> "The things that the Crown prosecutor points to as being lies: can I suggest to you that's – there's pretty thin support for that. The fact that he might not be able to remember a patient from two years earlier. I mean, we all know how busy GPs are. They might see however many – 50, 60 patients a day, or whatever it might be, and it's completely believable they might not remember an instance from two years ago. You might think that his reaction in relation to these things was completely understandable, it made sense, and it doesn't meet the criteria the Crown are pointing to when they say these things are lies.
>
> I'll just talk about that point, though. Because – his Honour will talk to you a bit more about this, and what lies do and don't mean. Even if you disagree with me about that, and you think there were lies told, that doesn't have any bearing on the proof of the charge of otherwise. The only use you can make of that evidence is whether you accept what else is said in the interview or not. That's it. So even if you form the view along what the Crown prosecutor has suggested to you, all you do then is set aside the interview. That's it. The other evidence still needs to stand on its own two feet. Nothing else negative flows from that. But, of course, I urge you to not form that view."

[17] The jury were reminded in the summing up of the distinct lie that was being relied on by the prosecutor. The trial judge's direction in relation to the submission by the prosecutor on lies by Dr Sudusinghe was:

> "The Crown submitted that the defendant lied in the interview when he denied that anyone had come in to the surgery and made a complaint in relation to being inappropriately touched. The Crown submitted that the audio recording on 20 November 2015 shows that such an allegation had, in fact, been made. You have heard submissions about this particular aspect of the matter, members of the jury.
>
> You will, of course, make up your own minds about whether the defendant did lie in that respect and, if so, whether he was doing so deliberately. If you conclude that the defendant deliberately lied in that regard, that is relevant only to the credibility of the account given by him. It is for you to decide whether the suggested lie affects the credibility of his account given otherwise."

[18] The trial judge then gave the usual warning to the jury in accordance with *Zoneff v The Queen* (2000) 200 CLR 234 at [23] about not following a process of reasoning to the effect that just because a person is shown to have told a lie about something, that is evidence of guilt. The trial judge gave examples of the reasons why a defendant may lie and directed that, if the jury thought there may be some innocent explanation for lies, if they found that they existed, they should take no notice of them.

[19] The trial judge also reminded the jury about Dr Sudusinghe's counsel's responsive submission to the prosecutor's argument that Dr Sudusinghe lied in the interview:

> "[Defence counsel] submitted that it was believable that the defendant couldn't remember an incident from two years earlier and therefore you would not be satisfied that the defendant told a lie in the interview. [Defence counsel] submitted that even if you do conclude that the defendant lied in that regard, that could only affect the credibility of his denials and not possibly amount to any consciousness of guilt evidence, though I have already directed you in that respect, members of the jury, and that was a correct submission for [defence counsel] to make."

[20] The error that Dr Sudusinghe's counsel now asserts was made by the trial judge was in allowing the prosecutor to address the jury in terms that, if the jury rejected Dr Sudusinghe's answer that no one had ever complained to him about inappropriate touching, they could use that to discredit Dr Sudusinghe's account generally given in the interview. The lie that was relied on by the prosecutor was not a lie that implicated Dr Sudusinghe in the conduct that became the subject of counts 2 and 3. As the trial judge had ruled appropriately at the trial, if it was to be relied on by the prosecutor, it could only be relied on as going to the credit of Dr Sudusinghe.

[21] The jury had the benefit of listening to the covert recording that showed Dr Sudusinghe's state of knowledge about the complainant's complaint, as at 20 November 2015. It was a matter for them, in the light of its content and the answers that Dr Sudusinghe then gave in the record of interview, as to whether or not they were satisfied the prosecution had shown Dr Sudusinghe lied when he denied before hearing the covert recording that any person had complained to him about inappropriate touching. Once they were satisfied that it was a lie, it was a matter for them as to how they assessed the credit of Dr Sudusinghe in respect of the other answers given by him in the record of interview.

[22] There was therefore no error in the trial judge either allowing the prosecutor to address the jury in the manner which he did on Dr Sudusinghe's credibility about what he submitted was the lie nor in the direction that the trial judge gave to the jury in how to deal with the lie, if they were satisfied that Dr Sudusinghe had so lied in the record of interview.

Ground 3

[23] In relation to the admission alleged to have been made by Dr Sudusinghe to Ms S, the prosecutor in addressing the jury referred to it as another piece of evidence that is "potentially confessional," quoted what Ms S said Dr Sudusinghe had said to her, and then submitted:

> "Naughty is obviously not a reference to a legitimate medical procedure, you might think. Did [Ms S] seem like someone who had an axe to grind against Dr Sudusinghe? You might recall that instead she said she felt sorry for him. She gave him a hug that day. She said she didn't want to be here yesterday. Now, Dr Sudusinghe says, through his barrister, that that conversation didn't happen in that way. You might think that it's a strange thing to come along and make up."

[24] The prosecutor concluded his address to the jury by saying:

> "You can conclude that Dr Sudusinghe himself admitted the conduct in the recording on 20 November 2015. You can conclude that he admitted the conduct last year when he admitted to being 'naughty with [the complainant's name]' and God punishing him to [Ms S]."

[25] The defence counsel also addressed the jury on this aspect of Ms S's evidence:

> "But the words that are being used in the context of the court case, which is obvious, because we're all involved in it, is something about him being naughty with [the complainant]. We don't know if it's a reference to the allegations being made, we don't know anything about that, and, can I suggest to you, it's just too vague, just to unreliable, to put much faith in, to put much weight on, to help you get anywhere in this trial. Can I suggest to you that the safest way to approach that evidence, and the most sensible way in all the circumstances, is to just ignore it. It's not particularly useful evidence; it's not particularly specific evidence. It certainly doesn't refer to the charges before the court, or anything like that, and you'd have some real questions about its accuracy, given the way in which it was delivered."

[26] The trial judge summed up on this evidence of Ms S in these terms:

> "Again, members of the jury, it is a matter for you whether you accept that the defendant said those words and if you do accept that he said that, it is a matter for you how you assess that evidence and what weight you give to it. The Crown submitted that this evidence is capable of being used as an admission. If you are satisfied that the defendant said those words, it is a matter for you to decide whether they amount to an admission of inappropriate conduct. Bear in mind that the words alleged to have been spoken by the defendant do not contain any specific details. Also bear in mind the submissions made by the defence. It was contended that Ms [S] was a confused witness and would struggle to accept the account given by her. It was also contended that the words used were about being naughty and that they were too vague and far too unreliable to enable you to attach any weight to them. It was also contended that there were concerns about the accuracy of the account. Well, members of the jury, again, they are matters for you to determine in your assessment of the evidence."

[27] It is conceded on behalf of Dr Sudusinghe that the evidence was properly admitted. It is argued on his behalf that, if the jury accepted that Dr Sudusinghe had spoken those words to Ms S, they were not an admission to any specific act, and as such could not be used as an admission to any of the counts. On the basis the words could potentially be used as showing a sexual interest in the complainant and a preparedness to act on it, it is submitted the jury should have been directed in accordance with *HML v The Queen* (2008) 235 CLR 334.

[28] It is also argued on behalf of Dr Sudusinghe in reliance on *R v BDJ* [2020] QCA 27 at [92]-[97] that the trial judge erred in failing to direct the jury to consider that, before they could use the statement made by Dr Sudusinghe to Ms S as an

admission, the jury must be satisfied what conduct was the subject of such admission.

[29] In *BDJ*, there were two complainants who were sisters and BDJ was their stepfather. A conversation took place between one of the complainants and BDJ that was witnessed by the other shortly after the death of the complainants' mother. The statements made by the appellant in that conversations were admitted into evidence on the basis they were capable of constituting an admission by the appellant, showing a consciousness of guilt by him that he had committed the sexual offences. Some of the offences that were charged involved unlawful sexual conduct, but others involved unlawful physical conduct. One of the complainants also gave evidence of being fearful of BDJ, due to his disciplinary behaviour when they were young. Boddice J (with whom Fraser JA and Lyons SJA agreed) observed at [94]:

> "Whilst the trial Judge's summing up directed the jury as to the need to be satisfied that the appellant's words amounted to an admission, the trial Judge did not address the jury as to what conduct the jury must be satisfied is the subject of any such admission."

That requirement arose in *BDJ* as a result of the variety of alleged unlawful conduct that was asserted by the complainants. As BDJ's guilt depended upon the jury being satisfied as to the reliability and credibility of the evidence of the complainants, it was noted at [97] there was a material risk that the jury, not having been properly directed as to the use to be made of the evidence said to constitute an admission, improperly used that evidence in being satisfied as to the reliability and credibility of the complainants.

[30] The respondent submitted as follows. Dr Sudusinghe's trial was conducted on the basis that both the prosecutor and the defence counsel agreed that there were no uncharged acts that required a sexual interest direction and the trial judge therefore did not give a sexual interest direction. The comment made by Dr Sudusinghe to Ms S was treated as a statement against interest in respect of all the counts. The trial judge's direction on this evidence from Ms S appropriately pointed out to the jury that it was a matter for them how to assess the evidence and what weight to give it. Although the trial judge reminded the jury that the prosecutor had submitted the evidence was capable of being used as an admission, the trial judge directed that it was up to them as to whether it amounted to an admission of inappropriate conduct and specifically commented that the words alleged to have been spoken by Dr Sudusinghe did not contain any specific details. In that context, the trial judge fairly reminded the jury of the arguments put on Dr Sudusinghe's behalf that went to the question as to whether or not they would even accept that evidence and, if they did, whether the words were too vague and unreliable for any weight to be attached to them.

[31] The respondent relied on *R v Sakail* [1993] 1 Qd R 312 to submit that it was appropriate for this evidence to have been left to the jury as an admission generally of inappropriate conduct.

[32] In *Sakail*, the appellant was convicted on a charge of rape and acquitted of another charge of rape of the same complainant. There was evidence that he admitted to the police that he may have had sexual intercourse with the complainant against her will on one occasion, but the occasion he described was neither of the two occasions

charged. See the discussion on *Sakail* in *R v M* [1995] 1 Qd R 213, 220. It is treated as an authority for the admissibility of an admission against interest: *R v PV, ex parte Attorney-General* [2005] 2 Qd R 325 at [13] and *R v IE* [2013] QCA 291 at [29].

[33] The conversation in the car park between Dr Sudusinghe and Ms S occurred about four months after Dr Sudusinghe had been interviewed by the police and made aware of the covert recording in respect of the complainant's allegation as to the inappropriate touching by him on 16 November 2015. There was no uncertainty about the identity of the complainant in the conversation that Dr Sudusinghe was having with Ms S. The fact that he used the word "naughty" to describe his own behaviour as a medical practitioner providing a professional service to a patient meant that it was open to the jury to consider whether he was making the comment generally in relation to the conduct alleged against him in the charges. The evidence of a non-specific admission of inappropriate conduct in the circumstances was therefore capable of supporting the evidence of the complainant. No direction in accordance with *HML* was therefore required. The circumstances of the making of the comment by Dr Sudusinghe are distinguishable from the circumstances that required more comprehensive directions in *BDJ* on the use of an admission.

[34] It was therefore a matter for the jury, if they accepted Ms S's evidence as credible and reliable as to what Dr Sudusinghe said to her, whether that was an admission of inappropriate conduct against the complainant. Although the prosecutor in general terms had suggested that Ms S's evidence of what Dr Sudusinghe said to her may be treated as potentially confessional in respect of the conduct the subject of the charges, the direction of the trial judge clarified that, at best, it was an admission of inappropriate conduct that lacked specificity. It was the timing and the context in which the statement against interest was made that meant it allowed the jury (if they accepted the evidence of Ms S) to treat it as an admission in general terms (unrelated to any of the specific charges) that could be taken into account in their assessment of all the evidence in deciding whether the prosecution had proved Dr Sudusinghe's guilt beyond reasonable doubt on each of the charges. There is no error shown in the directions of the trial judge given to the jury in respect of the evidence of Ms S of her conversation with Dr Sudusinghe in the car park.

Order

[35] None of the grounds of appeal succeeds. The order which should be made is: Appeal dismissed.

[36] **BODDICE J:** I agree with Mullins JA.