NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360350.html

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 94/2020
[2021] NZSC 10

BETWEEN	KUL VANT SINGH Applicant
AND	THE QUEEN Respondent

Court:	William Young, Glazebrook and O'Regan JJ
Counsel:	M J Dyhrberg QC and H G de Groot for Applicant B C L Charmley for Respondent
Judgment:	24 February 2021

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant, Dr Singh, was convicted after a jury trial on one charge of sexual violation by unlawful sexual connection (committed by way of digital penetration).[1] He was sentenced to a term of imprisonment of two years and 10 months.[2]

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1 He was acquitted on a second charge of sexual violation by unlawful sexual connection, which involved an allegation that he inserted an object into the complainant's vagina.

2 *R v Singh* [2019] NZDC 20579 (Judge Tinimiraka Clark).

[2] The applicant appealed against his conviction to the Court of Appeal, but that appeal was dismissed.[3] He now seeks leave to appeal to this Court against his conviction.

[3] At the time of the offending, the applicant was a practising medical doctor. The complainant had consulted a female doctor working in the same practice as the applicant about a vaginal discharge. After that consultation, the applicant conducted his own examination of the complainant, and the offending occurred during the course of that consultation.

[4] In her evidential video interview, the complainant said that in the course of his physical examination the applicant "kept touching every, inside my vagina, not the area outside; completely inside … he kept touching everywhere …".

[5] At the trial, the complainant initially answered in the negative when asked by the prosecutor whether the applicant's finger or fingers went inside her. She said the applicant pressed on the area *around* her vagina, and that he was rubbing *around* her vagina area. She said she did not think the applicant's finger went inside her. The prosecutor then sought to clarify with the complainant what she meant by the word "vagina". She answered: "The area between my legs". Some more questions followed, but the answers did not give greater specificity as to what the complainant meant when she referred to her vagina.

[6] The following exchange between the prosecutor and the complainant then took place:

> Q Did he touch you at any point between the lips of your vagina?
>
> A Yes he did.

[7] We will call this the first question. After this question, the trial Judge intervened and warned the prosecutor about the need to avoid asking leading

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3 *Singh v R* [2020] NZCA 487 (Collins, Mallon and Ellis JJ) [CA judgment].

questions. However there was no objection from defence counsel about this question. The next question and answer were:

> Q Where did he, where did he touch you in relation to your genitalia?
>
> A On the lips and also a bit inside as well.

[8] We will call that the second question.

[9] During the applicant's counsel's cross-examination of the complainant, the following exchange occurred:

> Q Well what is it? We have gone from, "Fingers didn't go inside me at any stage, the only thing that went inside me was a plastic device", to you then, after that was put to you by [the prosecutor], suggesting that, "Well there may have been some sort of penetration", of you. I am not sure what you are suggesting?
>
> A What I was trying to explain – I was unsure how to explain the vagina, other than saying it's the area between my legs, but what I meant was, when my legs are wide open obviously the lips are separated, so his fingers would touch a bit inside the lips. I didn't mean that he pressed – he put his fingers up my vagina, but when my legs are open the lips are open.

[10] The applicant's appeal to the Court of Appeal was advanced on the basis that a miscarriage of justice arose through the prosecutor eliciting evidence of penetration from the complainant through a leading question. The Court of Appeal rejected this on the basis that the crucial evidence from the complainant was in response to the second question, which was an open question.[4]

[11] The applicant wishes to argue on appeal, if leave is granted, that the Court of Appeal erred in determining that the crucial evidence was elicited by means of the second question, rather than the first question. He wishes to argue that the leading of evidence of penetration by a leading question contravened s 89 of the Evidence Act 2006 and that a miscarriage of justice was thereby occasioned. He argues that leave should be granted on the basis that a point of public importance relating to the eliciting of evidence by a leading question arises and also on the basis that a miscarriage of justice will occur if leave is not granted.[5]

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4 At [25].

5 Senior Courts Act 2016, s 74(2)(a) and (b).

[12] We accept there is room for debate about the Court of Appeal's conclusion that it was the second question, not the first question, which elicited the complainant's evidence of penetration.

[13] However, we do not consider that the case raises a point of public importance, as the applicant argues. Rather, it turns on the specific and unusual facts of the case.

[14] Nor do we consider that the miscarriage ground is made out. It is clear from an analysis of the transcript of the evidential video interview and the trial transcript that the complainant's evidence-in-chief reflected confusion between the complainant and the prosecutor as to what was meant by the term "vagina". In view of the clear evidence as to penetration in the complainant's account in her evidential video interview, it was obvious that the prosecutor would seek to resolve the apparent inconsistency between the accounts and there was no impediment to the prosecutor doing that. It would have been preferable had the prosecutor adopted a different course, but we do not see any real possibility that, whatever course the prosecutor followed, the complainant's evidence-in-chief would have ended without her giving evidence consistent with that of her evidential video interview as to penetration.

[15] In that regard, it is important to note that the applicant's defence was not that he had undertaken non-penetrative touching around the area of the complainant's vagina. Rather, his consultation notes (which he re-wrote after he knew of the complaint) said that he did not conduct any vaginal examination at all.

[16] We are not satisfied that the grounds for leave are made out. We therefore dismiss the application for leave.

Solicitors:
Crown Law Office, Wellington for Respondent