NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA16/2020
[2020] NZCA 314

BETWEEN	ASHER PRADEEPKUMAR RATNAM Appellant
AND	THE QUEEN Respondent

Hearing: 21 May 2020

Court: Brown, Simon France and Mallon JJ

Counsel: H T Young for Appellant
K S Grau for Respondent

Judgment: 27 July 2020 at 10.30 am

JUDGMENT OF THE COURT

The appeals against conviction and sentence are dismissed.

REASONS OF THE COURT

(Given by Simon France J)

[1] Mr Ratnam was convicted, following a jury trial before Judge Farnan, of four charges of indecent assault and one of sexual violation (digital penetration).[1] He was acquitted on one other charge of sexual violation (oral sex by him on her). Mr Ratnam

[1] Crimes Act 1961, ss 135 (maximum penalty seven years' imprisonment) and 128(1)(b) (maximum penalty 20 years' imprisonment).

was sentenced to two years and four months' imprisonment.[2] He appeals conviction and sentence.[3]

[2] The conviction appeal focuses on what is said to be unfairness created by aspects of the prosecutor's closing address, together with insufficient correction of these matters in the summing-up. Concerning sentence, it is submitted insufficient regard was had to the cultural consequences of the offending on both Mr Ratnam and his wife.[4]

Facts[5]

[3] The complainant (C) was a massage therapy student who visited her client, Mr Ratnam, on three occasions at his home. All charges stem from the third visit. One aspect of an earlier visit is relevant. C alleged (and Mr Ratnam denied) that Mr Ratnam asked at the first massage if the massage could conclude with a "happy ending", meaning her masturbating him. She said no. The second massage seems to have occurred without incident.

[4] As regards the third massage, Mr Ratnam rang C and asked if she could give him a three-hour massage. C agreed. During the massage Mr Ratnam was naked other than a small cloth over his genital area. Mr Ratman and C disagreed over whose idea it was for Mr Ratnam to be naked, each saying it was the preference of the other.

[5] During the massage Mr Ratnam asked if he could place his hands on C's thighs as it was more comfortable. C agreed but said he was not to move them. He nevertheless did so and at one point put his hands on her buttocks but C pushed him away, saying "No".

[6] About two hours into the massage Mr Ratnam asked if he could kiss C. She said no, saying that sort of behaviour was prohibited. The massage then continued to its three-hour conclusion. At that point Mr Ratnam asked for an extra period of time

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2 *Police v Ratnam* [2019] NZDC 24067.
3 Criminal Procedure Act 2011, ss 244 and 229.
4 Sentencing Act 2002, s 27.
5 This summary of the facts is primarily sourced in the Judge's findings for sentencing purposes: *Police v Ratman*, above n 2, at [8]–[18].

(30 minutes) and C agreed. C's motivation throughout was a need for money. It was in this extra period the assaults occurred.

[7] Mr Ratnam was sitting on the end of the massage table, facing C. He kissed her while hugging her tightly. It is said he sucked her lips and bruised them. C says she struggled to push him away because of weakness caused by the effort involved in the long massage. Mr Ratnam manoeuvred C onto the massage table and began removing her clothes. He exposed her breasts which he kissed and sucked. He also digitally penetrated her, and lay on her, rubbing his penis against her. Eventually he got off, she dressed and left. C went straight to the police station to complain about those events and also made the allegation of oral sex by Mr Ratnam.

[8] Mr Ratnam gave a police interview. He admitted all contact, other than the digital penetration and oral sex, but said what did occur was consensual. It will assist to give a general overview of Mr Ratnam's statement. We note, however, that prior to the police interview C had rung Mr Ratnam in a staged recorded call of the nature that are sometimes used as an investigative tool. Mr Ratnam's responses on the telephone call largely mirrored both his subsequent police interview and the defence position at trial.

[9] Mr Ratnam said it was C's preference that he be naked. After about two hours of normal massage, C started massaging him very close to his penis without touching it. He said he became aroused, even though the massage was also causing him pain. C asked if there was anything he wanted, and he asked if he could hug her.

[10] Moving to the sexual activity, C was massaging him while positioned behind him. He asked her to come to the front of him which she did. He said he hugged her and she hugged him back. They kissed. Mr Ratnam removed her T-shirt which he said she facilitated by raising her arms. He lay her on the table and she helped him remove her bra. He kissed and sucked her breasts.

[11] Mr Ratnam said he asked if it was ok to remove her pants and she agreed. He then lay on her rubbing himself up and down her until she said to stop, which he did. He denied any digital penetration or oral sex.

[12] Throughout the interview and at the end, Mr Ratnam made what could be termed counter points to the allegations being put to him. These generally were variations on why there was no evidence of force, why there was no torn clothing, and why there were no bite marks on her lips if it happened as she suggested. He also speculated as to why C was falsely claiming he had assaulted her. Matters raised were whether she was worried she was taking money when not qualified (he noted that she did not give receipts); a reference to her wanting more money from him in the sense of a higher hourly rate, but also whether she was getting money out of complaining; and whether she was worried that consensually having sex would ruin her career so she had made a complaint that what was consensual sex was forced on her. Mr Ratnam also talked of the massage so close to his penis and queried why she continued if she was not interested in anything happening.

Trial

[13] The complainant's evidence-in-chief was by way of a pre-recorded interview. Once that was played, cross-examination commenced straight away. The initial focus of the cross-examination was on establishing what had occurred at the first two massages, and then at the third massage prior to the extra 30 minutes. The underlying theme was that Mr Ratnam's sexual interest was clear, yet C returned two further times after the first massage, and also agreed to an extra 30 minutes notwithstanding what was said to have occurred in the preceding three hours. There was next a considerable focus on the mechanics of the alleged assaults, the purpose seeming to be to cast doubt on the likelihood that events could have unfolded as C alleged. The concluding proposition was that events happened as Mr Ratnam said, and they ended as he said. Namely, there was some consensual conduct between them until C wished to stop because she thought it was not the right thing to do as Mr Ratnam was married, she was worried about the impact on her career, and Mr Ratnam was no longer erect. Mr Ratnam stopped as requested.

[14] Mr Ratnam's police interview was then played. There was no defence evidence, and the closings took place. The Crown closing will be considered in depth. The defence closing mirrored the approach taken in cross-examination, with an emphasis on the implausibility of C staying for the whole massage let alone the

30 minutes extra, given all Mr Ratnam was said to have done and signalled, if C was not agreeable to some sexual activity. Concerning why she might falsely complain, counsel emphasised it was not the defence's job to provide any explanation, but mused that perhaps it was just a case of C wanting "to get in first".

Conviction appeal

[15] The focus of the appeal is on alleged unfairness stemming from the prosecutor's closing. We note in this regard that Mr Young was not trial counsel. Trial counsel, Mr Dawkins, is experienced and made no complaint at the time.

[16] The duties of prosecutors are well settled and recorded in a number of cases.[6] The use of emotive and inflammatory language, improper moral pressure, inappropriately personal observations, inaccuracies and any invitation to use improper propensity or bad character reasoning are impermissible prosecutorial tactics.[7]

[17] Mr Young takes no issue with the bulk of the closing address but targets the point at which Crown counsel begins to comment on Mr Ratnam's pre-trial recorded statement. It is submitted that from this point the prosecutor made unfounded, inappropriate and speculative submissions. We address the challenged passages in turn, although noting there is also a cumulative effect submission.

[18] The first challenged area involved the topic of why Mr Ratnam was massaged naked, with a cloth over his private parts. It will be recalled there was a dispute as to whose preference it was that he be naked. The prosecutor attributed the following proposition to Mr Ratnam, namely that C:

> was consenting to sexual behaviour because really she got a little cloth and put it over my penis and she's the one that wanted me not to have my underwear on.

The challenge made by Mr Young is that Mr Ratnam never said he believed she was consenting because she had asked him to be naked. We agree he never expressly said this, but it was not an unfair inference. The background context advanced by the

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6 *Stewart v R* [2009] NZSC 53, [2009] 3 NZLR 425 at [19]–[22]; and *R v Poutawa* [2009] NZCA 482 at [27]–[30].

7 *R v Poutawa*, above n 6, at [30], citing *R v Mussa* [2008] NZCA 290 at [19].

defence in support of consent was that there were events and acts occurring from the first massage that made it plain there was sexual interest from Mr Ratnam. One of these background contextual events was the proposition advanced by Mr Ratnam that C expressed a preference for him to be naked. We consider there was a basis for the prosecutor's submission.

[19] Next, the prosecutor outlined another proposition that she understood Mr Ratnam to be advancing. She described the proposition as extraordinary. The proposition identified was that it was C who wanted Mr Ratnam naked, that she then covered his private parts with a cloth but removed the cloth to massage him for a sustained period around the penis but without actually touching it. Mr Young submits the use of "extraordinary" is emotive language. We understand this criticism is advanced more as a point going to the cumulative effect submission than as requiring any independent analysis.

[20] It is next submitted the closing address went "quite wrong" when the prosecutor incorrectly attributed to Mr Ratnam the contention that C was deliberately arousing him. Having alleged Mr Ratnam to be submitting this, the prosecutor then debunked the incorrect proposition by suggesting that, if C's intention was to arouse Mr Ratnam, it would be more obvious for her to have gone "straight to the penis". It is submitted to be unfair advocacy. Mr Young submits that all Mr Ratnam ever said was that C's actions aroused him, and obviously so such that C would have known. He never said C was doing so deliberately.

[21] We do not consider the prosecutor erred. It was reasonable to read into Mr Ratnam's interview that he was saying there was something purposeful in C continuing to massage him right beside his penis when aware it was causing an erection. If there was no intent on C's part to arouse him, the fact that this happened would not be relevant to the consent defence. C denied the arousal happened. In support of her evidence, it was not excessive for the prosecutor to observe there was a more direct route available if that was her wish.

[22] The next criticism involves an invitation to the jury to look at the start of Mr Ratnam's police interview. The prosecutor suggests that Mr Ratnam immediately

raises the topic of "force", and denies it was present. It is suggested this may be because he knew there had been force and he wanted to "front foot" it. The complaint is that this is unfair because C, at the police's behest, had earlier rung Mr Ratnam. In that call she had accused him of using force, so by the time of the police interview Mr Ratnam was on notice about this. It was not a case of him cleverly trying to front foot anything. Having reviewed the telephone call transcript, we agree that force was discussed in the way Mr Young submits. Indeed, a reference to the absence of any evidence of force tends to be a repeated response of Mr Ratnam to most of C's allegations. We accordingly agree the Crown submission was not valid.

[23] The next focus of the appellant's analysis is the section of the closing address where the prosecutor further focuses the jury on the telephone call. Two matters are noted. The first relates to a comment by Mr Ratnam along these lines: "Oh … you don't want to massage me again". The prosecutor suggests this apparent surprise at being rejected as a client might show Mr Ratnam has trouble dealing with women generally, a fact said to be relevant to whether any belief he had of consent might be reasonable.

[24] The second submission by the prosecutor is that the call suggests Mr Ratnam believes C wants him to keep it all quiet. This part of the address is rather muddled, as oral submissions can be. It concludes with the prosecutor suggesting the topic might help the jury decide who is telling the truth albeit it is said to be "not a big point". On appeal Mr Young submits it was another groundless attack on Mr Ratnam's veracity.

[25] On this aspect of the appellant's case we have more concern with the first comment. There is always a risk of descending to a bad character attack when a general comment is made based on a single line. The point being raised was that it is unexpected for a person being accused of assault to register surprise that the complainant does not want to see him again. The surprise could reflect some sort of attitude but it equally could reflect a belief that nothing improper has happened. We consider a better base is required before making general assertions in this way about a person's attitudes.

[26] The second aspect seems to us of no moment. A confused argument that the credibility of C should be preferred is not likely to be a source of unfairness given that is the prosecution case. There was nothing inherently concerning in the underlying point.

[27] Mr Young next focuses on the prosecutor's submission about Mr Ratnam's idea of consent. There had been an emphasis by the prosecutor on Mr Ratnam referring, more than once, to the absence of physical evidence of force such as torn clothing. The prosecutor also noted Mr Ratnam's comment: "[if] … someone was sucking it is always can pull the lips off, if somebody has to by force doing they would have bite". The prosecutor took Mr Ratnam to be saying that C could have bitten him if she did not like the kissing. We observe on her version of events he was ensnaring her lips in a way that would make biting not possible. Of all this the prosecution submitted that it might show Mr Ratnam has an unrealistic view of what a woman has to do to show she is not consenting. We also observe that another interpretation of his comment is that if Mr Ratnam had used force to kiss C he would have bitten her, but there was no evidence of that.

[28] The appellant's complaint is not that it is an invalid submission but that the premise on which it is founded is incorrect. Mr Ratnam's statements are being misrepresented in that he was not saying what he thinks consent is, but pointing here to reasons why this conduct was consensual.

[29] We do not consider the prosecutor was unfair. Mr Ratnam said what is attributed to him. It is capable of bearing the inference the prosecutor attaches to it. It is also capable of bearing other inferences or being explained in the terms Mr Young would, but it was not wrong of the Crown to suggest it is relevant to an assertion of belief in consent. That was an element that had to be addressed in addition to the core defence of consent.

[30] The prosecutor then focused on some of the possible motivations raised by Mr Ratnam in the interview as to why C might make a false complaint. Before commenting specifically on the challenges, we observe speculation of such nature is frequently proffered in interviews. While it can be tempting fodder for

a prosecutor, care is needed not to overstate them or draw too much from them. It is an area where balance is needed.

[31] The first motive addressed was the point about taking cash, not giving receipts and whether she was qualified. No complaint is made of this. Then there was comment about Mr Ratnam musing about C wanting more money. Of this the prosecutor suggested:

> I took it from that that he was saying that there was an attempt to bribe – bribe him or whatever. Anyway, have a look at it.

The third area was the idea raised by Mr Ratnam that C went to the police and complained because she was trying to save her career. The prosecutor pointed out that given Mr Ratnam was married there was no chance he would tell anyone about a sexual encounter with C. So there was no reason for C to get in first by going to the police and making known that which would otherwise be unknown.

[32] Mr Young submits the bribery suggestion is unfounded. It is a misreading of an interview given by a person with poor English. We tend to agree in that it is not clear exactly what Mr Ratnam was saying about the money but a bribery allegation seems a very unlikely interpretation.

[33] Concerning the rebuttal of Mr Ratnam's proposition that C was falsely claiming it was non-consensual in order to save her career, Mr Young accepts the prosecutor was entitled to make the response she did. He submitted, however, that the prosecutor then went too far and talked of C having no possible motive to lie.

[34] We do not accept this point. The prosecutor said:

> So what possible logical reason could there be for her to make up a story by going to the police to save her reputation because like I said it's only going to work if she thought he was going to start squealing around town.

The appellant's submission places no weight on the clear link of the "no motive to lie" proposition to the particular allegation — to protect her career. It was not a general submission of no motive to lie. This section of the closing address begins with a clear statement by the prosecutor that she is not suggesting that just because C went to the

police, she should be believed. The prosecutor expressly acknowledges that people who are lying also go to the police.

[35] A related aspect of this challenge was a submission that the Judge's summing-up did not correct the prosecutor's incorrect reliance on an absence of any evidence that C had no motive to lie. For the reasons given we do not accept there was a prosecutorial error which the summing-up needed to repair.

[36] For completeness, however, we note that we consider the summing-up was adequate to address the trial issues. On "motive to lie", the Judge's direction directed on three things:

(a) Just because the defendant is facing allegations, it is not to be suggested he thereby had a motive to lie. Such reasoning would be contrary to the presumption of innocence.

(b) The defendant does not have to suggest why a complainant may have made up evidence.

(c) When assessing his interview it would be unfair to disbelieve him because he is facing charges.

[37] It can be seen the focus was primarily about the defendant not having a motive to lie, rather than on giving directions about a complainant's motive to lie. Based on *Parker v R* Mr Young submits the part of the direction which addresses the complainant's motive to lie needed to point out, and did not, that a lack of any evidence of a motive to lie does not mean the complainant's evidence is true.[8] We agree that since the Judge was directly commenting on the topic it would have been better to have added the fuller *Parker* direction as regards the complainant. The lack of focus on the topic of a complainant's motive to lie might have been a concern had it been a trial issue, but in the circumstances we consider the Judge's reinforcement of the onus, and of the presumption of innocence, was sufficient. Further, the Judge's firm

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8 *Parker v R* [2008] NZSC 25 at [6].

directions about the defendant's situation were appropriate given the trial focus on his evidential interview.

[38] Stepping back and looking at the closing address overall, we do not consider it is a source of miscarriage.[9] We have identified some submissions that were flawed, but they are not significant. Further, there were, as Ms Grau for the Crown accepted, some adversarial flourishes that would better have been avoided, but the case is far from one where it could be said there has been prosecutorial error. It is important to look at the address as a whole and not overweigh, in hindsight, a small aspect of it. It is also legitimate to pay some regard (we put it no higher than that) to the lack of concern at the time from either opposing counsel or the Judge.

[39] In our view, the greatest risk arose when the prosecutor made generalised comments about Mr Ratnam's attitudes. Care is needed to be specific and clear about the underlying evidence, and the proposition taken from that evidence should be no wider than it legitimately bears. The risk in going too far is that it becomes bad character reasoning that is too general, unfounded in the evidence, and invites the jury to decide the case on an improper basis. However, for the reasons given, we are satisfied this has not occurred here.

[40] Two other grounds were raised in the written submissions but not pursued orally. For completeness we observe that the verdicts were reasonably available on the evidence. C's evidence provided material that, if accepted, satisfied all the elements of the charges. Her credibility was not obviously undermined such as to make acceptance of her evidence unreasonable, and the scientific evidence provided an obvious source of the reasonable doubt the jury must have had concerning the charge on which Mr Ratnam was acquitted.

[41] The second ground concerns evidence that was not led. It concerned traces of unknown male DNA in C's underwear. A voir dire was held with the scientist about the evidence. This made it plain there was no probative value to the evidence; further, its admission would raise obvious issues under s 44 of the Evidence Act 2006.

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9 Criminal Procedure Act, s 232.

Mr Young responsibly and correctly advised the Court he did not consider he was able to advance that ground.

[42] The appeal against conviction is dismissed.

Sentence appeal

[43] Judge Farnan identified a starting point of three years, being within band 1 of *R v AM*.[10] There was then a previous good character discount of 10 per cent and also a 10 per cent recognition that prison would be difficult for Mr Ratnam because he was from Sri Lanka and with limited English.[11] The Judge declined credit for any matters arising from a cultural report under s 27 of the Sentencing Act 2002 on the basis that there was no link between any personal factors and the offending.[12] The end sentence was accordingly two years and four months' imprisonment.[13]

[44] The sentence appeal is advanced on the basis that further credit was due for matters raised in the s 27 report. The proposition is not that there is a link between Mr Ratnam's ethnicity and culture and the offending, but that the impacts to both him and his wife will be particularly severe because of their culture. It is submitted that the wife will be held responsible in the Sri Lankan community for Mr Ratnam engaging in sexual activity with another woman.

[45] Mr Young submits a linkage to the offending is not needed and that s 27(1)(e) of the Sentencing Act is wide enough to embrace the point being advanced. It provides that a report may cover:

> how the offender's background, or family, whanau or community support may be relevant in respect of possible sentences.

[46] It is submitted the couple have lost everything — marriage, savings, and in all likelihood Mr Ratnam's residency. The wife faces a difficult future as a separated woman in her culture. The fact of the offending is known amongst the local Sri Lankan community.

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10 *R v AM* [2010] NZCA 114, [2010] 2 NZLR 750 at [114]–[116].
11 *Police v Ratnam*, above n 2, at [44]–[46] and [50], per Sentencing Act, s 8(h).
12 At [47]–[49].
13 At [51] and [63].

[47] It is not necessary to consider the scope of s 27 and the need for a causative link. We are satisfied the matters raised do not provide a basis for a further reduction in Mr Ratnam's sentence. The impacts on his wife are regrettable, but it would be unexpected for a person who has offended in this way to receive a discount because it has caused hardship to his family. That is not normally seen as a reason to reduce the offender's sentence.[14]

[48] We are satisfied the existing discount of 20 per cent is far from manifestly inadequate.[15] There is no challenge to the starting point and accordingly the sentence appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

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[14] This is not an absolute statement. The impact on children, for example, is often a relevant sentencing consideration: *Ransom v R* [2010] NZCA 390, (2010) 25 CRNZ 163; and *Zheng v R* [2015] NZCA 451.

[15] Criminal Procedure Act, s 250(2); and *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [32]–[37].