CRIMINAL LAW - APPEAL AND NEW TRIAL - MISCARRIAGE OF JUSTICE - PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE - MISDIRECTION OR NON-DIRECTION - NON-DIRECTION

The appellant was convicted of Maintaining an Unlawful Sexual Relationship with a child contrary to s 50(1) of the Criminal Law Consolidation Act 1935 (SA). The appellant appeals that conviction contending that the primary judge erred in failing to give appropriate directions about an alleged implied admission.

Whether the appellant’s failure to respond to a text message was an admission by silence – use of an agreed fact – failure to direct the jury as to use of evidence - whether the failure to direct the jury resulted in a miscarriage of justice

Held (per curiam), allowing the appeal:

1. The failure to direct the jury on the use of the text message evidence resulted in a substantial miscarriage of justice.

Criminal Law Consolidation Act 1935 (SA) s 50(1); Evidence Act 1929 (SA) ss 34P, 34R, referred to.
R v Smith (1897) 18 Cox CC 470; R v Grills (1910) 11 CLR 400; R v Salahattin [1983] 1 VR 521; R v Kamleh [2003] SASC 269; Woon v The Queen (1964) 109 CLR 529; R v
R v SPENCER
[2019] SASCFC 70

Court of Criminal Appeal: Nicholson, Lovell and Hinton JJ

THE COURT:

Overview

The appellant was convicted of Maintaining an Unlawful Sexual Relationship with K, the complainant, contrary to section 50(1) of the Criminal Law Consolidation Act 1935 (SA). The appellant pleaded not guilty but the jury returned, by majority, a verdict of guilty. The appellant appeals the verdict contending that the primary judge erred in failing to give appropriate directions about an alleged implied admission.

Issues on appeal

There are two grounds of appeal arising from the same issue. In somewhat unusual circumstances, the prosecution introduced a text message sent by K to the appellant to which the appellant did not respond. The prosecution alleged that his failure to respond was an admission by conduct (silence). The appellant contends that his conduct could not be interpreted in that way. The appellant further contends that, even if his conduct could be interpreted as an admission, the primary judge failed to give any directions as to the use that could be made of the evidence.

For the reasons that follow, we would allow the appeal.

Background

The circumstances surrounding the admission of the text message were unusual. It is necessary to consider the circumstances in some detail.

The prosecution case relied almost entirely on the evidence of K to substantiate the allegations. At the time of trial K was aged 17. K gave evidence that she was good friends with J, although J was a few years older than her. K’s mother and J’s mother were close friends. The appellant was J’s step-father.

K said that when she was around 11 years of age she would spend a lot of time at J’s house. Often, she would stay the weekend. K gave evidence that between January 2012 and December 2015, when she was aged between about 10 and 14 years, the appellant regularly sexually abused her. K alleged that the appellant caused her to touch his penis, touched her vagina on the outside of her
underwear, touched her breasts, touched her buttocks and masturbated himself in front of her.¹ Some of the acts occurred more than once.

On the question of complaint, K said that when she was about 11 or 12 years old she told E, her best friend, about what was happening. The complaint was no more detailed than that. K said she “just [poured her] heart out” and told her “everything that had happened”. K was unable to remember E’s response. E did not give evidence.

Prior to the trial commencing, a photocopy of a text message sent by K to the appellant was disclosed to the defence. The text message was sent at 9.45am on 8 December 2015. The text message read:

Im fed up with this STOP taking photos and walking in when im sleeping becaue (sic) I swear to god ill tell my mum everything over the years!!! One more time and my mum hears everything!!

K did not give evidence, in chief, on the topics of photographs, the appellant walking into her room or sending the text message to the appellant. This was a deliberate decision by the prosecution. However, in relation to the incident where the appellant allegedly made K touch his penis, K gave evidence that the appellant had “bribed her” to keep quiet. She was asked what words he used and she replied:

I said “If I - this ever happens again I’m telling my parents” and he said “What will it take for you to not tell anyone this?”, and I said “Black forest chocolate” and that Christmas that’s what I got.

It was against that background that the following cross-examination occurred:

Q What, you say that there was an incident at Tranmere and you said something to Mr Spencer.
A Yes.
Q What did you say.
A Was this outside? Where he bribed me?
Q What did you say to him wherever.
A Well if this was the one I can remember outside was ’I will tell my parents basically, you know, everything’ and that’s when he said ’What will it take for you to not say anything?’.
Q And you were then how old.
A Around 10 or 11.

¹ This was the conduct alleged in the particulars of the charge.
Q Did you ever say anything like that again to him over the years.
A Yes.
Q Did you.
A Yes.
Q What did you say.
A I sent him a message saying if he says - if he does anything again, I'll tell my parents.
Q Was that at Klemzig.
A This was in Lewiston.
Q Lewiston. Did you say it, for example, more than once at Tranmere.
A I said it to him on multiple occasions.

The relevance of the text message

11 It is likely that K, in her response during cross-examination, was referring to the text message mentioned above. Counsel for the appellant was, no doubt, seeking to cross-examine about other examples of bribery. However, the question was non-specific and K interpreted it as being about telling the appellant to stop. Arguably the answer was not responsive to the question. The problem, however, is that the evidence was given; the parties therefore needed to consider how to deal with it. The parties needed to consider the relevance and admissibility of the evidence; that is, to what fact in issue the evidence was directed and for what purpose it may be used.

12 Although K did not specifically refer to a text message in that answer, the prosecutor, during a break in K’s evidence, raised the question of the previously disclosed text message with the primary judge. The prosecutor submitted that, due to the cross-examination, he would apply in re-examination to lead a photograph of a text message that K sent to the appellant. The prosecutor informed the primary judge that he and defence counsel had been discussing the question of re-examination over the lunch break and that they may seek a ruling from him.

13 The discussion with the primary judge is important. The primary judge was given a copy of the text message. His immediate response, an appropriate one, was to query why the prosecution had not led the message as part of its case. The prosecutor explained that he had not led the text message because of the reference in the message to the taking of photos. He informed the primary judge that if he applied to re-examine, he would still not want to lead the reference to the “photos”. It is not clear why the prosecution adopted this approach to the text
message and its content; it is possible that the prosecutor wanted to avoid the complications involved in introducing discreditable conduct evidence.

The prosecutor submitted that he may not have to lead the text message if no submission was to be made by the appellant challenging K’s evidence on this matter. Clearly, the prosecutor, in his discussion with the primary judge, was concerned that the credit of K, which was the major issue at trial, may be questioned relating to that evidence. The focus was on the text message, not the evidence that had been given. How the text message was to be used is a different question as to how the actual evidence given by K could be used. The prosecutor made no submissions to the primary judge as to how he may use the evidence given by K. There was no discussion about whether the appellant had responded to the text message.

Counsel for the appellant submitted that he had not challenged K’s evidence on the topic. He suggested the matter should be left. Counsel opposed any suggestion that the photocopy of the message should in some way be altered. Counsel was also concerned about misrepresenting the wording of the message.

The primary judge was not asked to rule, although he offered the suggestion that he may allow the text of the message into evidence with the reference to “photos” removed.

Later, the primary judge was informed that the parties had agreed to proceed by way of agreed fact which read:

During cross-examination, the complainant said “I sent him a message saying if he says - if he does anything again I’ll tell my parents”. It is an agreed fact that a text message was sent from the complainant’s phone to the accused’s phone on 8 December 2015.

The agreed fact does not reveal the content of the text message. However, implicit in the agreed fact is that the text message was consistent with her evidence. Such an interpretation was open to the jury. In important aspects, it was not consistent; in fact, the content of the text related to uncharged discreditable acts by the appellant. The consistency lay in K’s threat to “tell her mum everything”. The question arises as to what K meant by “everything”.

K was not asked in re-examination whether the appellant had responded to the text. At the close of the prosecution case, the evidence was simply that a text message had been sent. On the evidence as it then stood, no question of an admission by silence arose; there was no evidence that the appellant had failed to respond to the message. The agreed fact did no more than confirm, in a well-intentioned but ultimately misleading fashion, the fact that in some form K had sent the appellant a message arguably consistent with her answer in cross-examination.
The use of the text message and agreed fact

From the discussion with the primary judge, it is apparent that the proposed re-examination of K, and the subsequent use of the agreed fact, was postulated on the basis that it was necessary to buttress her credit on this point. Whether it needed to be admitted for that purpose, given the lack of specific challenge by the appellant’s counsel, is debateable. However, it appears that neither counsel at this stage of the proceedings gave thought to how the evidence she had given, irrespective of the text message, may be used, particularly if the appellant gave evidence.

We have no doubt that counsel acted with the best of intentions but there are difficulties with the approach adopted. It appears there was an attempt to “sanitise” the text message by removing its content. If the issue was to be taken no further by the prosecution, other than to bolster the credit of K, little harm may have been caused. However, the approach adopted by the parties led to difficulties later in the case.

When the appellant gave evidence, the problem with the evidence of K on this point and the agreed fact became apparent. K’s evidence about the message, and the agreed fact, took on an entirely different character. The prosecution used the evidence of K, bolstered by the agreed fact, to establish that the appellant had not responded to the message and that his failure to respond was an admission by silence.

It is important to note that it was open to the prosecution to have adduced evidence from K, in chief, about the topic of photographs and the appellant walking into the room where K was sleeping. If that had been done, the text would have been relevant and admissible in its full form; the evidence would have attracted the operation of section 34P of the Evidence Act 1929 (SA). The appellant may have challenged the evidence. If admitted, section 34R of the Evidence Act would have been engaged. The failure of the appellant to respond to the text and the issue of an alleged admission by silence would have been obvious on the prosecution case. The prosecution however made a forensic choice not to proceed in that manner.

Had the prosecutor made it clear how he may use K’s evidence about the message if the appellant gave evidence, the approach of the appellant’s counsel to the question of an agreed fact may well have been different. When the arrangement to proceed by way of agreed fact was considered the prosecutor would not have been aware the appellant would give evidence. However, that was always a possibility. The agreed approach meant that K’s evidence about the message was not challenged. Further, the agreed fact suggested that the text message sent was consistent with her evidence. As discussed, the text was inconsistent, in part at least, with her evidence.
The difficulties with the agreed fact became manifest when the prosecutor cross-examined the accused. The prosecutor asked the following series of questions:

Q  Isn't it the case that inside that room you caused K to touch your penis.
A  No, I did not.

Q  Inside that room didn't she say to you 'If you ever do that again, I'm going to tell my parents everything'.
A  No. It never happened.

Q  Has she ever said to you 'I'm going to tell my parents what happened'.
A  No.

Q  Never.
A  No.

Q  She's never said those words to you.
A  No.

Q  What about the text message that she sent to you. Did you see that.
A  Yes, I did.

Q  Didn't she say to you, didn't she send you a message saying that 'If you do anything again, then I'll tell my parents'.
A  Yes, she did send a message, yes.

Q  You saw that message.
A  Yes, I did.

Q  On 8 December 2015.
A  Yes.

Q  What, you don't consider that's her telling you to not do anything again or she'll tell her parents.
A  That was in a message. You asked me if she had spoke to me.

Q  Did you send the reply.
A  Tried to, yes.

Q  What did you say in the reply.
A  Just simply 'WTF' which means 'What the F'.
You say you tried to or do you think that might not have gone through.

Yeah, just wouldn't send.

Do you know why.

I've got no idea.

The issue, introduced in cross-examination, was the failure of the appellant to respond to the text. If questions were to be asked about the failure to respond to the text message, the actual content of the text was critical.

The prosecutor cross-examined the appellant as if the text message was consistent with her evidence, namely that the appellant should not do anything again or she'll tell her parents. It can be seen from the underlined portion of the cross-examination that the appellant gave a guarded answer to the question. The agreed fact, interpreted literally, did not state what was in the text. It simply said a message was sent. However as discussed, the agreed fact was misleading and in an important way; it was open to be interpreted as being consistent with her answer in cross-examination. The prosecutor’s cross-examination proceeded on that interpretation. What the appellant had not responded to was the actual content of the text, namely the allegations of uncharged discreditable conduct. The cross-examination led the jury to believe that the lack of response was to an unspecified “everything” and arguably, to the particular conduct alleged as particulars of the charge. When considering whether the failure to respond was an admission by silence, the distinction is crucial.

The appellant’s counsel made no complaint about the prosecutor’s cross-examination.

The prosecution address

The prosecutor addressed the jury on the topic as follows:

The complainant sent him a text message on 8 December 2015, towards the end of the abuse, threatening that if he didn't stop that again she would tell her parents. You've got the agreed fact there. She sent him a message saying that if he does anything again 'I'll tell my parents'. The accused didn't even bother to reply.

What would you do if a family friend accused you of abusing them and then threatened to tell someone if you didn't stop, sent that to you in a text message? Would you just ignore it, or would you try and find out why on earth this close family friend, a child, who has been sleeping over at your family house on a weekly basis for four years, is saying such an incredible thing?

You might think he didn't reply and he didn't speak with her about it because he knew full well what he had been doing.

The prosecutor’s address was in line with his cross-examination. He referred to the text message as if it was consistent with K’s evidence. That is, the
failure to respond to the text message was a failure to respond to an accusation of abuse. The text message, either in its correct form or by way of agreed fact, did not assert or allege abuse. Abuse had to be inferred. The question naturally arises, if the jury were to infer abuse, what abuse? The jury, as the true content of the text message was not before them, were left to speculate.

Counsel for the appellant did not complain to the primary judge about the prosecutor’s address.

**The primary judge’s summing up**

The primary judge dealt with the issue during his summing up in the following way:

That was part of what [the prosecutor] was putting to you, that K was consistently being groped and grabbed on the breasts and the buttocks over about a four-year period, that she told him to stop but he did not. She said that she would tell but that did not prevent him from trying and doing things again.

What was put to you was that he became emboldened by her conduct. In other words, having threatened that 'I will tell my parents if you do that again', she did not do so and then, as it were, that was a green light for him. He became emboldened by that, so he could then act on her failure to tell anyone in authority, particularly her parents, as she had said she was going to do.

[The prosecutor] referred to that particular exhibit message to that effect to which she received no reply. It was submitted to you that the accused's evidence in response to that, namely, that he did receive a message, that he did try to send a message in reply 'WTF' but for some reason it did not go through.

The primary judge did not give any directions, nor was he asked to, on the issue of an admission by conduct (silence) and how the jury were to go about their task when considering that issue.

There was no complaint about the directions given by the primary judge.

**Admission by conduct (silence)**

An allegation or assertion is not admissible in evidence against an accused person unless the circumstances are such as to leave it open to the jury to conclude that the accused, having heard the statement and having had the opportunity to explain or deny it, and the occasion being one upon which he or she might reasonably be expected to make some observation, explanation or denial, has, by his or her silence or conduct, substantially admitted the truth of the whole or some part of the allegation made. It is not that what is said to an

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2: R v Smith (1897) 18 Cox CC 470; R v Grills (1910) 11 CLR 400; R v Salahattin [1983] 1 VR 521; R v Kamleh [2003] SASC 269.
accused can of itself be evidence against an accused, but his response may be if his silence or conduct may amount to an admission of the truth of what was said.\(^3\)

If an accused person denies the truth of a statement when it is made and there is nothing in his conduct and demeanour from which the jury, notwithstanding his denial, could infer that he acknowledged its truth in whole or in part, it would accord with the accepted practice to exclude the statement altogether.\(^4\)

Whether an inference can be drawn depends on the coalition of a number of facts.\(^5\) They include questions such as whether the accused heard or received the subject statement, whether he or she understood it and whether the facts contained in the subject statement were within the personal knowledge of the accused.

The next step is whether the circumstances were such that a dissent would, in ordinary experience, have been expected by the accused. The issue concerns an assessment of human behaviour which is best made by the jury.\(^6\)

Where evidence is admitted of statements made in the presence of an accused, or the accused has, for example by letter or text message, received such a statement, it is in general desirable that the judge should explain to the jury that they can only use the statements as evidence of the truth of what was stated if they are satisfied that the accused has by his silence or conduct admitted the truth.\(^7\)

On appeal, these principles were not in dispute.

**Grounds of Appeal**

There are two grounds of appeal. They are interrelated and it is therefore preferable to deal with them together. First, the appellant submitted that the trial miscarried because the primary judge failed to direct the jury that the appellant’s failure to respond to the text message could not be used as an implied admission. Secondly, if it was to be left to the jury as an admission, the primary judge failed to direct the jury as to how they could use the evidence of the admission.

The question that arises in this case is to what allegation or assertion did the appellant fail to respond. Putting to one side the issue of the agreed fact, the jury were confronted with an assertion in a text message which, incorrectly, was said to contain a message that “if he did anything again I’ll tell my parents”. That

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\(^3\) *Woon v The Queen* (1964) 109 CLR 529 at 541 (Windeyer J - his Honour dissented in the result but not on the point of principle).

\(^4\) *R v Christie* [1914] AC 545.


\(^6\) *R v Alexander* [1994] 2 VR 249 at 263.

\(^7\) *Barca v The Queen* (1975) 133 CLR 82 at 107.
message needs to be looked at in the context of the entirety of K’s evidence. K had given evidence of a number of acts which related to the particulars of the charge. Her evidence was that sexual offending occurred at four different houses over a period of approximately four years. To what did “anything” in the message refer? Could the jury infer that “anything” referred to the specific acts alleged or uncharged acts (demonstrating a sexual relationship) or some combination of both.

Mr Barklay SC, who appeared for the appellant (he was not counsel at trial), submitted that, given the lack of detail in the assertion contained in the text message, the failure to respond could not be an implied admission of guilt. At best, it was submitted, it could only be an admission that he had done something, possibly something sexual, in the past; it could not be an admission of any specific act. He submitted that “anything” was so vague as to be meaningless and “intractably neutral”.

Mr Edge, who appeared for the respondent (he was not counsel at trial), acknowledged that the allegation was not specific. He contended that it was properly open to the jury to find that the recipient of the message could only “interpret it as being an accusation of significant wrong doing.” Mr Edge submitted that it was open to the jury to find that the innocent response was to make an enquiry and the failure to do so confirmed an acceptance of the assertion. Other than saying it meant “significant wrong doing”, Mr Edge was unable to define the “assertion” with any particularity.

If the jury construed the appellant’s failure to respond as an admission, they could not know the subject matter of the admission. If acceptance of the assertion “if you do anything again” was an admission of “significant wrong doing”, rather than an admission of a specific act, which self-evidently it was not, clear directions would need to be given to the jury about the use that could be made of such an admission. Such an admission could be used, arguably, as evidence of sexual attraction (or relationship evidence as it is sometimes called). Put another way, it could be an admission by the appellant that he had been sexually involved, in some unspecified way, with K. However, careful directions would need to be given as to the use that could be made of such evidence. Arguably section 34R of the Evidence Act would be engaged. It could be used, for example, by a jury when considering the truthfulness and reliability of K’s evidence. However, the jury could not convict, despite the admission, unless they were satisfied beyond a reasonable doubt that two or more specific acts were proved.

No such directions were sought or given.

This case highlights the need to consider carefully the content of the assertion or allegation of a witness when determining the question of what, if any of the assertion or allegation, has been admitted by silence.
We turn to the agreed fact. As discussed earlier, we consider the agreed fact to have been misleading in its content. It is no answer that the appellant’s counsel at trial agreed to it. The circumstances in which, and for which, the agreement was struck were different, and markedly so, compared with how it was eventually used.

It is correct to observe that under cross-examination the appellant accepted that he received a message and that although he tried to respond to the message the response did not go through. However, the prosecution asked the jury to accept that his failure to respond was an admission to an assertion in a text message which, in actual fact, the text did not assert. To put that another way, despite having in its possession the original text message, which was about photographs and walking into her bedroom, the prosecution put to the jury that the appellant’s failure to respond meant that he admitted an assertion K had not made in the actual text. As the prosecutor put to the jury, the appellant did not respond because “he knew full well what he had been doing”. The prosecutor put to the jury that the appellant’s failure to respond to the text message was an admission of guilt to all of the offending.

Mr Edge submitted that the assertion the jury heard was a fair paraphrasing of the original allegation. At a level of abstraction there may not be much difference between saying, stop various acts or I will tell mum “everything over the years” and “if you do anything again I will tell my parents”. Of course, what was missing here was the rest of the text; that was not “paraphrased”. It is not open to the prosecution to suggest an implied admission to a fair paraphrasing. If the prosecution intends to rely on an implied admission by silence, and they have in their possession the precise allegation or assertion, that is what should be put to an accused and the jury; not what others may, or may not, consider to be a fair paraphrasing.

Turning to the second ground, Mr Barklay submitted that the primary judge did not direct the jury at all on the way in which they should approach the question of the admission by silence. He submitted that, although there was no rule of law that evidence of this nature must be the subject of specific directions, the failure by the primary judge in the circumstances of this case to give directions led to a miscarriage of justice.\(^8\)

Mr Barklay relied upon his earlier submissions about the ambiguous nature of the allegation or assertion and the lack of clarity as to what was allegedly admitted. He pointed to the lack of direction as to whether the circumstances of receipt of the text message required a response. Mr Barklay also pointed to the failure to direct as to what the admission related to, in particular the fact that it could only be relevant to relationship evidence.

\(^8\) *Burns v The Queen* (1975) 132 CLR 258.
Mr Edge submitted that it was plain that the jury, applying their common sense, would have known that the admission had to be referable to the sexual relationship before it could be used. Mr Edge submitted that in the circumstances of the case no directions were required. He submitted that the trial was an “all or nothing” case dependent upon the credibility of K. The jury were correctly directed that they must accept K’s allegations if they were to convict the appellant. In those circumstances, he submitted, no risk of the jury misusing the evidence arose.

In *R v Thompson* Hinton J, when discussing the proper approach to the question of whether there was a failure to give a particular direction, observed:

> Once it is accepted that the failure to give a direction that complied with the authorities that deal with post-offence conduct capable of constituting an implied admission or consciousness of guilt is not an error of law, the question becomes one of whether, absent such direction, a miscarriage of justice has occurred. If the trial were conducted before a jury the answer to that question would turn on an assessment of the perceptible risk that the jury had failed, relevantly, to consider explanations for the apology consistent with innocence before determining that the apology was probative of guilt and proceeding to rely upon it.

(Footnotes omitted)

Thus, a judge is required to give those directions which are required to avoid a miscarriage of justice and what directions are required will vary according to the facts of the case.

Was there a miscarriage of justice?

In *R v MMJ*, a case where the prosecution relied on the silence of an accused to an allegation put to him as an implied admission, Ashley JA remarked:

> The particular evidence was beguilingly simple. But its apparent simplicity concealed a considerable number of real difficulties.

His remarks are apposite to this case. The failure of an adult to respond to a text message from a child, a message with a warning, is an alluring and potentially powerful piece of circumstantial evidence. As the prosecutor put it, the appellant didn’t respond because he knew what he had been doing; that is, his failure to respond means he is guilty. However, what is important in a case of an alleged implied admission is the process of reasoning. Where that process involves inferring facts from things done or not done, said or not said, the inferred fact being an admission, the trier of fact must be alive to the possibility of other explanations. Further, how the trier of fact is permitted to use the
evidence depends upon the inferences drawn. They are not necessarily simple concepts covered by the panacea of “common sense”.

The first difficulty arose with the ambiguous nature of the message. The appellant admitted in evidence to receiving the text message. However, the question arises, given the subject matter of the assertion and its method of delivery, whether there was an obligation on the appellant to respond. Although it perhaps does not arise in this case, a message delivered by text may require a different response to the same message delivered in person. Sometimes ignoring a text may be better than responding. This issue was a jury question but it was not mentioned by the primary judge.

However, even assuming that the jury found that the appellant should have responded, the question arises, “respond to what”. It was not, despite the claim of the prosecutor in his address, an assertion by K of abuse. Abuse could possibly, perhaps even probably, have been inferred but the jury were not given any assistance about that matter.

The jury could only use the accusatory statement implicit in the message if it was satisfied that the accused had, by silence, admitted the truth of it. Assuming the jury found that there was an implied admission by his failure to respond, the subject matter of any admission was unclear; the jury had to determine the subject matter of the admission. As discussed earlier, it could not be an admission to any specific act alleged. It could not, in our view, be an implied admission to the entire offending. The only logical use that could be of any failure of the appellant to respond is that he was, to use the words of the respondent, acknowledging “serious wrong doing”. As discussed, the jury may have been able to use that evidence as supporting the evidence of K that she was in an inappropriate relationship with the appellant. It could not, in our view, be used by the jury to treat the text message as alleging that the appellant had committed any one or more of the particularised conduct comprising the charge.

Mr Edge relied on other matters which require comment.

Mr Edge submitted that the prosecutor’s comment was of no moment in the trial. He submitted that the prosecutor did not focus on the admission being part of the prosecution case. We reject that submission. It was a powerful submission by the prosecutor following his cross-examination on the topic. The prosecutor relied on the evidence in two ways; first, to suggest unreliability in the appellant’s evidence and secondly, to suggest to the jury that they could infer the appellant “knew what he had done”. This was an “oath against oath” case. Rather than being of no moment, the cross-examination and the submissions went straight to the main issue in the case.

Mr Edge also relied upon the fact that the appellant’s counsel made no objection to the cross-examination nor the prosecutor’s comments in his address.
Counsel did not seek any directions from the primary judge about the issue. This, he submitted, reveals a lack of concern by counsel that the jury may misuse the evidence of implied admission. The lack of objection or a request for specific directions, he submitted, is relevant when a court of appeal is assessing whether there has been a miscarriage of justice in the circumstances of a particular trial.

In general terms, counsel’s forensic decisions made at trial may be obstacles to the success of an appeal. Generally, parties are bound by the conduct of their counsel, who exercise a wide discretion in deciding what issues to contest, what witnesses to call, what evidence to lead or to seek to have excluded, and what lines of argument to pursue. Considerations of fairness often turn upon the choices made by counsel at a trial. The fairness of the process is to be judged in that light. However, the law does not pursue that principle at all costs. It recognises the possibility that justice may demand exceptions.\(^\text{13}\)

It is surprising that counsel for the appellant did not seek directions on the use that could be made of the evidence relating to an implied admission. However, it is important to note, as was observed in Choudhary v Director of Public Prosecutions,\(^\text{14}\) there are two sides to the bar table. The primary judge, on this topic, received no assistance from either counsel.

Both counsel were party to the decision to proceed by way of agreed fact. To proceed in that manner clearly suited both the prosecution and the appellant at that time. The prosecution was caught, as much as the appellant, by the deficiencies in the way the topic had been resolved.

The prosecutor introduced the issue of the implied admission in cross-examination and then addressed on it. He did not seek any directions from the primary judge even though he did not open to the jury on the topic (understandably in the circumstances) and during his address, he did not use the expression “implied admission”. It is of note that neither counsel nor the primary judge ever referred to the concept of an implied admission. The primary judge in summing up to the jury, simply repeated the arguments of counsel. The primary judge was not asked, and gave no directions at all, about the topic of an admission and how the jury should go about its task in assessing the use to be made of the evidence. The prosecutor, as well as the appellant’s counsel, should have raised the issue of the appropriate directions with the primary judge. The answer as to why no directions were sought or given may be as simple as, in the heat of the trial, the difficulty of the issue was not appreciated.

Both the prosecution and the appellant were represented by experienced and competent counsel. Nothing we have said in these reasons should be interpreted as suggesting that counsel acted other than with the best of intentions. However,

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\(^{13}\) Nudd v The Queen [2006] HCA 9; R v MMJ (2006) 166 A Crim R 501; Choudhary v Director of Public Prosecutions [2013] VSCA 325.

\(^{14}\) [2013] VSCA 325.
stemming from one answer given by K in cross-examination, an answer that was arguably not responsive to the question, decisions were made that led to serious problems later in the trial. The trial was short and we accept there was little chance for mature reflection. Counsel’s failure to seek directions on the topic should not cause this appeal to fail.

The case against the appellant was almost entirely confined to the evidence of K. The fundamental task for the jury was assessing her credibility and reliability; this was a case where the truthfulness and reliability of K’s evidence was vitally important. In the circumstances of this case, directions as to how the jury should go about its task in assessing whether the failure to respond could be an implied admission were required. Directions about the use that could be made of any implied admission were also required. Ground 2 of the appeal is made out.

In our opinion, there is a substantial risk that the jury, in the absence of appropriate directions, misused evidence which was highly prejudicial to the appellant and highlighted by the prosecutor in his address. It follows that a substantial miscarriage of justice has occurred.

Permission to appeal on Ground 2 having been granted earlier, we would allow the appeal on this ground. We grant permission in relation to Ground 1 but it is unnecessary for us to consider this ground any further.

Order

Permission to appeal is granted in relation to Ground 1.

Appeal allowed on Ground 2.

The matter is remitted to the District Court for a retrial