

Case Name:
R. v. Sandhu

Between
**Her Majesty the Queen, Respondent, and
Harpreet Singh Sandhu, Appellant**

[2009] O.J. No. 374

2009 ONCA 102

265 O.A.C. 206

63 C.R. (6th) 1

2009 CarswellOnt 442

242 C.C.C. (3d) 262

Docket: C43661

Ontario Court of Appeal
Toronto, Ontario

J.I. Laskin, P.S. Rouleau and G.J. Epstein JJ.A.

Heard: June 20, 2008.
Judgment: February 2, 2009.

(34 paras.)

Criminal law -- Procedure -- Information or indictment -- Validity -- Trial judge's duties -- Charge or directions -- Appeal by accused from convictions for assault and sexual assault on his wife -- Wife testified to several assaults and sexual assaults during marriage -- Appellant argued trial judge did not instruct jury about improper use of evidence across counts, that indictment offended single transaction rule, and that trial judge's instruction compromised requirement of jury unanimity -- Appeal dismissed -- Instructions on application of evidence across counts appropriate, considering single victim and no material evidence outside scope of indictment -- Numerous incidents of spousal assault properly treated as single transaction -- Unanimous finding that

appellant committed each offence sufficient to meet jury unanimity.

Appeal by the accused from convictions for assault and sexual assault. The complainant was the appellant's former wife. The appellant argued that the trial judge failed to instruct the jury about the improper use of evidence across counts, that the assault and sexual assault counts infringed the single transaction rule, and that the trial judge's instructions on these counts compromised the requirement of jury unanimity. The complainant gave evidence of four incidents of assault and two incidents of sexual assault. Each count spanned the years 1996 to 2002. The trial judge instructed the jury to consider each of the counts separately. The trial judge also instructed the jury that, though the wife testified to more than one incident of assault and sexual assault, the Crown was only required to prove one assault and sexual assault beyond a reasonable doubt.

HELD: Appeal dismissed. The trial judge's instructions as to the application of the evidence to the individual counts was appropriate, considering there was only one victim and no material evidence outside the scope of the indictment. Much of the evidence given by the appellant and the complainant was relevant to all the counts. Since the jury acquitted the appellant on the threatening death charge, it strongly suggested that the jury considered, to the extent possible, the evidence supporting each count separately, and that it was not overly influenced by notions of general propensity or bad character. The single count rule was not infringed. The acts the appellant allegedly committed amounted to a pattern of conduct. They were acts of domestic abuse against the same complainant in their family home during the marriage. Numerous incidents of spousal assault by a husband against his wife were properly treated as a single transaction. Individual jurors were entitled to reach different conclusions on which incident or incidents included in a single count were made out on the evidence. A unanimous finding that the appellant committed each offence was sufficient to meet the requirement of jury unanimity.

Statutes, Regulations and Rules Cited:

Criminal Code, R.S.C. 1985, c. C-46, s. 581(1)

Appeal From:

On appeal from the convictions entered on February 4, 2005 by Justice S.S. Seppi of the Superior Court of Justice, sitting with a jury.

Counsel:

Vincenzo Rondinelli, for the appellant.

Christine Tier, for the respondent.

The judgment of the Court was delivered by

J.I. LASKIN J.A.:--

A. INTRODUCTION

1 The issues on this appeal arise out of allegations of spousal abuse over an extended period of time.

2 The appellant, Harpreet Sandhu, and the complainant, Ms. Lavaleet Sandhu, were married in 1996 in India. The complainant is a Canadian citizen, and she sponsored Mr. Sandhu's immigration to Canada. The parties lived together in Ontario for six years, and had a daughter. However, in 2002, the marriage broke down, and the parties separated.

3 After separation, Ms. Sandhu went to the police and told them that her husband had physically and sexually abused her during their marriage, and had even threatened to kill her. He was then charged on a three-count indictment, which alleged that he:

- * did unlawfully commit an assault on Lavaleet Sandhu;
- * did knowingly utter a threat to cause her death; and
- * did unlawfully commit a sexual assault on her.

Each count spanned the years 1996 to 2002.

4 Mr. Sandhu pleaded not guilty, and was tried before Seppi J. and a jury. The Crown's theory was that Mr. Sandhu was not happy with his wife, that he wanted a younger and more beautiful woman, and that he had married the complainant solely to facilitate his and his parents' immigration to Canada. The defence's theory was that Ms. Sandhu was angry when the appellant left the marriage and had retaliated by fabricating these allegations against him.

5 At trial, Ms. Sandhu testified that on numerous occasions during the marriage, Mr. Sandhu physically assaulted her and forced himself on her when she did not want to have sex. Mr. Sandhu testified, and denied the allegations.

6 The jury acquitted Mr. Sandhu on the threatening death count, but found him guilty on the other two counts: assault and sexual assault. The trial judge sentenced Mr. Sandhu to a nine-month conditional sentence followed by one year of probation.

7 Mr. Sandhu appeals his convictions. In support of his appeal he makes three submissions:

- (1) The trial judge failed to instruct the jury about the improper use of

evidence across counts;

- (2) Count one (assault) and count three (sexual assault) infringe the single transaction rule; and
- (3) The trial judge's instructions on counts one and three compromised the requirement of jury unanimity.

B. THE INCIDENTS OF ASSAULT AND SEXUAL ASSAULT

8 The complainant gave evidence of four incidents when Mr. Sandhu assaulted her and two incidents when he sexually assaulted her.

9 In chronological order the four incidents of assault are as follows:

- * The first incident of assault took place in late 1998, when Ms. Sandhu was five or six months pregnant. Mr. Sandhu squeezed her throat by pressing both his thumbs on it. When Ms. Sandhu went toward the telephone, possibly to call the police, Mr. Sandhu grabbed the phone. Ms. Sandhu screamed and ran outside. As she did, Mr. Sandhu kicked her, causing her hand to hit the wall. Ms. Sandhu claimed that Mr. Sandhu prevented her from calling the police about this incident.
- * The second incident occurred in February 2001. Ms. Sandhu testified that both Mr. Sandhu and his mother assaulted her. In her words, "his mother arrived and they got together to beat me up." According to Ms. Sandhu, they did so because she would not permit Mr. Sandhu to have a second marriage. Ms. Sandhu elaborated on the beating, testifying that Mr. Sandhu twisted her arm, pulled her hair and slapped her onto the back of the neck.

After this assault Ms. Sandhu did call 911. But Mr. Sandhu grabbed the phone from her, and then together with his mother demanded that Ms. Sandhu tell the police when they arrived that she had dialed 911 accidentally and that she did not need their assistance. When the police did arrive, Ms. Sandhu did as she was told because she feared for her life if she did not comply. She testified "I thought that the way he was threatening me, he could kill me or he could get me killed". She told the police that she had been trying to make a call to India - a plausible explanation as the country code for India is 91.¹

- * The third incident took place in 2002 while the parties were in India. Ms. Sandhu had an argument with her husband about what he did when he left the house. She was doing some cooking at the time. Mr. Sandhu told her not to ask him where he goes or what he does when he leaves. She said that

she had a right to know, whereupon Mr. Sandhu hit her in the neck with a hot spoon.

- * The final assault occurred in early September 2002 just before the parties separated. According to Ms. Sandhu, "[h]e twisted my arm, he pulled my hair and slapped me and my daughter was crying at the time."

10 The two incidents of sexual assault are as follows:

- * The first incident occurred early in 1999 when Ms. Sandhu was eight to nine months pregnant. Mr. Sandhu wanted to have sex with Ms. Sandhu but she turned him down. She told him, "[y]ou are drunk and I don't want to", and "[m]y child is heavy." Mr. Sandhu then physically forced her to have intercourse with him. He took off the pajama bottoms that she was wearing and had vaginal sex with her for five to ten minutes.
- * The other incident took place in March 1999, about 10 to 15 days after their daughter had been born. Because it was a cesarean birth, Ms. Sandhu had stitches and they had not healed. She therefore told Mr. Sandhu not to have sex with her. He persisted saying "I have to do it. I'm going to do it." He then removed her pajamas and forcibly had sex with her.

C. ANALYSIS

1) **Did the trial judge err by failing to instruct the jury about the improper use of evidence across counts?**

11 The trial judge instructed the jury to consider each of the counts separately. She said:

As there are three separate offences charged, you must consider each one individually to decide whether or not the Crown has proven the essential elements of each offence charged beyond a reasonable doubt.

12 However, Mr. Sandhu argues that this instruction did not go far enough. He submits that because the three counts are found in one indictment and the Crown did not bring a similar fact application, the trial judge was obliged to warn the jury that they must consider only the evidence relevant to each assault in arriving at a verdict on that assault. He relies on the judgment of this court in *R. v. M.(B.)* (1998), 42 O.R. (3d) 1, at p. 14, where Rosenberg J.A. discussed the need for this warning and the concern that, if it is not given, a jury may use evidence on one count to infer that the accused is the sort of bad person who would commit the offences charged on the other counts:

Thus, in a case involving multiple counts and complainants, and where evidence is led of other uncharged misconduct, Sopinka J. identified two essential elements of a charge to the jury. First, when evidence of one count is not

admissible as similar fact evidence on the other counts, jurors must be instructed to consider each charge separately and not to use evidence relating to one count as evidence on any of the other counts. In this case, the jury charge does not include this essential element. The charge does not clearly explain to the jurors that they could not use the evidence of all the counts to prove any one count.

Second, *Rarru* requires the trial judge to give the jury a proper limiting instruction regardless of whether evidence of other counts or of uncharged misconduct is admissible as similar fact evidence. The jury charge also fails to meet this standard. Even if the evidence of the various counts had been admissible as similar fact evidence, a limiting instruction was required. The jury had to be warned about misuse of the evidence of criminal and disreputable conduct. I have already referred to this issue in relation to the bestiality counts. It was essential that the jury be instructed that it was not to rely on the evidence of other counts or other uncharged misconduct as proof that the accused is the sort of person who would commit the offence or offences charged[.] [Citation omitted.]

13 I do not think that this instruction was required in this case. Moreover, even if it had been given, it would not have benefited Mr. Sandhu.

14 First, *M.(B.)* is a case involving multiple offences against multiple victims and evidence of discreditable conduct outside the scope of the indictment. I agree with the Crown that cases such as *M.(B.)* have limited application to a case such as the one before us where there is one victim and no material evidence outside the scope of the indictment.

15 Second, much of the evidence given by both Mr. Sandhu and Ms. Sandhu is relevant to all the counts. For example, in discussing her marital relationship, Ms. Sandhu testified that she sought her husband's permission before doing anything, that she did as she was told, and that she would not have left him because her culture dictated otherwise. All of this evidence was relevant to all the counts. Equally, Mr. Sandhu's testimony that his wife was the aggressor, that she was threatening and controlling, and that she fabricated the allegations to get back at him for leaving her, was relevant to all the counts.

16 Third, in cases of this sort in which an accused is alleged to have engaged in abusive conduct against the same complainant over a period of time, the accused's discreditable conduct is relevant and admissible to show animus toward the complainant: see *R. v. F.(D.S.)* (1999), 43 O.R. (3d) 609, per O'Connor A.C.J.O., at pp. 614 - 618 (C.A.); *R. v. Krugel* (2000), 143 C.C.C. (3d) 367, per Moldaver J.A. at 391 - 393 (Ont. C.A.); *R. v. Batte* (2000), 49 O.R. (3d) 321, per Doherty J.A., at paras. 102-114 (C.A.); *R. v. C.(N.P.)* (2007), 86 O.R. (3d) 571, per Gillese J.A., at paras. 13 - 23 (C.A.), leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 144; *R. v. S.(P.)* (2007), 221 C.C.C.

(3d) 45, per Goudge J.A., at paras. 24 - 41 (C.A.).

17 Thus, if the trial judge had given the instruction Mr. Sandhu seeks - "you must not infer that the accused is a bad person and therefore committed the offences with which he is charged" - she would have had to balance that instruction by a proper instruction on animus or predisposition - for example, "you may infer that the accused had a particular animus toward the complainant, or a predisposition to abuse her". This latter, and entirely appropriate, instruction would not have helped Mr. Sandhu.

18 Finally, and in my view significantly, the jury acquitted Mr. Sandhu on count two, the threatening death charge. This strongly suggests that the jury considered, to the extent possible, the evidence supporting each count separately, and that it was not overly influence by notions of general propensity or bad character. I would not give effect to this ground of appeal.

2) Do counts 1 and 3 infringe the single transaction rule?

19 Section 581(1) of the *Criminal Code* stipulates that "[e]ach count in an indictment shall in general apply to a single transaction". Mr. Sandhu acknowledges that a single transaction may encompass a number of separate incidences over a lengthy period of time: see *R. v. Hulan*, [1969] 2 O.R. 283 - 295 (C.A.). Indeed, as the Crown points out, commonly a single charge of assault or sexual assault is laid where the offender commits multiple or successive offences against the same person over time. The rationale for doing so, in the words of Kelly J.A. in *Hulan*, is that "[t]he continued proximity of the appellant and the complainant and the following of an established routine indicate the validity of associating the several acts as a single transaction".

20 Mr. Sandhu, however, submits that the several incidents of assault and sexual assault do not constitute a single transaction, and therefore the indictment is flawed. He claims that the alleged acts against him did not demonstrate a pattern of conduct, and that unlike other cases, the complainant, his wife, was not a child. These distinguishing features, he argues, mean that the indictment offends the single transaction rule.

21 I do not agree with Mr. Sandhu's submission. It seems to me that the acts Mr. Sandhu allegedly committed did amount to a pattern of conduct. They were acts of domestic abuse against the same complainant, his wife, in their family home, during the last four years of their marriage.

22 The facts of this case are similar to the facts in *R. v. M.(G.L.)* (1999), 138 C.C.C. (3d) 383 (B.C.C.A.). There, the accused was alleged to have committed four acts of indecent assault on his nephew over a four year period. Like Mr. Sandhu, the accused was charged with a single count, which encompassed the four incidents. Ryan J.A. held at para. 12 that the acts were "successive and cumulative" and, therefore, could be treated as a single transaction.

23 Moreover, for multiple incidents to be included in a single count does not require the complainant to be a child. In *R. v. Kaushal*, [1998] O.J. No. 1470, 1998 CanLII 2870 (ON C.A.),

leave to appeal to S.C.C. dismissed, [1998] S.C.C.A. No. 417, this court found that numerous incidents of spousal assault by a husband against his wife were properly treated as a single transaction "occurring as they did in the appellant's home and representing a consistent pattern of conduct." The same may be said here.

24 I would be concerned about the form of the indictment if I were persuaded that Mr. Sandhu was prejudiced by it. However, we have no evidence that the indictment prejudiced him. His wife's statement to the police and her evidence at the preliminary inquiry told him the case he had to meet. His defence to all her allegations was the same: she lied to get back at him for leaving her.

25 Also, Mr. Sandhu raised his complaint about the form of the indictment for the first time on appeal. He did not raise it at the beginning of the trial or even in the pre-charge conference. He did not apply to subdivide the counts under s. 590 of the *Criminal Code* or apply for particulars under s. 587. Although the failure to object to an indictment at trial does not preclude a successful objection on appeal - see *R. v. Selles* (1997), 34 O.R. (3d) 332 (C.A.), at para. 21 - it is a telling indicator that the accused was not prejudiced by the indictment as drafted. I would not give effect to this ground of appeal.

3) Did the trial judge's instruction on counts 1 and 3 compromise the requirement of jury unanimity?

26 Mr. Sandhu's final submission begins from the premise that, to be guilty of assault or sexual assault, all 12 jurors had to find him guilty of at least one of the incidents in each count. The trial judge, however, instructed the jury that, though Ms. Sandhu testified to more than one incident of assault (and sexual assault), the Crown is only required to prove one assault (and sexual assault) beyond a reasonable doubt:

Now, as I have read to you count one charge is the offence of assault. Though Ms. Sandhu gave evidence of more than one incident of assault, the Crown is only required to prove one assault beyond a reasonable doubt on count one. For you to find Harpreet Sandhu guilty of assault, Crown counsel must prove each of these three essential elements beyond a reasonable doubt:

- 1) That Harpreet Sandhu intentionally applied force to Lavaleet Sandhu.
- 2) That Lavaleet Sandhu did not consent to the force that Harpreet Sandhu intentionally applied, and
- 3) That Harpreet Sandhu knew that Lavaleet Sandhu did not consent to the force that Harpreet Sandhu applied intentionally.

If Crown counsel has not satisfied you beyond a reasonable doubt of each of

these essential elements, you must find Harpreet Sandhu not guilty of assault.

27 Mr. Sandhu submits that this instruction is wrong because it gives rise to the risk that a guilty verdict on, for example, the assault charge "was based on a collection of individual juror determinations that did not contain a single instance of unanimity in respect of any of the four charged factual incidents." In other words, Mr. Sandhu could be found guilty of assault if three jurors found him guilty on the first incident, three on the second incident, three on the third incident and three on the fourth incident of assault. Such a risk, Mr. Sandhu contends, compromises the requirement of jury unanimity. To avoid this risk, he submits that the jury should have been told that they had to be unanimous on at least one of the incidents.

28 This argument may appear superficially attractive, but this court's jurisprudence stands against it. The leading case is *R. v. Robinson* (2004), 189 C.C.C. (3d) 152 (C.A.), in which Doherty J.A. canvassed the very argument now advanced by Mr. Sandhu and rejected it.

29 In *Robinson*, the complainant described a series of incidents in which she was sexually assaulted in her home. The incidents took place in the kitchen and in the bedroom. Mr. Robinson contended that, where there is evidence that the accused committed more than one distinct act of sexual assault, the jury must be told that it could convict only if all 12 jurors are satisfied that the accused sexually assaulted the complainant in the kitchen; all 12 are satisfied that he sexually assaulted her in the bedroom, or all 12 are satisfied that he sexually assaulted her in both places.

30 This court did not agree with Mr. Robinson's contention. Instead, Doherty J.A. wrote at para. 72 that "it was open to the jury to reach different factual conclusions concerning the act that constituted the sexual assault as long as the act was within the four corners of the indictment", and as long as "all were agreed that the appellant had sexually assaulted [the complainant] during the incident in the house."

31 The principle that emerges from *Robinson* is that individual jurors may take different factual paths to reach a conclusion of guilt provided each juror is convinced beyond a reasonable doubt on all the essential elements of the offence. Individual jurors are entitled to reach different conclusions on which incident or incidents included in a single count are made out on the evidence.

32 What underpins this principle is the single transaction rule. I have already rejected the submission that counts one and three offend that rule. As the incidents of assault (and sexual assault) must therefore each be taken to have occurred within a single transaction, each "transaction" can be viewed as one offence consisting of more than one incident: see *R. v. M.(G.L.)*, *supra*, per Ryan J.A., at paras. 25 - 28. An accused who is concerned about the number of incidents included in a count may always apply to sub-divide the count.

33 On this indictment, a unanimous finding that Mr. Sandhu committed each offence is sufficient to meet the requirement of jury unanimity. Accordingly the trial judge did not err in her instructions on jury unanimity. I would dismiss this ground of appeal.

D. CONCLUSION

34 The appellant was convicted by a jury of assaulting and sexually assaulting his former wife during the course of their marriage. He appeals his convictions on the grounds that the trial judge did not instruct the jury about the improper use of evidence across counts, that the indictment offended the single transaction rule, and that the trial judge's instruction compromised the requirement of jury unanimity. I would not give effect to these grounds of appeal. Accordingly, I would dismiss Mr. Sandhu's conviction appeal.

J.I. LASKIN J.A.

P.S. ROULEAU J.A.:-- I agree.

G.J. EPSTEIN J.A.:-- I agree.

1 The threatening death count, of which Mr. Sandhu was acquitted, was based on this incident.

---- End of Request ----

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