

CITATION: R. v. Toor, 2011 ONCA 114
DATE: 20110209
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COURT OF APPEAL FOR ONTARIO

Goudge, Sharpe and Gillese JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Narinder Toor

Appellant

Narinder Toor, acting in person

Ian R. Smith, acting as duty counsel

Paul Lindsay, for the respondent

Heard: November 18, 2010

On appeal from the conviction entered on September 19, 2008, and the sentence imposed on February 3, 2009, by Justice M. Tulloch of the Superior Court of Justice, sitting with a jury.

Goudge J.A.:

[1] The appellant was charged with three counts of assault-related offences involving domestic abuse of his wife. These were as follows:

Count 1: assault on his wife causing her bodily harm on December 31, 2003;

Count 2: sexual assault on his wife during an eight year period ending on or about December 14, 2004;

Count 3: assault on his wife causing her bodily harm on December 15, 2004.

[2] On September 19, 2008, he was found guilty by a jury on all three counts. On February 3, 2009, he was given a global sentence of 4 years' imprisonment.

[3] He has appealed both his conviction and his sentence. He appeared before us in person, ably assisted by duty counsel, Mr. Smith.

[4] At trial, the appellant and his wife, the complainant, were the two principal witnesses. Their stories were diametrically opposed.

[5] Concerning the December 31, 2003 incident, the complainant testified that it began when she asked him to get her a phone card to call her parents in India on New Year's Day. He refused to do so because he did not want her speaking to them. He refused to let her get it herself. When she went up to her bedroom, he got angry, punched her and dragged her by the legs along the floor to the stairwell to bring her back down. The appellant said none of this happened, that she was the one who had become angry at

him because he failed to bring home a movie, and that if he touched her it was entirely accidental.

[6] The evidence on the sexual assault count also came entirely from the complainant and the appellant. She testified that while there were occasions of consensual sex there were many occasions over the eight years where she refused, but he violently forced himself on her. His evidence was that this never happened and that he had only consensual sex with her over this period of time.

[7] The complainant's evidence of the December 15, 2004 incident was that it began when she signed up to work for Avon and received their products at home. He threw out the products, telling her he would not let her do this work because it was a job whores do. When she threatened to call the police, he grabbed her by the hair, threw her down and stomped on her, hitting her harder and harder. Her screams brought their boarder, Mr. Singh, up from downstairs. In the end she was taken to the police station, and then to the hospital. Her evidence was corroborated to some extent by the evidence of both Mr. Singh and her son. The appellant denied hitting her or stomping on her. He said she got angry and fell on the stairs.

[8] The Crown did not seek to use the evidence on each count as similar fact evidence on each of the other counts. Nor did either counsel seek a judicial instruction cautioning the jury against propensity reasoning. None was given.

[9] The jury returned with findings of guilt on all three counts.

THE CONVICTION APPEAL

[10] The appellant argues that the trial judge's failure to warn the jury of the danger of propensity reasoning constitutes reversible error. He says that the circumstances here required that the jury be instructed that in considering each charge they could not use the evidence relating to the other charges simply to find that the appellant was the kind of person likely to have committed the charged offence.

[11] We do not agree with this submission.

[12] This is not a case in which the evidence of the appellant's discreditable conduct falls outside the counts in the indictment against him. The evidence was directly probative of at least one of the three counts.

[13] Moreover, in the circumstances of this case, the evidence in relation to each count was admissible on each of the other two counts as well. Mr. Smith does not seriously contest this. The evidence involves the ongoing relationship between the appellant and the complainant. It sheds light on the nature of that relationship, and is relevant for the purpose of setting the context in which each alleged event occurred.

[14] The evidence is also relevant to the appellant's disposition to assault his wife. It does much more than suggest that the appellant is a bad person who has a general disposition to act violently. It suggests a disposition to do the very act in question in each count, namely assaultive behaviour towards his wife.

[15] Finally, the evidence is relevant to the issue of the delayed disclosure of these incidents by the complainant, particularly the sexual assault over an eight-year period. It speaks to her position that she did not disclose immediately because she felt threatened and controlled by the appellant.

[16] The evidence concerning each count carries a probative force for the other two counts that rests on these three bases. That force outweighs the potential prejudice that the jury will engage in forbidden propensity reasoning, namely that the appellant is a bad person who would therefore have a tendency to commit the offences charged.

[17] While it was therefore properly open to the jury to consider the evidence relating to all three counts in reaching its verdict on each count, the appellant says that nonetheless in this case the trial judge was required to caution them against reasoning based on general propensity.

[18] The trial judge did not do so. Indeed, on several occasions, in describing for the jury their general task, he instructed them that they were to consider all of the evidence in reaching their decision. In doing so, however, he made no reference to the evidence directly relating to each count and how they might use it in considering the other two counts. Moreover, when he reviewed the evidence on each count, he did so without reference to the evidence directly relating to the other two counts.

[19] In addition, neither the Crown nor experienced defence counsel requested such a caution. This cannot have been an oversight on the latter's part because, in his closing

address, defence counsel expressly urged the jury to keep the evidence on each count separate and not to consider the evidence on one count in deciding on either of the other two counts.

[20] There is no doubt that the trial judge could have told the jury not to infer from the evidence of the appellant's discreditable conduct that he was the type of person who would engage in the criminal activity alleged against him. However, had he elected to do so he would also have had to instruct the jury on the proper use that could be made of such evidence.

[21] He would have had to instruct the jury that, if they accepted the complainant's evidence, they could find that the context of her relationship with the appellant was one in which he was controlling and abusive; that they could use the evidence tending to show the appellant's specific disposition to be violent with his wife to infer a disposition to do the very acts charged; and that the nature of their relationship explained her delay in reporting the sexual assault.

[22] In all these circumstances, we have no doubt that on balance, an instruction explaining both the proper and improper uses of the evidence on one count in deciding the other two counts would have operated against the appellant's interest. We therefore conclude that the trial judge did not err in not giving the instruction argued for by the appellant. In this respect, this case is very like a number of other cases decided by this

court: see for example *R. v. W.B.* (2000), 49 O.R. (3d) 321; *R. v. A.G.* (2004), 190 C.C.C. (3d) 504; *R. v. C.B.*, 2008 ONCA 486; and *R. v. Sandhu*, 2009 ONCA 102.

[23] The conviction appeal must therefore be dismissed.

THE SENTENCE APPEAL

[24] The appellant argues that his four-year sentence is unfit, particularly given the fact that he is a first offender, and the cursory nature of the trial judge's reasons for sentence.

[25] We do not agree. The trial judge was expressly alive to the appellant being a first-time offender. Moreover, in our view, it is clear from his reasons that, in sentencing the appellant, the trial judge accepted the complainant's evidence about what happened. He described the offences this way at p. 2 of his reasons for sentence:

The circumstances of this case [were] aggravated in light of the fact that it occurred within a domestic situation. The complainant's evidence was that she was controlled by Mr. Toor. In fact, he did not want her to work, he didn't want her to associate with people outside his family. He did not only physically abuse her at will but he also verbally abused her, as well as subjected her to a situation of psychological imprisonment.

[26] Described this way, there is nothing unfit about this global sentence for this offender and these offences.

[27] The sentence appeal must also be dismissed.

[28] We are grateful to the Crown and duty counsel for their assistance.

RELEASED: FEB 09 2011 ("S.T.G.")

"S. T. Goudge J.A."

"I agree. Robert J. Sharpe J.A."

"I agree. E. E. Gillese J.A."