

CANADA / JUDGMENT

R. v. Gondara

2020 BCSC 865

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 865 R. v. Gondara

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Gondara,

2020 BCSC 865

Date: 20200610

Docket: X080554

Registry: New Westminster

Regina

v.

Tirkarn Singh Gondara

Before: The Honourable Mr. Justice Riley

On appeal from: the decision of the Provincial Court of British

Columbia, Surrey Registry No. 211912-1K, dated June 1, 2017

Reasons for Judgment

Counsel for the Crown:

L.J. Kenworthy

Counsel for the Accused:

S.R. Wright

Place and Date of Hearing:

New Westminster, B.C.

July 25, 2019

December 10, 11, 2019

Place and Date of Judgment:

New Westminster, B.C.

June 10, 2020

Introduction

- [1] Following a trial in the Provincial Court of British Columbia, the appellant Tirkarn Singh Gondara was convicted of sexual assault and assault. He filed an appeal from conviction, alleging that his trial counsel failed to properly advise him that it was his choice as the accused whether or not to testify, thus effectively denying Mr. Gondara the opportunity to testify in his own defence. In this context, the key issue to be decided in this summary conviction appeal is whether the verdict should be set aside and a new trial ordered on the basis of ineffective assistance of counsel at trial.

Facts

Nature of Relationship between Mr. Gondara and the Complainant

- [2] Mr. Gondara and the complainant were married by way of an arranged marriage that took place in India on 13 December 2013. They lived together in India for several months in 2013, before Mr. Gondara returned to Canada. The complainant then came to Canada in 2015, where she lived with Mr. Gondara for a brief time, but left him less than a month later. The charges against Mr. Gondara relate to the period of time when Mr. Gondara and the complainant were living together in Canada, at a residence in Surrey.

Charges

- [3] Mr. Gondara was charged in the Provincial Court of British Columbia on an Information alleging four offences: (i) sexual assault of the complainant between 17 June 2015 and 11 July 2015, (ii) assault of the complainant between 18 June 2015 to 11 July 2015, (iii) uttering a threat to cause death or bodily harm to the complainant's brother, and (iv) assault of the complainant on or about 12 July 2015. The Crown elected to proceed summarily.

Procedural History

- [4] Mr. Gondara was initially represented by Baldev Sandhu, who was assisted by his articled student, Ahmed Verma.

- [5] As the first trial date approached, a proposal was made for the Crown to proceed by way of a peace bond, on the condition that Mr. Gondara attend a counselling program. The matter was adjourned to facilitate this arrangement, but in the end Mr. Gondara refused to attend counselling, taking the position that he should not be required to do so because he did nothing wrong.
- [6] As the second trial date approached, Baldev Sandhu's son Bikramjit Sandhu took over as Mr. Gondara's counsel. Mr. Gondara was consulted about this and had no objection. Baldev Sandhu's articulated student, Ahmed Verma, continued to assist.
- [7] The trial commenced on 19 January 2017. Mr. Gondara appeared at the trial with Bikramjit Sandhu as counsel, assisted by Mr. Verma. The proceedings were interpreted into Punjabi by an official interpreter.
- [8] The Crown called its evidence over three days, commencing on 19 January 2017, and continuing on 16 and 17 March 2017. The Crown concluded its case in the early afternoon of 17 March 2017. The defence elected to call no evidence, and the matter was then adjourned to 5 May 2017 for final submissions.

Summary of Evidence Adduced at Trial

- [9] The gist of the allegation against Mr. Gondara at trial was that after the complainant arrived from India and went to live with him, Mr. Gondara forced himself upon her and had non-consensual sex with her basically every night during the time they lived together, and further that he physically assaulted her several times. The complainant testified to this effect.
- [10] In challenging the complainant's credibility and reliability, the defence relied in part on alleged inconsistencies in the dates and timing of events, as recounted by the complainant at various points in time, and by comparison to the timeline emerging from the testimony of other witnesses.
- [11] There was at least some corroboration in respect of two specific incidents.
- [12] On the first occasion, on or around 21 June 2015, the complainant called a cousin, Ms. Brar, early in the morning. Ms. Brar went to the Gondara residence to find the complainant in tears and Mr. Gondara under the influence of alcohol. The complainant left the Gondara residence and went to stay with Ms. Brar. Later that day, or the next day, Mr. Gondara went to the Brar residence, appeared remorseful, and made a commitment in the presence of Ms. Brar that he would not drink any more.

- [13] On the second occasion, on the morning of 12 July 2015, the complainant arrived at the Brar residence, upset. She had bruises on her stomach and her arm, which were observed by Ms. Brar. They called a family friend, Mr. Bhagirath, who attended and saw the complainant's bruises, and then called the police. The police attended the Brar residence, where they interviewed the complainant and took photographs of the bruises.

Trial Judge's Reasons

- [14] The trial judge accepted the testimony of the complainant, supported by the testimony of Ms. Brar and Mr. Bhagirath as to the two above-noted specific events. The judge was satisfied beyond a reasonable doubt that Mr. Gondara sexually and physically assaulted the complainant on or around 21 June 2015. Her Honour found Mr. Gondara guilty of sexual assault and assault in relation to this incident, but went on to stay the assault conviction under the rule against multiple convictions for the same act or delict. The trial judge was further satisfied beyond a reasonable doubt that Mr. Gondara physically assaulted the complainant on or about 12 July 2015, and found Mr. Gondara guilty of a separate count of assault in relation to that incident.

Sentencing

- [15] Mr. Gondara was sentenced on 22 September 2017. He received a sentence of 18 months in jail for the offence of sexual assault, and 30 days concurrent for the offence of assault, followed by three years' probation.

Appeal

- [16] Mr. Gondara filed an appeal from conviction. His initial notice of appeal raised a number of grounds, including an allegation that he received ineffective assistance of counsel at trial. Later, Mr. Gondara's appellate counsel filed an amended notice of appeal, with the only ground of appeal being he alleged ineffective assistance of trial counsel. Mr. Gondara maintains that he wanted to testify at trial, that his counsel failed to advise him of his right as the accused to make the final decision about whether to testify, and that it was his trial counsel Bikramjit Sandhu who ultimately made the decision that Mr. Gondara would not testify. Mr. Gondara maintains that if he had been given the choice to testify, he would have done so.

Fresh Evidence

- (i) Evidence of Mr. Gondara

- [17] Mr. Gondara filed an affidavit and gave viva voce evidence before me. I would describe the key points of his evidence as follows:

- a) Mr. Gondara denied his guilt. He says he provided his first counsel, Baldev Sidhu, with a handwritten statement giving his account of the allegations. He maintained that he always wanted to testify at trial.
 - b) He did not know much about the Canadian legal system, and trusted his counsel to guide him through the process.
 - c) Before the matter went to trial, the Crown made a proposal to proceed by way of a peace bond, on the condition that Mr. Gondara attend counselling. Mr. Gondara thought about it but ultimately declined, taking the position that he should not have to go to counselling because he did nothing wrong.
 - d) As the trial date approached, Baldev Sandhu suggested that Bikramjit Sandhu represent him at trial. Mr. Gondara trusted that Baldev would not get Bikramjit to handle the case unless Bikramjit was qualified, so he agreed to have Bikramjit represent him at trial.
 - e) He had "various meetings" with Bikramjit Sandhu before the trial. He repeatedly asked if they needed to work on his testimony, and he was told to "just wait" and "we may not need that". The most that was said on the topic was that if they needed Mr. Gondara to testify, then he would.
 - f) The trial took place over three days. As the trial unfolded, Bikramjit Sandhu seemed "very confident". He told Mr. Gondara he "wouldn't be testifying", because the testimony of the complainant and her cousin was "false" and if Mr. Gondara testified he "could say the wrong thing and mess things up".
 - g) The last conversation he had with Bikramjit Sandhu about whether he would testify was part way through the last day of evidence. In his affidavit, Mr. Gondara said the discussion was "in the morning" of the last day of trial. In his viva voce testimony, Mr. Gondara said the meeting took place over the lunch break.
 - h) In the course of that final meeting "Bikramjit never asked [Mr. Gondara] if [he] wanted to testify". Mr. Gondara "did not know that it was ultimately [his] choice whether or not [he] would testify". If he had been given the choice, he would have testified, because he always maintained that he was innocent, and wanted to testify to that effect at trial.
- [18] This is merely a summary of the basic points made in Mr. Gondara's evidence. Crown counsel made a vigorous challenge to Mr. Gondara's credibility, an issue which will be addressed in the analysis portion of these reasons.

(ii) Evidence of Baldev Sandhu

[19] Baldev Sandhu furnished an affidavit in which he averred that:

- a) He was initially retained to represent Mr. Gondara. He admitted meeting with Mr. Gondara about the case, but denied that Mr. Gondara ever provided a written statement setting out his version of events.

- b) The Crown proposed to resolve the case by way of a peace bond. Mr. Gondara was initially agreeable to a peace bond and had "no objection" to counselling. The matter was adjourned to facilitate this, but Mr. Gondara never attended the counselling, eventually taking the position that he should not have to do so because he did nothing wrong. Baldev Sandhu recommended that Mr. Gondara agree to the peace bond, but Mr. Gondara ultimately refused.
- c) If the trial had proceeded on the first trial date with Baldev Sandhu as counsel, his plan was to call Mr. Gondara as a witness. He never suggested to Mr. Gondara that he might not need to testify.
- d) When a new trial date was set, he asked Mr. Gondara if he would be agreeable to his son Bikramjit Sandhu conducting the trial, and Mr. Gondara had no objection. Baldev Sandhu did not participate in the subsequent trial preparations, but nonetheless confirmed in his affidavit that Mr. Gondara, Bikramjit Sandhu and Mr. Verma met in the board room at his law office when preparing for the trial.

(iii) Evidence of Bikramjit Sandhu

[20] Bikramjit Sandhu furnished two affidavits and gave viva voce evidence before me. I would summarize his evidence as follows:

- a) Certain portions of both affidavits were redacted on the basis that they went beyond the implied waiver of privilege arising from Mr. Gondara's allegations of ineffective assistance of counsel.
- b) After being called to the bar in February of 2016, he assisted his father Baldev Sandhu in handling immigration matters, and he also did some criminal defence work. By the time that he took over Mr. Gondara's case in December 2016, his practice consisted primarily of criminal defence work and personal injury litigation.
- c) In December 2016, he was retained to represent Mr. Gondara at his upcoming trial, scheduled to commence in January 2017. His father suggested it, and Mr. Gondara did not express any objection.
- d) There was no written statement from Mr. Gondara "in the file".
- e) He met with Mr. Gondara a number of times, twice in December 2016 and a further two times in January 2017. Mr. Verma was present for all of these meetings. The plan was for Mr. Gondara to testify at trial, and in this regard, mock examinations of Mr. Gondara were conducted, with Bikramjit Sandhu putting the questions, and Mr. Verma acting as an interpreter.

- f) At some point during the course of these preparatory meetings, Mr. Gondara asked Bikramjit Sandhu what answer he could give if questioned by Crown counsel about the complainant's bruises. Bikramjit Sandhu responded that he could not furnish the answers and Mr. Gondara had to answer the questions truthfully.
 - g) The trial took place over three days of court time, commencing on 17 January 2017, and continuing on 16 and 17 March 2017. As the trial unfolded, Bikramjit Sandhu, Mr. Verma, and Mr. Gondara all discussed the case and appeared to be in agreement that it was going well for the defence for various reasons.
 - h) The final meeting, at which the decision that Mr. Gondara would not testify was made, took place during the lunch break on the third day of the trial. Bikramjit Sandhu explained that Mr. Gondara could testify but it was "not mandatory". He made it clear to Mr. Gondara that it was his choice if he wanted to testify or not. Mr. Gondara expressed confidence that the complainant was not a credible or reliable witness and said "he did not want to testify if it was not mandatory". Mr. Verma was present and was an "eyewitness" to this discussion.
- [21] Again, this is just a summary of the basic points made in Bikramjit Sandhu's evidence. His credibility was vigorously challenged by appellant's counsel. The assessment of Bikramjit Sandhu's evidence is dealt with in the analysis portion of these reasons.

(iv) Evidence of Mr. Verma

- [22] Mr. Verma furnished an affidavit and gave viva voce evidence before me. I would summarize the key points of his evidence as follows:
- a) He obtained a law degree in India and worked as an Assistant Public Prosecutor there before his immigration to Canada. He began working as an articulated student for Baldev Sandhu in May 2016.
 - b) He assisted Bikramjit Sandhu in preparing for Mr. Gondara's trial. He was present at meetings with Bikramjit Sandhu and Mr. Gondara in which they prepared Mr. Gondara for testifying at trial.
 - c) Bikramjit Sandhu asked "if Mr. Gondara wants to testify in the court but Mr. Gondara refused to testify". Mr. Verma was present for this discussion. In his affidavit, Mr. Verma asserted it occurred "on the day of Mr. Gondara's trial" even though, as noted above, there were three days of evidence.
- [23] Again, this is merely a summary of the points made in Mr. Verma's evidence. The credibility and reliability of his evidence is addressed later in these reasons.

Analysis

(i) Test for Admission of Fresh Evidence

- [24] Fresh evidence tendered on a summary conviction appeal is governed by the combined operation of s. 822(1) and s. 683(1) of the Criminal Code, R.S.C., 1985, c. C-46. Fresh evidence is normally only admissible under the four-part test articulated in the leading case of *Palmer v. The Queen*, [1980] 1 S.C.R. 759 [Palmer]. In brief and oversimplified terms, the four criteria set out in *Palmer* require that the proposed evidence: (i) could not with reasonable diligence have been adduced at trial, (ii) is relevant in the sense that it bears on a potentially decisive issue, (iii) is credible in the sense that it is reasonably capable of belief, and (iv) is of such significance that if believed, it could reasonably be expected - when taken together with all the other evidence - to have affected the result.
- [25] The *Palmer* criteria govern admission of evidence directed to substantive issues "decided at the trial level", the most obvious example being the question of whether the accused's guilt was proven beyond a reasonable doubt. Where fresh evidence is tendered for such purposes, the appeal court will generally consider it at the hearing of the appeal and then reserve judgment on its admissibility to be decided with the merits of the appeal itself. If the appeal court determines that the fresh evidence satisfies the *Palmer* criteria and thus might reasonably have affected the result, the fresh evidence application will be granted, and the appeal must be allowed and a new trial ordered: *R. v. Ball*, 2019 BCCA 32 [Ball] at para. 101-102, explaining *R. v. Stolar*, [1988] 1 S.C.R. 480.
- [26] However, a different approach is taken where the fresh evidence is not directed toward a substantive issue decided at the trial level, but rather toward the "integrity of the trial process" itself. An allegation of ineffective assistance of counsel is an example of an issue going to the integrity of the trial process. In such circumstances, fresh evidence may be admitted for the limited purpose of assessing the appellant's complaint about the integrity of the process, provided that (i) it complies with the rules of evidence, (ii) it is relevant to the issue raised on appeal, and (iii) it is credible: *Ball* at para. 103-104, applying *R. v. Aulakh*, 2012 BCCA 340 [Aulakh] at para. 59, 64.
- [27] In the case at bar, all of the fresh evidence placed before the court is directed toward the issue of whether Mr. Gondara was denied effective assistance of counsel at trial. It is therefore governed by the modified fresh evidence analysis described in *Ball* and *Aulakh*.
- [28] With two exceptions, the affidavit material tendered on appeal complies with the rules of evidence. The first exception is that certain portions of the affidavits of Baldev Sandhu and Bikramjit Sandhu went beyond the implied waiver of privilege arising from Mr. Gondara's allegations of ineffective assistance of counsel. To address this, the original affidavits were sealed and the offending portions redacted. The second exception is that there are two portions of Mr. Gondara's affidavit, at paragraph 4, line 4 and paragraph 7, line 4, which offend a statutory rule of admissibility and were struck out by the court at the outset of the hearing.

[29] With regard to the balance of the fresh evidence, consisting of the affidavits as redacted, together with all of the viva voce evidence presented at the hearing of the appeal, the evidence is all relevant to the issue raised on appeal. The only remaining consideration is credibility. It should be apparent from my recounting of the evidence above that there are conflicting versions of what happened at trial, such that the court will be required to make credibility findings. In these circumstances, I would admit the fresh evidence for the limited purpose of assessing the integrity of the trial process, with the unresolved issues about credibility to be dealt with as a matter of weight.

(ii) Legal Principles Governing the Claim of Ineffective Assistance of Counsel

[30] An accused who is represented by counsel at trial is entitled to effective legal assistance. A denial of effective assistance of counsel may undermine the reliability of the verdict, or the fairness of the trial: *R. v. Al-Shammari*, 2016 ONCA 614 at para. 75.

[31] There are two constituent legal elements to a claim of ineffective assistance of counsel, namely the performance component and the prejudice component. The performance component addresses whether trial counsel's conduct fell below the standard of professionalism and diligence that could reasonably be expected, allowing for a wide margin of deference toward elements of professional judgment, and being careful not to scrutinize counsel's conduct with perfect hindsight. The prejudice component is concerned with whether the conduct in issue could be said to have negatively affected the result or created some procedural unfairness so as to give rise to a miscarriage of justice: *R. v. G.D.B.*, 2000 SCC 22 at para. 26-29. The burden is on the appellant, as the party advancing the claim of ineffective assistance of counsel, to prove each of these elements on a balance of probabilities: *R. v. Dunbar*, 2003 BCCA 667 at para. 24.

[32] In the case at bar the appellant contends that he received ineffective assistance of counsel because he was not properly advised that it was his choice whether or not to testify, such that he was effectively denied the opportunity to provide evidence in his own defence. On this point, the law is clear the accused must "understand that the decision as to whether or not to testify ultimately belongs to him or her (not his or her lawyer), and the accused must personally make that decision": *R. v. Shofman*, 2015 ONSC 6876 at para. 17.

[33] Mr. Gondara claims he was never told that the choice about whether or not to testify was his, and he claims that if he was given the choice, he would have testified. Mr. Gondara's trial counsel denies this, asserting that it was made clear to Mr. Gondara that it was his choice, and that Mr. Gondara was the one who ultimately decided not to testify. In this particular scenario, the two legal elements of the ineffective assistance of counsel test are effectively collapsed into a single factual question, that being, "who made the decision?": *R. v. Archer* (2005), 202 C.C.C. (3d) 60 (Ont. C.A.) at para. 139. As the party advancing the claim of ineffective assistance of counsel, Mr. Gondara bears the burden of establishing on a balance of probabilities that it was trial counsel who decided that Mr. Gondara would not testify.

(iii) Assessment of the Evidence

- [34] When it comes to assessing the evidence presented to the court on this issue, there are two starkly different accounts of what took place. On the one hand, there is the evidence of Mr. Gondara, who asserts that he always wanted to testify, that he provided a written account of his position to his first counsel, that he enquired about preparing to testify and was put off, that he was never told it was his right to decide whether to testify, and that Bikramjit Sandhu ultimately made the decision that Mr. Gondara would not testify at trial. On the other hand, there is the evidence of Bikramjit Sandhu that Mr. Gondara never furnished a written statement, that Mr. Gondara was not interested in preparing to testify, that Mr. Gondara thought he could win the case without testifying, that he informed Mr. Gondara that it was his choice whether or not to testify, and that when he asked Mr. Gondara on the last day of the Crown's case whether he wanted to testify, Mr. Gondara said he did not want to do so if it was not mandatory.
- [35] Mr. Gondara's appellate counsel argued that as between these two versions of events, Mr. Gondara's version is on balance more likely to be true. Counsel submits that Mr. Gondara's version makes more sense, considering that he had been offered a peace bond and declined it because he did nothing wrong and should not have to go to counselling. In this context, it is submitted that the court should accept Mr. Gondara's testimony that he was willing to go to trial and was eager to testify on his own behalf.
- [36] One possible inference that could be drawn from Mr. Gondara's prior refusal to accept a peace bond is that he believed he was innocent, and that he would have been eager to testify at trial for the same reason. On the other hand, another way to look at Mr. Gondara's refusal to accept a peace bond is that he is a strong-willed individual, inclined to make his own decisions rather than being cajoled into doing things he does not want to do. On this view of matters, Mr. Gondara's refusal to accept a peace bond despite his lawyer's strong recommendation to the contrary does not sit well with the claim that he always wanted to testify at trial but was denied that opportunity based on the unilateral decision of his lawyer. Given the competing interpretations of Mr. Gondara's behaviour, I am not inclined to agree with the suggestion that his refusal to accept a peace bond makes his stated intention to testify at trial more likely to be true than false. I do not feel comfortable attaching any significance or motive to Mr. Gondara's decision to refuse a peace bond. I prefer to decide the case based on the preponderance of probabilities arising from the substance of the witness testimony.
- [37] On my view of the evidence I find five separate reasons to question the truthfulness of Mr. Gondara's account. I will review each of them.
- [38] First, Mr. Gondara asserted in his affidavit and maintained in his viva voce testimony that he gave a written account of his position to Baldev Sandhu. Both Baldev Sandhu and Bikramjit Sandhu gave evidence that Mr. Gondara never provided a written statement. Bikramjit Sandhu said there was no such written statement "in the file", which I infer to be a reference

to the file originally created by his father Baldev Sandhu, who originally took Mr. Gondara on as a client and later arranged for Bikramjit to represent Mr. Gondara at trial. Bikramjit Sandhu gave evidence that after the trial, the entire file was copied and given over to Mr. Gondara. It would have been an easy matter for Mr. Gondara to furnish evidence on appeal to establish the existence of the statement in the file. He did not do so. I find it more likely than not that Mr. Gondara never gave Bikramjit Sandhu a written statement setting out his position on the substance of the allegations against him.

- [39] Second, Mr. Gondara gave evidence that Bikramjit Sandhu did not appear interested in preparing for trial. Mr. Gondara admits that he met with Bikramjit Sandhu on at least two occasions, for about one hour on each occasion, but maintains that there was no real preparation for Mr. Gondara to testify at trial. By contrast, Bikramjit Sandhu testified that it was always the plan to call Mr. Gondara as a witness, and that it was Mr. Gondara himself who did not take the preparations seriously. Bikramjit Sandhu gave evidence that his meetings with Mr. Gondara included mock examinations, during which Bikramjit Sandhu asked questions and Mr. Verma acted as an interpreter. If true, this assertion tends to support Bikramjit Sandhu's position that the plan all along was for Mr. Gondara to testify. The same assertion, if true, weighs heavily against Mr. Gondara's claim that he asked whether they should prepare for his testimony only to be put off by Bikramjit Sandhu. The evidence of Mr. Verma corroborates Bikramjit Sandhu on this point, in that Mr. Verma averred in his affidavit that Bikramjit Sandhu asked Mr. Gondara to prepare for testifying, discussed court etiquette associated with giving testimony, and met with Bikramjit Sandhu "for preparation to testify in the court". The only material Mr. Verma read before drafting his responding affidavit was the affidavit of Mr. Gondara. Further, Mr. Verma confirmed in his viva voce testimony that he had not spoken with Bikramjit Sandhu about this matter before preparing his affidavit or testifying in court. I believe Mr. Verma on this point, and therefore conclude that there was no opportunity for him to collude with Bikramjit Sandhu about what happened during the pre-trial preparation sessions. For all of these reasons, I prefer Bikramjit Sandhu's evidence on this point over the evidence of Mr. Gondara.
- [40] Third, Bikramjit Sandhu gave evidence that Mr. Gondara uttered the phrase "men can live in jail too" after he and Mr. Verma chastised Mr. Gondara for failing to take the trial preparation seriously. Mr. Gondara denied ever uttering this phrase. In the course of his viva voce testimony, Mr. Verma testified that Mr. Gondara uttered the phrase "people are living in jail too", at least twice in Mr. Verma's presence. The first time was when Mr. Gondara told Baldev Sandhu that he would not accept the peace bond. The second time was in an unspecified conversation between Mr. Gondara and Bikramjit Sandhu. Once again, I find that Mr. Verma's evidence corroborates the evidence of Bikramjit Sandhu, noting again that Mr. Verma had no access to Bikramjit Sandhu's affidavit and did not discuss the matter with him prior to testifying.

- [41] Fourth, there were several instances during his trial testimony when Mr. Gondara gave an answer and then quickly changed his evidence. One instance was when Mr. Gondara was being questioned about the meeting at which it was ultimately decided that he would not testify. When questioned by Crown counsel about whether the meeting took place before or after the Crown's evidence had finished, Mr. Gondara's initial response was that he could not recall because he had been in jail and had taken medication for depression. When pressed on how the medication affected his memory, Mr. Gondara backed away from this point, explaining that exactly what stage the Crown's case was at was a mere detail he could not remember. Mr. Gondara went on to say that the comment about taking medication just "slipped out of my mouth" or words to that effect. Another instance was when Mr. Gondara was being questioned about whether he ever said he would agree to the peace bond. Mr. Gondara's initial response was that he never said he would agree, but in a follow up question he quickly conceded that he initially said he would agree to the peace bond but later thought better of it when he went home. I find that both of these were instances in which Mr. Gondara strategically changed his testimony to limit the perceived damage of being caught in a larger inconsistency.
- [42] The fifth point has to do with the particulars of the meeting during which it was decided that Mr. Gondara would not testify. Both Mr. Gondara and Bikramjit Sandhu agreed that this meeting took place during the lunch break on the third day of trial, on 17 March 2017. Mr. Gondara testified that the meeting took place outside the courthouse, and lasted about 15 minutes, after which Mr. Gondara, his friend Paul, Bikramjit Sandhu and Mr. Verma all went to lunch together at a restaurant near the courthouse. For his part, Bikramjit Sandhu testified that he did not have lunch with Mr. Gondara and his friend on the third day of the trial. They had a 10 to 15 minute meeting to discuss whether Mr. Gondara would testify, parted for lunch, and then met again before court reconvened, at which point Bikramjit Sandhu confirmed that Mr. Gondara did not want to testify. Bikramjit Sandhu went on to explain that he, Mr. Gondara, and Mr. Verma in fact had lunch together at a nearby restaurant during the first day of the trial. Mr. Verma, who had not discussed the matter with Bikramjit Sandhu prior to preparing his affidavit or testifying in court, corroborated Bikramjit Sandhu's evidence on this particular point.
- [43] Since the credibility of both Bikramjit Sandhu and Mr. Verma was placed in issue, I should also address some of the points made about their testimony.
- [44] Mr. Gondara's appellate counsel argued that the evidence of Bikramjit Sandhu is not convincing because he was argumentative and repetitive during cross-examination. Bikramjit Sandhu repeatedly testified that Mr. Gondara made his own decision not to testify, in a manner that was sometimes unresponsive to the questions put to him. I accept that Bikramjit Sandhu was nervous and somewhat argumentative in cross-examination. Insofar as demeanor is concerned, witnesses will present in different ways, for a variety of reasons. In Bikramjit Sandhu's case, my sense is that he was nervous and defensive because his professionalism and integrity were being called into question in these proceedings. He was

especially tense because he had not made contemporaneous notes of the advice he gave or instructions he received from Mr. Gondara. Bikramjit Sandhu has since come to recognize this as a mistake or failing on his part, explaining that he viewed the entire situation as a lesson learned. In this particular context I would not attach any significance to Bikramjit Sandhu's apparent defensiveness in the witness box as far as his credibility is concerned.

- [45] This brings me to a second point about Bikramjit Sandhu's evidence, having to do with his record keeping process. Bikramjit Sandhu testified that in his preparations for trial, he made handwritten notes to himself on the Crown "particulars", and he also typed out potential questions to ask Mr. Gondara and placed these in his file. However, he admittedly did not make notes of his advice to Mr. Gondara or the instructions Mr. Gondara gave to him. Written instructions may well have removed any room for debate or disagreement about what happened in this case. Certainly, a lawyer who fails to make a written record of important advice given or instructions received, such instructions from the client about whether to testify in his or her own defence, can open him or herself up to claims of ineffective assistance of counsel, which is what occurred in this case.
- [46] Despite the absence of contemporaneous records, on the facts of this case I cannot accept that Bikramjit Sandhu failed to properly advise Mr. Gondara or take instructions from him concerning his right to testify at trial. I find that the plan all along was for Mr. Gondara to testify, as reflected in the evidence of Bikramjit Sandhu and Mr. Verma about steps taken to prepare Mr. Gondara to give evidence. I find that Mr. Gondara, when presented with the question of whether he wanted to testify on the last day of the Crown's case, believed that he would win the case without testifying, and responded that he did not want to testify if not required to do so.
- [47] I will also address the testimony of Mr. Verma. Mr. Verma's evidence might fairly be criticised on the basis that his affidavit was very general, consisting only of six paragraphs on a single page, whereas his trial testimony contained much more detail. Mr. Verma admitted in cross-examination that Mr. Gondara's counsel asked him for more information on five separate occasions and received nothing in response, which on its face is hard to square with the further detail Mr. Verma gave about the points in issue during his viva voce testimony. Mr. Verma's response was that he did not have access to the file, and that he only recalled further details when asked specific questions in court, or on seeing Mr. Gondara's face in the courtroom. In terms of the substance of Mr. Verma's testimony, I found his responses to be genuine. I consider that when preparing his affidavit, Mr. Verma might not recalled certain specifics, or might not have anticipated the significance of certain details, such as whether they went to lunch on the first day as opposed to the third day of trial, or whether Mr. Gondara uttered a phrase like "people live in jail too" at any point in time. There is also uncontroverted evidence that Mr. Verma did not speak with or review Bikramjit Sandhu's affidavit evidence prior to preparing his own affidavit and testifying at trial. There being no opportunity for Mr. Verma to adjust his testimony to accord with the evidence of Bikramjit Sandhu, I find his answers respecting certain collateral issues to be reliable,

credible, and helpful in deciding what facts are most consistent with the preponderance of probabilities in the case.

Conclusion

[48] My conclusion is as follows. I accept the evidence of Bikramjit Sandhu as regards his dealings with Mr. Gondara. I find that the expectation going into the trial was that Mr. Gondara would testify, and in this regard the parties met to prepare for his trial testimony. I find that as the trial proceeded, both Bikramjit Sandhu and Mr. Gondara were of the view that the case was going well for the defence. By the time of the lunch break on the last day of the Crown's case, Bikramjit Sandhu had a conversation with Mr. Gondara, in the presence of Mr. Verma, during which they discussed whether Mr. Gondara would testify. Bikramjit Sandhu explained that it was Mr. Gondara's choice whether to testify, and that there could be no guarantees about what view the trial judge would take as to the credibility and reliability of the Crown's evidence. I find that Mr. Gondara thought he would win the case without testifying, and told Bikramjit Sandhu that he did not want to testify if he did not have to, which in the circumstances clearly amounted to a decision not to give evidence on his own behalf.

[49] Mr. Gondara's appeal from conviction is dismissed.

"Riley J."

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