
CANADA / JUDGMENT

R. v. K.M.

2016 BCSC 2595

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. K.M.,

2016 BCSC 2595

Date: 20161020

Docket: 33929

Registry: Williams Lake

Regina

v.

K.M.

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Before: The Honourable Madam Justice Fisher

Oral Reasons for Judgment

Counsel for the Crown:

A. Pace

Counsel for the Accused:

E. Rines

Place and Date of Trial/Hearing:

Williams Lake, B.C.

October 18-19, 2016

Place and Date of Judgment:

Williams Lake, B.C.

October 20, 2016

- [1] THE COURT: The accused, K.M., is charged on a seven-count indictment with unlawful confinement, sexual assault, assault with threats to use a weapon, possession of a weapon, conveying threats to cause death or bodily harm, uttering threats to damage property, and assault. Other than the assault, the charges arise from two incidents involving K.M.'s former common law partner, S.L., between September 27 and October 7, 2015. The assault is alleged to have occurred sometime after September 7, 2015.
- [2] K.M. did not testify. The only evidence at trial came from S.L. and two police officers who attended at the residence on October 7, 2015, to arrest K.M. There is little controversy about the circumstances of the arrest. Both officers observed S.L. to be distressed when they arrived and K.M. was cooperative with the police.
- [3] My summary of the evidence pertinent to the charges themselves is based only on the testimony of S.L. I have considered her evidence with care, given the seriousness of the charges and issues of credibility and reliability which have been raised.

Background

- [4] Some evidence was led about the background of the relationship between K.M. and S.L., without objection, for the purpose of understanding the context in which the incidents giving rise to these charges occurred.
- [5] K.M. and S.L. met in October 2013. S.L. was in her mid-forties and was divorced. They were in a romantic relationship for two years after that, and they lived together on and off during this period of time. They lived at various places, including [content redacted], and in August 2015 they moved to a residence on [content redacted] in the [content redacted] area near [content redacted].
- [6] Unfortunately, the relationship was a troubled one. S.L. described it as "very unhealthy" and "rocky". There was a history of physical abuse. K.M. would give her black eyes from time to time, and each time he would apologize and vow to never touch her again, but he was moody and the same behaviour recurred. S.L. had made a prior complaint to police at [content redacted] but had recanted her allegations. She said that her recantation was not true.

- [7] S.L. agreed that she and K.M. both struggled from some mental health problems. She said that she never knew what K.M.'s moods were going to be. She herself had been diagnosed, prior to meeting him, with depression and borderline personality disorder. She was treated for depression but not the personality disorder, but she was aware that the effects of this included depression, codependency and mood swings. S.L. also agreed that drinking was a part of her relationship with K.M., but said that they only drank to excess about once a week.
- [8] S.L. admitted that she blamed a majority of her problems on K.M., but she only blamed herself for staying in the relationship. She was emotionally invested in it and continued to have feelings for K.M. after his arrest.

The incidents

- [9] K.M. was arrested on October 7, 2015, after S.L. had contacted Kamloops Crown counsel by email, saying that she needed help and could not get away from her residence. This stemmed from conduct of K.M. that involved three incidents.
- [10] The first incident relates to the assault charge in Count 7, which is alleged to have occurred about a month before the arrest. S.L. testified that while they were in the bedroom, K.M. grabbed her wrists with both hands, yelling violent words at her, spun her around, grabbed her by the hair at her temples, pulling out some of her hair, forcefully shook her head, and then forced her face into the pillow causing her nose to bleed. After, when K.M. saw that her nose was bleeding, he got a wet towel and cleaned up her face.
- [11] Photographs taken of S.L. on October 7, 2015, show a small amount of hair loss on the right side near her temple, as compared to the left side, but there are no other indications of injury.
- [12] S.L. did not recall any indication of strife earlier that day or anything in particular that happened that day, other than the incident. She thought they had a few drinks throughout the evening but they were not intoxicated.
- [13] The second incident relates to the charges of unlawful confinement, sexual assault, threats, and possession of a weapon in Counts 1 to 6. It is alleged to have occurred two to three weeks later. S.L. testified that one evening after she had gone to bed, K.M. came into the bedroom very upset, with a knife in his hand, and threatened to kill himself. S.L. was frightened. She was in the corner of the bed and K.M. was flailing the knife around, at times plunging it into the mattress or the floor and at times pointing it at her. At some point, he held the knife to his throat and pretended to plunge it into his neck, which made her deathly afraid. He told her that she was not going to die, but that he was going to kill himself or kill her dog, and that something bad would happen in the morning. Some of the things he was saying did not make sense.

- [14] When K.M. noticed that S.L. was wearing clothes in bed, which she did not normally do, he accused her of planning to go next door and rat him out. S.L. said that he told her to take her pants off, and when she refused, he told her that something bad would happen if she did not. She then acceded. The same thing happened with her top. She was then wearing only her socks. She said that K.M. moved up to her on the bed and began to rub her bottom and say that he wanted to have sex. She said, "How could we have sex after you just terrified me?" K.M. then complained that she did not love him and never enjoyed sex with him. She asked if he was going to rape her. He asked her if she was accusing him of being a "goof" who rapes women. She said no, but told him she did not want to have sex. K.M. then told her, while pointing the knife at her, that if she did not, something bad was going to happen. She then relented and they had intercourse. At some point, K.M. put the knife down on a shelf in the bedroom.
- [15] S.L. said that she did not want to take her clothes off and did not want to have sex, but she did so because she was afraid that K.M. would hurt her. She said that she never said that she wanted to have sex, she never changed her mind, and did nothing to indicate that it was okay. The whole incident made her deathly afraid, as in K.M.'s state of mind, she did not know what he was going to do with the knife.
- [16] S.L. said that K.M. had been "overall moody" in the past few days but this whole incident came out of nowhere and totally surprised her. She thought they each had about three beers that evening but remembered nothing else about the rest of the day or evening.
- [17] The third incident relates to the unlawful confinement charge in Count 1. It is alleged to have occurred a few days after the incident with the knife. S.L. said that K.M. again made her take her clothes off in bed because he was afraid she would leave him in the middle of the night.

Credibility and reliability

- [18] As the Crown's case relies only on the testimony of S.L., the primary submissions made by both Crown and defence centered on the credibility and reliability of her evidence.
- [19] In the Crown's submission, S.L.'s evidence was credible and not seriously challenged in cross-examination. Ms. Pace suggested that any gaps in her memory can be expected and it is normal for a person to remember violent incidents. She pointed out that S.L. was not defensive in her testimony and was thoughtful in her answers to questions.
- [20] The defence submitted that the gaps in memory and the contradictions in S.L.'s evidence are sufficient to render it an unreliable basis on which to found any conviction. Mr. Rines says that S.L.'s inability to recall anything that occurred in the hours or so before any of these incidents, coupled with her acknowledgment of numerous inconsistencies in her evidence about what was going on in their lives in the month before the arrest, suggests an unwillingness to remember and should be cause for serious concern. This is particularly so in light of the absence of any confirmatory evidence from the scene of the knife incident, as

police failed to conduct any investigation in that regard.

- [21] Generally, I found S.L. to be a thoughtful witness who appeared to do her best to answer truthfully. However, I agree with the defence that there were gaps in her memory of events during the month prior to the arrest and some of her evidence was internally inconsistent. I do not attribute this to a lack of candour on her part, because when tested about her memory, she was quite prepared to accept that she had been inaccurate, but I have to be concerned about the reliability of her evidence.
- [22] What became apparent during cross-examination was the complexity of the relationship between S.L. and K.M., which S.L. admitted was dysfunctional and codependent. However, in the absence of any independent expert evidence that would help to explain the psychological dynamics at play, it is difficult for me to assess what effect, if any, these dynamics had on S.L.'s perception of the events in issue.
- [23] While of course it may have been a stronger case for the Crown had the police conducted some investigation in the residence, it is trite to say that I have to consider the evidence before me.
- [24] I accept that S.L. would remember traumatic events over more benign everyday occurrences. Importantly, her evidence about the specifics of the three incidents in and of themselves was not seriously undermined in cross-examination; neither was her evidence about the nature of her relationship with K.M. S.L. admitted blaming K.M. for many things that went wrong, but also accepted responsibility for her own part in the dysfunctional nature of the relationship.
- [25] While I do find it somewhat unsettling that S.L. was not able to describe what may have led up to these rather sudden incidents, given the volatile nature of their relationship, I find no basis to discount her evidence about these three incidents. She was not always certain of the timeframes, but I did not find this to be particularly unusual. In general, I find S.L.'s evidence about what occurred in these incidents to be reliable and I accept it.
- [26] Where I have difficulty is in relation to the evidence related to Count 1, the charge of unlawful confinement. The Crown's case is based on a confinement by psychological means, such as by threats, intimidation and the imposition of fear, as described in *R. v. Kematch*, 2010 MBCA 18 at para. 55, cited by Saunders J. of this court in *R. v. Fagg*, 2014 BCSC 2632. The Crown founds its case on Count 1 in the context of an abusive relationship which crystallized during the second incident with the knife and manifested when K.M. again directed S.L. to remove her clothing, and submitted that S.L. was thereby rendered psychologically incapable of leaving. For reasons I will explain, I find S.L.'s evidence about this on its own to be insufficient to establish all of the necessary elements of unlawful confinement beyond a reasonable doubt.

Analysis

Count 1 - unlawful confinement

[27] Section 279(2)(a) of the Criminal Code provides that "[e]very one who, without lawful authority, confines, imprisons or forcibly seizes another person" is guilty of an indictable offence.

[28] The elements of this offence were reviewed in Fagg, with reference to R. v. Luxton, [1990] 2 S.C.R. 711; R. v. Gratton, (1985), 18 C.C.C. (3d) 462 (Ont. C.A.); R. v. E.B., [2006] O.J. No. 1864 (Ont. S.C.J.); and Kematch, which I will summarize as follows:

- The essence of the offence of unlawful confinement is the forcible deprivation of another person's physical liberty or freedom under the principle of "illegal domination of one person by another".
- There must be physical restraint that deprives the victim of her ability to move from one place to another, though not necessarily her ability to escape.
- The physical restraint need not be effected solely by physical means such as binding up the victim or placing her within a locked room, but may be by "psychological means, such as by threats, intimidation or the imposition of fear".
- Confinement need not take place for the entire period specified in the count, but the victim must be fully restrained contrary to her wishes so that she could not move about from place to place for some significant period within the time alleged in the count.

[29] In Fagg, the court found that the victim was unlawfully confined in circumstances that were partly physical and largely psychological. The victim, an 18-year-old woman, had been involved with the two accused, a man and a woman, in a three-way relationship. They had all lived together for a time, but the victim had left, moving back home with her parents. The accused, wishing her to return, arranged to meet her one afternoon. The victim, intending to be back in an hour, was driven by the accused to several locations over many hours, where they argued at some length.

[30] At the first location, the male accused, Fagg, had taken the victim's cellphone and thrown it some distance away, breaking it into pieces. At the second location, Fagg choked her and made threats that if she did not move back, her family would have to leave town, he would damage their house and hurt her mother and brother, or have others he knew hurt her family. He also threatened the victim with a knife, bringing it up to her throat for a few seconds and slashing it across a tree, and threatened her at the edge of a cliff. They then went back to the accused's home, stopping for take-out food on the way. The victim eventually left when her parents came to the residence. Before that, the victim had been too afraid to attempt to leave.

[31] Saunders J. found that the victim was unlawfully confined by Fagg "at least from the point in time when he began to make verbal threats against her family" and continued as she was threatened with the knife and at the edge of the cliff. At paragraph 42, he said:

. . . She had already, at that point in time, had limitations placed on her physical liberty in that she had been driven out to an isolated location, for all practical purposes completely dependent upon Mr. Fagg to be able to return to town. Being deprived of her cell phone, notwithstanding the fact that there was no service at that location, further increased her dependence on Mr. Fagg and would, to any reasonable, objective viewer of the situation, have been seen as increasing her psychological isolation by reason that even if she had been able to leave at some point and make her way down the logging road to where cell phone service would be restored, she would have had no means of phoning for assistance.

[32] He found that when the threats began, the restraint of the victim became forcible and unlawful, she then became psychologically restrained and had no freedom to leave except in the company of Fagg, and she remained unlawfully confined when they reached the residence. At paragraph 44, he concluded:

. . . Her unlawful confinement - achieved by Mr. Fagg through the imposition of overbearing psychological power, including threats, intimidation, and physical force, inflicted on a person whom he knew or ought to have known, from their relationship, to be depressed and/or emotionally vulnerable - continued until she was rescued by her parents. She had been, through force, deprived of her liberty.

[33] While there are some similarities in this case, the evidence, in my view, falls short of establishing the kind of psychological confinement that was present in Fagg.

[34] I do not doubt that S.L. felt trapped in her relationship with K.M. and the knife incident was very frightening for her, but the evidence does not establish that K.M.'s conduct in either the week or month prior to his arrest increased her psychological isolation to the point where she was unable to leave for any significant period of time before October 7, 2015. She was not completely isolated from others, as there were periods of time, at least prior to the last two weeks, where K.M. was working all day and she had ample freedom to come and go as she pleased.

[35] S.L. testified in chief that during the two months they lived in [content redacted], neither of them were employed or involved in any way with the community. They lived on social assistance and were together all the time. However, in cross-examination, she agreed that K.M. was working for some of the time they lived there, that they attended AA meetings together in 100 Mile House, and they were around other people a fair bit. In particular, they saw their neighbour at least every other day and she had his phone number. She admitted that she never took the opportunity to seek help from anyone in the community with whom she had contact.

- [36] S.L. was not sure about the timing of K.M.'s work. She first placed it three and a half months before the arrest, which was before they actually moved to the residence on [content redacted], and then agreed that it would have been later than that. She maintained, however, that K.M. was not working in the two weeks prior to the arrest.
- [37] In light of this evidence, I cannot accept S.L.'s testimony that she had no privacy and could not go anywhere on her own during the time she and K.M. were living in [content redacted]. She testified that even when they were home together, they often spent time on their phones, so she had the ability to access others.
- [38] The Crown does not say that S.L. was psychologically confined beyond the week prior to K.M.'s arrest. Ms. Pace argued that in the context of an abusive relationship, K.M.'s threats with a knife, followed by his demands for S.L. to remove her clothing, show his intention to confine her. The final incident where he demanded she remove her clothing manifested this intention further.
- [39] This evidence demonstrates that K.M. was very troubled and was afraid of losing S.L., but I am not satisfied that it establishes an intention on his part to confine her, other than perhaps for very brief periods of time. His focus initially appears to have been self harm, which became confused with unspecified threats toward S.L. and her dog. In this context, his demands that S.L. remove her clothing appear to me to demonstrate paranoia rather than an intention to confine.
- [40] S.L.'s evidence about why she did not leave was telling. She said that she was always hopeful that things would get better. She said that she did not want to live "there" with K.M. (which I understood to mean the residence in [content redacted]), but also said that even during the last week, she was only "seriously considering" leaving. It was not until October 7th, when she decided to contact Crown counsel, that she finally realized that all of the things K.M. had said and promised were not true. She said that she had enough of what she called the psychological, physical, and financial abuse, the empty promises and the chaos. She was depressed, she missed her kids, and she wanted a sense of normalcy in her life. She knew that if she stayed, things would not get better, and since the incident with the knife, she did not know if K.M. would lose control and take her life.
- [41] I accept all of this, but it does not establish that S.L. actually wanted to leave before October 7th, and even if she had, her fear after the knife incident does not explain why she was unable to leave at any time after it. She said only that if she had wanted to leave in that last week, she could not have, because they were always together. However, there were no other events of any note that followed, other than the second demand for her to remove her clothes, which was in itself very brief and not accompanied by threats. She said that in the past, when she had tried to leave, K.M. would stop her and beat her, but she provided no timeframe and no details about this.

- [42] The Crown submitted that S.L.'s act of sending an email to Crown counsel in another jurisdiction, Kamloops, shows that she was confined against her will, otherwise she would simply have left in their car. I do not disagree that this shows a level of desperation, but I am not satisfied on the evidence as a whole that this was caused by K.M.'s conduct as manifested in the incidents. S.L. said she had no way of contacting anyone, but this is simply not borne out by the evidence, and there is little to support the suggestion that she felt she could not go to the police.
- [43] The Crown argued in the alternative that it was not necessary to prove a continuous state of confinement for the entire week and that the evidence establishes that S.L. was confined at least during the second and third incidents. However, after the knife incident, S.L. said that K.M. calmed down and went to sleep, and she eventually went to sleep as well. She said that she did not feel comfortable getting up and going to the washroom and was afraid of waking K.M. up if she tried to leave, but again she had not yet evinced a clear intention to do so.
- [44] I am not satisfied that this evidence is sufficient to establish the elements of physical restraint by psychological means, or confinement for some significant period of time within the time alleged in the indictment. Accordingly, I find K.M. not guilty of Count 1.
- [45] I will now address the remaining counts. As I indicated before, I generally accept S.L.'s evidence as it pertains to the specific incidents. As the defence did not take issue with the proof of the elements of these offences should the court accept S.L.'s testimony, I intend to be brief.

Count 2 - sexual assault

- [46] Assault, as defined in s. 265 of the Criminal Code, occurs where a person applies force intentionally to another person without that person's consent. Sexual assault is an assault committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated.
- [47] Section 265(3) provides that no consent is obtained where the complainant submits or does not resist by reason of
- (a) the application of force to the complainant or to a person other than the complainant; [or]
 - (b) threats or fear of the application of force to the complainant or to a person other than the complainant
- [48] It is the Crown's onus to prove a lack of consent.
- [49] S.L. had a good recall of the knife incident, which was not undermined in cross-examination. She said that K.M. initially threatened to kill himself with a knife, went on to threaten her dog, and also to threaten her in a vague way that something bad would happen. This latter threat was repeated in relation to S.L. taking off her clothes, and again with a knife pointed towards her when she told K.M. that she did not want to have sex. She

testified, and I accept, that she acquiesced because she was afraid K.M. was going to hurt her if she did not. His behaviour was erratic enough that even if he intended to self harm, it was quite reasonable for S.L. to be frightened for her own safety.

- [50] I am satisfied that this evidence establishes beyond a reasonable doubt all of the elements of sexual assault. S.L. did not consent to having sexual intercourse with K.M. that night, or to any other sexual contact, and her acquiescence to these acts was as a result of threats he made to her. Therefore, I find K.M. guilty of Count 2.

Count 3 - assault with a weapon

- [51] Section 267(a) of the Criminal Code provides that every one who, in committing an assault "carries, uses or threatens to use a weapon" is guilty of an indictable offence.
- [52] In Count 3, the Crown has charged this section despite S.L.'s evidence, which establishes that K.M. made threats with a knife in committing sexual assault. Where sexual assault is involved, I would have expected the Crown to charge under s. 272 of the Code, which addresses this specifically. However, the defence took no issue with the indictment and the evidence does establish that K.M. made threats while committing an assault as well as a sexual assault.
- [53] Accordingly, I find that the Crown has proven Count 3 beyond a reasonable doubt and I find K.M. guilty.

Count 4 - possession of a weapon for a dangerous purpose

- [54] Section 88(1) provides that

Every person commits an offence who carries or possesses a weapon for a purpose dangerous to the public peace or for the purpose of committing an offence.

- [55] I am satisfied that the Crown has proven this offence beyond a reasonable doubt. S.L.'s evidence establishes that K.M.'s possession of the knife was for a purpose dangerous to public peace. While he initially threatened to kill himself, K.M. also made threats directed to S.L. or to her dog, and his actions in flailing the knife at himself, at S.L., and on the bed and the floor clearly created a sense of fear and danger. I find K.M. guilty of Count 4.

Counts 5 and 6 - uttering threats

- [56] I will deal with Counts 5 and 6 together. Under s. 264.1(1):

Every one commits an offence who, in any manner, knowingly utters, conveys or causes any person to receive a threat

- (a) to cause death or bodily harm to any person;
- (b) to burn, destroy or damage real or personal property; or
- (c) to kill, poison or injure an animal or bird that is the property of any person.

- [57] Count 5 charges K.M. under subsection (a) and Count 6 under subsection (b). The Crown must prove that K.M. uttered a threat by one of the means set out. Words are to be viewed objectively in the context of the circumstances such that they convey a threat to a reasonable person, and there must be an intention to be taken seriously or to intimidate. The victim need not appreciate that she is being threatened as long as the subjective test is met.
- [58] "Bodily harm" in subsection (1)(a), defined in s. 2 of the Criminal Code, means any hurt or injury to a person that interferes with the health or comfort of that person and is more than merely transient or trifling in nature. "Property" in subsection (1)(b), also defined in s. 2, includes "real and personal property of every description".
- [59] These counts arise from K.M.'s threats, while brandishing the knife, to kill himself, to hurt S.L.'s dog, and the more generalized threat to S.L. that something bad would happen. In this context, I am satisfied that Count 5 has been proven beyond a reasonable doubt.
- [60] Count 6 charges K.M. under s. 264.1(1)(b), threats to damage to property, rather than (1)(c), which addresses threats to injure an animal. However, I am satisfied, given the broad definition of "property" in the Criminal Code, that the offence has been made out under that subsection as well.
- [61] Therefore, I find K.M. guilty of Counts 5 and 6.

Count 7 - assault

- [62] I have already defined the elements of assault. This charge arises from S.L.'s evidence about K.M.'s physical attack on her earlier in September where he grabbed her wrists, spun her around, grabbed her by the hair, shook her head, and forced her face into the pillow, causing her nose to bleed.
- [63] S.L. initially confused the time when this incident occurred, but on reflection she corrected herself and placed it earlier than the knife incident. Other than her lack of recall about what preceded this incident, this evidence was not seriously challenged. I therefore accept that this evidence establishes the offence of assault beyond a reasonable doubt and I find K.M. guilty of Count 7.

Conclusion

- [64] In conclusion, K.M. - and now you can stand up, sir - I find you guilty of Counts 2, 3, 4, 5, 6 and 7, but I find you not guilty of Count 1.

"Fisher J."

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