COURT OF APPEAL FOR YUKON

Citation: *R. v. Kaswandik*,
2013 YKCA 8

Date: 20130531
Docket: CA12-YU703

Between:

Regina

Respondent

And

John August Kaswandik

Appellant

Before: The Honourable Madam Justice Saunders
The Honourable Mr. Justice Tysoe
The Honourable Madam Justice Bennett

Oral Reasons for Judgment

The Appellant:	In Person
Counsel for the Respondent:	Keith Parkkari
Place and Date of Hearing:	Whitehorse, Yukon Territory May 31, 2013
Place and Date of Judgment:	Whitehorse, Yukon Territory May 31, 2013

[1] **BENNETT J.A.:** On June 21, 2012, following a trial in the Supreme Court of Yukon, the appellant was convicted by a jury of one count of assault, one count of uttering a threat and acquitted of one count of uttering a threat.

[2] The factum of the Crown summarizes the evidence as follows:

[3] The appellant, John Kaswandik, who is an American citizen, met the complainant, Leet Mueller, in California in January 2008. The two married in Alaska in October 2008. They had a daughter in December 2008. They then moved to Whitehorse. Ms. Mueller testified that sometime in the fall of 2009 or spring of 2010 Mr. Kaswandik grabbed her, threw her down on a bed and placed his knee on her chest and his hands around her neck for about 10 to 15 seconds.

[4] Mr. Kaswandik said the event happened in the fall of 2009. Ms. Mueller became hysterical when the appellant would not talk to her. She charged at him. He grabbed her behind the legs, and she fell backward on the bed. He did not place his hands on her neck. He said there were other occasions when she was violent, but that he did not get violent with her.

[5] Ms. Mueller alleged Mr. Kaswandik said "I'll kill you" in May or June 2010. She also alleged that Mr. Kaswandik said "you deserve to die" and that things would "get very ugly" during an argument on May 3, 2011.

[6] Constable Desaulniers testified as follows:

> Q Do you remember the general content of that call?
>
> A Yes. Initially, she was basically wanted to talk about the fight that she had with her husband that -- or the previous night and the content of which basically was that he had told her that something bad was going to happen if he and -- or if she wanted to split with him and that she deserved to die. I was attempting to get more information out of her as to if anything else had happened in the past and if there had been any violence or anything like that, as was typical in our domestic investigations.
>
> Q And as a result of that conversation, what did you do?
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> A As a result of our chat I determined that there had been violence in the past and some threats had been uttered, with Mr. Kaswandik saying that he was going to kill her and had actually held her down on

> a bed at one point. I spoke with my corporal, Corporal MacLeod, at the time and we determined that Mr. Kaswandik would have to be arrested, and when I informed Ms. Mueller of this, she was upset. She was concerned both, I believe, about Mr. Kaswandik and about her own safety. She indicated that she didn't want him arrested. She didn't know what he was going to do if he was backed into a corner. She was concerned about both her safety and I believe his -- as to his reaction.
>
> Q Now, in your position as a peace officer, did you have any concerns about her safety?
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> A Yes, I did, just based on the -- for me there was an exploiting [sic] sense of urgency to what's been happening. He told her that he was going to kill her. He held her down on the bed, and the previous night he had told her that she deserved to die and that something bad was going to happen to her if she decided to separate, which, at that point, I believe that she was.
>
> Q And your knowledge of what he did was based upon what?
>
> A Based upon what she told me.
>
> Underlining added.

[7] The jury found Mr. Kaswandik guilty of assault and uttering the May 3, 2011 threat, but not guilty of uttering the May or June 2010 threat.

[8] Mr. Kaswandik appeals his conviction and raises a number of grounds of appeal. At the hearing of the appeal, the Court raised an issue with respect to the evidence of Constable Desaulniers, quoted above. The concern was that the jury heard the prior consistent statements of Ms. Mueller, as well as Constable Desaulniers' view of what had occurred.

[9] The British Columbia Court of Appeal recently considered the issue of prior consistent statements in *R. v. Moir*, 2013 BCCA 36. The law is set out at paras. 18-20:

> [18] With few exceptions, a witness's prior consistent statements are not admissible. If the jury hears prior consistent out-of-court statements, a limiting instruction as to the use of the statements must almost always be given by the trial judge. Failure to do so will generally be an error of law.
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> [19] This rule is succinctly set out in *R. v. Demetrius* (2003), 179 C.C.C. (3d) 26 at para. 12, 176 O.A.C. 349 (C.A.):
>
> > [12] There is a well-established rule that self-serving evidence, such as prior consistent statements are generally not admissible at

> trial. In *R. v. Toten* (1993), 83 C.C.C. (3d) 5 (Ont. C.A.) at 36, Doherty J.A. identified the rationale for generally rejecting prior consistent statements as resting "not ... on any principle unique to prior consistent statements, but on the very practical assessment that, generally speaking, such evidence will not provide sufficient assistance to the trier of fact to warrant its admission." As David M. Paciocco and Lee Steusser, *The Law of Evidence*, 2nd ed. (Toronto, Ont: Irwin Law, 1999) at 305 explain: "In most cases, the evidence is ... of no value. It is redundant and potentially prejudicial to allow the testimony to be repeated. It may gain false credence in the eyes of the trier of fact through the consistency with which it is asserted." ...
>
> [20] In *R. v. Ellard,* 2009 SCC 27, [2009] 2 S.C.R. 19, the Court considered the question of the admissibility of a prior statement through re-examination by the Crown. The majority of the Court, in concluding that the statement was inadmissible, said this at para. 31:
>
> > [31] Having described the relevant context, the first issue is whether Ms. Bowles' prior statements were admissible through re-examination. It is true that prior consistent statements are presumptively inadmissible (*R. v. Béland*, [1987] 2 S.C.R. 398, at pp. 409-10, and *R. v. Stirling*, 2008 SCC 10, [2008] 1 S.C.R. 272, at para. 5). The rationale for excluding them is that repetition does not, and should not be seen to, enhance the value or truth of testimony. Because there is a danger that similar prior statements, particularly ones made under oath, could *appear* to be more credible to a jury, they must be treated with caution. [Emphasis in original.]

[10] A witness' prior consistent out-of-court statement is rarely admissible. When it is admitted into evidence, sometimes as narrative, there must be an instruction to the jury limiting the use that may be made of such a statement. No limiting instruction was given in this case. The problem was compounded as the jury requested a transcript of the police officer's evidence. No transcript was available; the jury heard a playback of this evidence and, specifically, "the discussion with respect to Ms. Mueller's allegation to the incident, as to what took place, the language around that." No instruction was provided when the playback was heard regarding the limited use that may be made of such evidence.

[11] The main issue at this trial was credibility as between Ms. Mueller and Mr. Kaswandik. The trial judge instructed the jury that if they accepted Mr. Kaswandik's evidence, they should acquit.

[12] In my view, most of the evidence of Constable Desaulniers, as set out above, was not admissible. It went far beyond the proper scope of narrative evidence. In

addition, if it was admissible, there was no limiting charge to the jury with respect to the use that may be made of this evidence. The evidence may have had the effect of improperly supporting the evidence of Ms. Mueller, both by the admission of her prior statement and the officer opining on the situation.

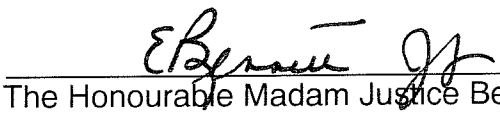
[13] The Crown fairly conceded that he could not proffer an argument that would sustain the conviction. He properly drew this Court's attention to the issue of the playback and did not seek to rely on s. 686(1)(b)(iii). There is an error of law that in my opinion requires a new trial.

[14] We did not hear the parties on the other issues raised by Mr. Kaswandik, as in my view none would lead to an acquittal if successful. I would allow the appeal and order a new trial.

[15] SAUNDERS J.A.: I agree.

[16] TYSOE J.A.: I agree.

[17] BENNETT J.A.: The appeal is allowed. The conviction is set aside, and a new trial ordered.



The Honourable Madam Justice Bennett