

Citation: *R. v. Kerluke*, 2010 YKTC 34

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Docket: 08-00774
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09-00471A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Faulkner

REGINA

v.

BEVERLY ANN KERLUKE

Appearances:
Kevin Komosky
Malcolm Campbell

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] FAULKNER T.C.J. (Oral): Beverly Ann Kerluke is charged that she, on or about the 20th day of February 2009 at or near Whitehorse, Yukon Territory, did unlawfully commit an offence in that she did endanger the life of Landis Kerluke thereby committing an aggravated assault, contrary to s. 268 of the *Criminal Code*.

[2] Landis Kerluke is Beverly Kerluke's husband. On the date in question, things were not going well for the accused and her husband. Ms. Kerluke was having an affair and had not come home on the previous evening. As Mr. Kerluke did not have a key to their apartment, he was unable to get into the residence and had to spend the night

elsewhere. The atmosphere was understandably tense when the two met the following day, but ultimately they returned to their apartment. Both consumed alcohol both before and after returning home. Again, not surprisingly, an argument erupted. During the course of this argument, the accused, having armed herself with a butcher knife, inflicted a serious stab wound to Mr. Kerluke's left side at waist level. There were also two other less serious wounds inflicted, one to Mr. Kerluke's back and a cut on his leg.

[3] The accused admits to inflicting these injuries but claims to have acted in self-defence.

[4] Mr. Kerluke's evidence as to what occurred is sketchy on some points but is nonetheless believable. Mr. Kerluke struck me as a reluctant witness against his wife and for that reason the evidence he does give implicating her has substantial weight, in my view. It is true that in cross-examination he acknowledged that many of the suggestions put to him by defence counsel could be true. However, in many cases, these suggestions related to matters that Mr. Kerluke could not recall, thus, as a matter of logic, he conceded that certain of those matters could have occurred. More importantly, these concessions struck me as those of a witness in some sympathy with the accused and who was trying his best to be helpful.

[5] For the defence, it was urged that Mr. Kerluke's description of where the stabbing occurred is wrong. He describes it as happening between the kitchen and the living room. The bloodstains observed by the police and photographed are actually on a mat in the living room itself, which is some feet away from the location described by Mr. Kerluke. It is far from certain that the blood would have been shed exactly where the

stabbing occurred, especially considering that there are three wounds. As well, there is the fact that Mr. Kerluke used the telephone after the stabbing and then retreated to the bedroom, and possibly to the bathroom as well, after the incident. However, even if Mr. Kerluke is wrong in describing the exact location where he was stabbed, it does not cause me to generally discount his evidence.

[6] According to Mr. Kerluke, the argument became heated and he was calling his wife a slut and a bitch. She went to the kitchen, got a knife, and came at him yelling, "I'm going to fuckin' kill you" and stabbed him in the abdomen. As indicated, he also received injuries to the back and leg but he could not recall how these were inflicted. He says that after he was stabbed, he pushed the accused away and she fell over. He then called 9-1-1 but hung up before speaking to the operator and retreated to the bedroom.

[7] Other evidence established that the police first responded to the 9-1-1 hang-up by telephoning the residence in question. The accused answered the phone and assured the operator that everything was okay. The police nonetheless decided to investigate further and went to the apartment. They were met at the apartment door by the accused. On being asked where Landis was, the accused replied, "He's sleeping, he went to bed." The officers could see blood on the floor so they entered the apartment. They found Landis Kerluke in bed, obviously seriously injured. Emergency Medical Services were summoned. Initially, Mr. Kerluke refused medical treatment but his condition soon worsened and he agreed to be taken to the hospital where he was treated for his injuries.

[8] When the police first encountered Mr. Kerluke in his bed, he said that Beverly had stabbed him. The accused, who was also present in the room, said that it was self-defence. She was asked where the knife was and she indicated that it was in the kitchen sink. No injuries were observed on Ms. Kerluke; however, evidence was called to establish that she had sought medical attention some three days later and that bruises were observed on her back, chest and arms.

[9] The evidence clearly establishes, and it is admitted, that the accused assaulted her husband with a knife. However, as indicated, she claims to have acted in self-defence. In her testimony, she said that Mr. Kerluke was pressuring her to have sex with him as well as hurling insults. Eventually, he assaulted her and pushed her to the floor in the kitchen. She told him to stay away but he kept coming at her. She grabbed the knife and retreated toward the living room, with Mr. Kerluke in pursuit, calling her names. She turned around and Mr. Kerluke was coming at her as if ready to grab her. She testified that she was afraid that Mr. Kerluke was going to hurt her or rape her. She struck him with the knife, saying, "Fucking bastard, you're not going to hurt me again." Afterwards, she says she recalls little. She could not say how many times she struck her husband with the knife. She says she told the Telecoms operator that everything was okay because the assault on her had stopped and Mr. Kerluke had gone to the bedroom.

[10] While testifying, the accused missed no opportunity to insist that she was being violated, was acting in self-defence and was in fear of being sexually assaulted. The claim by Ms. Kerluke that she acted in self-defence and, in particular, of being sexually assaulted is seriously undermined by her actions immediately afterward. She did not

call 9-1-1, Mr. Kerluke did. When the police phoned back, she told them that everything was fine. When the police arrived, all she initially told them was that Landis was sleeping.

[11] More telling still, in this regard, is the contrast between Ms. Kerluke's trial evidence and her statement to the police, which was given within hours of the stabbing. In that statement, the accused makes no claim whatever that she feared being sexually assaulted. Rather, she says that she was physically assaulted and that she was not going to put up with abuse of that kind any longer.

[12] At page 18 of the statement, the following exchange occurs:

Q: Did you want to kill him?

A: No.

Q: No.

A: That's not in me.

Q: But you did stab him.

A: I just wanted to hurt him.

And then there was an inaudible portion.

Q: Right. Teach him a lesson eh. Was that the intent, just to teach him a lesson I guess?

A: Yes.

Q: Yeah. All that frustration built up.

A: Yes.

And at page 20:

Q: But I guess everything came to a head.

- A: Ahh Victim Services has been really good to me.
- Q: Good, but everything came to a head tonight and you just
- A: Yes
- Q: basically the straw that broke the camel's back eh?
- A: Yeah, I suppose you could say that.
- Q: Right, are you sorry for what you did for stabbing?
- A: Yes I
- Q: him tonight?
- A: am so sorry.

Finally, on page 22, after describing where the stabbing took place, Ms.

Kerluke tells the officer what Mr. Kerluke said immediately afterward:

- Q: Yeah, Okay, okay.
- A: And he says umm owe Beverly you hurt me, I said [oh] well just don't fuck me around I told him. I said I'm sorry I said.

[13] In short, while the accused claims in her statement that her husband assaulted her, she does not claim that she feared being sexually assaulted, nor does she claim that she feared death or grievous bodily harm. Rather, the tenor of the statement is that she simply was not going to put up with any more abuse. She wanted to hurt him to teach him a lesson.

[14] If we assume in the defendant's favour that Landis Kerluke did push her before the knife attack and not afterwards, as Mr. Kerluke states, the situation does not change materially. An accused who is assaulted will be justified in using force to repel an

assault even where she does not fear death or grievous bodily harm. Nor is she required to measure the degree of force too finely in proportion to that used by the attacker. She may even, albeit unintentionally, cause death or grievous bodily harm. Nevertheless, as s. 37(2) of the *Criminal Code* makes clear:

Nothing in this section shall be deemed to justify the wilful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force used was intended to prevent.

[15] In my view, s. 37(2) speaks more or less precisely to what happened in this case. At the end of the day, I do not believe the accused's evidence that she acted in self-defence. Nor does it raise a doubt in my mind as to her culpability for the assault.

[16] Thus, I find that it has been proved that the accused stabbed her husband Landis with a knife. To the extent that any claim of self-defence could be made, the response was excessive and in fact intended primarily for other purposes, mainly venting the accused's anger and obtaining revenge for past hurts.

[17] It will be recalled that the charge alleges an aggravated assault in that the accused did endanger the life of Landis Kerluke. No medical evidence whatever was called to establish that Mr. Kerluke's life was in danger. It is true that Mr. Kerluke gave some evidence regarding the extent of his abdominal wound and the course of treatment. There is, however, no evidence that would permit the Court to find that the assault had potentially lethal consequences. To so find on the available evidence would require the Court to take judicial notice of medical matters which it is not permitted to do.

[18] To be clear, proof that bodily harm occurred is not essential but proof that the victim's life was endangered is. Despite this frailty, the evidence clearly establishes an assault with a weapon, which is an included offence, in my view, to the offence of aggravated assault. Accordingly, I find the accused guilty of assault with a weapon.

[19] MR. KOMOSKY: Your Honour, Ms. Kerluke, as I understand it at this time, does not have a criminal record. She does have several matters withstanding before the Court. The Crown would request the preparation of a pre-sentence report with respect to the assault with a weapon charge.

[20] THE COURT: All right. Is it Ms. Kerluke's intention to deal with any of the other outstanding matters at this point?

[21] MR. KOMOSKY: Your Honour, my friend and I spoke very briefly this morning. We didn't come to any agreement. Perhaps those charges should go over simply to next Wednesday to see if anything can be worked out.

[22] MR. CAMPBELL: With respect to one of those charges, which is Count 3 on the four-count Information?

[23] MR. KOMOSKY: Yes, the other counts are removed, they merely appear as one count.

[24] THE COURT: I am sorry?

[25] MR. CAMPBELL: Yes, it just shows as one count on the docket, but I understand that in discussions with Mr. Sinclair, who had previous conduct of that, that the Crown's intention is to re-elect on that matter to summary conviction, unindictable.

[26] MR. KOMOSKY: I have no problem in doing so.

[27] THE COURT: Crown re-elects to summary conviction?

[28] MR. KOMOSKY: Yes, that's on the s. 471 conviction.

[29] THE COURT: Yes.

[30] MR. CAMPBELL: Perhaps all matters could go to this afternoon at one o'clock to fix a date for sentencing in front of -- on the assault with a weapon.

[31] THE COURT: Are you joining the application there be a pre-sentence report?

[32] MR. CAMPBELL: No, in my submission, I can provide enough information to the Court without the necessity of a bail supervision report, but --

[33] MR. KOMOSKY: The issue then sometimes arises that the information that my friend is able to provide is only what he's advised through his client. A pre-sentence report allows for some verification, other information. She's had, as my colleague indicates, she's had substantial involvement in Family Violence Prevention Unit and also that kind of information would be helpful with exactly how far that involvement goes.

[34] THE COURT: There is obviously a lot of history to this matter and some of that background may be vital in assessing the proper disposition in this matter. I am going to direct the preparation of a pre-sentence report.

[35] The matter will go to one o'clock to fix a date, and for the moment the remaining matters can go to one o'clock as well.

FAULKNER T.C.J.