Citation: *R. v. Devellano*, 2022 YKTC 19

Date: 20220425
Docket: 20-05179
20-00696A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Chisholm

REGINA

v.

BENJAMIN FRANCIS DEVELLANO

Appearances:

Jane Park	Counsel for the Federal Crown
Kelly McGill	Counsel for the Territorial Crown
Benjamin Devellano	Appearing on his own behalf

REASONS FOR JUDGMENT

[1] CHISHOLM, T.C.J. (Oral): Mr. Benjamin Devellano stands charged with the following *Criminal Code* (the "*Code*") offences: obstruction (s. 129(a)); dangerous operation of a conveyance (s. 320.13(1)); and failure to remain at the scene of an accident (s. 320.16(1)). The Crown withdrew a s. 270.01(1)(a) charge just before trial. Also, during submissions, the Crown, fairly, entered a stay of proceedings with respect to a s. 430(3) charge. The Crown has proceeded summarily in this file.

[2] Additionally, Mr. Devellano is charged with three *Motor Vehicle Act*, RSY 2002, c. 153 (the "*MVA*") offences, namely, failure to remain at the scene of an accident

(s. 94(1)(a)); careless driving (s. 186); and backing up a motor vehicle when it was unsafe to do so (s. 162).

[3] The parties agreed to have both Informations proceed to trial at the same time.

[4] Mr. Devellano earlier brought a *Charter* application, alleging a breach of s. 9. After hearing evidence in a *voir dire*, I found that Mr. Devellano had not been arbitrarily detained by police. The evidence in the *voir dire* was applied to the trial proper.

[5] Two police officers, Cst. Moore and Cst. Caron, testified for the Crown. Mr. Devellano testified in his defence. Additionally, the interactions between Mr. Devellano and the police were captured by the video recording system in Cst. Moore's vehicle. This recording became an exhibit at trial. The video recording system footage from Cst. Caron's vehicle, who arrived on scene part way through the investigation, also became an exhibit at trial.

Summary of the Relevant Evidence

[6] The charges stem from an incident that occurred in downtown Whitehorse on December 17, 2020. The police received a 911 call from an employee of a local business reporting a possible impaired driver. The RCMP dispatch operator provided Cst. Moore with information about the complaint, including that the subject of the complaint was driving a white Ford truck, that he had entered a business and raised the suspicions of an employee, and that he was presently asleep in his truck.

[7] Cst. Moore attended to the business located on Second Avenue, and parked behind a white Ford truck which was running. The truck was parked in front of the

Marble Slab Creamery, with the front of the vehicle facing the store. It was after 9:00 p.m. and dark out, however, the parking lot was well lit. It was snowing. Cst. Moore activated her emergency lights and exited her police vehicle. She testified that, based on the initial complaint, she took an Approved Screening Device ("ASD") with her when exiting her vehicle for the purposes of a mandatory alcohol screening test. Upon approaching the white Ford truck, she noted an individual in the driver's side seat leaning against the driver's side window. Initially, she was unable to get the individual's attention, but after banging on the window with her hand, and announcing her presence, the individual awoke. He opened the driver's side window, at which time she requested his driver's licence, registration, and insurance. The individual was cooperative with the officer, and indicated that his name was Ben Devellano. He also provided his date of birth.

[8] Cst. Moore made the Mandatory Alcohol Screening demand. Mr. Devellano provided a sample of his breath. The screening device indicated that his blood alcohol level was zero percent. The officer testified that once she received the result, she immediately contacted another officer on shift, who was trained as a Drug Recognition Expert, and asked that he attend to her location.

[9] Cst. Moore testified that she did so because of the initial complaint and her subsequent interactions with Mr. Devellano which led her to suspect that Mr. Devellano's ability to operate the truck was impaired by a substance. She, therefore, detained Mr. Devellano for an impaired driving investigation and subsequently provided him with his right to counsel and the police warning. He questioned this detention based on having passed the alcohol screening device test. According to

Cst. Moore, Mr. Devellano began to become agitated. The officer testified that she advised him on a number of occasions that he was detained because she believed that he was impaired, and she advised him that the Drug Recognition Expert who was coming to the scene would provide him with more information about the investigation.

[10] Just prior to the Drug Recognition Expert, Cst. Caron, arriving on scene, Mr. Devellano began to rummage through his centre console. Cst. Moore learned from him that he was looking for a cigarette. She testified that she told him that he could not have anything in his mouth until the investigation was completed, but that despite this he did not desist. Not knowing what he was reaching for, the officer explained that she became more firm in her instructions, and advised him that if he was not going to follow her instructions, he would have to sit in the back of her police vehicle. Mr. Devellano next proceeded to put up his window contrary to the instructions of the officer. As this was occurring, Cst. Caron was approaching the scene on foot. Cst. Moore attempted to open the driver's side door on two occasions, and, both times, Mr. Devellano closed the door, and after doing so a second time, he locked the doors. She continued to give directions to him to put down his window and unlock the doors.

[11] At this point, Cst. Caron arrived at the truck. He testified that he overheard Cst. Moore directing the driver to leave his window down. He next observed her opening the driver's side door, while the driver resisted by closing it. He intervened and advised the driver that if he did not lower the window, he would have to break it. He subsequently took out his baton. The driver lowered the window somewhat, enabling Cst. Caron, who was on the truck's running board, to put his hand in the cab and unlock the door. After he unlocked the door, Cst. Moore testified that she opened the driver's

side rear door. Around this time, she heard the truck being put in gear, prompting her to move away from the vehicle. Cst. Caron explained that he was still on the running board when the driver put the vehicle in reverse, and "floored the gas". I understood his evidence to be that the truck tires began spinning as the truck moved quickly backwards. Cst. Caron was able to jump off the running board. He testified that the driver's side door, which was momentarily opened, struck his leg, leaving a bruise below the knee.

[12] As Mr. Devellano reversed the truck, both officers observed the truck turn. As a result, when the truck collided with the front of Cst. Moore's police vehicle, the passenger side of the truck struck the police vehicle. After the collision, the truck travelled through the parking lot in an easterly direction towards, and onto, Second Avenue. Cst. Caron noted that Mr. Devellano drove away very quickly. The police officers were instructed by superiors not to pursue the truck.

[13] Mr. Devellano testified that he was driving home from his brother's house after working long hours. He decided to stop and get milkshakes from the Marble Slab ice cream shop. He also attended the Pizza Hut next door and ordered a pizza. He returned to his truck to wait for his pizza. After he drank one of his milkshakes, he dozed off.

[14] Mr. Devellano explained that he was startled awake by Cst. Moore "pounding" on the driver's side window of his truck. Despite his suspicion that there had not been a 911 call made to police complaining about him, he complied with the officer's requests, including a roadside screening device demand. After passing the roadside screening

test, and then being informed that Cst. Moore was asking another officer to come to their location to continue the investigation, Mr. Devellano described himself as becoming considerably agitated due to the fact that he had already passed the approved screening device test. Also, he felt that Cst. Moore was unable to articulate her reasons for his continued detention and was unresponsive to his questions.

[15] While waiting for the other officer to attend, he decided to look for a cigarette. Cst. Moore told him that he was not allowed to. He explained that as his driver's side window had been down for about 10 minutes in minus 25-degree weather, he decided to put it back up. He testified that although he did not say this to Cst. Moore, he did so because he was getting cold. When the window was about three-quarter's shut, he heard Cst. Moore yell at him to roll it back down. He was startled. He pressed the button to move it down slightly, and as he was about to put it down further, she tried to force his door open. In response, he pulled the door shut because he did not want to be assaulted.

[16] The second officer, Cst. Caron, arrived and threatened to break Mr. Devellano's window, if he did not put it all the way down. Mr. Devellano said that he asked the officer politely not to do so. He tried to calm Cst. Caron down. He believed the officer would use the baton which he was holding in his hand, and felt safer to have the partially closed window as a barrier between him and the police officers. Cst. Caron then stepped on the truck's running boards and put his arm through the window to unlock the door. Mr. Devellano stated that he put his vehicle in reverse because he felt scared. He told the police that he was scared. He believed that the police would damage his truck and then assault him. He believed this because of their body

language. He said that he feared for his life. He did not see the police vehicle behind him before striking it. He testified that Cst. Moore was not parked properly and was partially blocking the lane behind his vehicle. He agreed that he reversed his vehicle more quickly than normal, but not considerably more. He believed that it was almost an involuntary action.

[17] When Mr. Devellano collided with the police vehicle, he did not stop his vehicle because he was concerned that the two officers, who had escalated the incident, would harm him. When he exited the parking lot onto the main thoroughfare, he drove prudently in the winter driving conditions. Although he did not contact the police detachment immediately after the incident, he turned himself in a few days later.

[18] The video recording from Cst. Moore's vehicle shows Mr. Devellano reversing his truck quickly while the officers have the driver's side doors, front and back, open. After his vehicle strikes Cst. Moore's police vehicle, the video shows the truck for a few seconds as it moves forward, with the sound of its tires spinning in the snow.

[19] The video recording from Cst. Caron's vehicle shows that there is some distance between Mr. Devellano's truck, parked in front of the Marble Slab store, and Cst. Moore's parked vehicle, parked behind the truck. It also shows that the top emergency lights on Cst. Moore's vehicle are activated.

Positions of the Parties

[20] The federal Crown contends that the three *Code* charges have been proved beyond a reasonable doubt. The Territorial Crown takes the same position with respect

to the three *MVA* charges, but concedes that the rule against multiple convictions may turn out to be applicable depending on the Court's findings.

[21] Mr. Devellano asks the Court to find that the police evidence was not credible or reliable. He asserts that he was acting in self-defence; and, although he did not address the defence of necessity, both the Federal and Territorial Crown addressed that defence, as well as self-defence, in their submissions. He contends that his actions were necessitated by the likelihood of damage to property and grievous bodily harm to himself if he remained at the scene of the incident.

Analysis

[22] Mr. Devellano is presumed innocent until proven guilty beyond a reasonable doubt. The Crown bears the burden of proof throughout the trial. In ***R***. v. ***Starr***, 2000 SCC 40, at para. 242, the Court held that this burden "...falls much closer to absolute certainty than to proof on a balance of probabilities".

[23] In the case at bar, two witnesses testified for the Crown, and Mr. Devellano testified in his own defence. Although I must consider the credibility and reliability of all witnesses, it is not a credibility contest between the Crown and the defence.

[24] In ***R***. v. ***Campbell***, 2018 YKSC 37, at para. 4, the Court stated:

> I must remind myself that a criminal trial is not a credibility contest. It is a trial to determine whether the Crown has proved the guilt of the accused on the specific charge alleged beyond a reasonable doubt. Therefore, it is wrong to decide a criminal case where, as here, there is conflicting evidence simply by deciding which version of events is the preferable one. The decisive question is whether, considering the evidence as a whole,

> the Crown has proved the guilt of the accused beyond a reasonable doubt.

[25] The Court in ***R***. v. ***Wolff***, 2019 SKCA 103, at para. 38, explained:

> It is clear that there are two important aspects for a trier of fact to consider in assessing the testimony of witnesses: (i) credibility, and (ii) reliability. Credibility has to do with the veracity of witness's testimony; reliability has to do with its accuracy. A witness who is credible may provide unreliable evidence, because honest witnesses can misperceive events, have poor memory, or just be wrong.

[26] See also ***R***. v. ***Sweet***, 2013 YKSC 42, at para. 7.

[27] As Mr. Devellano testified, the principles set out in ***R***. v. ***W.(D.)***, [1991] 1 S.C.R. 742, apply. Those principles may be summarized, as follows:

- First, if I believe the evidence of the accused, I must acquit;
- Second, if I do not believe the accused's testimony, but am left in reasonable doubt by it, I must acquit; and
- Third, even if the accused's evidence does not raise a reasonable doubt, I must consider, on the basis of the evidence I do accept, whether I am convinced beyond a reasonable doubt of the accused's guilt.

Dangerous Driving

[28] As indicated, Mr. Devellano is charged with operation of a conveyance in a manner that is dangerous to the public pursuant to s. 320.13(1) of the *Code*.

[29] The law regarding dangerous driving, under the former provision (s. 249) has been considered by the Supreme Court of Canada on a number of occasions, including: ***R.** v. **Hundal***, [1993] 1 S.C.R. 867; ***R.*** v. ***Beatty***, 2008 SCC 5; ***R.*** v. ***Roy***, 2012 SCC 26, and ***R.*** v. ***Chung***, 2020 SCC 8.

[30] It should be mentioned that the language of s. 249(1)(a) of the *Code* has been altered slightly by s. 320.13(1) to remove consideration of particular circumstances, and now simply states, that an offence is committed when a person "operates a conveyance in a manner that, having regard to all of the circumstances, is dangerous to the public". The prior wording of this offence, as set out in s. 249(1), read:

> (1) Every one commits an offence who operates
>
> (a) a motor vehicle in a manner that is dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place;

[31] As stated by Gorman, J. in ***R.*** v. ***Hoffman***, [2019] N.J. No. 356 (NL PC); 2019 CanLII 112836 (NL PC), at para. 106:

> Section 320.13(1) constitutes a streamlined version of the former section 249(1)(a). A trial judge must still consider all of the circumstances in determining if the operation of the conveyance was dangerous to the public. The circumstances specifically listed in the former provision can be considered, but they are no longer statutorily mandated circumstances for consideration. As a result, the differences between the two provisions in [*sic*] minimal from the perspective of what the Crown must prove: the accused operated a conveyance in a manner that was dangerous to the public. Accordingly, the jurisprudence which defined the elements of dangerous driving as defined in the former section 249(1)(a) is still applicable.

[32] In ***R.*** v. ***Harnett***, 2022 ONCJ 65, at para. 111, the Court concluded that the wording under the new s. 320.13 offence is inclusive, and that a court is to consider "all the circumstances", including those enumerated in the previous s. 249 of the *Code*.

[33] In ***Hundal***, the Court held, at para. 35, that the "…basis of liability for dangerous driving is negligence…", and the question to be determined is whether, viewed objectively, the appropriate standard of care was employed by the accused. This is a modified objective test. Justice Cory stated, at para. 31, that "…it is unnecessary for a court to establish that the particular accused intended or was aware of the consequences of his or her driving…". The accused may still raise a reasonable doubt that a reasonable person would have been aware of the risks associated with the accused's conduct (para. 38).

[34] The two components of the offence are: the prohibited conduct of operating a motor vehicle in a dangerous manner, and the fault requirement of "a marked departure from the standard of care that a reasonable person would observe in all the circumstances…" (***Roy***, at para. 1).

[35] At para. 28 of the ***Roy*** decision, Cromwell J. reviewed and summarized the relevant principles of law in this area as enunciated in ***Beatty***:

> …The *actus reus* of the offence is driving in a manner dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle was being operated and the amount of traffic that at the time was or might reasonably have been expected to be at that place (s. 249(1)(*a*) of the *Criminal Code*). The *mens rea* is that the degree of care exercised by the accused was a *marked* departure from the standard of care that a reasonable person would observe in the accused's circumstances (*Beatty*, at para. 43). The care exhibited by the accused is assessed against the standard of care

> expected of a reasonably prudent driver in the circumstances. The offence will only be made out if the care exhibited by the accused constitutes a *marked* departure from that norm. While the distinction between a mere departure from the standard of care, which would justify civil liability, and a *marked* departure justifying criminal punishment is a matter of degree, the lack of care must be serious enough to merit punishment (para. 48).

[36] When considering the *actus reus* of the offence, the ***Roy*** decision reiterates the need to concentrate on the risks created by the manner of driving as opposed to the end result of the driving, for example, an accident:

> As Charron J. put it, at para. 46 of *Beatty*, "The court must not leap to its conclusion about the manner of driving based on the consequence. <u>There must be a meaningful inquiry into the manner of driving</u>" (emphasis added). A manner of driving can rightly be qualified as dangerous when it endangers the public. It is the risk of damage or injury created by the manner of driving that is relevant, not the consequences of a subsequent accident. ... (para. 34).

[37] The Ontario Court of Appeal recently stated in ***R.*** v. ***Akhtar***, 2022 ONCA 279, at para. 29:

> It is clear that the *actus reus* of the dangerous driving offence is conduct which, viewed objectively in all the circumstances, constitutes a danger to the public actually present or who may reasonably be expected to be present. It is the manner in which the vehicle was driven that is at issue, not the consequences of that driving…

[38] With respect to the *mens rea* component of dangerous driving, the Ontario Court of Appeal summarized it in ***R.*** v. ***Pyrek***, 2017 ONCA 476, at para. 34, as:

> …The *mens rea*, or the required degree of fault, is exercising a standard of care that is a marked departure from the standard of care a reasonable person would observe in the accused's circumstances. …

[39] It is important not to lose sight of the fact the Crown must prove the driver's moral blameworthiness to the criminal law standard, and that carelessness or negligence under the civil law is insufficient (***Roy***, at para. 37; ***R.*** v. ***Blostein***, 2014 MBCA 39, at para. 15; and ***Akhtar***, at para. 30). Even if the accused drove in a manner constituting a marked departure from the norm, all the circumstances must be examined "… to determine whether it is appropriate to draw the inference of fault from the manner of driving…" (***Roy***, at para 40).

[40] In ***Hundal***, Cory, J. stated at para. 35:

> …It is not overly difficult to determine when a driver has fallen markedly below the acceptable standard of care. There can be no doubt that the concept of negligence is well understood and readily recognized by most Canadians. Negligent driving can be thought of as a continuum that progresses, or regresses, from momentary lack of attention giving rise to civil responsibility through careless driving under a provincial Highway Traffic Act to dangerous driving under the Criminal Code.

[41] In ***Chung***, the Supreme Court considered a fact situation where the driver had driven at a high speed, and in an objectively dangerous fashion for a short duration. The trial judge had found that momentary speeding in the facts of that case was insufficient to establish *mens rea*. At paras. 21 and 22, the Court stated:

> 21 The trial judge erred in focussing on the momentary nature of Mr. Chungs's conduct, rather than analyzing whether the reasonable person would foresee the dangers to the public from the momentary conduct. …
>
> 22 …Conduct that occurs over a brief period of time that creates foreseeable and immediate risks of serious consequences can still be a marked departure from the norm (*Beatty*, at para. 48). …

[42] The Court also stated that it is conceivable in some contexts that grossly excessive speed may not establish a marked departure (para. 27).

[43] The Court emphasized that the core question at issue was whether Mr. Chung's dangerous manner of driving "was the result of a marked departure from the standard of care which a reasonable person would have exercised in the same circumstances…" (para. 23).

Obstruction of a Peace Officer

[44] Mr. Devellano is also charged that he wilfully obstructed Cst. Moore, a peace officer engaged in the execution of [her] duty by driving away while being detained, contrary to s. 129(a) of the *Code*.

[45] In ***R.*** v. ***Alsager***, 2016 SKCA 91, the Court held that in order to prove *mens rea*, it must be established beyond a reasonable doubt that the accused a) knew the individual obstructed was a peace officer; b) knew the peace officer obstructed was in the execution of their duty; and, c) had an intention to obstruct, or foresaw with certainty or substantial certainty that doing the act in question would obstruct the peace officer (para. 53). As the British Columbia Court of Appeal explained in ***R.*** v. ***Noel*** (1995), 63 B.C.A.C. 191, in terms of an officer's execution of duty: "[i]n most cases where the intent to obstruct arises it will be in connection with an obvious duty which the officer is executing…" (para. 21).

Failure to Stop after an Accident

[46] Section 320.16(1) of the *Code* stipulates that the driver of a conveyance who knows that, or is reckless as to whether, the conveyance has been involved in an accident with a person or another conveyance must stop, give their name and address,

and offer assistance to any person who appears to be injured. Anyone who fails, without reasonable excuse, to comply with one of these requirements is guilty of an offence.

[47] Therefore, the Crown must prove beyond a reasonable doubt in this case that Mr. Devellano:

(a) was operating a conveyance;

(b) while operating the conveyance, he knew or was reckless as to whether the conveyance was involved in an accident with another vehicle; and

(c) failed, without reasonable excuse, to stop the conveyance, give his name and address, and offer assistance.

[48] This wording is different than the prior offence which was found at s. 252(1) of the *Code*, to the extent that the earlier section required the Crown to prove that the accused had failed to stop "…with intent to escape civil or criminal liability".

Defences – Necessity and Self-Defence

[49] Mr. Devellano has raised the defence of self-defence in the circumstances of this case. Additionally, the Crown has suggested that I consider the common law defence of necessity.

[50] In considering these defences, once a defendant raises them and there is an air of reality to them, the onus is on the Crown to establish beyond a reasonable doubt that

in the circumstances of the case, the defences cannot succeed (***R.*** v. ***Griffith***, 2017 BCSC 1551, at para. 61; ***R.*** v. ***Leatherbarrow***, 2010 YKTC 88, at para. 13). As explained in ***Griffith***, at para. 61, "…in order to reject the defence and to give it no effect, the court must be satisfied to that standard that the defence is not applicable on the facts. If there is a doubt on that issue, the accused is entitled to the benefit of the defence."

[51] The defence of necessity has been described as an excuse where the impugned "…acts are still wrongful, but in the circumstances they are excusable… (***R.*** v. ***Perka***, [1984] 2 S.C.R. 232, at p. 248).

[52] As set out in ***R.*** v. ***Latimer***, 2001 SCC 1, paras. 28 through 31, the three requirements of the necessity defence that must be satisfied are:

- that the defendant was in imminent peril or danger;
- that the defendant had no legal alternative to the action taken;
- there must be proportionality between the harm inflicted and the harm avoided, in other words, the harm inflicted must not be disproportionate to the harm the accused sought to avoid.

[53] Regarding the first and second requirements, outlined above, they are evaluated on a modified objective standard (***Latimer***, paras. 32 and 33).

[54] The defence of self-defence is found at s. 34 of the *Code*, which stipulates:

(1) A person is not guilty of an offence if

(a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;

(b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and

(c) the act committed is reasonable in the circumstances.

(2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:

(a) the nature of the force or threat;

(b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;

(c) the person's role in the incident;

(d) whether any party to the incident used or threatened to use a weapon;

(e) the size, age, gender and physical capabilities of the parties to the incident;

(f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;

(f.1) any history of interaction or communication between the parties to the incident;

(g) the nature and proportionality of the person's response to the use or threat of force; and

(h) whether the act committed was in response to a use or threat of force that the person knew was lawful.

(3) Subsection (1) does not apply if the force is used or threatened by another person for the purpose of doing something that they are required or authorized by law to do in the administration or enforcement of the law,

> unless the person who commits the act that constitutes the offence believes on reasonable grounds that the other person is acting unlawfully.

[55] In ***R.*** v. ***Khill,*** 2021 SCC 37, the Court explained at para. 2:

> The contours of our law of self-defence are tied to our notions of culpability, moral blameworthiness and acceptable human behaviour. To the extent self-defence morally justifies or excuses an accused's otherwise criminal conduct and renders it non-culpable, it cannot rest exclusively on the accused's perception of the need to act. Put another way, killing or injuring another cannot be lawful simply because the accused believed it was necessary. Self-defence demands a broader societal perspective. Consequently, one of the important conditions limiting the availability of self-defence is that the act committed must be reasonable in the circumstances. A fact finder is obliged to consider a wide range of factors to determine what a reasonable person would have done in a comparable situation.

[56] The Court in ***Khill*** considered conceptually the three inquiries under s. 34(1) as: (1) the catalyst, (2) the motive, and (3) the response (para. 51). In looking at a defendant's belief "on reasonable grounds", it is not solely the defendant's perception of the need to act, as "…community norms and values in weighing the moral blameworthiness of the accused's actions…" are incorporated into the reference to reasonableness (para. 53). At para. 57, the Court stated: …[t]he question is not therefore what the accused thought was reasonable based on their characteristics and experiences, but rather what a reasonable person with those relevant characteristics and experiences would perceive…"

[57] The second element requires a subjective inquiry into the defendant's purpose of committing the act that constitutes the defence (para. 59).

[58] The third element considers the reasonableness of the defendant's response in the circumstances, which will be measured "…on what a reasonable person would have done in comparable circumstances and not what a particular accused thought at the time…" (para. 65).

[59] The Court also pointed out that the defendant's "relevant circumstances" in s. 34(2) can also include any mistaken beliefs reasonably held by the accused. At para. 66, the Court explains:

> …If the court determines that the accused believed wrongly, but on reasonable grounds, that force was being used or threatened against them under s. 34(1)(a), that finding is relevant to the reasonableness inquiry under s. 34(1)(c). However, while s. 34(1)(a) and (b) address the belief and the subjective purpose of the accused, the reasonableness inquiry under s. 34(1)(c) is primarily concerned with the reasonableness of the accused's *actions*, not their mental state.

Credibility and Reliability of the Evidence

[60] I find that there are inconsistencies in the evidence of Mr. Devellano, specifically in terms of parts of his testimony, when compared to the video recording from Cst. Moore's police vehicle. For example, Mr. Devellano testified that when the officer stepped back from his truck to speak into her radio, he began to put up his window. However, the video recording reveals that Cst. Moore did not step back from his vehicle at that time. In cross-examination, he indicated that he did not recall saying to the officer that he was going to roll up his window, or something to that effect, and that the window was already partially up when Cst. Moore first told him to put it down. However, in the video recording, he can be heard saying that to the officer that he is going to put up the window. Mr. Devellano also testified that he did not know that Cst. Moore's

vehicle, which he struck, was parked behind him. When he was questioned as to whether he could see the emergency lights on her vehicle flashing, he stated that he could see ambient blue light, but could not determine where it was coming from. However, in the video, the blue lights of the officer's vehicle are seen in the business window immediately in front of the defendant's truck.

[61] In sum, I find that Mr. Devellano's evidence was, at times, unreliable.

[62] As indicated in the *voir dire* decision in this case, Cst. Moore was inconsistent in articulating her view of Mr. Devellano's level of sobriety. She, at times, referred to him as being impaired, and, at other times, she testified that she had a suspicion that he was impaired. At the same time, as noted, the video recordings that are before me captured the interactions between the police officers and Mr. Devellano. I do not find that the evidence of either Cst. Moore or Cst. Caron differs from what the video recordings captured.

[63] Before dealing with the defences raised, I will indicate that I find, beyond a reasonable doubt that the manner in which Mr. Devellano drove his truck after being detained by police was clearly a marked departure from the conduct of a reasonable driver. Snow was falling, resulting in winter driving conditions, where a driver is expected to drive with more care than usual. Reversing his vehicle at a higher rate of speed than normal, as admitted by Mr. Devellano, and as depicted in the video, while one police officer was initially on the running board of his truck and another was beside his truck, in a parking lot with open businesses in which there were other vehicles, and

potentially pedestrians, was extremely dangerous. There was a real risk that he would collide with either a pedestrian or a vehicle.

[64] This conduct is even more risky when the driver, as here, is unclear what it is behind him before backing up at a high rate of speed. Mr. Devellano testified that Cst. Moore's vehicle was partially parked in the laneway behind him. He said that he could not check his left side mirror because the left door was partially open and the police were on that side, and that he could not see her vehicle with his passenger side mirror because of where the officer had parked. However, he agreed that he had not checked his rear-view mirror before backing up, because it was an instinctual manoeuvre. Moving his vehicle in reverse at a high speed, in those driving conditions, and in a commercial parking lot with other vehicles and the likelihood of pedestrians, was patently dangerous.

[65] After striking a police vehicle, he left the parking lot at a high rate of speed in the winter driving conditions. The combination of the driving conditions and his high rate of speed increased the risk of this conduct.

[66] I find that his manner of driving from the time that he started backing up until he reached Second Avenue was manifestly reckless and dangerous.

[67] Regarding the alleged offence of failure, without reasonable excuse, to stop at the scene of the accident, Mr. Devellano argues that since he feared for his safety, he did not stop after hitting the police vehicle or attend immediately at the police detachment. In other words, he does not dispute that he committed the *actus reus* or

illegal act, but maintains that he was justified or had an excuse to do so in the circumstances.

[68] Similarly, regarding the alleged offence of obstruction of a peace officer while detained by driving away, he submits that although he drove away while detained by a police officer in the course of an investigation, he was justified or had an excuse to do so in these circumstances.

[69] Turning to the defences raised, I will consider each, in turn, in the context of the allegations.

[70] First, I find that there is no air of reality to the necessity defence, or if there were, the Crown has disproved the defence. Mr. Devellano had been interacting with Cst. Moore for approximately nine minutes before he decided to put up his window. Although he was annoyed with her continuing the investigation after he passed the ASD test, he agreed that she allowed him to stay in his vehicle, which was running, during the investigation; that she was not aggressive in her questions to him; and that, although she was being intrusive, she was civil to him.

[71] Importantly, Cst. Moore told Mr. Devellano after he passed the ASD test that he was being further detained for an impaired investigation, and Mr. Devellano acknowledged that he knew he was being detained. It is also of significance that the second officer, Cst. Caron, was not yet at Mr. Devellano's vehicle when the incident between Mr. Devellano and Cst. Moore started. When Mr. Devellano said he was going to put up his window, Cst. Moore immediately told him not to do so. She repeated this direction, but Mr. Devellano did not comply with her direction. When she opened the

driver's side door on two occasions, he pulled it shut twice. I do not accept his evidence that he believed that Cst. Moore was going to assault him at this point. In fact, not long before the incident occurred, when Cst. Moore told him to stop searching for a cigarette, she advised him that if he did not follow her instructions, he would have to sit in the police vehicle.

[72] It is just as this interaction occurred that Cst. Caron arrived at the side of the defendant's vehicle. When he observed what was happening, he also directed Mr. Devellano, on numerous occasions, to put down his window. He ultimately took out his baton and threatened to break the window if Mr. Devellano did not follow his direction. Mr. Devellano refused to put his window all the way down. Cst. Caron then stood on the running board, and put his arm through a space in the window in an attempt to unlock the door and open it. Even if I were to find that there was an air of reality to the necessity defence at this point because Mr. Devellano was scared, based on all the evidence, I would be unable to accept that there is a reasonable doubt that Mr. Devellano was in an urgent situation of "imminent danger or peril". I do not accept his testimony that he believed the police would have beat him up severely once they accessed the interior of his vehicle. The Crown has disproved this defence.

[73] Moving to the self-defence argument, I am of the view that this defence also fails. As mentioned, Mr. Devellano acknowledged, in his testimony, that Cst. Moore had detained him while they awaited Cst. Caron's arrival. He understood, more or less, what a detention meant, and although he did not agree with the detention, he complied with it.

[74] However, his attitude changed when contrary to police direction, he put up his window, and then would not put it all the way down, as it had been for the prior nine minutes. Mr. Devellano takes issue with the fact that the police became aggressive with him, and threatened his property, namely, his driver's side window. He also indicated that he believed they would harm him physically.

[75] As outlined above, s. 34(3) of the *Code* stipulates that subsection (1) does not apply if the force used or threatened by another person for the purpose of doing something that they are authorized to do in the administration or enforcement of a law, unless the person who commits the act that constitutes the offence believes on reasonable grounds that the other person is acting unlawfully. In s. 35 of the Code, dealing with defence of property, the wording of subsection (3) is identical to that in s. 34(3).

[76] Pursuant to s. 25 of the *Code*, a peace officer who is authorized by law to do anything in the enforcement of a law is, if acting on reasonable grounds, justified in doing what the officer is required or authorized to do and in using as much force as is necessary for that purpose.

[77] In the matter before me, the police officers were investigating a possible crime, and Mr. Devellano was detained as a result. When he failed to comply with clear directions to keep his window down, in a vehicle which was running, and which could be used to leave the scene, it is without question that the officers were acting in the execution of their duties when they attempted to open the driver's side door, and when they threatened to break his window, unless he complied with their direction. In the

circumstances of this case, there can be no foundation to a belief on reasonable grounds that the police were acting unlawfully.

[78] Alternatively, I consider s. 34(1) and s. 35(1) of the *Code*. Although it is not a compelling argument, even if I were to accept that s. 34(1)(a) and (b), and/or s. 35(1)(a), (1)(b)(iii) and (1)(c)(ii) have been met, in my view, the acts committed by Mr. Devellano were not reasonable in the circumstances, as required by s. 34(1)(c) and s. 35(1)(d).

[79] It must be remembered that focus at this stage is what a reasonable person would have done in comparable circumstances. In determining that question, I will consider the factors that are, in my view, relevant to this incident. First, the nature of the threat to property, in this case, was his door window, which is at the lower end of the scale of property damage. In terms of the nature of any physical threat, a reasonable person in the circumstances of Mr. Devellano would not have believed that the police intended to beat him severely. Cst. Moore had treated him well before the incident. As indicated, she had also told him that if he did not comply with her direction, he would have to sit in her police vehicle. Also, Cst. Caron never suggested that he would strike Mr. Devellano. Significantly, Mr. Devellano's compliance with the police direction to roll his window all the way down would have ended the threat.

[80] In terms of Mr. Devellano's role in the incident, it includes all of his conduct during the course of the incident that is relevant to whether his ultimate act was reasonable in the circumstances. He became non-compliant to reasonable police direction and as a result brought about this conflict. As such, he bears significant responsibility for what ultimately occurred.

[81] Although Cst. Caron threatened to use a weapon, he was authorized to use it, if necessary, in the lawful execution of his duties. At no time did Cst. Caron threaten to strike Mr. Devellano.

[82] There had been no previous interactions between Mr. Devellano and these police officers. Although Mr. Devellano said, in closing submissions, that he had had a bad experience in a Mexican jail years ago, and that he might suffer from Post-traumatic stress disorder (PTSD), he never testified to this and led no evidence with respect to any diagnosis. In any event, he did not detail any police interactions involving excessive force that he had experienced in Canada.

[83] Finally, in terms of the proportionality assessment, although case law has established that self-defence cannot be disproportionate to the threat being met, "…the assessment will be a fair, large and tolerant one. The expression sometimes used is that a person acting to defend himself is not expected to weigh to a nicety the exact measure of the force he uses. …" (***Griffith***, at para. 84).

[84] That being said, the acts committed by Mr. Devellano were not proportionate to any harm that he faced. The force that he used was recklessly applied, very dangerous, and clearly unnecessary.

[85] Balancing these factors, I find that the acts committed were unreasonable in all the circumstances. Therefore, the defence of self-defence has been disproved.

[86] In conclusion, I am satisfied beyond a reasonable doubt that the defences of necessity and self-defence are either not applicable or have been disproved beyond a reasonable doubt in this case.

[87] In the result, I find Mr. Devellano guilty of dangerous driving, failing to remain at the scene of an accident, and obstruction of justice.

[88] I find that the there is both a factual and legal nexus between the *MVA* offences and the *Code* offences for which I have registered convictions. As such, Mr. Devellano should not be punished twice for the same offences. Therefore, the *MVA* offences should be stayed based on the principles enunciated in ***R.*** v. ***Kienapple****,* [1975] 1 S.C.R. 729.

_____

CHISHOLM T.C.J.