SUPREME COURT OF YUKON

Citation: *R v GPD* 2023 YKSC 6

Date: 20230207
S.C. No. 20-01514A
Registry: Whitehorse

BETWEEN:

HIS MAJESTY THE KING

AND

G.P.D.

Publication, broadcast, or transmission of any information that could identify the complainant or a witness is prohibited pursuant to s. 486.4 of the *Criminal Code*.

Before Justice M.D. Gates

Counsel for the Crown — Leo Lane and Kevin Gillespie

Counsel for the accused — Jennifer Cunningham

REASONS FOR DECISION

(Ruling on Defence Application to Leave the Defence of Necessity and Self-Defence to the Jury)

Introduction and Overview

[1] The Accused, G.D., is charged with one count of sexual assault and two counts of assault arising from a series of events alleged to have taken place in January 2020, in Whitehorse. He elected trial by a court consisting of a judge and jury.

[2] At the conclusion of the evidence, the Defence asked the Court to instruct the jury on the defences of necessity and self-defence relative to Count #3 in the Indictment, a count of assault alleged to have taken place between the 24th and 25th day of January 2020. In response, the Crown adopted the position that neither defence

should be left with the jury in the circumstances. After hearing extensive oral submissions, I dismissed the Defence requests relating to the defences of necessity and self-defence. At the time of rendering my oral decision, I indicated that written reasons would be filed. These are my Reasons for Decision.

Facts

[3] During the trial, both the Accused and the Complainant, P.C.T., gave evidence regarding an incident that took place in the Accused's vehicle on January 24th or 25th, 2020.

[4] P.C.T.'s evidence was that she was drinking at her aunt's residence in Takhini on the date in question. She initially claimed that she was drinking cider, but later acknowledged that, together with her aunt and another female friend, they might have been drinking from a 26-ounce bottle of vodka. She also smoked a small piece of crack cocaine, the first time that she had tried that drug. P.C.T. reported that the drug had limited impact on her, though she noticed that her jaw was involuntarily moving back and forth and that she got quiet. She stated that she was not that intoxicated when she got in the truck with the Accused.

[5] G.D.'s evidence, on the other hand, was that he received a telephone call from P.C.T. in which she sounded distressed. She told him that she was at her aunt's home and needed help. She asked him to come and get her. G.D. was confused as to what was going on and so drove to the residence to confirm that she was not in danger or hurt. He entered the home and saw P.C.T. sitting at a table with her aunt and another woman. There was an open bottle of vodka on the table. He described P.C.T. as

distraught and on drugs, though he was satisfied that she was not otherwise in any danger.

[6] According to P.C.T. she was texting with the Accused prior to his arrival at her aunt's home. At one point, he told her via text that he was coming over as he wanted to talk to her. He subsequently sent her a text advising that he was outside. Though she did not really want to go, she went outside to speak to him, telling her aunt that she would be right back. She was just wearing a sweater when she went outside, believing that they were going to talk in the truck. According to P.C.T., the Accused took off in the truck as soon as she entered. She maintained that he was mad and yelling at her as he pulled away. She did not want to go with him and asked him to take her back. He continued driving towards Takhini Trailer Park on Range Road. He then grabbed her with his right hand and arm, placed her in a choke hold and started hitting her with his right fist.

[7] P.C.T. testified that she opened the passenger door of the truck and tried to jump out of the moving vehicle, but the Accused pulled her back inside the vehicle on each occasion that she tried to escape. She stated that he then pushed her to the floor of the truck on the passenger side of the vehicle and held her there while striking her on the back and head. She found it difficult to breathe as a result of the way that the Accused had her squished on the floor. She was gasping for air. She was scared, called for help, and repeatedly told him stop and to take her back to her aunt's residence. The Accused refused to take her back and kept on driving away from Whitehorse. According to P.C.T., the drive lasted between 30 minutes and 1 hour and that G.D. was driving quite quickly. He told her he was taking her to Burwash Landing. At some point, P.C.T.

reported that the Accused turned around and drove back to Whitehorse. She recalled that he dropped her off at her aunt's home and then took off.

[8] The following day she noticed bruising on her arms and legs as a result of the incident in the truck. She maintained that she did not have any of these bruises prior to the truck incident. P.C.T. reported this bruising to the police, but was reluctant to show the full extent of the bruising to a male RCMP officer at the time of her initial attendance at the RCMP detachment. She subsequently allowed a female RCMP officer to photograph all of the bruising on her body. She identified the bruising depicted in 11 photographs (Exhibit #1) as representing bruises sustained as a result of the actions of the Accused in the truck. Cst. Jordan Booth, the RCMP officer who received P.C.T.'s initial complaint on January 30, 2020, observed a bruise on the top of the complainant's left hand, as well as a faint bruise on her forehead.

[9] In cross-examination, P.C.T. acknowledged that she may have grabbed at the steering wheel while attempting to escape, but did not grab at the gear shift. She also acknowledged that she may have kicked G.D. in the head at one point and agreed that she could have also kicked him in the ribs. She kind of remembered this because he was grabbing her neck at the time. Further, P.C.T. agreed that she kicked the windshield of the vehicle during the struggle, but went on to say that she thought that she had broken the side window of the vehicle, not the windshield, as depicted in the photographs in Exhibit #4.

[10] The Accused acknowledged that he drove away from the residence over the objections and without the consent of P.C.T. He also acknowledged that she repeatedly told him that she did not want to go for a drive with him in the vehicle. He agreed that

she repeatedly told him to stop the vehicle or to turn around, insisting that he return her to her aunt's home. Further, G.D. testified that he continued to drive out of town after P.C.T. attempted to grab the gear shift and the steering wheel of the vehicle, the latter act causing the vehicle to veer off the main road and head partially into the ditch. At around this time, P.C.T. told him "I'm going to kill us all if you don't bring me back." G.D. acknowledged that P.C.T. managed to open the passenger side window and attempted to exit the moving vehicle on several occasions, each attempt thwarted by him grabbing her sweater and pulling her back inside the vehicle.

[11] The Accused confirmed that P.C.T. was angry and yelling at him to take her back to her aunt's home. He described her as "freaking out" and that he had never seen her in such a state. While he attributed her highly agitated state to the effects of alcohol and drugs, he conceded that he had never previously held her against her will.

[12] G.D. acknowledged that P.C.T. had already told him many times that she wanted to go back before she grabbed the steering wheel. After getting the vehicle partly out of the ditch, he continued to drive the vehicle onto the Alaska Highway towards Haines Junction and further away from Whitehorse. He maintained that P.C.T. then began hitting and kicking him and kicking at the windshield, eventually causing the windshield to crack, as depicted in the photographs in Exhibit #4. As he continued driving towards Haines Junction, the Accused described how P.C.T. opened the window and moved her arms and shoulders outside of the vehicle trying to get away. He acknowledged that he pulled her pretty hard to get her back inside the vehicle on the several occasions that she attempted to jump out of the window of the moving vehicle. He was hollering at her to "stop, stop, stop", though denied that he ever covered her mouth to muffle her yelling.

He had no recollection of her ever calling for help. He conceded during cross-examination that it was clear to him that P.C.T. was desperate to get out of the vehicle, but he continued driving towards Haines Junction.

[13] The Accused believed he was the best person for P.C.T. to be around at the time given her state of intoxication. He maintained that he was worried for her safety throughout and that he believed she simply needed time to calm down and sober up. He maintained that he was a little upset at her intoxicated state, but not mad at her. He denied ever striking or choking her, or forcing her onto the floor of the vehicle. He insisted that the only physical contact that he had with P.C.T. in the vehicle was his hand pulling her back into the vehicle when she tried to climb out the window and in using one raised hand to try and block the blows she directed towards him.

[14] According to the Accused, P.C.T. eventually calmed down, told him that she was sorry and asked to go to his house. He then turned the vehicle around and returned to Whitehorse. He estimated that he drove for approximately 30-45 minutes in the direction of Haines Junction before returning to Whitehorse.

The Law

A) Air of Reality

[15] It is common ground between the parties that there must be an air of reality to the essential elements of a defence before that defence should be left with jury in any given case. In *R v Cinous*, 2002 SCC 29, the Supreme Court explained, at para. 49, that:

> The correct approach to the air of reality test is well established. The test is whether there is evidence on the record upon which a properly instructed jury acting reasonably could acquit. See *Wu v The King*, [1934] S.C.R.

> 609; *R v Squire*, [1977] 2 S.C.R. 13; *Pappajohn v The Queen*, [1980] 2 S.C.R. 120; *Osolin, supra*; *Park, supra*; *R v Finta*, [1994] 1S.C.R. 701. This long-standing formulation of the threshold question for putting defences to the jury accords with the nature and purpose of the air of reality test. We consider that there is nothing to be gained by altering the current state of the law, in which a single clearly-stated test applies to all defences.

[16] The majority in *Cinous* continued, at paras. 50-51 in the following terms:

> The principle that a defence should be put to a jury if and only if there is an evidential foundation for it has long been recognized by the common law. This venerable rule reflects the practical concern that allowing a defence to go to the jury in the absence of an evidential foundation would invite verdicts not supported by the evidence, serving only to confuse the jury and get in the way of a fair trial and true verdict. Following *Pappajohn*, *supra*, the inquiry into whether there is an evidential foundation for a defence is referred to as the air of reality test. See *Park*, *supra*, at para. 11.
>
> The basic requirement of an evidential foundation for defences gives rise to two well-established principles. First, a trial judge must put to the jury all defences that arise on the facts, whether or not they have been specifically raised by an accused. Where there is an air of reality to a defence, it should go to the jury. Second, a trial judge has a positive duty to keep from the jury defences lacking an evidential foundation. A defence that lacks an air of reality should be kept from the jury [citations omitted]. This is so even when the defence lacking an air of reality represents the accused's only chance for an acquittal, as illustrated by *R v Latimer*, [2001] 1 SCR. 3, 2001 SCC 1.

[17] The Supreme Court also provided guidance in *Cinous* in terms of the evidence to be considered by a trial judge in the application of the air of reality test. At para. 53, the Court held:

> In applying the air of reality test, a trial judge considers the totality of the evidence, and assumes the evidence relied upon by the accused to be true. See *Osolin*, *supra*; *Park*, *supra*. The evidential foundation can be indicated by evidence emanating from the examination in chief or cross-

> examination of the accused, of defence witnesses, or of Crown witnesses. It can also rest upon the factual circumstances of the case or from any other evidential source on the record. There is no requirement that the evidence be adduced by the accused. See *Osolin, supra, Park, supra; Davis, supra*.

[18] The majority in *Cinous* went on to discuss the threshold determination to be made by a trial judge in the application of this test (at para. 54):

> The threshold determination by the trial judge is not aimed at deciding the substantive merits of the defence. That question is reserved for the jury. See *Finta, supra*; *R v Ewanchuk*, [1999] 1 S.C.R. 330. The trial judge does not make determinations about the credibility of witnesses, weigh the evidence, make findings of fact, or draw determinate factual inferences. See *R v Bulmer*, [1987] 1 S.C.R. 782; *Park, supra*. Nor is the air of reality test intended to assess whether the defence is likely, unlikely, somewhat likely, or very likely to succeed at the end of the day. The question for the trial judge is whether the evidence discloses a real issue to be decided by the jury, and not how the jury should ultimately decide the issue.

[19] The majority in *Cinous* confirmed that the question to be posed by a trial judge in the application of the air of reality test is whether the evidence "put forward is such that, if believed, a reasonable jury properly charged could have acquitted", at para. 60, citing with approval Cory J. in *R v Osolin*, [1993] 4 S.C.R. 595, at 682.

[20] Finally, the majority decision recognized that the role of the trial judge in applying the air of reality test is rendered somewhat more complicated when the record does not disclose direct evidence as to every element of the proposed defence. The Court explained this scenario at paras. 89-91 in *Cinous*. At para. 89, it stated:

> The judge's task is somewhat more complicated where the record does not disclose direct evidence as to every element of the defence, or where the defence includes an element that cannot be established by direct evidence, as for example where a defence has an objective reasonableness

> component. In each of these cases, the question becomes whether the remaining elements of the defence – that is, those elements of the defence that cannot be established by direct evidence – may reasonably be inferred from the circumstantial evidence. …

[21] The majority then referred to its earlier decision in *R v Arcuri*, [2001] 2 S.C.R. 828, wherein McLachlin C.J. introduced the concept of "limited weighing" in describing the principles governing a judge's assessment of the evidence in the context of a preliminary inquiry. According to the majority in *Cinous* (at para. 90), "[T]hat question is essentially the same as the question applicable to air of reality analysis." In *Arcuri,* McLachlin C.J. described the concept of "limited weighing" as follows, (at para. 23):

> Answering this question inevitably requires the judge to engage in a limited weighing of the evidence because, with circumstantial evidence, there is, by definition, an inferential gap between the evidence and the matter to be established – that is, an inferential gap <u>beyond</u> the question of whether the evidence should be believed … The judge must therefore weigh the evidence, in the sense of assessing whether it is reasonably capable of supporting the inferences that the [accused would ask] the jury to draw. This weighing is, however, limited. The judge does not ask whether she herself would conclude that the accused is guilty. Nor does the judge draw factual inferences or assess credibility. The judge asks only whether the evidence, <u>if believed</u>, could reasonably support an inference of guilt. (emphasis in original)

[22] At para. 91 of *Cinous*, the majority concludes that "[T]he judge does not draw determinate factual inferences, but rather comes to a conclusion about the field of factual inferences that could reasonably be drawn from the evidence."

[23] The Supreme Court confirmed its' decision in *Cinous* in *R v Fontaine*, 2004 SCC 27, and subsequently in *R v Mayuran*, 2012 SCC 31. In *Mayuran,* the Court provided

the following elaboration on the determination on the existence of an air of reality (at para. 21):

> In determining whether a defence has an air of reality, there must be an examination into the sufficiency of the evidence. It is not enough for there to be "some evidence" supporting the defence (*Cinous*, at para. 83). The test is "whether there is (1) evidence (2) upon which a properly instructed jury acting reasonably could acquit if it believed the evidence to be true" (*Cinous*, at para. 65). For defences that rely on indirect evidence or defences like provocation that include an objective reasonableness component, the trial judge must examine the "field of factual inferences" that can reasonably be drawn from the evidence" (*Cinous*, at para. 91).

The Defence of Necessity

[24] The Defence urges the Court to instruct the jury on the defence of necessity relative to the Accused's potentially assaultive conduct in pulling the Complainant back into the moving vehicle when she repeatedly attempted to jump out of the window. The Complainant's evidence on this point was that she attempted to jump out of the passenger side door of the vehicle, though the Accused testified that he only observed her attempting to get out of the vehicle through the open passenger side window.

[25] The Defence contends that the Accused had no way of anticipating that the Complainant would attempt to exit the moving vehicle in two instances that occurred in rapid succession. As such, the Defence says that the Accused acted involuntarily or instinctively in pulling her back into the vehicle so as to prevent imminent harm. Further, the Defence maintains that his involuntary act was what any reasonable person would have done in such circumstances. Relying on the Supreme Court's decision in *Perka v The Queen,* [1984] 2 S.C.R. 232, the Defence says that the fact that the Accused may have been engaged in unlawful conduct at the time as a result of his confinement of the

complainant in the vehicle, does not preclude him from advancing the defence of necessity in these circumstances. The Defence also relies on the decision of Belzil J. in *R v Morris*, 1981 CanLII 1216 (ABQB).

[26] The Crown, on the other hand, says that the defence of necessity should not be left with the jury in this instance. The Crown contends that the conduct of the Accused, viewed in all of the surrounding circumstances, disentitles him to advance the defence of necessity. Further, the Crown maintains that the Supreme Court in *Perka* specifically carved out a scenario where the defence would not be available. The Crown says that this contributory fault scenario described in *Perka* is precisely the scenario that exists in this instance. With respect to the Defence's reliance on *Morris*, the Crown says that it is so factually dissimilar to the within matter as to be of no assistance in the resolution of this issue.

The Law

B) Defence of Necessity

[27] In *R v Latimer*, 2001 SCC 1, the Supreme Court described its' earlier decision in *Perka,* as "the leading case on the defence of necessity" (at para. 26). The Court in *Latimer,* referred to the three elements of the defence of necessity set forth in *Perka* (*Latimer* at para. 28):

> *Perka* outlined three elements that must be present for the defence of necessity. First, there is the requirement of imminent peril or danger. Second, the accused must have had no reasonable legal alternative to the course of action he or she undertook. Third, there must be proportionality between the harm inflicted and the harm avoided.

[28] Dickson J. (as he then was) explained the rationale for the defence of necessity

in *Perka* in the following terms (at para. 26):

> It rests on a realistic assessment of human weakness, recognizing that a liberal and humane criminal law cannot hold people to the strict obedience of laws in emergency situations where normal human instincts, whether of self-preservation or of altruism, overwhelmingly impel disobedience. The objectivity of the criminal law is preserved; such acts are still wrongful, but in the circumstances they are excusable. Praise is indeed not bestowed, but pardon is …

[29] The circumstances in *Perka* were somewhat unusual. Perka and his co-accused were involved in the delivery of a shipload of marihuana with an estimated value of between $6M and $7M from a location in international waters off the coast of South America to a drop-off location in international waters approximately 200 miles off the coast of Alaska. The ship was plagued by mechanical and navigational difficulties, exacerbated by deteriorating weather conditions, as it made its journey northward. For the safety of the ship and crew, the vessel sought refuge in a sheltered cove on the west coast of Vancouver Island to try and effect repairs. The drug cargo was unloaded when the vessel ran aground and it was feared that the vessel would capsize.

[30] The accused were all arrested, as were the two ships, and the drug cargo was seized by the police. The accused were charged with importing marihuana into Canada and for possession for the purposes of trafficking. They were, however, all acquitted at trial, the jury apparently accepting that they never intended to import the marihuana into Canada, or to otherwise leave the marihuana in the country. Implicit in the jury's acquittal was the acceptance of the defence of necessity advanced by the accused relative to their decision to seek refuge in Canada on account of the ship's distress. The Court of Appeal allowed the Crown's appeal and directed a new trial. In so doing, the

Court upheld the trial judge's decision to leave the defence of necessity with the jury. On further appeal to the Supreme Court, the Court dismissed the appeal, confirming the availability of the defence of necessity in the circumstances, but finding that the trial judge erred in law in his instructions on the elements of that defence.

[31] Dickson J. explained the limitations on the defence (at para. 38):

> If the defence of necessity is to form a valid and consistent part of our criminal law, it must, as has been universally recognized, be strictly controlled and scrupulously limited to situations that correspond to its underlying rationale. That rationale as I have indicated, is the recognition that it is inappropriate to punish actions which are normatively "involuntary". The appropriate controls and limitations on the defence of necessity are, therefore, addressed to ensuring that the acts for which the benefit of the excuse of necessity is sought are truly "involuntary" in the requisite sense.
>
> In *Morgentaler, supra*, I was of the view that any defence of necessity was restricted to instances of non-compliance "in urgent situations of clear and imminent peril when compliance with the law is demonstrably impossible".

[32] In *Latimer*, the Court explained the basis upon which the three requirements of the defence of necessity are to be assessed. At paras. 33-34, the Court held:

> The first and second requirements – imminent peril and no reasonable legal alternative must be evaluated on the modified objective standard described above. As expressed in *Perka*, necessity is rooted in an objective standard: "involuntariness is measured on the basis of society's expectation of appropriate and normal resistance to pressure" (p. 259). We should add that it is appropriate, in evaluating the accused's conduct, to take into account personal characteristics that legitimately affect what may be expected of that person … While an accused's perception of the surrounding facts may be highly relevant in determining whether his conduct should be excused, those perceptions remain relevant only so long as they are reasonable. The accused person must, at the time of the act, honestly believe, on reasonable grounds, that he faces a situation of imminent peril that leaves no reasonable legal alternative

> open. There must be a reasonable basis for the accused's beliefs and actions, but it would be proper to take into account circumstances that legitimately affect the accused person's ability to evaluate his situation. The test cannot be a subjective one, and the accused who argues that he perceived imminent peril without an alternative would only succeed with the defence of necessity if his belief was reasonable given his circumstances and attributes. …
>
> The third requirement for the defence of necessity, proportionality, must be measured on an objective standard, as it would violate fundamental principles of the criminal law to do otherwise. Evaluating the nature of an act is fundamentally a determination reflecting society's values as to what is appropriate and what represents a transgression … The proper perspective, however, is an objective one, since evaluating the gravity of the act is a matter of community standards infused with constitutional considerations (such as, in this case, the s. 15(1) equality rights of the disabled). We conclude that the proportionality requirement must be determined on a purely objective standard. (emphasis in original)

[33] One of the issues before the Supreme Court in *Perka*, was whether the fact that the accused were engaged in an allegedly illegal act at the time they sought refuge in Canada precluded them from raising the defence of necessity. In this instance, the Defence acknowledges that there is certainly some evidence that the Accused confined P.C.T. against her will and, as such, was engaged in an unlawful act at the time of the alleged emergent peril. However, the Defence relies on the following statement of Dickson J. in *Perka* (at para. 49):

> …I have considerable doubt as to the cogency of such a limitation. If the conduct in which an accused was engaging at the time the peril arose was illegal, then it should clearly be punished, but I fail to see the relevance of its illegal character to the question of whether the accused's subsequent conduct in dealing with this emergent peril ought to be excused on the basis of necessity. At most the illegality – or if one adopts Jones J.A.'s approach, the immorality – of the preceding conduct will colour the subsequent conduct in

> response to the emergency as also wrongful. But that wrongfulness is never in doubt. Necessity goes to *excuse* conduct, not to *justify* it. Where it is found to apply it carries with it no implicit vindication of the deed to which it attaches. That cannot be over-emphasized. Were the defence of necessity to succeed in the present case, it would not in any way amount to a vindication of importing controlled substances nor to a critique of the law prohibiting such importation. It would also have nothing to say about the comparative social utility of breaking the law against importing as compared to obeying the law. The question, as I have said, is never whether what the accused has done is wrongful. It is always and by definition, wrongful. The question is whether what he has done is voluntary. Except in the limited sense I intend to discuss below, I do not see the relevance of the legality or even the morality of what the accused was doing at the time the emergency arose to this question of the voluntariness of the subsequent conduct. (italics in original, emphasis added)

[34] I agree that this portion of the decision in *Perka*, read in isolation, tends to lend support to the Defence contention that the Accused's potentially unlawful conduct does not preclude resort to the defence of necessity. However, subsequently, at paras. 52-55, Dickson J. explained the relationship or link between fault and the availability of the defence of necessity. At para. 53, he stated:

> In my view, the better approach to the relationship of fault to the availability of necessity as a defence is based once again on the question of whether the actions sought to be excused were truly "involuntary". If the necessitous situation was clearly foreseeable to a reasonable observer, if the actor contemplated or ought to have contemplated that his actions would likely give rise to an emergency requiring the breaking of the law, then I doubt whether what confronted the accused was in the relevant sense an emergency. His response was in that sense not "involuntary". "Contributory fault" of this nature, but only of this nature, is a relevant consideration to the availability of the defence.

[35] After discussing the availability of the defence of duress, Dickson J. continued (at

para. 55):

> In my view, the same test is applicable to necessity. If the accused's "fault" consists of actions whose clear consequences were in the situation that actually ensued, then he was not "really" confronted with an emergency which compelled him to commit the unlawful act he now seek [sic] to have excused. In such situations the defence is unavailable. Mere negligence, however, or the simple fact that he was engaged in illegal or immoral conduct when the emergency arose will not disentitle an individual to rely on the defence of necessity.

[36] G.D.'s fault lay in his continuing to confine P.C.T. after she made it very clear that she was desperate to get away, so desperate that she grabbed the steering wheel at one point and attempted to put the vehicle into the ditch. It is significant, in my view, that P.C.T. unsuccessfully attempted to put the vehicle into the ditch before she attempted to exit the vehicle, either through the open window or via the passenger side door. As such, she escalated her efforts to escape when less drastic actions, combined with her verbal protestations, proved to be inadequate to bring about a change in the Accused's behavior. I accept the Crown's contention that the Accused created the necessity that he now relies on to excuse this aspect of his conduct.

[37] The actions of P.C.T. in attempting to flee the vehicle so as to end her confinement were clearly foreseeable to a reasonable observer. As such, the Accused contemplated, or ought to have contemplated, that his actions would give rise to the very "emergency" that he now relies on as justification for this aspect of his potentially assaultive behavior. In my view, there is simply no air of reality to the Accused's assertion that this aspect of his conduct inside the vehicle was involuntary in the sense that he was responding to an unforeseen emergency.

[38] I also agree with the Crown's contention that, even assuming that the first time he pulled her back may have been justified by necessity, the second and any subsequent attempts by the complainant to flee the vehicle were clearly foreseeable. In my view, this is not a situation of mere negligence on the part of the Accused. In the result, I agree with the Crown that in such circumstances, the Accused's conduct disentitles him to advance the defence of necessity.

[39] As previously indicated, the Defence also relies on the decision in *Morris*. I have carefully considered this decision and am of the view that it is clearly distinguishable from the facts of the within matter.

[40] In *Morris*, the accused was acquitted of assaulting his wife, a decision that was confirmed by the Summary Conviction Appeal Court. After spending a night drinking at a tavern, the accused and his wife were driving back to their home. The accused was driving. He was sober, though his wife was intoxicated and agitated as a result of events that had taken place earlier that evening involving one of her friends. At one point, the accused's wife asked to return to the location of the tavern so that she might have an opportunity to speak to the police about her friend. The accused refused. His wife then reached for the door of the truck to jump out of the moving vehicle. In response, the accused grabbed his wife around the neck to prevent her from leaving the vehicle. A short while later, she grabbed the steering wheel of the vehicle and put the front wheels of the vehicle into the ditch. The accused again grabbed his wife by the neck and held her in that position until they reached their home. As previously noted, the accused was acquitted at trial.

[41] On appeal, Belzil J. held that the defence of necessity was available to the accused in these circumstances. He found that the accused "was suddenly confronted by an emergency situation created by the complainant", and that to have allowed his intoxicated wife to walk home on a dark road would have shown a wanton or reckless disregard for her life or safety: at para. 14. Similarly, her action in grabbing the steering wheel showed a wanton or reckless disregard for both of their safety in that instance. In upholding the acquittal, Belzil J. found that the accused found himself in an emergency situation in which he was required to act quickly, and that he acted reasonably and in good faith in intervening to prevent possible harm to himself or his wife.

[42] I accept the Crown's contention that the circumstances of this case are readily distinguishable from the facts in *Morris*. In *Morris*, the accused's wife voluntarily entered the vehicle at the end of the evening. Her attempts to leave the vehicle when the accused refused to return to the community where they had spent the evening only arose sometime after they entered the vehicle. Unlike the within matter, *Morris* involved a situation where the accused had no role in creating the scenario. Rather, he was faced with two bad options in circumstances that were entirely not of his own making.

[43] In this case, it is clear that the Accused continued to confine the complainant, all the while driving further and further away from Whitehorse, notwithstanding her repeated assertions from the outset of the journey that she did not want to remain in the vehicle with the Accused, accompanied by her increasingly aggressive physical protests to her confinement. In such circumstances it was foreseeable that the complainant would escalate her attempts to get away after her earlier verbal and less drastic physical actions seemingly failed to have any impact on the actions of the Accused. In

other words, the Accused created the emergency when he failed to heed any of her earlier protests and, in effect, took away her other available options.

[44] Having carefully considered the evidence and the submissions of counsel, in accordance with *Perka*, I find that there is no air of reality to the defence of necessity in these circumstances. The evidence before me does not disclose a real issue to be determined by the jury. Accordingly, I decline to instruct the jury on this defence.

Self-Defence

[45] The Defence urges the Court to place the defence of self-defence before the jury in addition to the defence of necessity or, alternatively, as a stand-alone defence. Specifically, the Defence maintains that self-defence potentially arises in two different ways in this instance. First, the Defence says that self-defence arises on the basis of the Accused's evidence that he put up his right hand and arm to fend off the blows directed towards him by P.C.T. Second, the Defence says that self-defence arises if the jury rejects his evidence and accepts her evidence as to what transpired inside the vehicle. In this second scenario, the Defence suggests that the assaultive behavior alleged by the Complainant was entirely the result of defending himself against blows delivered by P.C.T. By inference, the Defence also seems to suggest that the assaultive behavior alleged by the Complainant was also partly in response to her aggressive acts directed towards the moving vehicle.

[46] The Defence relies on s. 34(2)(c) of the self-defence provision in the *Criminal Code*, R.S.C., 1985, c. C-46. Section 34 provides:

> 34 (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.
>
> Factors
>
> 34(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.

[47] The Crown, on the other hand says that there is no air of reality to self-defence in this case. For the reasons that follow, I decline to put this defence to the jury in my jury instructions.

[48] Before turning to address the two alternative theories of the Defence, I would note that, in principle, I agree with the Defence contention regarding the application of

the relevant enumerated factors in s. 34(2). However, those listed factors only arise for consideration if the three requirements of s. 34(1) have been met. As more fully set out below, I am not persuaded that these conditions have been met, particularly s. 34(1)(b). In the result, I find that the content of s. 34(2) is of no application in these circumstances.

(a) Raised Hand Blocking Complainant's Alleged Blows

[49] The evidence of the Accused and the Complainant was very different in terms of their respective accounts of what transpired in the vehicle. According to the Accused, he did not assault the complainant. He maintains that he did not initiate any physical contact with the complainant other than the instances in which he grabbed her by the sweater to prevent her from exiting the moving vehicle. Otherwise, he insists that he did not assault P.C.T. in the manner that she described, and that he only raised his right hand and arm to ward off blows he claims that she directed towards him.

[50] While acknowledging that an air of reality relative to a potential defence can arise on the evidence of a complainant, either alone or in conjunction with other evidence, the Crown says that there is no air of reality to self-defence arising on the evidence presented during this trial. The Crown says the Accused's action of putting up an open hand to block P.C.T.'s blows was not an assault, rather it was a defensive act that was passive in nature. As such, the Crown says that the Accused took no act that would otherwise constitute an offence "for the purpose of defending or protecting themselves … from that use or threat of force": s 34(1)(b). I agree. On this theory of the Defence, the actions of the Accused fail to meet the requirements of s. 34(1)(b) in that

his passive action is not capable of being construed as an assault in relation to which a claim of self-defence might arise.

b) Rejection of the Accused's Evidence and Acceptance of the Evidence of P.C.T.

[51] In the alternative, the Defence maintains that the air of reality for the defence of self-defence lies in the evidence of P.C.T. if the jury were to accept some or all of her evidence and reject the evidence of the Accused relative to the key events inside the vehicle. As such, the Defence relies on the decisions of the Supreme Court in *R v Esau*, [1997] 2 S.C.R. 777, at para. 16, and in *R v Park*, [1995] 2 S.C.R. 836, at para. 25, as support for the proposition that alternative theories can be placed with the jury and, further, that an air of reality can arise from "cobb[ling] together some of the complainant's evidence and some of the accused's evidence to produce a sufficient basis for such a defence": *Park*, at para. 25.

[52] As previously indicated, the Accused emphatically denied that he ever initiated any physical contact with P.C.T. inside the vehicle other than the instances where he grabbed her sweater to prevent her from jumping out of the moving vehicle and when he raised his right hand and arm in an attempt to block the blows she directed towards him. The Complainant, on the other hand, described a prolonged attack involving choking, repeated blows to her head and body, the Accused covering her mouth when she tried to cry for help, and him forcing her to the floor of the vehicle that left her gasping for air. In short, the versions of the events related by the two principal parties are diametrically opposed.

[53] In light of my conclusion that there is no air of reality to self-defence in this instance, I make no finding as to whether the alternative theories advanced by the

Defence are inconsistent with one and other. This point was not fully argued by counsel and, as indicated, I make no findings in this regard.

[54] The Defence reliance on the decisions in *Esau* and *Park* are, in my view, unhelpful in this instance. Both *Esau* and *Park* involved allegations of sexual assault. Both cases turned on the issue of consent and, specifically, the accused's assertion in both instances that he mistakenly believed that the complainant was consenting to the complained of sexual activity. In *Esau*, the complainant was passed out or asleep during the alleged sexual assault and thus was unable to provide any evidence as to what had transpired. In *Park*, the trial judge declined to leave the defence of mistaken belief in consent with the jury on the basis that there was no air of reality to the defence given the dissimilarities in the evidence of the accused and the complainant. On appeal, the Court of Appeal ordered a new trial on the basis that the trial judge erred in law in failing to leave this defence with the jury. On further appeal to the Supreme Court, the Court set aside the decision of the Court of Appeal, upholding the trial judge's decision not to put the defence to the jury.

[55] When both cases reached the Supreme Court, the focus was on the determination as to whether or not there was sufficient evidence to lend an air of reality to the defence of honest but mistaken belief in consent, now commonly described as honest but mistaken belief in *apparent* consent.

[56] At para. 16 of *Park*, Major J., referring to the Court's earlier decision in *Esau*, made the following observations:

> The parties' testimony is usually the most important evidence in sexual assault cases. In *Osolin, supra*, there was debate whether, if the parties' testimony were "diametrically opposed", the defence of mistake should be

> put to the jury. In the present cases, not only was the testimony not "diametrically opposed", but even on a slightly stricter test, the parties' stories may be "cobbled together" in an entirely coherent manner. In *Park, supra*, L'Heureux-Dubé J. stated at para. 25:
>
> > … the question is whether, in the absence of other evidence lending an air of reality to the defence of honest mistake, a reasonable jury could cobble together some of the complainant's evidence and some of the accused's evidence to produce a sufficient basis for such a defence … Put another way, is it realistically possible for a properly instructed jury, acting judiciously, to splice some of each person's evidence with respect to the encounter, and settle upon a reasonably coherent set of facts, supported by the evidence, that is capable of sustaining the defence of mistaken belief in consent?

[57] I would note that in *Park*, Justice L'Heureux-Dubé concluded the paragraph quoted in *Esau* with the following sentence – a sentence not included in *Esau*:

> If the stories cannot realistically be spliced together in such a manner, then the issue really is purely one of credibility – of consent or no consent – and the defence of mistaken belief in consent should not be put to the jury.

[58] Given the increasingly complex body of law that has evolved relative to sexual offences, particularly around the defence of honest but mistaken belief in apparent consent, I approach these decisions with some caution. Not only were the cases decided some time ago, I would note that there has been a considerable body of law developed in the interim that has continued to shape and refine this admittedly challenging area of the law.

[59] In *Esau*, a divided Court concluded that on the particular facts of that case, there was an air of reality to the defence of mistaken belief in consent. As such, Major J. for

the majority held, at para. 19:

> The absence of memory by the complainant as to what happened in the bedroom makes it easier to "cobble together" parts of both the accused and complainant's evidence to reach a reasonable conclusion of honest but mistaken belief. Any number of things may have happened during the period in which she had no memory. The evidence of the accused combined with the lack of memory of the complainant and, as previously noted, the absence of violence, struggle or force, when taken together makes plausible and gives an air of reality to the defence of mistaken belief.

[60] In this instance, the evidence is very different from that presented to the Court in *Park*. First, the complainant, P.C.T., had no lack of memory regarding the significant events giving rise to the current charges before the Court. Moreover, P.C.T. gave a detailed account of the physical injuries sustained during the incident. Her evidence in this regard was corroborated by the observations of Cst. Booth and the photographs that were taken at the RCMP detachment a number of days after the alleged incident.

[61] The Crown maintains that the evidence of P.C.T. excludes any conduct on the part of the Accused taken to defend himself. Rather, all of her evidence reveals that the Accused's physical actions towards her were to further his control of her and to prevent her from leaving the vehicle. Again, the Crown says that the evidence of P.C.T. fails to demonstrate any basis for the Accused to say that any of his actions were taken for the purpose of defending or protecting himself from the threat or use of force. In the result, the Crown maintains that neither the evidence of the Accused nor that of the P.C.T. provides the evidentiary basis to support leaving the defence of self-defence with the jury. I agree.

[62] This is one of those situations described by L'Heureux-Dubé J. in *Park*, where there is no way to realistically splice together portions of two highly conflicting versions of events so as to give rise to an air of reality to the defence of self-defence. Accordingly, I decline to instruct the jury on the defence of self-defence.

Conclusion

[63] For the reasons outlined above, I decline to instruct the jury on either the defence of necessity or self-defence.

[64] Before closing, I want to express my appreciation to counsel for their very helpful submissions on this important issue.

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GATES J.