Citation: *R. v. Johnson*, 2004 YKTC 101

Date: 20050112
Docket: 04-00031
Registry: Whitehorse
Heard: Burwash Landing

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Chief Judge Lilles

R e g i n a

v.

Keith Johnson

Appearances:
Edith Campbell — Counsel for Crown
Malcolm Campbell — Counsel for Defence

REASONS FOR JUDGMENT

Introduction

[1] Mr. Keith Johnson was charged with the offence of driving while disqualified contrary to s. 259(4)(a) of the *Criminal Code*. Although Mr. Johnson acknowledged that he had been operating a motor vehicle on December 10, 2003 while disqualified from driving, he put forward the defence of necessity.

The Facts

[2] The facts as I found them are as follows. Ms. Clara Northcott, a Probation Officer, saw Mr. Johnson in the restaurant of the Talbot Arms hotel on December 10, 2003. Ms. Northcott knew Mr. Johnson well, having prepared a pre-sentence report for him previously and also because she had supervised him on a conditional sentence. Ms. Northcott spoke to Mr. Johnson in the restaurant. When Mr. Johnson left, Ms. Northcott observed him paying for gasoline he had

purchased, exit the front door, get into his pick up truck and drive away. There was no one else in the vehicle.

[3] Since the pre-sentence report Ms. Northcott had prepared for Mr. Johnson was for an impaired driving charge, Ms. Northcott was certain that Mr. Johnson was prohibited from driving. She reported the incident to the police and Mr. Johnson was charged.

[4] Mr. Johnson did not deny the incident. His position was that on that day he drove his vehicle out of necessity.

[5] Mr. Johnson testified that his home was heated with wood, with an oil furnace as backup. He ran out of wood on December 8, 2003. In the evening of December 9, 2003, he ran out of oil. The next morning, December 10, he borrowed two blocks of wood from his brother-in-law who lived close by. He said he needed to get some wood or oil or his house would freeze up. This would result in the pipes freezing and in significant damage to the house.

[6] Mr. Johnson said he was not able to purchase oil in Burwash because a year earlier he had bounced a check in the amount of $850.00, a debt that he had not yet settled.

[7] Mr. Johnson’s mother lives in Burwash and owns a small Ford Ranger truck. He did not phone her for assistance. Mr. Johnson’s truck has a manual transmission while his mother could only drive an automatic. As a result, she was not able to drive his truck. He suggested that his mother’s truck was too small to access the wood lot in the winter.

[8] Mr. Johnson explained that he only borrowed two blocks of wood from his brother-in-law because that is all that he could carry at one time. He gave the

following reasons at different times for not getting more wood from his brother-in-law:

> “I couldn’t rely on him to fill my woodpile”
> “I didn’t know when he would get back [from Whitehorse]”
> “I knew I had to get wood myself”.

[9] The house Mr. Johnson lived in was owned by his First Nation. Asked why he did not phone the band office for emergency help, he stated: “I knew they would not have helped me out. The people who work in the band office run programs.”

[10] Mr. Johnson did not phone his daughter for help because she does not have a driver’s licence (although she is 26 years old).

[11] Mr. Johnson admitted that he knows a lot of people around town. He said he attended a friend’s house for assistance, but the adult individuals in that residence had already started drinking and were unable to help him. He did not seek assistance from anyone else.

[12] Mr. Johnson’s evidence was that no one in town was selling firewood at the time – “the wood cutters were more or less done”.

[13] As to why Mr. Johnson allowed his wood and oil to run out, he said that he never forecasted running out of oil or wood that quickly.

The Law

[14] The defence, or more accurately, the excuse of necessity, is fully described in two decisions of the Supreme Court of Canada: *Perka v. The Queen*, [1984] 2 S.C.R. 232 and *R. v. Latimer*, [2001] 1 S.C.R. 3.

[15] The nature of the defence was set out by Dickson J. in *Perka*, *supra*, at p. 248:

> 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 situation 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 …

[16] For practical and policy reasons, the defence of necessity must be "strictly controlled and scrupulously limited" (*Perka*, *supra*, at p. 250). It is well established that the defence of necessity must be of limited application.

[17] A concise summary of the requirements of this defence can be found in *Latimer*, *supra*, 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.
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> To begin, there must be an urgent situation of "clear and imminent peril": *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616, at p. 678. In short, disaster must be imminent, or harm unavoidable and near. It is not enough that the peril is foreseeable or likely; it must be on the verge of transpiring and virtually certain to occur. In *Perka*, Dickson J. expressed the requirement of imminent peril at p. 251: "At a minimum the situation must be so emergent and the peril must be so pressing that normal human instincts cry out for action and make a counsel of patience unreasonable". The *Perka* case, at p. 251, also offers

> the rationale for this requirement of immediate peril: "The requirement…tests whether it was indeed unavoidable for the actor to act at all". Where the situation of peril clearly should have been foreseen and avoided, an accused person cannot reasonably claim any immediate peril.
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> The second requirement for necessity is that there must be no reasonable legal alternative to disobeying the law. *Perka* proposed these questions, at pp. 251-52: "Given that the accused had to act, could he nevertheless realistically have acted to avoid the peril or prevent the harm, without breaking the law? *Was there a legal way out?*" (emphasis in original). If there was a reasonable legal alternative to breaking the law, there is no necessity. It may be noted that the requirement involves a realistic appreciation of the alternatives open to a person; the accused need not be placed in the last resort imaginable, but he must have no reasonable legal alternative. If an alternative to breaking the law exists, the defence of necessity on this aspect fails.
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> The third requirement is that there be proportionality between the harm inflicted and the harm avoided. The harm inflicted must not be disproportionate to the harm the accused sought to avoid. See *Perka*, per Dickson J., at p. 252:
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> No rational criminal justice system, no matter how humane or liberal, could excuse the infliction of a greater harm to allow the actor to avert a lesser evil. In such circumstances we expect the individual to bear the harm and refrain from acting illegally. If he cannot control himself we will not excuse him.

[18] It is now clear that the test to be applied to the first two requirements of the defence of necessity is a modified objective test: *Latimer*, *supra*, at para. 32.

> Before applying the three requirements of the necessity defence to the facts of this case, we need to determine what test governs necessity. Is the standard objective or subjective? A subjective test would be met if the person believed he or she was in

> imminent peril with no reasonable legal alternative to committing the offence. Conversely, an objective test would not assess what the accused believed; it would consider whether in fact the person was in peril with no reasonable legal alternative. A modified objective test falls somewhere between the two. It involves an objective evaluation, but one that takes into account the situation and characteristics of the particular accused person. We conclude that, for two of the three requirements for the necessity defence, the test should be the modified objective test.
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> …
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> While an accused's perceptions 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. (emphasis in original)

[19] The Court in *Latimer*, *supra*, concludes that with respect to the third requirement, there be proportionality between the harm inflicted and the harm avoided, that this must be determined on a purely objective standard.

Onus of Proof

[20] Dickson J. in *Perka*, *supra*, at 257-258, sets the onus of proof on the accused and on the Crown. The Crown must disprove the defence of necessity as part of its normal burden of proving guilt beyond a reasonable doubt, but that obligation does not arise until the accused has overcome his or her preliminary

burden by adducing some evidence justifying consideration of the defence. The accused does not have to establish the defence of necessity either beyond a reasonable doubt or on the balance of probabilities. There must only be evidence potentially capable of establishing the defence. It is clear that the evidential onus on the accused is less than a balance of probabilities.

[21] The nature of the onus on the accused is examined in greater detail in *Latimer*, *supra*, at para. 35:

> The inquiry here is not whether the defence of necessity should in fact excuse Mr. Latimer's actions, but whether the jury should have been left to consider this defence. The correct test on that point is whether there is an air of reality to the defence.
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> …
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> The question is whether there is sufficient evidence that, if believed, would allow a reasonable jury – properly charged and acting judicially – to conclude that the defence applied and acquit the accused.
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> For the necessity defence, the trial judge must be satisfied that there is evidence sufficient to give an air of reality to each of the three requirements. If the trial judge concludes that there is no air of reality to any one of the three requirements, the defence of necessity should not be left to the jury. (emphasis in original)

Conclusion

[22] On the facts of this case, there is no air of reality to the first and second requirements of necessity.

[23] The first requirement that the peril be imminent has not been met in this case. This requirement is closely tied to the second, that Mr. Johnson had no reasonable legal alternative to breaking the law. As the peril was not imminent,

on the facts before the court, there were legal alternatives available to the accused.

[24] This situation is unlike that in *R. v. Hunziker*, [2000] Y.J. No. 40 (Yk. Terr. Ct.) where the peril or danger consisted of a wall collapsing which in turn could cause the collapse of the wall of an adjoining and possibly occupied building. In *Hunziker*, *supra*, the peril was imminent. A judgment was made to take action immediately. In the case at bar, the peril was not imminent. There was a danger that Mr. Johnson's house might freeze up, but by his actions on the day in question he had the better part of a day to find a way of locating some wood or purchasing some oil.

[25] Mr. Johnson could have borrowed more wood from his brother-in-law. Mr. Johnson's reasons for not doing so were not reasonable. They were premised on the underlying assumption that he was already planning to drive and get wood for himself.

[26] By his own admission, Mr. Johnson knows a lot of people in Burwash. His attempt to seek assistance from his friends in Burwash fell far short of what would be considered reasonable. Seeking assistance should reasonably have included contacting more people than he did and finding someone to drive his truck to the wood lot.

[27] The evidence that Mr. Johnson's mother's truck was not suitable for the purpose of transporting some wood, enough to get him past the difficult situation he was in, was not credible. I take judicial notice of the fact that Burwash is an isolated community surrounded by trees and that there are numerous places where small quantities of wood could be accessed using his mother's truck. Her truck could also have been used to borrow enough wood to keep the house from freezing up. Moreover, he made no attempt to borrow money from his mother or

his adult child to purchase a small quantity of diesel oil from the gas station down the road at Destruction Bay.

[28] To put it another way, Mr. Johnson has not demonstrated the existence of an emergency, one where the threatened harm is imminent. In the situation in which he found himself, there were a number of lawful options available to him which he did not take advantage of.

[29] There is another reason why Mr. Johnson is disentitled to the defence of necessity. In *Perka*, *supra*, at p. 403, Dickson J. states:

> 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.

[30] Mr. Johnson lives in Burwash Landing, Yukon Territory. It is winter. Over a period of weeks, prior to December 9, 2003, he saw his woodpile get smaller, and then disappear altogether. He made no effort to replenish his woodpile during this time period. He stated that he was relying on his oil furnace as "back up" but made no effort to check the amount of oil remaining. He stated that he was surprised that his oil ran out. I do not accept his evidence. I find that it is much more likely that he didn't care if his wood or oil ran out because he was prepared all along to drive his truck to the wood lot to replenish his wood when it was convenient for him to do so.

[31] I find Mr. Johnson guilty of the offence contrary to s. 259(4)(a) of the *Criminal Code*.

LILLES C.J.T.C