Citation: *R. v. Ferguson*, 2004 YKTC 8 Date: 20040209
Docket: 02-10138
Registry: Whitehorse

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

R e g i n a

v.

Vivienne Ferguson

Appearances:
K. Drolet and J. Phelps Counsel for Crown
M. Campbell Counsel for Defence

REASONS FOR JUDGMENT

Introduction

[1] Ms. Ferguson is charged with operating a motor vehicle, having consumed alcohol in such a quantity that the concentration in her blood exceeded 80 mg of alcohol in 100 ml of blood. Although admitting to the facts of the offence, she pled not guilty, raising the defence of duress during the trial.

Facts

[2] On February 26, 2003, Ms. Ferguson, her common-law spouse, Lawrence Walker, her brother and his girlfriend, and a friend, Grant McBrattney, had been drinking. Although there is a difference in recollection between Ms. Ferguson and Mr. Walker as to what they were doing earlier that day, I am satisfied that they had all been drinking at the Belvedere Hotel at Watson Lake and departed around 11:30 p.m. in a brown Econoline van driven by Mr. Walker.

[3] The police had observed the Walker vehicle in the parking lot at the Belvedere Hotel and several minutes later pulled up behind it when it stopped at the Alaska highway. The police observed the vehicle's parking lights turn on, and then observed the vehicle rock, consistent with a switch of drivers. The police pulled the vehicle over after it moved a short distance and observed Ms. Ferguson in the driver's seat. After making certain observations, she was arrested for impaired driving and, in due course, she provided breath samples with readings of 150 and 160 mg of alcohol in 100 ml of blood.

[4] There is no issue that Mr. Walker drove the vehicle from the Belvedere Hotel to the stop at the Alaska highway. Upon noticing the police car, Mr. Walker got Ms. Ferguson to switch with him. This caused the rocking of the van, which was noticed by the police, and resulted in their investigation. There is also no doubt that Mr. Walker had been drinking and that his ability to operate a motor vehicle was impaired by alcohol. Mr. Walker subsequently pled guilty to a charge contrary to s. 253 (a) of the *Criminal Code* for which he has already been sentenced.

[5] Ms. Ferguson's evidence was that when Mr. Walker noticed the police car behind his vehicle, he yelled at Grant McBrattney, who was sitting next to Mr. Walker in the passenger seat, to take the wheel. Mr. McBrattney declined, although he was apparently the only sober person in the van. He then yelled "Viv, get back here!", meaning behind the wheel. Mr. Walker was angry. Ms. Ferguson said she was frightened. She testified that their relationship was an abusive one and he had assaulted her several weeks earlier, resulting in three fractured ribs. They were still sore at the time of this incident. She did not go to the police about this assault but did see a doctor. She also said that she and Mr. Walker had been in counseling for a number of months prior to this incident.

[6] In response to her counsel's question, Ms. Ferguson stated that she got into the driver's seat because she was afraid that Mr. Walker would abuse her

when they got home. She believed he would be angry if she did not take the driver's seat because if he received another impaired driving conviction, he would lose his driver's license and go to jail.

[7] After Ms. Ferguson gave her evidence, the trial was adjourned for several months. She agreed to bring to court the medical report dealing with her injuries resulting from the assault by Mr. Walker. She did not bring the report because it would not substantiate the assault. Her doctor had told her that the injury was an old one, related to an earlier car accident. She also said that she did not bring the records because she did not want Mr. Walker charged with assault, as that would make matters between them worse. She also testified that her brother and his girlfriend, Venus, were present at the assault. They were not called as witnesses.

[8] Mr. Walker and Ms. Ferguson have been living together for eight years. Her evidence on cross-examination was that the assault she described was the only time he had assaulted her. She also testified that she had two years of post secondary education towards a degree in social work and that she was currently working for certification as an addictions counselor. Ms. Ferguson acknowledged that she did not want the impaired conviction on her record because it would make it difficult for her to continue or to qualify as an addictions counselor.

[9] The following exchange occurred between Crown counsel and Ms. Ferguson (page 17, November 7, 2003 transcript):

> Q: It would make it very difficult for you to continue in your field if you had an impaired driving record?
>
> A: Yes.
>
> Q: Isn't it true that the only reason you took the steering wheel that night was because you didn't want Lawrence Walker to get into trouble?
>
> A: Yes.

Ms. Ferguson later clarified her answer by saying that was not the only reason.

Q: That's the main reason?

A: It is part of the reason. The other part is that I felt I had no choice and…

Q: You felt like you have no choice because he was going to jail if you didn't?

A: Yes.

The Court: Sorry. Why would his going to jail make such a big difference to you? If he's in jail he can't beat you up.

A: Yes, that's true. But I do still care for him and he is my partner. And I didn't want us to be separated like that.

[10] Mr. Walker was called as a rebuttal witness by the Crown. Mr. Walker acknowledged that he had pled guilty to impaired driving and obstruction of justice with respect to the incident before the court and that he was currently serving an intermittent sentence of imprisonment. His version of the events was as follows:

A: We were being pulled over. We decided we were going to switch, and it was a last-minute thing. I asked "who is going to switch with me", and Vivienne got up, said "Move, move, move." So there was another guy in the vehicle – he's deceased right now – that was sober and was going to do it but he …

Q: He didn't want to switch at that point in time?

A: He didn't want to switch at that point in time. And I sort of grabbed him and shook him a little bit and then Vivienne jumped behind the wheel. And the officer came to the door, took Vivienne to the vehicle, to the RCMP vehicle, and came back, called me out of the vehicle, asked me who was driving, and I said , "Well, I was". He said, "Well, we can't take both of you now, but she was already behind the wheel,

> so we’re just going to take her. Get your stuff out of the van, you guys get a cab or whatever, and go home.”

[11] On cross-examination, Mr. Walker agreed that he actually grabbed Mr. McBrattney, the person in the front passenger seat, and shook him. Grant McBrattney would not agree to drive. Mr. Walker then yelled at Ms. Ferguson, and pulled her into the driver’s seat. When confronted with the apparent contradiction between his two versions of the event, he stated (at page 43):

> A: I don't recall grabbing Vivienne. Like I said, it was a tense - tense moment. I may have grabbed her and threw her in there. I know I did grab Grant McBrattney, and he said “no, no, no," and I don't know whether I grabbed Vivienne or if it was “Move” or like--it was quite some time ago, also.

[12] Mr. Walker testified that when Ms. Ferguson was arrested and taken to the detachment, he and others in the vehicle went to his home. There were discussions about how to get Ms. Ferguson out of her charge of impaired driving (page 29):

> Q: What did you understand the story to be?
>
> A: Well, that I told her that she had to drive because she’s scared of me and like “get behind the wheel” type thing, and figured that that would maybe save her in court. I did not want her to have a criminal record, because of her social work history and addictions counseling and stuff like that, and she’s trying to get back into it. So it’s just a fabricated story that we tried to -- tried to get her off and ended up getting us both in more trouble than what we started with.
>
> Q: What part of the story was fabricated?
>
> A: The part where I was threatening or telling her that she had to drive, she had to switch with me.

The Law

[13] Section 17 of the *Criminal Code* was revised by the Supreme Court of Canada in *R. v. Ruzic*, [2001] 1 S.C.R. 687, by striking down the requirements that the threat be immediate and from a person who is present when the offence is committed. Section 17, as revised, should now be read as follows:

> A person who commits an offence under compulsion by threats of death or bodily harm from a person is excused from committing the offence if the person believes that the threats will be carried out and if the person is not a party to a conspiracy or association whereby the person is subject to compulsion, but this section does not apply where the offence that is committed is [a list of excluded offences follows but drinking and driving offences are not listed].

[14] Section 17 clearly prescribes a purely subjective belief by the accused that the threat will be carried out. The reasonableness of the belief is relevant to show whether the accused's belief was genuinely held. The Supreme Court in *Ruzic, supra,* noted that section 17 of the *Criminal Code* is entirely subjective and does not require that the accused's belief be reasonable.

[15] Assuming an accused has raised the defence of duress, the burden shifts to the Crown to disprove it beyond a reasonable doubt. As stated by the Supreme Court of Canada in *Ruzic, supra,* at page 100 :

> There was no misdirection either on the burden of proof. The accused must certainly raise the defence and introduce some evidence about it. Once this is done, the burden of proof shifts to the Crown under the general rule of criminal evidence. It must be shown, beyond a reasonable doubt that the accused did not act under duress. Similarly, in the case of the defence of necessity, the court refused to shift the burden of proof to the accused …, although the defence must have an air of reality, in order to be sent to the jury, as the court held in *Latimer*….

[16] This passage indicates that once a defence of duress has been raised with sufficient evidence to possess an air of reality, the Crown must then

disprove at least one of the elements of the defence beyond a reasonable doubt. The Supreme Court of Canada entered into a lengthy review of the authorities on this topic in the *R. v. Cinous,* [2002] 2 S.C.R. 3, pp. 28 to 52. A concise conclusion of this discussion is found at paragraph 82 :

> We conclude that the authorities after Pappajohn continue to support a two-pronged question for determining whether there is an evidential foundation warranting the defence be put to a jury. The question remains whether there is (1) evidence (2) upon which a properly instructed jury acting reasonably could acquit if it believed the evidence to be true. The second part of this question can be rendered by asking whether the evidence put forth is reasonably capable of supporting the inferences required to acquit the accused. This is the current state of the law, uniformly applicable to all defences.

[17] With respect to jury trials, the Court states at paragraph 87:

> The trial judge must review the evidence and determine whether, if believed, it could permit a properly instructed jury acting reasonably to acquit. It follows that the trial judge cannot consider issues of credibility. Further, the trial judge must not weigh evidence, make findings of fact or draw determinate factual inferences.

It is reasonable to apply the same standard to a judge sitting alone in determining whether a defence validly possesses an air of reality.

[18] The availability of a reasonable opportunity to escape removes the defence of duress. Where such an opportunity exists, the accused can no longer contend that she lacked a realistic choice in committing the offence charged. This point was discussed in *R. v. Hibbert*, [1995] 2 S.C.R. 973, (quoting from the head note):

> An accused person cannot rely on the common law defence of duress if he had an opportunity to extricate himself safely from the situation of duress. The rationale for the “safe avenue of escape rule" is simply that, in such circumstances, the condition of

> "normative involuntariness" that provides the theoretical basis for the defences of both duress and necessity is absent. Indeed, if the accused had the chance to take action that would have allowed him to avoid committing an offence, it cannot be said that he had no real choice when deciding whether or not to break the law. Furthermore, the internal logic of the excuse-based defence, which has theoretical underpinnings directly analogous to those that support the defence of necessity, suggests that the question of whether or not a safe avenue of escape existed is to be determined according to an objective standard. When considering the perceptions of a "reasonable person", however, the personal circumstances of the accused are relevant and important, and should be taken into account.

Conclusion

[19] In order to reverse the burden of proof to the Crown to show that the accused did not act under duress, it is incumbent on the accused to introduce some evidence on all the elements of the defence. The sufficiency of that evidence need only meet the "air of reality" test. Without weighing the evidence or making findings of credibility, that test is met when the evidence put forth is reasonably capable of supporting the elements of the defence of duress. Ms. Ferguson's evidence can be summarized as follows:

- She had been assaulted by Mr. Walker several weeks earlier.
- Under cross-examination, Ms. Ferguson changed her earlier story and testified that she had only been assaulted once by Mr. Walker in their eight-year relationship.
- Mr. Walker yelled at Ms. Ferguson to take the driver's seat when he saw the police and he grabbed her shoulder and pushed her forward in that direction.
- Mr. Walker did not verbally threaten Ms. Ferguson in the vehicle.
- The threat, if there was one, was implicit.
- One of the reasons she took the driver seat was that she was afraid of Mr. Walker and that he might assault her when they got home.

[20] I am not satisfied that this evidence meets the threshold “air of reality” test. In particular, I note that the police were in close proximity and that Ms. Ferguson could have removed herself from the vehicle instead of driving it forward. Ms. Ferguson could easily have taken the driver’s seat, opened the door and approached the police car behind the van and asked for assistance. Ms. Ferguson’s fear related to what Mr. Walker would do to her when she got home. She was not fearful of Mr. Walker while she was in the vehicle. I note that others, including her brother, were in the vehicle with her.

[21] It is also evident that Ms. Ferguson’s fear of Mr. Walker was only one of several reasons that she offered to explain taking the driver’s seat and driving the van. Those reasons included not wanting Mr. Walker to get into trouble, not wanting him to go to jail, not wanting him to lose his job and that she continues to care for him, her partner.

[22] There was no explicit threat by Mr. Walker to harm Ms. Ferguson while in the van. Based on what she described as her abusive relationship, she said that she believed unless she complied when Mr. Walker shouted at her, he would assault and harm her when they got home. On the facts as presented, I am unable to infer that this belief was genuinely held. Notwithstanding her earlier statement in examination-in-chief, she unequivocally stated on cross-examination that Mr. Walker only assaulted her once during their eight-year relationship. Her subjective belief, based as it was on one previous assault, lacks a factual foundation.

[23] I also note that Ms. Ferguson was impaired at the time of the incident. One could reasonably infer that her judgment was affected by her alcohol consumption. It is trite to note that in these circumstances, particularly where the charge Ms. Ferguson is facing is one of drinking and driving, it would be contrary

to public policy to allow a belief resulting from or significantly affected by self-induced intoxication to operate as a defence.

[24] In any event, based on all the evidence, the Crown has satisfied me beyond a reasonable doubt that Ms. Ferguson did not act under duress as defined by law for the following reasons:

- Ms. Ferguson was not a credible witness, as key aspects of her story changed under cross-examination.
- I am satisfied the main reason Ms. Ferguson occupied the driver's seat was that she knew Mr. Walker had a number of previous drinking and driving convictions and if he was convicted again he would probably go to jail and lose his job.
- The evidence does not support the defence theory that Ms. Ferguson was an abused spouse. Her belief that she would be abused when they returned home if she did not comply with Mr. Walker's request was not genuinely held. Ms. Ferguson acknowledged that she had only been assaulted once in eight years. She did not report the assault to the police. She declined to bring her medical records regarding her attendance for treatment for the alleged assault to court, as her counsel asked her to do. Ms. Ferguson then acknowledged that the medical report would indicate that her sore ribs were caused by an earlier car accident. She said her brother was present during the assault but she did not call him as a witness. Moreover, Mr. Walker denied the assault.
- Mr. Walker stated that the duress defence was made up in an attempt to get Ms. Ferguson off on her charge of drinking and driving. When he gave this evidence, Mr. Walker was living with Ms. Ferguson. The defence was fabricated because they both believed that a conviction would prevent her from qualifying or practicing as an addictions counselor.

- Ms. Ferguson had a safe avenue of escape as the police were immediately behind the vehicle when Mr. Walker yelled at her to switch seats with him. She could have easily occupied the driver's seat, exited the driver's door and asked the police for help.

[25] In conclusion, I find that the defendant has not met the evidentiary threshold that would require the Crown to disprove duress beyond a reasonable doubt. In any event, the Crown has satisfied me beyond a reasonable doubt that the legal defence of duress has not been made out. I find Ms. Ferguson guilty of the charge contrary to s. 253 (b) of the *Criminal Code*.

[26] I would add that my decision in this case is not intended to suggest that an abused spouse could not successfully raise the defence of duress. My reasons for rejecting the defence of duress in this case are based entirely on insufficiency of evidence.

LILLES C.J.T.C.