Citation: *R.* v. *Leatherbarrow*, 2010 YKTC 88

Date: 20100811
Docket: 09-11007
09-11016
Registry: Dawson City

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

REGINA

v.

ALFRED JAMES LEATHERBARROW

Appearances:
Noel Sinclair — Counsel for the Crown
André Roothman — Counsel for the Defence

REASONS FOR JUDGMENT

[1] LILLES T.C.J. (Oral): Mr. Leatherbarrow is a 64-year-old man who has been charged with operating a motor vehicle while disqualified pursuant to s. 259(1) of the *Criminal Code*, and that is an offence contrary to s. 259(4)(a) of the *Code*. The incidents resulting in these charges occurred on June 4th and June 27, 2009. This Court was assisted by a statement of agreed facts.

[2] Mr. Leatherbarrow was, on the dates in question, subject to a five-year driving prohibition dated November 3, 2004. Thus, in June 2009, he had approximately six months left on the driving prohibition. On June 4th at 10:55 a.m., a police constable observed Mr. Leatherbarrow driving a quad, an ATV, along the dyke in Dawson City.

He recognized Mr. Leatherbarrow and knew he was disqualified from driving. Mr. Leatherbarrow was arrested and then released on process.

[3] On June 27, 2009, some three weeks later, at 7:07 p.m. in the evening, a police constable observed Mr. Leatherbarrow again driving an ATV, a three-wheeler, on the shoulder of the highway near the parking lot at the Bonanza Gold Motel. Again, he was arrested for driving while disqualified. He admitted to consuming two beer and was required to give a roadside breath sample for analysis. He registered a warning. His vehicle was impounded. He was released on an appearance notice and given a ride home.

[4] Mr. Leatherbarrow has raised a defence of necessity. That necessity is based on his personal circumstances, the physical limitations imposed on his health, and his living situation in Dawson. According to Mr. Leatherbarrow, he resorted to driving into town with his ATV's on both June 4th and June 27th because he had run out of food. He resorted to driving into town because he needed to get groceries. He testified that he lives alone, 1.5 miles out on the old Bonanza Road. He has lived there for 31 years. Throughout that period of time he has worked in the mining industry. As a result, he has a number of work-related injuries. He has a bad back, a deteriorating hip, and he cannot walk long distances. He could walk into town with difficulty but he would be in such discomfort and pain that he would not be able to walk back, at least not without resting for several hours. Mr. Leatherbarrow has not sought medical assistance, does not like doctors and he does not like to take painkillers. Running out of food has a special meaning for Mr. Leatherbarrow. As a child he suffered from malnutrition, apparently severe enough to affect his bone development. He stated that his fingers

are deformed as a result.

[5] As indicated above, Mr. Leatherbarrow has been on a driving prohibition for over four years, while living at the same residence. How has he gotten along in the past? He stated that he has a couple of friends who live near him and often drop by. They often pick up groceries for him, but in the summer they are not always available. He stated that he had waited for his friends for two days, and that while he may have had some small food items, like crackers, in the house, he had no real food. He was forced to go into town.

[6] He said it was not realistic for him to call people. He did not have a telephone. It would be too expensive for him to put one in as it would cost $5,000 for the five poles necessary for the telephone installation. He was not sure his neighbours had a telephone. In any event, he did not get along with his nearest neighbour. Mr. Leatherbarrow acknowledged that there was a taxi service in town but he did not have a telephone to call them.

[7] He said he could not afford to move his residence or to rent accommodation in town, although one winter he lived and worked at the Westminster Hotel. He acknowledged that he was aware that the prohibition order would require him to change his lifestyle but, as he stated, “Punishment should not make life impossible.”

The Law

[8] The law in relating to necessity is summarized in two decisions of this Court, *R.* v. *Keith Johnson*, [2004] YKTC 101, and *R*. v. *Hunziker*, [2000] Y.J. No. 40.

[9] 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. The nature of the defence was set out by Dickson J. in *Perka*, *supra*, at 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 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….

For practical and policy reasons, the defence of necessity must be "strictly controlled and scrupulously limited." It is well established that the defence of necessity must be of limited application.

[10] A concise summary of the requirements of this defence can be found in *Latimer*, *supra*, at paras. 28-31:

> 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 [with then], there must be an urgent situation of "clear and imminent peril": …. 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.

I want to repeat that sentence: "Where the situation of peril clearly should have been foreseen and avoided, an accused person cannot reasonably claim any immediate peril."

> 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 [page20] 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?" ... 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.

[11] 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.

Later in *Latimer*, the Court states:

> 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.

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

[12] I also need to address the onus of proof in cases involving the defence of necessity. In R. v. Hunziker [2000] Y.J. No. 40 in para. 42 I set out the onus of proof

on the accused and on the Crown as follows:

> … 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.

[13] In the two Yukon cases previously mentioned, the Court held that the accused need only raise an air of reality with respect to the defence of necessity and having done so, that would trigger the requirement of the Crown to disprove the defence.

Conclusion

[14] On the facts of this case, I find that there is no air of reality to the first and second requirements of necessity or, if there were, that the Crown has disproved the defence. The first requirement, that the peril must be imminent, has not been met in this case, nor has the second, that Mr. Leatherbarrow had no reasonable legal alternative to breaking the law. As stated by Dickson J. in *Perka*, *supra,* at page 403:

> 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.

[15] I find that Mr. Leatherbarrow acted unreasonably by placing his entire reliance for obtaining food on two friends who dropped by occasionally, but unreliably and unpredictably. His situation, that of running out of food, was entirely foreseeable, as was the unpredictability of the visits by his friends. There were also alternatives available to Mr. Leatherbarrow. The most obvious one is that he could have made arrangements with the taxi company in advance to pick him up at a particular day and time, weekly, biweekly, and take him to town to shop for groceries. Or he could have paid someone to regularly bring him groceries according to a list provided by him. These alternatives are simple and straightforward.

[16] The nature of the five-year prohibition order is that Mr. Leatherbarrow was not faced with an emergency or imminent threat. He had ample time, and, in this particular case, four and a half years, to make arrangements for his transport or for the transport of his groceries. Nor do I, on the facts, rule out the reasonableness of investing $5,000 to install a telephone. This would have been a five-year investment for him. I did not hear any evidence of his income or his assets that would rule that out as a reasonable alternative.

[17] In the circumstances indicated, I find that the defence of necessity fails and that, in the result, a conviction should be entered.

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LILLES T.C.J.