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Date and Time: March 11, 2020 11:28:00 PM PDT
Job Number: 112329968

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1. *R. v. Milne, [2020] B.C.J. No. 304*

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R. v. Milne, [2020] B.C.J. No. 304

British Columbia Judgments

British Columbia Provincial Court

(Traffic Division)

Colwood, British Columbia

H.W. Gordon Prov. Ct. J.

Heard: September 4, 2019.

Judgment: February 27, 2020.

File No.: AJ11529750-1

Registry: Western Communities

[2020] B.C.J. No. 304 | 2020 BCPC 28

Between Regina, and Gabriel Raoul Nicol ***Milne***

(54 paras.)

Counsel

Appearing for the Crown: Cst. L.T. Narraway.

Counsel for the Defendant: T.B. ***Doust***.

REASONS FOR JUDGMENT

H.W. GORDON PROV. CT. J.

Introduction

1 Mr. ***Milne*** is charged with speeding on March 26, 2019 on the Malahat portion of the Trans-Canada Highway in Langford, contrary to s. 146(3) of the *Motor Vehicle Act*.

2 He does not contest that he was speeding but raises the defence of necessity.

Prologue

3 The event took place on a short stretch of the Malahat that descends southbound toward Greater Victoria.

4 That short stretch of the highway has contributed under s. 140, 146 and 148 of the *Motor Vehicle Act* considerable revenue to the provincial and ultimately municipal coffers.

5 The Malahat has sadly been the scene of numerous serious or deadly accidents, often attributable to speed. Over time, various portions of the Malahat have been reconstructed to reduce the risk.

6 Until recent construction widened southbound travel to two lanes from the South Shawnigan Lake turnoff some distance north of this location, this short two lane passing section of approximately two kilometres in length was the only portion of the southbound portion of the Malahat from South Shawnigan Lake Road to Westshore Parkway that was two lanes before narrowing again to a single lane as the Malahat continued to wind downhill to Westshore Parkway.

7 In other words, for those who did not want to be caught behind 'slow' vehicles, this short stretch was the only opportunity for drivers to get ahead of such vehicles before reaching Westshore Parkway. Since reconstruction, it is the last opportunity.

8 Despite the widened highway until the pinch point at the bottom of this stretch, in December alone on this short downhill portion, there were 19 excessive speed tickets issued on one day and on another day that month, 63 speeding tickets were issued, including 10 for excessive speeding.

9 The harm from speeding on the Malahat, and in particular on this portion of the Malahat where two downhill lanes of traffic merge into one lane near the bottom of that hill, is greater than might be found on other highways.

10 But as I say, Mr. ***Milne*** does not contest that he was speeding. He submits he was doing so out of necessity.

The Evidence

11 The evidence of Cst. Narraway, a RCMP officer seconded to the Capital Regional District Integrated Road Safety Unit, is that on the afternoon of March 26, 2019 he was

positioned in a pull-out at the bottom of the hill on the Malahat portion of the Trans-Canada Highway opposite Wellswood Road, in the area referred to above, monitoring southbound traffic.

12 He has been a police officer since 2004 and assigned to traffic duties since 2009. He had with him a Laser Ally lidar unit. He had training on the operation of a lidar, which included estimating the speed of vehicles, with an error range of +/- 5 to 10 km/h.

13 He had tested this lidar at the beginning of his shift that day and did so at the end of his shift, a time after issuing Mr. ***Milne*** this ticket. The testing on both occasions showed the lidar to be working according to the manufacturer's specifications.

14 The day was dry and clear.

15 The speed limit along this portion of highway is posted at 80 km/h.

16 At the time of 1449, he observed a southbound vehicle descending the hill in the centre lane at a speed of what he estimated to be 100 km/h. This vehicle then transitioned to the right or curb lane. He aimed his lidar at the vehicle and it gave him a reading of 105 km/h and then 103 km/h at 666.0 m from where he was standing. On cross-examination, Cst. Narraway could not recall whether the speed reading was taken in the centre lane or the outside lane after the vehicle transitioned.

17 He kept continuity of observation of this vehicle and as a result of these observations of speed, as the vehicle approached him more closely, he waved the vehicle to the side of the road, advised the driver of why he had stopped him, asked him for his driver's licence and from the driver's BC picture driver's licence, conducted the usual steps of identity, that being Mr. ***Milne***. He issued Mr. ***Milne*** this Violation Ticket.

18 At the end of the evidence in chief of Cst. Narraway, Mr. ***Milne*** made a no evidence motion. He argued that the officer had not sufficiently identified Mr. ***Milne*** as the driver.

19 He submitted that he did not identify the driver in court and using the picture on his BC driver's licence was insufficient.

20 I dismissed the motion. The officer also gave evidence the he asked the driver his name, his date of birth and his address and as the driver's response matched the information on the licence, he was satisfied the driver was Mr. ***Milne***.

21 In my view, that is sufficient, in the absence of evidence to the contrary, to establish identity.

22 Although unnecessary, I pass the comment that a traffic officer will generally be unable to identify a driver in court. Traffic officers issue hundreds or thousands of tickets and unless there is something particularly memorable about a traffic stop, the officer will not recall a face many months later in court. This is why they perform the test of identity used by Cst. Narraway above.

23 Mr. ***Milne*** testified that he had been travelling in the right lane behind a smaller tourist bus. This bus started to slow down aggressively.

24 Not wanting to remain behind this slow tourist bus as he was approaching a long stretch of single lane highway, he pulled out to pass the bus.

25 He said that as he did so, he noticed a large transport truck also move from the right lane directly behind him at the same time and was so close that given its size and speed he feared it would rear end him.

26 He said he feared for his safety so he accelerated, passing the tourist bus and then pulled back in front of the bus and slowed to the regulated speed. He felt he did not have any other option than to increase his speed to pass.

27 Several hundred metres past the point where the two lanes merged to one, at the bottom of the hill, was Cst. Narraway who signalled him to the side, and issued the speeding ticket.

28 Mr. ***Milne*** said that he made the point of why he sped to Cst. Narraway at the roadside when he was stopped by the officer. Cst. Narraway could not recall this and did not make a note of it but no doubt if the comment had been made, the officer would consider it to be just another of the many excuses officers hear at roadside in response to a traffic offence allegation.

29 On cross-examination, Mr. ***Milne*** could not pinpoint where on the highway this incident took place other that it was after a bend and on the straight portion heading down the hill.

30 Mr. ***Milne*** also could not recall where the transport truck was after he passed the tourist bus or how long it may have been behind him prior to initiating the pass.

Analysis

31 As I said above, Mr. ***Milne*** admits that as he passed the tourist bus, his vehicle was

travelling at a speed greater than the posted speed limit of 80 km/h. He does not dispute the alleged speed recorded on the lidar used by Cst. Narraway.

32 Mr. ***Milne*** raises the defence of necessity to the offence of speeding.

33 In fairness to his counsel, Mr. ***Doust***, as I understand it, he took on the task of representing Mr. ***Milne*** just before the trial. He was in the courtroom representing another client and agreed to assist Mr. ***Milne*** when his other client's matter was completed. So he did not come prepared with authority to support a defence of necessity.

34 I am left with doing my own research on the issue.

35 At the start, my gut told me that whatever was the defence of necessity, it would not apply to a speeding offence, especially in a situation of speeding up for fear of being rear-ended.

36 Such an excuse is not that uncommon in traffic court and such a defence might open the "flood gates".

37 A review of the law tempered my gut reaction.

38 The leading case in Canada is *R. v. Perka* *[1984] 2 S.C.R. 232*, a decision delivered by Dickson, J. as he then was.

39 That decision was elaborated on in *R. v. Latimer* *[2001] 1 S.C.R. 3*.

40 I keep in mind that both cases, particularly the latter, involved significant criminal offences, of far greater significance than a speeding charge.

41 But from them come principles that apply in any criminal or quasi-criminal charge and inform me in my consideration.

42 The analysis in both of these decisions are far too lengthy to recite them here, so I have chosen to reproduce only what I consider informs me in my analysis.

43 I'll begin with *Perka, supra*. Beginning at page 248 of the judgment, Justice Dickson for the majority says:

> Conceptualized as an "excuse", however, the residual defence of necessity is, in my view, much less open to criticism. 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, when one does a wrongful act under pressure which, in the words of Aristotle in the *Nicomachean Ethics, supra*, at p. 49, "overstrains human nature and which no one could withstand".

At page 250 after citing an academic discussion:

I agree with this formulation of the rationale for excuses in the criminal law. In my view this rationale extends beyond specific codified excuses and embraces the residual excuse known as the defence of necessity. At the heart of this defence is the perceived injustice of punishing violations of the law in circumstances in which the person had no other viable or reasonable choice available; the act was wrong but it is excused because it was realistically unavoidable.

Relating necessity to the principle that the law ought not to punish involuntary acts leads to a conceptualization of the defence that integrates it into the normal rules for criminal liability rather than constituting it as a *sui generis* exception and threatening to engulf large portions of the criminal law. Such a conceptualization accords with our traditional legal, moral and philosophic views as to what sorts of acts and what sorts of actors ought to be punished. In this formulation it is a defence which I do not hesitate to acknowledge and would not hesitate to apply to relevant facts capable of satisfying its necessary prerequisites.

c) Limitations on the Defence

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.

At page 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 requirement that compliance with the law be "demonstrably impossible" takes this assessment one step further. 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?

And finally at page 252:

> If there is a reasonable legal alternative to disobeying the law, then the decision to disobey becomes a voluntary one, impelled by some consideration beyond the dictates of "necessity" and human instincts.
>
> The importance of this requirement that there be no reasonable legal alternative cannot be overstressed.

44 Having set out the principles, Justice Dickson discusses the onus of proof, beginning at page 257:

> Although necessity is spoken of as a defence, in the sense that it is raised by the accused, the Crown always bears the burden of proving a voluntary act. The prosecution must prove every element of the crime charged. One such element is the voluntariness of the act. Normally, voluntariness can be presumed, but if the accused places before the Court, through his own witnesses or through cross-examination of Crown witnesses, evidence sufficient to raise an issue that the situation created by external forces was so emergent that failure to act could endanger life or health and upon any reasonable view of the facts, compliance with the law was impossible, then the Crown must be prepared to meet that issue. There is no onus of proof on the accused.
>
> [Emphasis added.]

45 The Supreme Court of Canada subsequently visited and summarized this issue in *R. v. Latimer* *[2001] 1 S.C.R. 3* [*2001 SCC 1*], a decision of the Court.

46 The Court in *Latimer* said, beginning at para. 26 under the heading of *The Availability for the Defence of Necessity*:

> 26 We propose to set out the requirements for the defence of necessity first, before applying them to the facts of this appeal. The leading case on the defence of necessity is *Perka v. The Queen*, *1984 CanLII 23* (SCC), *[1984] 2 S.C.R. 232*. Dickson J., later C.J., outlined the rationale for the defence 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 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 . . . .
>
> 27 Dickson J. insisted that the defence of necessity be restricted to those rare cases in which true "involuntariness" is present. The defence, he held, must be "strictly controlled and scrupulously limited" (p. 250). It is well established that the defence of necessity must be of limited application. Were the criteria for the defence

loosened or approached purely subjectively, some fear, as did Edmund Davies L.J., that necessity would "very easily become simply a mask for anarchy": *Southwark London Borough Council v. Williams*, [1971] Ch. 734 (C.A.), at p. 746.

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.

31 Evaluating proportionality can be difficult. It may be easy to conclude that there is no proportionality in some cases, like the example given in *Perka* of the person who blows up a city to avoid breaking a finger. Where proportionality can quickly be dismissed, it makes sense for a trial judge to do so and rule out the defence of necessity before considering the other requirements for necessity. But most situations fall into a grey area that requires a difficult balancing of harms.

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.

33 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 would 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. The approach taken in *R. v. Hibbert*, *1995 CanLII 110* (SCC), *[1995] 2 S.C.R. 973*, is instructive. Speaking for the Court, Lamer C.J. held, at para. 59, that

> it is appropriate to employ an objective standard that takes into account the particular circumstances of the accused, including his or her ability to perceive the existence of alternative courses of action.

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.

47 I find Mr. ***Milne*** to be a credible witness. He candidly admitted he was speeding at the speed determined by Cst. Narraway, he stated to the officer at roadside why he was speeding and he has been consistent in doing so. Admittedly, Cst. Narraway may not have recognized the significance of the statement, for the reasons given above.

48 I find that once Mr. ***Milne*** had made the decision to move to the left lane and pass the tourist bus, he committed himself to do so and it is evident to me from his testimony that it was then and only then that he realized the transport truck had done the same thing (likely moments before he did) and was bearing down on him at a very close distance.

49 I also find that at that moment he honestly believed, on reasonable grounds, that he faced a situation of imminent peril that left no reasonable legal alternative open.

50 Further, I find that he increased his speed only until he was safely past the tourist bus and he then pulled back to the right lane out of harm's way and slowed to the posted speed. The harm of speeding was proportional to the harm of an imminent accident.

51 As stated at the end of the quotes of Justice Dickson reproduced in para.44 above, Mr. ***Milne*** has raised the issue in evidence and the Crown has the onus to prove the elements of necessity were not present. It must prove that the action taken by Mr. ***Milne*** in the moment was voluntary in the legal sense. The Crown has not done so, and in saying this, I recognize the difficulty this onus places on the Crown.

52 In any event, I am satisfied on the evidence the elements of necessity have been proved.

53 The fact that speeding is an absolute liability offence does not deprive Mr. ***Milne*** of the residual defence of necessity. See Justice Dickson's discussion at page 248 of *Perka*, cited above in para. 43 above.

Decision

54 For these reasons, I acquit Mr. ***Milne***.

H.W. GORDON PROV. CT. J.

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