

Date: 20150928  
Docket: 15/51  
Citation: *R. v. Gardner*, 2015 NLCA 44

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
COURT OF APPEAL**

**BETWEEN:**

KEVIN GARDNER

APPELLANT

**AND:**

HER MAJESTY THE QUEEN

RESPONDENT

Coram: Rowe, Barry and Harrington JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador  
Trial Division (G) 201404G0230

Appeal Heard: September 15, 2015

Judgment Rendered: September 28, 2015

Reasons for Judgment by Barry J.A.

Concurred in by Rowe and Harrington JJ.A.

Counsel for the Appellant: Self Represented

Counsel for the Respondent: Iain R. W. Hollett

**Barry J.A.:**

[1] Mr. Gardner relies on the excuse of necessity in arguing his convictions for impaired driving and driving with a blood-alcohol concentration in excess of 80 mg per 100 ml should be reversed.

**BACKGROUND FACTS**

[2] On July 1, 2014, police arrested Mr. Gardner after responding to a complaint from Susan Webb, who alleged he had assaulted her and had left her house after drinking.

[3] The responding police officer found Mr. Gardner slowly driving on a road. When stopped he exhibited clear signs of impairment and two samples of his breath gave recordings of 210 mg and 200 mg alcohol per 100 ml of blood.

[4] Mr. Gardner admitted to impairment in a cautioned statement and in trial testimony. He did not challenge the breathalyzer readings but claims he has the excuse of necessity for driving while impaired in that he feared for his life and the safety of his vehicle after being ejected from the home of Susan Webb and Tommy Dollard by Mr. Dollard.

[5] Mr. Gardner said Mr. Dollard had dragged him from the house on his back and left him lying outside.

[6] When police asked Mr. Gardner why he did not just knock on someone's door for help instead of driving his car, he responded that he wanted to go to the home of someone he knew. When asked why he did not approach the police who were nearby, he said he did not want to go to the police as he had "gotten himself out of the situation" by then. However, he said he still wanted to protect his car from damage.

[7] The trial judge concluded the excuse of necessity was not made out as Mr. Gardner's life was not in imminent peril and, even if it was, Mr. Gardner had legal alternatives available in that he could have sought shelter in nearby vehicles or houses. The trial judge also noted that Mr. Gardner had inflicted more harm by driving in an intoxicated state than the harm he claims to have been seeking to avoid. The trial judge convicted Mr. Gardner and imposed a fine of \$1,500.00 and a 14-month prohibition from driving.

[8] A Summary Conviction Appeal Court justice agreed with the trial judge and dismissed Mr. Gardner's appeal. Mr. Gardner seeks leave to appeal and, if successful, asks that the convictions be set aside.

## LEAVE TO APPEAL

[9] On the hearing, the issues of leave and the availability of the excuse of necessity were heard together.

[10] In *R. v. Mahoney*, 2011 NLCA 71, Welsh J.A. discussed the right of appeal from a summary conviction appeal court:

[5] Mr. Mahoney appealed his conviction to the summary conviction appeal court. Appeals are governed by the relevant provisions of the *Criminal Code (Provincial Offences Act*, SNL 1995, c. P-31.1, section 6). Section 839 of the *Criminal Code* applies to appeals to this Court. That section requires two conditions to be satisfied: first, leave of the Court must be obtained; and, second, the appeal is restricted to "any ground that involves a question of law alone". In determining whether leave to appeal should be granted, the test to be applied is set out in *R. v. Newfoundland Recycling Ltd.*, 2009 NLCA 28, 284 Nfld. & P.E.I.R. 153:

[9] Thus, to obtain leave to appeal pursuant to s. 839(1):

(a) the appeal must "be taken on a ground that involves a question of law alone", and

(b) the ground(s) of appeal must be such that:

(i) either the ground of appeal has a "reasonable possibility of success", or

(ii) "the proposed question of law [has significance] to the administration of justice".

[11] For the following reasons, I believe leave to appeal must be refused in the present case as the ground of appeal raised by Mr. Gardner has no reasonable possibility of success and the proposed question of law is well settled, contrary to Mr. Gardner's submissions, and has no significance to the administration of justice.

[12] Mr. Gardner appears to believe he has been unsuccessful so far on appeal because the judges have not believed him. That is not correct. Both judges below have accepted the facts set out in his statement and testimony. They correctly pointed out to him, however, that the law does not permit the excuse of necessity to be applied in the circumstances described by Mr. Gardner.

[13] The Supreme Court of Canada has established that three elements must be present for the excuse (also referred to as the defence) of necessity to succeed. First, the accused must be in imminent peril. Second, the accused must have no reasonable legal alternative to the course of action taken. Third, there must be proportionality between the harm inflicted and the harm avoided. See, *R. v. Perka*, [1984] 2 S.C.R. 232, at 251-252, and *R. v. Latimer*, 2001 SCC 1, [2001] 1 S.C.R. 3, at para. 28.

[14] In the present case Mr. Gardner was in no imminent peril after Mr. Dollard had returned to his home. If Mr. Gardner believed his life was still at risk, as he stated, that belief was an unreasonable one. As stated in *Latimer*, at para. 29:

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.

Mr. Gardner, by his own admission, believed he had gotten himself out of the situation of danger before driving. As for Mr. Gardner’s argument that he needed to move his car to protect it from possible damage, assuming, but not deciding, that avoiding imminent property damage may in certain circumstances meet the test of necessity, in the present case damage to his car was not “on the verge of transpiring and virtually certain to occur” but merely a speculative risk which did not provide a valid excuse for driving.

[15] On the second requirement that there be no reasonable legal alternative to disobeying the law, Mr. Gardner failed also. He had the reasonable legal alternatives of contacting the nearby police or of walking to nearby houses.

[16] Finally, on the third point, proportionality, by driving while impaired, Mr. Gardner exposed the public to a much greater risk of harm than he himself was experiencing or sought to avoid. This is not permissible. The

harm inflicted must not be out of proportion to the peril to be avoided. See, *Latimer*, at para. 31.

[17] The factors of imminent peril and no reasonable legal alternative are evaluated in accordance with a modified objective standard. See, *Latimer*, at para. 32. It is not enough for Mr. Gardner to establish he believed he was in imminent peril with no reasonable legal way out. That belief must be one that is reasonable in the circumstances. In Mr. Gardiner's case it was not reasonable.

[18] The judges below correctly concluded that the Crown had proven that Mr. Gardner was in no imminent peril and had reasonable legal alternatives.

### **SUMMARY AND DISPOSITION**

[19] In summary:

- (i) The Summary Conviction Appeal Court Judge did not err in agreeing with the trial judge that in the circumstances Mr. Gardner could not avail himself of the excuse of necessity; and
- (ii) Leave to appeal is refused.

---

L. D. Barry J.A.

I Concur: \_\_\_\_\_

M. H. Rowe J.A.

I Concur: \_\_\_\_\_

M. F. Harrington J.A.