SUPREME COURT OF QUEENSLAND

CRIMINAL JURISDICTION

ATKINSON J

Indictment No 126 of 2012

THE QUEEN

v.

MICHAEL BENNETT GARDNER (SENIOR)

BRISBANE

..DATE 20/03/2012

..DAY 1

RULING

HER HONOUR: The defendant has raised, by way of a pre-trial hearing, the question of whether or not the defence found in section 25 of the Criminal Code applies to the circumstances of his case. He argues that the section does apply and that he will be able to lead evidence sufficient to raise that defence so that the onus then lies on the prosecution to exclude that defence beyond reasonable doubt.

Section 25 provides that, "subject to the express provisions of this Code relating to acts done upon compulsion or provocation or in self-defence, a person is not criminally responsible for an act or omission done or made under such circumstances of sudden or extraordinary emergency that an ordinary person possessing ordinary power of self-control could not reasonably be expected to act otherwise".

The defendant is charged on an indictment that between 1 June 2004 and 17 December 2008 at Inglewood and elsewhere in the State of Queensland, he carried on the business of unlawfully trafficking in the dangerous drug cannabis.

He is charged in the alternative that between 1 June 2004 and 2 July 2008, he unlawfully produced the dangerous drug cannabis and the quantity of the dangerous drug exceeded 500 grams. The extent by which it exceeded 500 grams is shown by the quantity of cannabis found, which I need not go into here. It is proposed to lead evidence, for example, that the harvestable amount, sold at wholesale prices, of the cannabis found at the property when the police executed a search

warrant valued the crop at a maximum of 72 million dollars.

Mr Gardner appears for himself. He was represented by solicitors and counsel but is now representing himself because of the defence he wishes to raise before the Court. It was sensible of him to raise it on a pre-trial application for a ruling.

His submission was that the reason he grew cannabis was to preserve the safety of human life. He argued that abortion is the destruction of human life and that this was a long-term project which he was undertaking. He said that, as women were seeking abortions contrary to the law, he wished to establish a fund to campaign against abortion and that was the reason why he was growing the quantity of cannabis he did for the length of time for which he did it.

He said "extraordinary" is defined in the dictionary as beyond what is ordinary. He submitted that human life commences at the moment of conception and that the attitude to elective abortion in our society is extraordinary and that it is an emergency to each foetus. He then gave personal details about his partners and a daughter who he has either had to persuade not to have a termination of pregnancy or who has, unbeknownst to him, had a termination of pregnancy.

He said that he is strengthened in his views by the fact that he can remember his time in the womb and his own birth. This was in support of his submission that he did not grow cannabis

with criminal intent but rather to save lives and that an ordinary person in his situation could not be expected to do otherwise. He said this was to save his descendants but also other pregnancies from being terminated.

He said that the fact that unlawful terminations are proceeding can be seen by the fact that in two recent editions of the yellow pages there are advertisements for pregnancy termination services which say that no referral is necessary, there is a same-day service and they offer free parking. He argued that the harm generated by his activity was less than the harm generated by the emergency situation. He said that he commenced growing cannabis in 1998 but he had not yet had the opportunity to commence the campaign which, he said, was the reason why he grew the cannabis and gives rise to the defence under section 25.

He said he formed the view that cannabis use was not harmful and that when he was conducting a tourism operation he met many young people from overseas countries where cannabis use was accepted and that those people were polite and well behaved. He referred to the decision of the Victorian Court of Criminal Appeal of *R v Loughnan* [1981] VR 443. I will return to the law in due course. He asked, perhaps rhetorically, "What would an ordinary person in my position do?" Cannabis, he said, did no harm to him as a young person, so what could he do to save human life?

He said he had never made a complaint to the police about

unlawful abortion or done anything else to give effect to his views about unlawful abortion apart from persuading those with whom he had a relationship. He said his inspiration was formed in 1998 when the Federal Government announced a war on drugs and that he thought that he needed a very large amount of money for a nationwide campaign against abortion.

He tendered a bundle of newspaper articles which commenced from 27 August 2009 which, of course, was after his arrest, which he said demonstrated the widespread nature of voluntary and unlawful abortion in the community. He said that his views required stronger measures than picketing abortion clinics or complaining to members of parliament. He said it was not a war that he intended to conduct, that he did not approve of that word, but that abortion was an abomination based on principles of humanitarianism, particularly given his memory of time in the womb. He said that he had had, earlier, between 1991 and 1998, intended to raise money via a tourism venture but he was not able to complete it because he did not have enough money.

He talked about the long and rocky road to gain the experience to grow cannabis and that he did not tell anyone at the time why he was growing the cannabis, the facts which he says give rise to the section 25 defence. He said his concern was the imminent threat to his descendents but also the welfare of others. He said the reason why it took place over many years was because he had to gain experience and, just when it looked like he was getting to a point where his wife was placated, he

found that she had told someone so he had to reorganise matters and that the 2008 crop was not to be his last. He said how difficult it was to grow cannabis under clandestine conditions and that he was not ashamed, because it was aimed to fund the betterment of our society by saving lives.

Mr Lehane, who appears as the prosecutor in this case, submitted that to exclude the defence, the prosecution will need to satisfy beyond reasonable doubt that the circumstances which confronted Mr Gardner did not amount to a sudden or extraordinary emergency, or that his reaction in the circumstances was outside what one could reasonably expect an ordinary person with ordinary powers of self-control.

Mr Lehane submitted that the provision deals with cases where a person is confronted with sudden and extreme danger, and exercises judgment as a man of ordinary will and fortitude might reasonably be expected to exercise under the circumstances. He referred to a number of cases which support the proposition that the danger must be imminent and extreme, and submitted that the defendant was not confronted by such sudden and extreme circumstances.

There was no person, to his knowledge, in sudden peril. He had harboured his anti-abortion views well before the commencement of the trafficking period. Further, on no view, it was submitted, could the defendant's acts in trafficking in large amounts of cannabis sativa over a period of four and a half years be considered a reasonably necessary response to

express his objection to abortions. There were a myriad of alternatives which he could have pursued to protest against those acts.

The prosecutor submitted that the defence had not been raised on the evidence proposed to be led by Mr Gardner. I should also mention that in reply, Mr Gardner tendered an extremely lengthy handwritten document which repeats, he says, the arguments that he has made. I gave him the opportunity to tell me if there were any further arguments that he wished to raise, but he was satisfied that there were none.

The prosecutor argues that there is an insufficient evidentiary basis on the matters raised before me to put the matter before the jury. Before dealing with that question, I should first raise the question of whether or not a defence under section 27 of the *Criminal Code* or the question of fitness to plead under section 613 is raised. There does not appear to me to be any uncertainty about whether the defendant is fit to be tried. Notwithstanding the submissions he made, he appears to be fit to be tried, and accordingly, I do not regard as presently advised that there is any question to be put to the jury about that.

There is, of course, the presumption of sanity under section 26 of the *Criminal Code* which has not been displaced in this case. Mr Gardner has said that he will provide me with a psychiatric report to that very effect, but even in the absence of that report, I am satisfied that a section 27

defence does not apply and he is fit to plead.

The next matter to mention in passing is of course that motive for doing something is not a defence to the action. As section 23(3) provides, unless otherwise expressly declared, the motive by which a person is induced to do or to admit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility. If his desire to prevent abortions was his motive for doing it, it is irrelevant. If it was only his motive, then it is irrelevant. Its relevance can only be if it is sufficient evidence to raise a section 25 defence.

So far as the law regarding this defence is concerned, I refer firstly to the case of *R v GV* [2006] QCA 394, a unanimous decision of the Court of Appeal. That was a case in which a person had pleaded guilty to dangerous driving causing grievous bodily harm. The plea had been accepted, but it appeared from the submissions made that the driver had, in the extremely unusual circumstances of that case, a defence available under section 25.

There was ample evidence that the driving of the defendant was done under an extraordinary emergency where he was being chased by what the sentencing Judge had referred to as "skinheads", where he and the passengers in his vehicle had been attacked and threatened, and where he, the driver, had previously stopped at a red light and been attacked and then attempted to go through a red light in order to avoid further

violence.

There was a collision, and a person in the defendant's car was injured. Even after that occurred, witnesses were threatened. Members of the public who tried to assist the injured passenger were threatened with broken bottles by the skinheads and the defendant was himself chased, assaulted, and kicked to the ground by his attackers. That was an extremely unusual case, and raised the defence under section 25. The Court, in dealing with the matter, said at [25]-[27]:

"This section [section 25] is the subject of a learned chapter in a book by R.S. O'Reagan, 'New Essays on the Australian Criminal Codes'. Mr O'Reagan refers to a note in his draft of the Criminal Code explaining the effect of the provision by its author, Sir Samuel Griffith:

'This section gives effect to the principle that no man is expected (for the purposes of the criminal law, at all events) to be wiser or better than all mankind. It is conceived that it is a rule of the Common Law, as it undoubtedly is a rule upon which any jury would desire to act. It may, perhaps, be said that it sums up nearly all the Common Law rules as to excuses for an act which is prima facie criminal.'

Mr O'Regan refers to s 25 as being a residual defence to protect the “morally innocent” where other defences did not apply. Sir Samuel Griffith revealed his understanding of section 25 in a case decided by him as Chief Justice of

Queensland with regard to a collision at sea. In *Webster & Co v The AUSN Co Ltd* [1902] St R Qd 207, his Honour said at 216:

'It is sufficient in such a case of extreme danger if the person in charge of [the ship] exercises such judgment as a man of ordinary skill and fortitude might reasonably be expected to exercise under the circumstances.' He compared this position to s ... 25 of the Criminal Code which he referred to as a 'rule[] of common sense as much as rules of law'."

As was submitted by the prosecutor in this case, the cases which followed that in the Court of Appeal show the limitations on the defence, that it is limited to cases where the defendant is confronted by sudden and extreme circumstances and where the danger is imminent and extreme. He referred to *R v Heenan* [2002] QCA 292, *R v Hawton* [2009] QCA 248, *R v Bishop* [2010] QCA 375 and *R v Hunt* [2009] QCA 397.

His submissions are supported by examination of the ordinary meaning of the words and by the common law. An "emergency" is defined in the Oxford English dictionary as a juncture that arises or turns up, especially a state of things unexpectedly arising and urgently demanding immediate attention.

The Macquarie Dictionary defines "emergency" as an unforeseen occurrence; a sudden and urgent occasion for action. It is not necessary to go into all of the common law in this area,

but I shall mention some cases which are of significance. *R v Loughnan* [1981] VR 443 was referred to by the defendant. That case was applied in the later case of *R v Rogers* (1996) 86 A Crim Rep 542.

That case - as did Loughnan's case - involved a person who escaped from prison and his defence was that he feared a life threatening attack was going to be committed on him and for that reason he was attempting to escape.

Gleeson CJ, then Chief Justice of New South Wales said at 543 that almost 500 years ago it was argued that a person may lawfully escape from a burning gaol to save his life. His Honour observed, 'This is unsurprising if the assumption is that the prisoner would surrender himself to the authorities as soon as he put himself out of the reach of the fire.' However the Court held on the circumstances raise in *Rogers*, there was no evidence fit to go to the jury on the issue of necessity, as it is called at common law, the appellant having failed to discharge the evidentiary onus in that respect.

His Honour referred to the test formulated in *Loughnan* and applied by the trial Judge in *Rogers* as follows:

"It will be seen ... that there are three elements involved in the defence of necessity. First, the criminal act or acts must have been done only in order to avoid certain consequences which would have inflicted irreparable evil upon the accused or upon others whom he was bound to protect. The

limits of this element are at present ill defined and where those limits should lie is a matter of debate. But we need not discuss this element further because the irreparable evil relied upon in the present case was the threat of death and if the law recognises the defence of necessity in any case it must surely do so where the consequence to be avoided was the death of the accused. We prefer to reserve for consideration if it should arise what other consequence might be sufficient to justify the defence. ...

The other elements involved ... can for convenience be given the labels, immediate peril and proportion, although the expression of what is embodied in those two elements will necessarily vary from one type of situation to another. The element of imminent peril means that the accused must honestly believe on reasonable grounds that he was placed in a situation of imminent peril. As Edmond Davies LJ pointed out in *Southwark London Borough Council v Williams and Anderson* ... all the cases in which a plea of necessity has succeeded are cases which deal with an urgent situation of imminent peril. Thus if there is an interval of time between the threat and its expected execution it will be very rarely if ever that the defence of necessity can succeed.

The element of proportion simply means that the acts done to avoid the imminent peril must not be out of proportion to the peril to be avoided. Put in another way, the test is: would a reasonable man in the position of the accused have considered that he had any alternative to doing what he did to avoid the

peril?"

Gleeson CJ referred to a decision from the Supreme Court of Canada in the case of *Perka* (1984) 14 CCC (3d) 385, in particular in the judgment of Dickson J. The Chief Justice said, "Using the term 'defence' without any implications as the onus of proof, his Lordship pointed out (at 399) that it has been universally recognised that, if the defence of necessity is to have a place in the criminal law, it must be strictly controlled and scrupulously limited to situations that correspond to its underlying rationale."

His Honour further said:

"As with self-defence, considerations of reasonableness and proportionality are essential control mechanisms." Dickson J referred (at 400) to 'the requirement that the situation be urgent and the peril be imminent', but in a context consistent with the approach that this is a factual matter of relevance to the contention that the breach of the law in question was, in practical terms, unavoidable.

The corollary of the notion that the defence of necessity exists to meet cases where the circumstances overwhelmingly impel disobedience to the law is that the law cannot leave people free to choose for themselves which laws they will obey, or to construct and apply their own set of values inconsistent with those implicit in the law. Nor can the law encourage juries to exercise a power to dispense with the

compliance of the law where they consider disobedience to be reasonable, on the ground that the conduct of an accused person serves some value higher than that implicit in the law which is disobeyed.

This is why, historically, it has been regarded as important to seek to limit the scope of the defence by referring to requirements such as urgency and immediacy."

Further his Honour said, at 547, "The relevant concept is of necessity, not expediency, or strong preference. If the prisoner, or the jury, were free to consider and reject possible alternatives on the basis of value judgments different from those made by the law itself, then the rationale of the defence, and the condition of its acceptability as part of a coherent legal system, would be undermined. To adopt the language of Dickson J in *Perka*, the accused must have been afforded no reasonable opportunity for an alternative course of action which did not involve a breach of the law."

His Honour referred to the earliest formulations of the defence in *Steven's Digest of the Criminal Law*. As his Honour said, "Reasonableness is not designed to allow people to choose for themselves whether they obey the law."

Those concepts are well illustrated in the decision of the Supreme Court of the Northern Territory in *Limbo v Little* (1989) 65 NTR 19, in particular at 47 where the defence was

raised to a trespass to facilities at Pine Gap on the basis that the defendant said that he feared that "human technological mistakes could result in a nuclear weapon being directed to" Pine Gap, and in that event, "not only would Pine Gap be destroyed, but the people there would be killed along with those in the nearby town of Alice Springs."

I also refer to the High Court decision in *Stevens v The Queen* (2005) 227 CLR 319; [2005] HCA 65, particularly at [11] which deals with section 25 where Gleeson CJ and Heydon J observed:

"It is a requirement of s 25 ... as explained, that the act of the accused for which criminal responsibility would otherwise attach was done under such circumstances of sudden or extraordinary emergency that an ordinary person possessing ordinary power of self-control could not reasonably be expected to act otherwise."

This is clearly not a case in which the growing of cannabis over a period of at least four and a half years was done under circumstances of sudden or extraordinary emergency. Criminal activity of such long duration cannot be excused under s 25 which deals with a reaction to imminent danger. Further, there is no evidence which would suggest that an ordinary person possessing ordinary powers of self control could not reasonably be expected to behave in any other way.

There are, of course, a number of quite lawful ways to make one's opposition to activities known. There has been nothing

to suggest that the only way of dealing with this situation was to engage in illegal activity. The law regards the trafficking in and the production of huge amounts of cannabis as a very serious crime and there is nothing raised by the defendant which suggests that he has satisfied the evidentiary onus, accepting the evidence he intends to lead at its highest as a defence to the matters on the indictment. Accordingly, I rule that the defence is not available and the evidence as to his views about abortion is irrelevant as a defence in this trial.
