

R. v. Lotufo, [2008] O.J. No. 2894

Ontario Judgments

Ontario Superior Court of Justice

Toronto, Ontario

E.M. Stewart J.

Heard: March 31, 2008.

Oral judgment: March 31, 2008.

Court File No. P-435/07

[2008] O.J. No. 2894

Between Her Majesty the Queen, and Luigi Lotufo

(44 paras.)

Case Summary

Criminal law — Criminal Code offences — Motor vehicles — Dangerous operation of a motor vehicle — Failing to stop or remain at accident scene — Flight from police — Accused acquitted of dangerous driving, failure to stop, and flight from police — The police had placed his vehicle in a "box" with unmarked cars, with no flashing lights or sirens, and a plain-clothed officer had approached with a firearm extended on a dark and rainy night — In light of all the evidence, the court was left with a reasonable doubt as to the accused's knowledge that his pursuers were police officers — The Crown failed to prove beyond a reasonable doubt that the defence of necessity did not apply to the circumstances.

Criminal law — Defences — Necessity — Perception of danger — Accused acquitted of dangerous driving, failure to stop, and flight from police — The police had placed his vehicle in a "box" with unmarked cars, with no flashing lights or sirens, and a plain-clothed officer had approached with a firearm extended on a dark and rainy night — In light of all the evidence, the court was left with a reasonable doubt as to the accused's knowledge that his pursuers were police officers — The Crown failed to prove beyond a reasonable doubt that the defence of necessity did not apply to the circumstances.

Accused charged with dangerous driving, failing to stop, and operating a motor vehicle while being pursued by a peace officer operating a motor vehicle. In executing a search warrant of the accused's car, the police, in unmarked vehicle, had attempted to place the accused's vehicle in a "box". When the accused's vehicle stopped, an officer approached the car with a firearm extended, and said: "Police. Don't move." The accused then drove his vehicle out of the box and the high-speed chase ensued. The defence argued that the accused was not aware that the persons pursuing were police. Instead, the accused argued he thought reasonably that he was being chased by an unknown assailant with a gun, that it was necessary for him to escape and the means employed were proportionate to the danger. He testified that all he heard was a passenger saying "He's got a gun! He's going to kill us! Got Go! Go!"

HELD: Accused acquitted of all counts.

In light of all the evidence, the court was left with a reasonable doubt as to his knowledge that his pursuers were police officers. The officers were in plain clothes. The vehicle in front of the accused's car had no activated flashing lights, and the evidence as to activated lights in the other vehicles was weak enough to leave the court with a doubt that they would have had to have been seen by the accused or his passenger. It was a dark, rainy night, and the attention of the vehicle's occupants would mostly have been on the gun to the exclusion of much else. The incident happened late at night while the accused was on a date with his fiancée, and there was

nothing to make the accused suspect he might be the target of a police takedown. The low-level nature of the accused's outstanding charges bolstered his evidence that he did not know the assailant was a police officer. The accused was acquitted of failing to stop and operating a motor vehicle while being pursued by a peace officer operating a motor vehicle. As for the count of dangerous driving, the Crown failed to prove beyond a reasonable doubt that the defence of necessity did not apply to the circumstances.

Counsel

D. Sgouromitis: Counsel for the Provincial Crown.

A.S. Reid: Counsel for Luigi Lotufo.

REASONS FOR JUDGMENT

E.M. STEWART J. (orally)

1 On the evening of July 14, 2006, several officers of the Toronto Police Service, in plain clothes and in unmarked vehicles, engaged in close surveillance of Luigi Lotufo, a "person of interest" to them. Over the course of several hours on this midsummer night, they saw him obviously involved in social interaction with his fiancée and with friends, variously at coffee-shop parking lots and at a restaurant along the popular College Street strip in Toronto.

2 In the early morning hours of July 15, Lotufo left the restaurant on College Street with his fiancée and another couple. In two separate vehicles they drove north, while the women chatted on cell phones trying to decide where to go next. The two vehicles became separated when Lotufo's friends' car managed to catch the light at an intersection before it turned red, causing the vehicle driven by Lotufo, a white BMW, to come to a stop. Throughout this surveillance, there was no suggestion from the police witnesses that there was anything untoward or objectionable about the manner in which Lotufo was driving.

3 A search warrant had been authorized just before midnight to permit police to search the BMW. For some reason not explained in the evidence, the warrant was not executed while the vehicle was presumably parked outside the restaurant on College Street. Instead, the police decided to embark upon what they described as a "high-risk takedown" of the vehicle and Lotufo, while his fiancée, a young mother of Lotufo's child and not in any way a "person of interest", was a passenger in the vehicle.

4 The signal to proceed with the takedown was given shortly before 2:30 a.m. by Officer Brian Johnson and acted upon immediately by several other officers, all in unmarked vehicles.

5 The method employed by the police to effect the takedown was to attempt to put Lotufo's vehicle in a "box." A large black pick-up truck driven by Officer Harlen Tinney stopped at a red light at the corner of Caledonia Road and St. Clair Avenue West facing westbound. The Lotufo vehicle was stopped behind it. Another vehicle, an SUV driven by Officer Tara Darling, came up behind the BMW, while the third vehicle driven by officer Stephen Fadi was positioned toward the passenger side of the vehicle.

6 According to Officer Fadi, this manoeuvre represented a deviation from the normal box-in approach, which would have involved driving up beside the driver's side of the vehicle to box it in. However, because of the location of the

elevated streetcar tracks and shelter area to the left of the driver's side of the BMW, the third vehicle, driven by Officer Fadi, had to try to box in the BMW from the passenger side.

7 I conclude from the evidence that the vehicle driven by Officer Fadi was not able to be placed in an ideal position for the box-in and was, rather, somewhat to the rear of the BMW's passenger side and parked at an angle.

8 None of the vehicles had sirens, nor were any of the vehicles marked in any way as being police cars. No regular police scout car was involved in this high-risk takedown which was carried out on a city street, very late on a slightly foggy and rainy night. Although there was some conflict in the evidence as to just how hard it was raining during the takedown, the evidence of all of the witnesses does confirm that it was raining, at least to some degree, and more than one witness mentioned that it was a somewhat foggy or steamy evening.

9 While the BMW was stopped, Officer Tinney exited his vehicle and approached the BMW. He was holding his firearm straight out in front of him with both hands. He testified that he identified himself as a police officer by saying, "Police. Don't move," in a loud and commanding tone. He said that he saw Lotufo's hands go up in the air. Officer Tinney testified that he actually got close enough to the BMW to see that, and to see that its window was down, and that he had his hand on the driver's door when the vehicle backed up, hit Officer Darling's bumper, and then pulled ahead and to the right, striking Officer Tinney's vehicle, and thus broke out of the box.

10 The BMW then proceeded at high speed northbound up Caledonia Road. Various unmarked police vehicles undertook the pursuit of the BMW, which continued up Caledonia Road, east onto Rogers Road, through some nearby residential streets, back on to Rogers Road, north on Caledonia Road again to Lawrence Avenue West, east on Lawrence Avenue West toward Bathurst Street via some additional residential streets, and then east on Lawrence Avenue West, where it stopped just east of the Allen Expressway entrance. At that point, marked police scout cars with lights activated were travelling eastbound on Lawrence Avenue West and were approaching the BMW.

11 During the chase the evidence of the police officers who pursued the vehicle was to the effect that the BMW was proceeding at speeds that were in excess of the posted limit and that Lotufo drove through several red lights and stop signs without stopping. The entire chase lasted for about five or six minutes. No accident or collision occurred during the chase and no one was injured.

12 After the vehicle was stopped, it was searched. No firearm was found in the BMW. No officer involved in the pursuit reported having seen any object thrown from the BMW, nor was any firearm found along the chase route.

13 Lotufo is charged with operating a motor vehicle in a manner dangerous to the public, contrary to the Criminal Code. He is also charged with operating a motor vehicle while being pursued by a peace officer operating a motor vehicle, in order to evade the peace officer and failing without reasonable excuse to stop the vehicle as soon as was reasonable in the circumstances.

14 In order to secure a conviction on the second charge, the Crown must prove beyond a reasonable doubt that Lotufo knew that he was being pursued by a peace officer. It is the position of the defence that Lotufo was not aware that a person or persons pursuing were police.

15 With respect to the first charge, it is advanced on Lotufo's behalf that his operation of the motor vehicle was not "dangerous" in the circumstances. In the alternative, it is argued that, because Lotufo thought reasonably that he was being chased by an unknown assailant with a gun, it was necessary for him to escape in the car and that the means so employed by him for that purpose were proportionate to the danger perceived by him.

16 Lotufo gave evidence at the trial. His evidence is in basic conformity with that of the police officers undertaking surveillance of him up until the time of the takedown, or "box-in." According to Lotufo's evidence, he was talking on his cell phone at the time the BMW approached the red light at St. Clair Avenue West and Caledonia Road. He was stopped behind a black pick-up truck. His fiancée, Tina Theophilopoulos, was also talking on her cell phone to her

friend, Ana Carvahlo. Music from the radio was playing in the car. He denies that his driver's side window was down and said that, because it was raining, he would have only tilted open the sun roof if he had smoked a cigarette in the car.

17 Lotufo said that he saw a man exit the black truck and approach his car, pointing a gun directly at him. He did not see any markings on the man's clothes to identify him as a police officer. If the man said anything, he did not hear what it was that was said. All he heard was Tina screaming something to the effect that, "He's got a gun! He's going to kill us! Got Go! Go!"

18 Lotufo said that the entire incident just lasted seconds. He denied that the man got close enough to touch the car. He put the BMW into reverse to give himself enough room to get around the truck. He heard a loud bang and knew he had hit something behind him. He did not stop but instead pulled to the right and forward and accelerated away from the black truck, hitting the truck on its side in the process.

19 There was no specific evidence as to the extent of the damage done to the truck, but I deduce that it could not have been very severe since both the BMW and the truck were able to function well enough to be involved in the events of the chase which ensued. Lotufo said that he did not see and was not aware of the presence of the third vehicle driven by Officer Fadi. He did not see any flashing lights or any other signs that any vehicles present on St. Clair West were police vehicles.

20 Lotufo's description of the route of the chase basically corresponded to that given by the police officers, although he could not recall some of the specific residential streets in the Bathurst and Lawrence areas he went through. He admits that he went through several stop signs and red lights without stopping, although he said that he did slow down at each intersection and signalled his turns so that any other traffic, which was very light at that time of night, would get some advanced warning of his intentions.

21 Although I consider that he tried to downplay the exact magnitude of the speeding, there is no doubt that Lotufo was driving at rates of speed significantly in excess of the posted speed limits for this city residential neighbourhood.

22 During the chase, Lotufo said that he was crouched down behind the dashboard so as to avoid anything that the gunman he thought was chasing them might do. He did not look back into his rearview mirror for any length of time, so he says that he could not see how many cars were involved in the chase and could just see the headlights of the vehicle behind him.

23 The impact while exiting the box had done something to the overhead light of the BMW, causing it to keep coming on and having to be turned off, a problem which Lotufo said also interfered with his ability to see exactly what was going on behind him during the chase.

24 Throughout the chase, Tina was screaming and crying. She was repeating words to the effect that, "They're going to kill us" and "I love my son," repeating the name of their young son, Timothy, all while on the phone to her friend, Ana. Essentially, Lotufo describes Tina as being panic stricken and hysterical. He did not think to ask Tina to call 911. He did not think to drive to a police station. The cell phone on which he had been speaking had been dropped somewhere on the floor of the car when he saw the gunman approach and he started to put the car in gear to get away. His main objective and thought during the chase was to get away from the black truck and the man with a gun who was driving it. He denies having any idea that it was the police who were chasing him.

25 He drove through the residential streets in an effort to shake his pursuer, to no avail. It was only when he was travelling westbound on Lawrence Avenue West that he saw marked police cruisers coming toward them with lights flashing that he elected to stop, thinking that they were now safe. When the BMW stopped, he says police told him to turn off the engine and put his hands out the window. He rolled down the windows and put his hands out the window, telling Tina to do the same.

26 In considering the evidence of Lotufo with respect to the charge of "evade police," I have instructed myself in accordance with the approach prescribed by R. v. W.(D.), [1991] 1 S.C.R. 742, as follows:

1. If I believe Lotufo's evidence that he did not know it was police who had approached him or chased him, I must find him not guilty.
2. Even if I do not believe Lotufo's evidence, if it leaves me with a reasonable doubt of his guilt or about this essential element of the offence, I must find him not guilty.
3. Even if Lotufo's evidence does not leave me with a reasonable doubt of his guilt or about an essential element of the offence charge, I may convict him only if the rest of the evidence that I do accept proves his guilt beyond a reasonable doubt.

27 Having carefully considered Lotufo's evidence in light of all of the evidence at this trial, I find that I am left with a reasonable doubt as to his knowledge that his pursuer or pursuers on the night in question were police officers. My reasons for arriving at this conclusions are as follows:

1. It is common ground that the police officers involved in the takedown were in plain clothes, not uniforms, and were driving unmarked cars with no sirens. The vehicle directly in front of the BMW driven by Lotufo had no activated flashing lights. The evidence as to any activated lights on any unmarked vehicles behind the BMW at the time of the box-in was either conflicting or weak enough to leave me with a doubt that any such lights would definitely have had to have been seen by Lotufo or his passenger, Tina.
2. Although I accept that Officer Tinney was wearing his police vest at the time of the attempted takedown, the wording on the vest would not necessarily have been clearly visible to the occupants of the BMW on a dark, rainy night and could easily have been obscured by the angle of his arms while holding his firearm in an extended fashion in front of him. I also consider that the attention of the vehicle's occupants would mostly have been on the gun to the exclusion of much else, so it is not surprising to me that certain other details of what was going on around them might have escaped their notice. Officer Tinney's evidence that he was close enough to the BMW to have his hand on the door handle is disputed by Lotufo and is not supported by the observations of the other officers. I therefore find that Officer Tinney was not so close to the BMW so as to require me to conclude that Lotufo must have known he was a police officer or that Lotufo necessarily must have heard Officer Tinney identify himself as a police officer.
3. The incident itself took place very late at night when Lotufo was on, for lack of a better word, a "date" with his fiancée. There was nothing in the surveillance detail outlined by the police witnesses to suggest that Lotufo was engaged in any activity that evening which would have attracted the interest of police or would have made Lotufo suspect that he might be the target of a takedown by police.
4. Crown counsel suggested the fact that Lotufo was driving while his licence was under suspension for unpaid fines and had given a false name to a police officer when stopped and questioned several days before gave him a reason to want to escape police. Added to that, it was suggested, it might be the presence of the very small amount of marijuana on his person which was subsequently produced by Lotufo at the police station. I find it difficult to accept, on a purely common-sense basis, the likelihood that Lotufo would have embarked upon a dramatic and intentional flight from armed police officers, including a violent breaking out of the box and then a high-speed chase around city neighbourhoods while his fiancée and mother of his infant son was in the car, simply to avoid the consequences of facing charges of driving while under suspension, or possession of marijuana, or even an "obstruct police" charge. Moreover, and again on a common-sense basis, I doubt that the average reasonable person would expect that those offences would be likely to prompt the kind of high-risk takedown engaged in by the police on this

occasion. In fact, the low-level nature of these possible outstanding charges serves to bolster the credibility of Lotufo's evidence that he did not know the assailant who exited the black truck was a police officer. Further, if Lotufo had, in fact, known it was police who were pursuing him for reason of these alleged offences, he would also have known that they knew who he was, where he lived, and how to find him. That consideration makes it even more plausible that he did not know who was chasing him.

5. Lotufo's evidence in most material aspects is corroborated by that of Tina Theophilopoulos. Ms. Theophilopoulos provided a very credible account of the events of that evening, and the honest emotion she displayed and attempted to control while giving her evidence indicated that it has had a lasting traumatic impact on her. She testified that when the person with the gun approached them, she did not recognize him as a police officer. She did not hear anything he may have said, since the music was playing in the car. The windows were up, and it was raining. When the chase was on, she said that she did not know who was chasing them, did not know it was police, and was hysterical and screaming throughout, repeating her son's name while on the cell phone to Ana. She did not think to call 911 as she was too rattled by what was going on to think straight. During most of the chase she was huddled down under the front dashboard and did not look back to see who was behind them. When she finally saw the scout car approaching, her reaction was one of relief, thinking that finally now they would be safe. Instead, she was pulled out of the car, thrown to the ground, arrested, and taken shoeless and soaking wet to the police station. When the car stopped, she says that Lotufo put his hands out the window and told her to do the same.
6. The evidence of the police officers involved in the chase was to the effect that there was not a solid line of vehicles behind the BMW. In some cases, there were very considerable distances between the pursuing cars. To the extent that some had some sort of marker lights, they were not on the roof or necessarily typical of police vehicles. None of the cars was marked as a police vehicle. None had sirens. The fact that there was more than one vehicle involved in the chase, given these factors, does not serve to dispel the reasonable doubt raised by Lotufo's evidence that he was not aware that he was being chased by police.
7. Evidence was given by Officer Daniel Amerlinck whose red vehicle, driven by him, pulled up alongside the BMW while eastbound on Lawrence Avenue West. Officer Amerlinck said he flashed his badge at the window to the female occupant of the BMW because, as he stated, he thought that the driver may not have known that it was the police who were chasing him. Lotufo denied having ever seen the vehicle driven by Officer Amerlinck, although Tina said that she did see a man in a red car pull up on her side while they were travelling at high speed along Lawrence Avenue West. She stated that she screamed at him, "Please don't kill us," and did not see any police badge. Officer Amerlinck, who thought he saw a gun in Lotufo's hand, put out on the police radio the message that the suspect had a gun. As it turned out, no gun was found when the car was searched after it came to a final stop, nor was any gun seen being flung from the window of the BMW during the chase. All of that leaves me with some considerable doubt as to the reliability of anything that anyone may have thought he or she had seen, while these two vehicles were travelling at high speed, in the dark and in the rain.
8. The BMW was brought to a stop by Lotufo as the marked scout cars approached on Lawrence Avenue West. This supports, in my opinion, his evidence that he stopped the car at that point because he thought for the first time that police were on the scene and they would be safe. There is conflicting evidence as to how and when Lotufo came to put his hands out of the window of the BMW. Even if Lotufo did put his hands out the window without having been instructed by the police to do so as has been suggested, I do not consider that feature to be particularly persuasive or weighty evidence of guilt in light of all of the other circumstances surrounding the events of that evening.

28 As a result, I am left with a reasonable doubt that Lotufo knew he was being chased by police when he broke

out of the box and attempted to evade his pursuer or pursuers. Accordingly, Lotufo is acquitted of Count 2 on this Indictment.

29 I now must consider Count 1.

30 Counsel for Lotufo argues that the manner in which Lotufo was driving was not dangerous given all circumstances. I do not agree. It is undisputed that Lotufo drove at speeds well in excess of posted speed limits on residential streets and, at times, drove at very high speeds. I accept the evidence of the police officers involved in the chase that, at times, these speeds approached 80, 90 or 100 kilometres per hour. He went through several red lights and several stop signs without stopping. The conditions for driving were far from ideal. Although traffic was light, it was raining and dark and somewhat foggy. It is very fortunate for everyone, the pursuers as well as the pursued, that no collision or serious accident occurred during this chase. Although traffic at that hour was light, it was nevertheless present and certainly other traffic and pedestrians might reasonably be expected to be in such a place, even well after midnight.

31 Applying the modified objective test in the context of all of the events surrounding the incident, I find that the manner of driving in this incidence was dangerous to the public within the definition of the term required by section 249(1) of the Criminal Code (see: R. v. Hundal, 79 C.C.C. (3d) 214 (S.C.C.) and R. v. MacPhee, 38 C.C.C. (2d) 49 (N.S.S.C. App. Div.). The manner of Lotufo's driving amounts to a marked departure from the standard care that a reasonable person would observe in the accused's situation.

32 The question, however, then arises: Is Lotufo able to avail himself of the defence of necessity in order to avoid a conviction on Count 1? Was it reasonably necessary for him to drive in the manner he did in all of the circumstances?

33 I note that the evidence is uncontradicted that Lotufo slowed down when approaching each intersection and signalled his turns. Police seemed, in fact, puzzled by the fact that his turns were being signalled before they were made. As already mentioned, no accident occurred. Likewise, I find that the preponderance of evidence suggests that no swerving, skidding, or erratic driving was observed by the majority, at least, of the witnesses.

34 The success rate of a "necessity" defence is probably deservedly low. It would have to be very rare and unusual circumstances indeed which would persuade a court to give licence to anyone to engage in conduct otherwise prohibited by the criminal law. Guidance as to the analytical approach to be taken to such a defence can be found in the decision of the Supreme Court of Canada in R. v. Perka, 14 C.C.C. (3d) 385. Justice Dickson, as he then was, speaking for the majority of the Court, summarized a number of conclusions as to the defence of necessity in terms of its nature, basis, and limitations, as follows (at page 405):

- "1. the defence of necessity could be conceptualized as either justification or an excuse;
2. it should be recognized in Canada as an excuse by operation of section 7(3), now section 8(3), of the Criminal Code;
3. necessity as an excuse implies no vindication of the deeds of the actor;
4. this criterion is the moral involuntariness of the wrongful action;
5. this involuntariness is measured on the basis of society's expectations of appropriate and normal resistance to pressure;
6. negligence or involvement in criminal or immoral activity does not disentitle the actor to the excuse of necessity;
7. actions or circumstances which indicate that the wrongful deed was not truly involuntary do disentitle;

8. the existence of a reasonable legal alternative similarly disentitles; to be involuntary, the act must be inevitable, unavoidable, and afford no reasonable opportunity for an alternative course of action that does not involve a breach of the law;
9. the defence only applies in circumstances of imminent risk, where the action was taken to avoid a direct and immediate peril, and
10. where the accused places before the Court sufficient evidence to raise the issue, the onus is on the Crown to meet it beyond a reasonable doubt."

35 In this case, the evidence referred to above successfully raises the issue. Lotufo was approached by a man who stopped his vehicle in front of his at a red light on a dark street late at night and who then exited the vehicle and advanced toward his vehicle while pointing a gun straight at him.

36 I have already found that the Crown has failed to prove beyond a reasonable doubt that Lotufo knew that the man was a police officer. The additional burden on the Crown with respect to Count 1 is to prove beyond a reasonable doubt that the criteria outlined by the Supreme Court of Canada in *R. v. Perka* have no application.

37 It does not seem to be seriously contended by the Crown that an approach on a dark street by an armed man does not represent a circumstance of imminent risk or direct and immediate peril. Such an event, especially in a fairly central location in an urban environment like Toronto, would reasonably present a possible threat of a carjacking or worse.

38 The Crown has advanced its main argument on the basis of what Lotufo did after he broke out of the box. The suggestion is made that Lotufo should have called 911, or instructed Tina to do so, or should have driven to a police station. By failing to do so, and thereby failing to take advantage of these reasonable legal alternatives to driving dangerously for five or six minutes, the Crown submits that Lotufo is disentitled to rely on the defence of necessity.

39 In his decision on an appeal, *R. v. Morris*, 61 C.C.C. (2d) 163, Belzil, J. upheld the defence of necessity in a case involving the dismissal of a charge of common assault. In doing so, the appeal judge made the following observation:

"In an emergency situation in which he found himself, the respondent could not have been expected to assess with nicety his legal position under any of the above provisions, or to look at all alternate avenues open to him. He had to act quickly. It was sufficient that he in good faith and on reasonable grounds believed that intervention was necessary."

40 Of additional assistance is the comment made by Keenan J. who, sitting on appeal for convictions for dangerous driving and failing to stop for police, set aside the convictions and ordered a new trial. In so doing, he noted that "the appellant's course of conduct may not have been the best or most prudent choice, but if the fear was genuine and he believed himself in danger, there is no requirement that he make the best choice, only that the choice may be proportionate to a perceived danger and that the evil chosen may not be greater than the evil avoided."

41 In this case, Lotufo made no violent response to the approach of an armed stranger. He just tried to get away. He slowed down when coming to each intersection and signalled his turns. He drove through quiet residential streets, albeit at high speeds, in an effort to "shake off" whoever was following him in the belief, as he stated in his evidence, that maybe the person was some unhinged individual who was angry because of something done to him on the road and who, presumably, would soon tire of the chase and eventually go away. As soon as he saw a marked police scout car, he stopped and pulled over.

42 Lotufo admitted that he did not call 911, nor did he instruct Tina to do so. He did not drive to a police station or other public building. I took from his evidence that while the chase was on, it did not occur to him to do any of those things. Tina, likewise, did not have the presence of mind to stop her hysterical screaming and crying and call 911.

This is corroborated by the evidence of her friend, Ana Carvahlo, with whom she was on the cell phone at the time, and who did not think to call the police or 911 either.

43 Calling 911 would have been a wise thing to do, but it seems on the evidence that no one involved was thinking clearly enough to be wise and to do so, and I have difficulty faulting them for this failure in all of the circumstances. Similarly, driving to a police station or other public building or commercial building might have been a more reasonable response, but I am unable to conclude that any such particular failure should deprive Lotufo of the necessity defence. The choice he made to try to shake his pursuer by driving as he did may not have been the best choice, but it was nevertheless, in my opinion, proportionate to the perceived danger.

44 As a result, I find that the Crown has failed to prove beyond a reasonable doubt that the defence of necessity raised by Lotufo does not apply to the circumstances of this case. Accordingly, Lotufo is also acquitted of Count 1 of the Indictment.