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Prompt 1: Queen v. Dudley and Stephens (1884).

1. INTRODUCTION

There is no way to separate the case under analysis from other two known cases: United States vs. Holmes (real) and the Case of the Speluncean Explores (fictitious), the latter having been noted by the fierce debate between natural law, represented by judge Foster, and the positivism, defended by judge Keen, balancing, finally, the positioning of the wise judge Handy, which (the argumentation) pondered with *grano salis* the radical argumentation of the first two.

Foster, as the name suggests, creative, innovative, and Keen, on the other hand also as the name suggests, tight, rigid, literal, severe. There are arguments in a clear intention to show the points of view of the dichotomy between natural law and positive law, a beautiful exercise of hermeneutics science.

In according to the opinion of judge Foster, the situation in which they found the Defendants was the state of nature, not subject therefore to the law found outside the cave and cannot be, Thus - according to him - even to speak of system application current legal the "outside world" (Defendants would have created their own legal system through the established contract) should prevail, in his view, the abstract concept of justice, even in opposition to the letter of the law; On the other hand, the judge Keen held that being characterized the requirements for the crime of murder configuration, such as typicality, material evidence, written evidence and intentional act, there would be no other way than the application of the law as set under the aegis of positive law.

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Finally, the judge Handy, as the name suggests, a skilled man (pragmatic), helpful and accessible, demonstrates an excellent dialectical argument, based on principled analysis, so that the facts can be seen with greater equity, filling the gaps sometimes left by vagueness ("problems of penumbra") of the legal system. He also focuses the importance of public opinion on the case (about this topic I will discuss forward, because I disagree), mentioning the exclusive of illegality in this case, proposing an approach between the judiciary and executive branches as a way of making more harmonious coexistence between them, emphasizing the suffering they (the defendants) endured in the concrete situation, concluding for acquittal of the defendants.

In effect, indeed, it's really important to say that the judges in the case of the Speluncean Explorers weren't totally right in their decisions. All of them, Foster, Keen and Handy, made some mistakes during their verdicts, in my opinion.

Foster, for example, while making his decision, ignored the fact that there was a law and that he should decide in according to it, or at least in according to principles. Besides that, he decided that the defendants were in a state of nature, and they shouldn't be judged in according to Newgarth laws. In my point of view that's not the main issue in his decision. His main issue was not judging in according to principles, nor even by analogy.

Decisions like that are too dangerous (can cause *legal uncertainty)*, because can be used as precedents to other decisions – ignoring the law and judging in according to the will of the judge. I'm not saying that a judge cannot make a verdict with his personal feelings, but if he wants to do that, he needs to be based it in principles, at least.

And Keen decides to put all his emotion apart and make his verdict in according to the act of the defendants and what was in the law, as a math teacher! That was another huge mistake. So I ask: the due process and the contradictory don't exist anymore?

About Handy' verdict, despite he is the best of them, he also made some mistakes in his judgment. Well, about public opinion to base his verdict was one of the most important issues in his decision. In the case of the Speluncean Explorers, the public opinion was 90% to consider the defendants not guilty, and only 10% considering them guilty of murder. But some people didn't know exactly what the facts that they were involved were, and, besides that, the sources that they heard about the case weren't so well known.

The issue about Handy's verdict was that he could make precedents to decisions just like that, but with an unfair trial. Let's imagine if the public opinion was saying that the defendants had to be considered guilty. Now the scenario is totally different, and a precedent saying that the public opinion was relevant for the judge to make his/her decision, could also be used by another judge.

Therefore, Handy's decision could lead (*Binding/Holding)* on new verdicts based on his precedent, talking about the public opinion itself, ignoring the other facts and the law, which could be a really great issue to be solved.

Anyway, besides that, I follow Handy's opinion, even with that problem about the public opinion. I say that because I consider the mistakes that Foster and Keen did more important than Handy's.

So, in general, as I said above, in my view, the Handy judge's position is more reasonable and thoughtful, the more defensible, both from the philosophical aspect as the legal aspect, clearly applying it to the case Queen v. Dudley and Stephens (1884), as discussed below.

2. ARGUMENTS / REASONING (Law and Philosophy)

Before entering specifically the substance of the case (Queen v. Dudley and Stephens), important that some premises are established for the development of valid reasoning submitted.

According to my theoretical and empirical experience (as a lawyer and professor in Brazil), both systems, Civil Law and Common Law, despite their differences, have the same sufferings and concerns.

The big question or problem is not in the legal system itself, but the people who make up this system, despite the need for fairness and impartiality, judges are human beings like all of us, with constant doubts, moral trends, ethical, political, religious, virtues, defects and a variety of beliefs.

And these characteristics, inherent to all human beings, are not something only current but date back to Ancient Greece, just for that, analyze accurately the writings of philosophers like Socrates, Plato and Aristotle. So the problem is not in this or that form of government or system. The problem is the human being, who has in himself (or her) some intrinsic characteristics to their own kind, as the sense of struggle, the "fight" for survival (*v.g.*, *Darwin*) and defects that make up human nature itself as anger, envy, greed, corruption etc.

Of course, a judge when adjudges, besides taking with him/her the features mentioned above, also should consider all sources of law in their (his/her) decision, such as the Constitution, statutes, rules, treaties, Regulations, Precedents and the principles and general rules of law.

But even with this entire framework available, the judge often is at a crossroad, unable to find objective arguments to justify his/her decision. These are called legal gaps (also vagueness) or "problems of the penumbra", as taught by Professor

Christopher Taggart[2], in Law and Philosophy classes, citing the *Positivism and the Separation of Law and Morals,* mentioned by H. L. A. Hart and explained by David M. Adams[3].

Among the legal and philosophical methods adopted to prepare a court decision, the syllogism (premises and conclusion) and the *subsumption* of the fact to the norm (incidence hypothesis) are two tools of the most used, just that, therefore, is in the system a rule or decision (paradigm) that may apply to that particular case on trial.

However, although still valid, these methods are often not sufficient for the solution of so-called hard cases, whereas the evolution of law brought to discussing new realities, always linked to social dynamics, considering the slow pace of science writing compared to the rapid transformations of contemporary societies.

The problem is that not always the classic process can predict expressly a immediate solution to certain phenomena observed in the *procedural iter* and falling to the empirical world, making it even more tormenting a particular situation and the solution hoped to-find in Judiciary.

I have discussed this issue in other previous paper[4], having mainly be based in the thought of Ronald Dworkin[5], Robert Alexy[6] and Riccardo Guastini[7]. And although much of the doctrine believe that Dworkin and Alexy do not follow the same philosophical line, I believe, although not based on different premises, the two professors can indeed be analyzed with a complementary approach, always under the so-called *neoconstitutionalism*, because they use the hermeneutics as an essential way for the interpretation of legal science.

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[2] TAGGART, Christopher. Law and Philosophy classes, at Harvard Extension School. January, 2016.
[3] ADAMS, David M. Philosophical Problems in the Law. Boston: Wadsworth, fifth edition, pp. 69/73.
[4] GERAIGE NETO, Zaiden. Rescission Action – the slow pace of the written Law compared to the rapid changes of contemporary societies. RT ed., 2009, pp. 156/160.
[5] DWORKIN, Ronald. Law's empire. Oxford: Hart Publishing, 1998, pp. 02-3; DWORKIN, Ronald. A Matter of Principle. Trad.: Luís Carlos Borges. São Paulo: Martins Fontes, 2001, pp. 14-6.
[6] ALEXY, Robert.Theory of Legal Reasoning. São Paulo: Landy, 2001, pp. 17/18 e.53.
[7] GUASTINI, Riccardo. From sources to standards. Trad. Edson Bini. São Paulo: Quartier Latin, 2005, pp. 183/184.

Dworkin, for example, does not spare criticism of legal realism, and also partly to the utilitarian doctrine of Jeremy Bentham, believing that judges should base their decisions on arguments of political principles, questioning even what is the true notion of State under Rule of Law, putting in doubt until the legitimacy of decisions, because, for him, a hypothetical judicial discretion (=discretionary) cannot be unlimited, otherwise could subvert its own legal science.

In his turn, Alexy through his Theory of Legal Argumentation, believes the problem is in the quality of own legal bases trying to sustain a court decision. He says that most of the decisions do not stand in syllogisms legitimate, for various reasons, such as the vagueness of the legal language and the conflict between standards, generating often decisions are "true" fallacies.

The doctrines of the two cited professors can adopt distinct ways (premises), but seek a similar conclusion for the resolution of disputes by legal science, that is, the use of interpretation, hermeneutics, general principles of law as a way to correct these flaws in the legal system and also occupying the gap left by the aforementioned legal vagueness.

By the way, on the subject of gaps, Riccardo Guastini[8] ponders the barriers imposed by the so-called doctrine of *completeness* ("the problems of penumbra").

Now, after these considerations, it is possible to note that, following the Handy judge's line of argument (in another case), we believe that Dudley and Stephens should have been acquitted of the murder charge, for various reasons, both philosophical and legal.

In my view, the question should be solved on the basis of three main premises: a) Flagrant necessity; b) "Theory of diverse conduct unenforceability" (a complement of the first); c) Greater Good.

[8] GUASTINI, Riccardo. From Sources to Standards. Trad. Edson Bini. São Paulo: Quartier Latin, 2005, pp. 176/184.

First, in this case, the boy was saved by Defendants, as was drifting in the open sea and certainly would die.

We must think that only after eighteen days of the boy's rescue, the accused (both), who were seven days without food and five days without drinking water, decided that the only way to stay alive (and others) would be feeding boy's body. And for that, of course, they would have to kill him. Before that, the boy was fed by the accused, when they could find a turtle to eat. If they had the real intention of killing him would not have given the boy anything to eat or drink!

I am convinced that there is no intention (there is no *criminal intent*) to kill the boy, otherwise they would have killed him as soon as the rescued. But no! Only after eighteen days going through a desperate situation, 1000 miles from land, with no glimpse of any alternative, is that the accused decided to take the boy's life. Still, after talking about the case with others, they decided to wait for another night, in the hope that some vessel would appear the next day, which did not happen.

This is a typical *flagrant necessity*, which is a legal excuse and neither the concrete situation be considered a crime, particularly in light of the diverse conduct unenforceability and utilitarianism, represented for the greater good: the life of the accused and others vs the boy's life!

By the way, on this last point, as well addressed in Law and Philosophy classes, taught by Professor Christopher Taggart[9], David M. Adams[10], citing some utilitarian philosophers like Jeremy Bentham and John Stuart Mill, teaches that the doctrine has an utility central moral principle, which means that often you will need to make choices to achieve a greater good, even if it means, in theory, the practice of something bad. So,

[9] TAGGART, Christopher. Law and Philosophy classes, at Harvard Extension School. January, 2016.
[10] ADAMS, David M. Philosophical Problems in the Law. Boston: Wadsworth, fifth edition, pp. 8/9.

between drifting in the open sea, feeling hunger and thirst and wait for certain death, the accused killed the boy (bad hypothetical) to feed and not die (greater good).

Also, important to remember that physical and mental condition of the accused was extreme and reading the Physiology & Behavior journal[11] was possible to find dozens of scientific papers reporting the damage and changes that the lack of food and water can cause in the brain and in the body, with serious implications for physiological, neurological and psychological nature. Therefore, even under the medical point of view, it is clear that the accused were under of absolute necessity, with biochemical changes that resulted directly in their way of thinking and acting.

On the other hand, the fact that the boy had not been consulted, the fact of not having made any agreement on who should die, has no relevance to the case, because is basic understanding that to no one is permitted to transact (to settle) on inalienable rights, and life, of course, is one of those goods. Therefore, any agreement had been made would not have legal validity, except under the moral and philosophical aspect, which does not mean that in a *flagrant necessity*, for the greater good, someone cannot take another's life to save his/her own life, for this situation characterizes a legal excuse.

There is also another argument that, although not legal, has great moral and philosophical importance. The accused could simply have omitted the fact occurred. They could not say anything, not even refer to the boy, but perhaps as a matter of principle and because they were sure of their innocence by absolute *flagrant necessity*, the accused reported the facts to the authorities, which cost them a wrongful judgment, in my opinion.

3. CONCLUSIONS

[11] http://www.sciencedirect.com/science/journal/00319384.

In conclusion, there is no doubt, in my opinion, the accused should have been acquitted and for better implementation of legal science, under any legal system, it is necessary that judges add to the classical methods of the syllogism and the *subsumption* a few other ingredients, such as teleological analysis of standards and jurisprudence, as did Monstesquieu with the celebrated paper The Spirit of the Laws, the use of the principles and axioms, reasonableness and proportionality and the common sense, always guided by a deep study of hermeneutics science and never forgetting that it is guaranteed to the accused due process (Section One of the Fourteenth Amendment to the US Constitution).

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