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DURESS BY THREATS

INTRODUCTION

The general nature of the defence of duress is that the defendant was forced by someone else to break the law under an immediate threat of serious harm befalling himself or someone else, ie he would not have committed the offence but for the threat. Duress is a defence because-

"… threats of immediate death or serious personal violence so great as to overbear the ordinary powers of human resistance should be accepted as a justification for acts which would otherwise be criminal." (*Attorney-General v Whelan* [1934] IR 518, per Murnaghan J (Irish CCA)

The defendant bears the burden of introducing evidence of duress and it is then up to the prosecution to prove beyond all reasonable doubt that the defendant was not acting under duress. If a defence is established it will result in an acquittal.

1. THE THREAT

The defence must be based on threats to kill or do serious bodily harm. If the threats are less terrible they should be matters of mitigation only. For example:

- In *R v Singh* [1973] 1 All ER 122, the Court of Appeal held that a threat to expose the defendant's adultery would not be sufficient grounds to plead duress.
- In *DPP for N. Ireland v Lynch* [1975] AC 653, Lord Simon stated *obiter*, that the law would not regard threats to a person's property as a sufficient basis for the defence.

It is generally accepted that threats of violence to the defendant's family would suffice, and in the Australian case of *R v Hurley* [1967] VR 526, the Supreme Court of Victoria allowed the defence when the threats had been made towards the defendant's girlfriend with whom he was living at the time.

The threats must be directed at the commission of a particular offence:

- In *R v Coles* [1994] Crim LR 582, the defendant was charged with committing a number of robberies at building societies. At his trial he sought to adduce evidence that he had acted under duress. The basis for the defence was that he had owed money to money-lenders who had threatened him, his girlfriend, and their child with violence if the money was not repaid. The trial judge ruled that the facts did not give rise to the defence as the threats had not been directed at the commission of a particular offence, but to the repayment of the debt. The defendant's appeal against conviction was dismissed. It was held that the defence of duress by threats was only made out where the threatener nominated the crime to be committed by the defendant. In the present case the threatener had indicated that he wanted the defendant to repay the debt, an action

that, if carried out, would not necessarily involve the commission of an offence.

2. THE TEST FOR DURESS

The two-stage test for duress is contained in *R v Graham* [1982] 1 WLR 294. The defendant is expected to act as a reasonable man in his circumstances would do and the jury will decide on that basis whether the threats are serious enough:

- *R v Graham* [1982] - The defendant (G) lived in a flat with his wife and his homosexual lover, K. G was taking drugs for anxiety, which made him more susceptible to bullying. K was a violent man and was jealous of the wife. One night after G and K had been drinking heavily, K put a flex round the wife's neck, pulled it tight and then told G to take hold of the other end of the flex and pull on it. G did so for about a minute and the wife was killed. Both were charged with murder. The defendant pleaded not guilty and said that he had complied with K's demand to pull on the flex only because of his fear of K. The judge directed the jury on the defence of duress (too favourably) but the defendant was convicted.

  The Court of Appeal, in confirming the conviction, laid down the model direction to be given to a jury where the defence of duress was raised. (This was subsequently approved by the House of Lords in *R v Howe* [1987] AC 417.) The jury should consider:

(1) Whether or not the defendant was compelled to act as he did because, on the basis of the circumstances as he honestly believed them to be, he thought his life was in immediate danger. (Subjective test)
(2) Would a sober person of reasonable firmness sharing the defendant's characteristics have responded in the same way to the threats? (Objective test)

The jury should be directed to disregard any evidence of the defendant's intoxicated state when assessing whether he acted under duress, although he may be permitted to raise intoxication as a separate defence in its own right.

RELEVANT CHARACTERISTICS

The reasonable person is of average fortitude, ie strength and firmness of mind:

- In two cases, *R v Hegarty* [1994] Crim LR 353 and *R v Horne* [1994] Crim LR 584, the defendant sought to introduce psychiatric evidence that he was especially vulnerable to threats. His aim was to argue that this characteristic of vulnerability should be attributed to the reasonable man when the objective test (see above) was applied. The Court of Appeal refused to admit the evidence in both cases because it rejected the argument that the reasonable person should be endowed with the characteristic. The rationale of the objective test was to require reasonable firmness to be displayed and it would completely undermine the operation of that test if evidence were admissible to convert the reasonable person into one of little firmness.

What are the relevant characteristics of the accused to which the jury should have regard in considering the second objective test? See:

- In *R v Bowen* [1996] Crim LR 577, the Court of Appeal held that a low IQ, short of mental impairment or mental defectiveness, was not a relevant characteristic since it did not make those who had it less courageous or less able to withstand threats and pressure than an ordinary person. Stuart-Smith LJ stated that age and sex were, and physical health might be relevant characteristics. The other principles were as follows:

* The mere fact that the accused was more pliable, vulnerable, timid or susceptible to threats than a normal person did not make it legitimate to invest the reasonable/ordinary person with such characteristics for the purpose of considering the objective test.
* The defendant might be in a category of persons whom the jury might think less able to resist pressure than people not within that category. For example, age; possibly sex; pregnancy; serious physical disability, which might inhibit self-protection; recognised mental illness or psychiatric condition.
* Characteristics which might be relevant in considering provocation would not necessarily be relevant in cases of duress, for example, homosexuality.
* Characteristics due to self-imposed abuse, such as alcohol, drugs or glue-sniffing, could not be relevant.
* Psychiatric evidence might be admissible to show that the accused was suffering from mental illness, mental impairment or recognised psychiatric condition provided persons generally suffering from such condition might be more susceptible to pressure and threats and thus to assist the jury in deciding whether a reasonable person suffering from such a condition might have been impelled to act as the defendant did.

3. IMMEDIACY

The threat must be "immediate" or "imminent" in the sense that it is operating upon the accused at the time that the crime was committed. If a person under duress is able to resort to the protection of the law, he must do so. When the threat has been withdrawn or becomes ineffective, the person must desist from committing the crime as soon as he reasonably can. As Lord Morris said in *Lynch* [1975] AC 653:

[The question is whether] a person the subject of duress could reasonably have extricated himself or could have sought protection or had what has been called a ‘safe avenue of escape’.

What is the position if the defendant has an opportunity to seek help but fears that police protection will be ineffective?

- In *R v Hudson and Taylor* [1971] 2 QB 202, two teenage girls committed perjury during the trial of X. They claimed that X's gang had threatened them with harm if they told the truth and that one of them was sitting in the public gallery during the trial. The defendants were convicted of perjury following the trial judge's direction to the jury that the defence of duress was not available because the threat was not sufficiently immediate. Allowing the appeals, Lord Widgery CJ stated:

* The threat was no less compelling because it could not be carried out there if it could be carried out in the streets of the town the same night.
* The rule does not distinguish cases in which the police would be able to provide effective protection, from those when they would not.
* The matter should have been left to the jury with a direction that, whilst it was always open to the crown to shown that the defendants had not availed themselves of some opportunity to neutralise the threats, and that this might negate the immediacy of the threat, regard had to be had to the age and circumstances of the accused.

4. VIOLENT GANGS VOLUNTARILY JOINED

The defence of duress is not available to persons who commit crimes as a consequence of threats from members of violent gangs which they have voluntarily joined. A defendant who joins a criminal association which could force him to commit crimes can be blamed for his actions. In joining such an organisation fault can be laid at his door and his subsequent actions described as blameworthy:

- In *R v Sharp* [1987] 1 QB 353, the defendant was a party to a conspiracy to commit robberies who said that he wanted to pull out when he saw his companions equipped with guns, whereupon one of the robbers threatened to blow his head off if he did not carry on with the plan. In the course of the robbery, the robber killed a person. The defendant was convicted of manslaughter and appealed. In dismissing the appeal, the Court of Appeal held that a man must not voluntarily put himself in a position where he is likely to be subjected to such compulsion. Lord Lane CJ said:

Where a person has voluntarily, and with knowledge of its nature, joined a criminal organisation or gang which he knew might bring pressure on him to commit an offence and was an active member when he was put under such pressure, he cannot avail himself of the defence of duress.

The defence is not inevitably barred because the duress comes from a criminal organisation which the defendant has joined. It depends on the nature of the organisation and the defendant's knowledge of it. If he was unaware of any propensity to violence, the defence may be available. The court so held in:

- *R v Shepherd* (1987) 86 Cr App R 47. The defendant joined a group of thieves. They would enter retail premises and while one of them distracted the shopkeeper, others would carry away boxes of goods, usually cigarettes. The defendant claimed that after the first burglary he wanted to give up, but had been threatened with violence to himself and his family if he did not carry on with the thefts. He was convicted of burglary and appealed against conviction. In allowing the appeal, the Court of Appeal held that the question should have been left to the jury to decide whether he could be said to have taken the risk of violence from a member of the gang, simply by joining its activities.

Until these decisions there was no English authority on the point, but there was persuasive authority in the Court of Criminal Appeal in Northern Ireland in *R v Fitzpatrick* [1977] NILR 20. The defendant,

who had voluntarily joined the IRA, tried to raise the defence of duress to a charge of robbery. He claimed that he had committed the offence following threats that had been made to him by other IRA members if he did not take part. The appeal court held that the trial judge had been correct in withdrawing the defence of duress from the jury:

* As a matter of public policy the defence could not be made available to those who voluntarily joined violent criminal associations, and then found themselves forced to commit offences by their fellow criminals.
* To do so would positively encourage terrorist acts, in that the actual perpetrators could escape liability on the ground of duress, and further,
* it would result in the situation where the more violent and terrifying the criminal gang the defendant chose to join, the more compelling would be his evidence of the duress under which he had committed the offences charged.

R v Fitzpatrick was endorsed by the Court of Appeal in *R v Sharp*, a decision which makes it clear that this is not a principle limited to cases involving terrorist organisations.

The principle in *R v Sharp* was extended by the Court of Appeal in:

- *R v Ali* [1995] Crim LR 303 - The defendant was a heroin addict and seller who had fallen into debt to his supplier, X. From the outset, he knew X to be a very violent man and he had been threatened by him that he would be shot if he did not repay the debt. X gave him a gun and told him that he wanted the money by the following day. X told him to get it from a bank or building society. The defendant alleged that he was scared that X would get him if he went to the police and so he committed a robbery at a building society. He was convicted despite his defence of duress. The Court of Appeal dismissed his appeal. The defence was not available where the defendant knew of a violent disposition in the person involved with him in the criminal activity which he voluntarily joined. Thus, if the defendant voluntarily participated in a criminal offence with X, whom he knew to be of a violent disposition and likely to perform other criminal acts, he could not rely on duress if X did so.

5. LIMITATIONS

Duress is considered to be a general defence in criminal law, but there are a number of offences in relation to which duress cannot be raised as a defence:

A) MURDER

Duress and murder is now governed by the House of Lords' decision in *R v Howe and Others* [1987] AC 417, in which it was held that duress would not be available to a defendant who committed murder either as principal or accomplice.

- In *R v Howe*, two appellants, Howe and Bannister, participated with others in torturing a man who was then strangled to death by one of the others. These events were repeated on a second occasion but this time it was Howe and Bannister who themselves strangled the victim to death. They claimed that they had acted under duress at the orders of and through fear of Murray who, through acts

of actual violence or threats of violence, had gained control of each of the defendants. The House of Lords dismissed their appeals against conviction. Lord Hailsham LC made the following points:

* Hale's *Pleas of the Crown* (1736) and Blackstone's *Commentaries on the Laws of England* (1857) both state that a man under duress ought rather to die himself than kill an innocent.

* If the appeal (and consequently the defence) were allowed the House would also have to say that *R v Dudley and Stephens* was bad law (which it was not prepared to do). A person cannot be excused from the one type of pressure on his will (ie, duress) rather than the other (ie, necessity).

* In the present case, the overriding objects of the criminal law must be to protect innocent lives and to set a standard of conduct which ordinary men and women are expected to observe if they are to avoid criminal responsibility.

* In the case where the choice is between the threat of death or serious injury and deliberately taking an innocent life, a reasonable man might reflect that one innocent human life is at least as valuable as his own or that of his loved one. In such a case a man cannot claim that he is choosing the lesser of two evils. Instead he is embracing the cognate but morally disreputable principle that the end justifies the means.

* If a mandatory life sentence would be harsh on any particular offender there are effective means of mitigating its effect - the trial judge may make no minimum recommendation, the Parole Board will always consider a case of this kind, and the prerogative of mercy may be used.

(See Smith & Hogan, *Criminal Law*, Eighth edition 1996, p241-2 for general points made in the House)

B) ATTEMPTED MURDER

In *R v Gotts* [1992] 2 AC 412, the defendant, aged 16, seriously injured his mother with a knife. In his defence to a charge of attempted murder he claimed that his father had threatened to shoot him unless he killed his mother. The trial judge ruled that such evidence was inadmissible since duress was not a defence to such a charge. The defendant pleaded guilty and then appealed. The House of Lords held that the defence of duress could not be raised where the charge was one of attempted murder. Lord Jauncy stated:

"The reason why duress has for so long been stated not to be available as a defence to a murder charge is that the law regards the sanctity of human life and the protection thereof as of paramount importance. Does that reason apply to attempted murder as well as to murder? As Lord Griffiths pointed out [in *Howe*] … an intent to kill must be proved in the case of attempted murder but not necessarily in the case of murder. Is there any logic in affording the defence to one who intends to kill but fails and denying it to one who mistakenly kills intending only to injure? …

It is of course true that withholding the defence in any circumstances will create some anomalies but I would agree with Lord Griffiths (*Reg. v Howe*) that nothing should be done to undermine in any way the highest duty of the law to protect the freedom and lives of those who live under it. I can therefore see no justification in logic, morality or law in affording to an attempted murderer the defence which is held from a murderer. The intent required of an attempted murderer is more evil than that required of the murderer and the line which divides the two is seldom, if ever, of the deliberate making of the criminal. A man shooting to kill but missing a vital organ by a hair's breadth can justify his action no more than can the man who hits the organ. It is pure chance that the attempted murderer is not a murderer. …"