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NECESSITY

THE GENERAL RULE

Necessity arises where a defendant is forced by circumstances to transgress the criminal law. The generally accepted position is that necessity cannot be a defence to a criminal charge. The leading case is:

- *R v Dudley and Stephens* (1884) 14 QBD 273. The defendants and a cabin boy were cast adrift in a boat following a shipwreck. The defendants agreed that as the cabin boy was already weak, and looked likely to die soon, they would kill him and eat him for as long as they could, in the hope that they would be rescued before they themselves died of starvation. A few days after the killing they were rescued and then charged with murder. The judges of the Queen's Bench Division held that the defendants were guilty of murder in killing the cabin boy and stated that their obvious necessity was no defence. The defendants were sentenced to death, but this was commuted to six months' imprisonment.

  Lord Coleridge CJ, having referred to Sir Matthew Hale's assertion (*The History of the Pleas of the Crown*, 1736) that a man was not to be acquitted of theft of food on account of his extreme hunger, doubted that the defence of necessity could ever be extended to a defendant who killed another to save his own life. After referring to the Christian aspect of actually giving up one's own life to save others, rather than taking another's life to save one's own, he referred to the impossibility of choosing between the value of one person's life and another's:

  "Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own. In [the present case] the weakest, the youngest, the most unresisting life was chosen. Was it more necessary to kill him than one of the grown men? The answer be, No."

Until recently it was commonly thought that a general defence of necessity did not exist in English law. Thus:

- In *Buckoke v GLC* [1975] Ch 655, Lord Denning indicated obiter that the driver of a fire engine was compelled to stop at a red traffic light even if he saw 200 yards down the road a blazing house with a man at an upstairs window in extreme peril and the man's life would be lost by waiting. Lord Denning accepted that the driver would commit an offence against the Road Traffic Regulations if he crossed the red light. (Note: there now exist statutory defences for fire-engines, police and ambulances.)

- And in the civil case of *Southwark LBC v Williams* [1971] Ch 734, where defendants in dire need of housing accommodation entered empty houses owned by the local authority, it was held that the defence of necessity did not apply. Lord Denning MR justified the rule on the ground that:

"… if hunger were once allowed to be an excuse for stealing, it would open a door through which all kinds of lawlessness and disorder would pass … . If homelessness were once admitted as a defence to trespass, no one's house could be safe. Necessity would open a door which no man could shut. It would not only be those in extreme need who would enter. There would be others who would imagine that they were in need, or would invent a need, so as to gain entry."

And Edmund-Davies LJ held:

"[T]he law regards with deepest suspicion any remedies of self-help, and permits those remedies to be resorted to only in very special circumstances. The reason for such circumspection is clear - necessity can very easily become simply a mask for anarchy."

Whilst there has been no general recognition of necessity as a defence, it has been permitted to operate under various guises, on a piecemeal basis, for example, in medical cases:

- In *R v Bourne* [1939] 1 KB 687, the defendant gynaecologist performed an abortion on a young girl who had been raped. He had formed the opinion that she could die if permitted to give birth, and the operation was performed in a public hospital, with the consent of her parents. The defendant was found not guilty of "unlawfully procuring a miscarriage" following a direction from the trial judge to the jury that a defendant did not act "unlawfully" for the purposes of s58 Offences Against the Person Act 1861, where he acted in good faith, in the exercise of his clinical judgement. (This is now within the Abortion Act 1967.)

However, necessity may never be a defence to a charge of murder. In *R v Howe* [1987] AC 417, the House of Lords affirmed *Dudley and Stephens* (1884).

THE PRAGMATIC APPROACH

(a) The practical solution perhaps lies in the way in which the discretion to prosecute is exercised. Lord Denning, in *Buckoke v GLC* [1971], stated *obiter* that the driver of an emergency service vehicle who drove through a red traffic signal when responding to an emergency call, whilst he would not be able to rely on the defence of necessity, "should not be prosecuted. He should be congratulated".

(b) In other cases the circumstances can be taken into account, as mitigating factors, when considering what sentence would be appropriate (as recommended by the Law Commission, 1977).

DURESS OF CIRCUMSTANCES

INTRODUCTION

Recently the courts have begun to show a willingness to allow the defence of necessity, or duress of circumstances as some judges have described it, where there is a fear of death or serious bodily injury:

- In *R v Willer* (1986) 83 Cr App R 225, the defendant had driven recklessly to escape from a crowd of youths who appeared intent upon causing physical harm to the passengers in his car; in *R v Conway* [1988] 3 All ER 1025, the defendant had driven recklessly to protect his passenger from what he had honestly believed was an assassination attempt. In both cases the Court of Appeal ruled that the defendants should have been permitted to put the defence of necessity before the jury, given the apparent threat of death or bodily harm created by the circumstances.

PRINCIPLES OF THE DEFENCE

- In *R v Martin* [1989] 1 All ER 652, the defendant had driven his stepson to work although he was disqualified from driving. He claimed that he had done this because his wife had threatened to commit suicide unless he did so, as the boy was in danger of losing his job if he was late. The wife had suicidal tendencies and a doctor stated that it was likely that she would have carried out her threat. The Court of Appeal allowed the defendant's appeal against his conviction, as the defence should have been left to the jury. Simon-Brown J stated that the principles may be summarised thus:

* First, English law does in extreme circumstances recognise a defence of necessity. It can arise from objective dangers threatening the accused or others in which case it is conveniently called "duress of circumstances".

* Secondly, the defence is available only if, from an objective standpoint, the accused can be said to be acting reasonably and proportionately in order to avoid a threat of death or serious injury.

* Thirdly, assuming the defence to be open to the accused on his account of the facts, the issue should be left to the jury, who should be directed to determine these two questions:
  (1) Was the accused, or may he have been, impelled to act as he did because as a result of what he reasonably believed to be the situation he had good cause to fear that otherwise death or serious injury would result?
  (2) If so, may a sober person of reasonable firmness, sharing the characteristics of the accused, have responded to that situation by acting as the accused acted?

If the answer to both these questions was yes, then the jury would acquit: the defence of necessity would have been established.

Further, the court in *Martin* was willing to contemplate the defence succeeding where an unqualified or disqualified driver took control of a car to get a person who had suffered a heart attack to hospital.

TIME LIMIT ON THE DEFENCE

Duress of circumstances cannot excuse the commission of an offence after the time when the threat has ceased:

- In *R v Pommell* [1995] 2 Cr App R 607, police officers discovered the defendant to be in possession of a firearm without a firearms certificate. The defendant sought to raise the defence of necessity or duress of circumstances, on the basis that he had been visited in the early hours by a friend who intended to kill another person. The defendant had taken the gun in order to prevent the killing, and had intended handing over the gun to the police the following day. The trial judge ruled that the defendant's failure to go to the police immediately deprived him of the defence. The defendant was convicted and appealed. The Court of Appeal allowed the appeal and ordered a retrial.

  It was held that the continued availability of the defence depended on the defendant desisting from the commission of the offence as soon as he reasonably could. Whether or not the defendant had done so would be a question for the jury, unless the trial judge decided that there was no evidence (indicating that the defendant had acted as soon as he reasonably could) upon which a jury could act. The trial judge had erred in ruling that the defendant's failure to hand over the gun to the police at the earliest opportunity effectively denied him the right to have the matter left to the jury.

THE REQUIREMENT OF DIRECTNESS AND IMMEDIACY

- The requirements of the defence of duress of circumstances were further explained by the Court of Appeal in *R v Coles* [1994] Crim LR 582. At the defendant's trial for robbing two building societies, he pleaded that he had done so because of his inability to repay money lenders who had threatened him and his girlfriend and child. The trial judge ruled that no defence of duress was open to the defendant. Dismissing the defendant's appeal against conviction, the Court of Appeal held that the defence of duress by threats was not open to the defendant because the threateners had not nominated the offences which he had committed. Nor, the Court held, was the defence of duress of circumstances available.

  For the defendant to rely on the defence of duress of circumstances, there would have to be a greater degree of directness and immediacy between the danger to the defendant or others and the offence charged. What was required was evidence that the commission of the offence had been a spontaneous reaction to the prospect of death or serious injury. Note: the connection between the threat and the offences was not as close and immediate as in *Willer*, *Conway* and *Martin*, where the offences had been virtually a spontaneous reaction to the physical arising.

APPLICATION OF THE DEFENCE

Referring to Lord Denning's statements in *Southwark LBC v Williams* [1971], Smith and Hogan, *Criminal Law*, 1996, p253, stated:

Probably it is now the law that if the taking or the entry was necessary to prevent death or serious injury through starvation or cold there would be a defence of duress of circumstances; but if it were

merely to prevent hunger, or the discomforts of cold or homelessness, there would be no defence.

- In *R v Pommell* [1995] 2 Cr App R 607, the Court of Appeal held that the limited defence of duress of circumstances, developed in English law in relation to road traffic offences, was closely related to the defence of duress by threats and applied to all crimes except murder, attempted murder and some forms of treason.

PROPOSALS FOR REFORM

THE LAW COMMISSIONS

- The Law Commission (1974) proposed that a general defence of necessity be introduced into English law.

- However, the Law Commission (1977) rejected the idea, going so far as to say that if a defence of necessity already existed at common law, it should be abolished. It felt that such a defence to a charge of murder could effectively legalise euthanasia in England. It felt that specific statutory provisions already covered those areas where the defence might be most needed. For minor offences it argued that prosecutions were unlikely and, in any event, the sentencing policy of the English courts was such that people convicted in these situations would probably receive a minimal sentence, say, an absolute or conditional discharge.

- The Law Commission (1985) referred to these "totally negative" proposals and said that it would not do to rely on prosecutorial discretion. Instead they proposed a defence of necessity called "duress of circumstances" which would apply to all crimes except attempted murder and murder.

- The Law Commission (1992) and (1993) proposed that the defence of duress of circumstances be available to all crimes including murder. The Draft Criminal Law Bill, 1993, (Law Com. No. 218), clause 26 provides:

"(1) No act of a person constitutes an offence if the act is done under duress of circumstances.

(2) A person does an act under duress of circumstances if -
  (a) he does it because he knows or believes that it is immediately necessary to avoid death or serious injury to himself or another, and
  (b) the danger that he knows or believes to exist is such that in all the circumstances (including any of his personal characteristics that affect its gravity) he cannot reasonably be expected to act otherwise.

It is for the defendant to show that the reason for his act was such knowledge or belief as is mentioned in paragraph (a)."

The defence would not apply to a person who knowingly and without reasonable excuse exposed himself to the danger known or believed to exist; the accused would have the burden of proving that he had not so exposed himself if the question arose.