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A2 GCE LAW

G154/01/RM Criminal Law Special Study

PRE-RELEASE SPECIAL STUDY MATERIAL

JUNE 2018



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G154 CRIMINAL LAW
SPECIAL STUDY MATERIAL

SOURCE MATERIAL**SOURCE 1**

Extract adapted from the judgment of Lord Hailsham L.C. in *R v Howe* [1987] 1 AC 417.

I have known in my own lifetime of too many acts of heroism by ordinary human beings of no more than ordinary fortitude to regard a law as either 'just or humane' which withdraws the protection of the criminal law from the innocent victim and casts the cloak of its protection upon the coward and the poltroon in the name of a 'concession to human frailty.' [...]

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A long line of cases, it is said, carefully researched and closely analysed, establish duress as an available defence in a wide range of crimes [...]

I would, however, prefer to meet the case of alleged inconsistency head on. Consistency and logic, though inherently desirable, are not always prime characteristics of a penal code based like the common law on custom and precedent. Law so based is not an exact science. All the same, I feel I am required to give some answer to the question posed. If duress is available as a defence to some crimes of the most grave why, it may legitimately be asked, stop at murder, whether as accessory or principal and whether in the second or the first degree? But surely I am entitled, [...] to believe that some degree of proportionality between the threat and the offence must, at least to some extent, be a prerequisite of the defence under existing law. Few would resist threats to the life of a loved one if the alternative were driving across the red lights or in excess of 70 m.p.h. on the motorway. But, [...] it would take rather more than the threat of a slap on the wrist or even moderate pain or injury to discharge the evidential burden even in the case of a fairly serious assault. In such a case the 'concession to human frailty' is no more than to say that in such circumstances a reasonable man of average courage is entitled to embrace as a matter of choice the alternative which a reasonable man could regard as the lesser of two evils. Other considerations necessarily arise where the choice is between the threat of death or a fortiori of serious injury and deliberately taking an innocent life. In such a case 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.

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SOURCE 2

Extract adapted from the judgment of Lord Bingham in *R v Hasan* [2005] 2 AC 467.

There remains the question, which the Court of Appeal left open in para 75 of their judgment, whether the defendant's foresight must be judged by a subjective or an objective test: i.e. does the defendant lose the benefit of a defence based on duress only if he actually foresaw the risk of coercion or does he lose it if he ought reasonably to have foreseen the risk of coercion, whether he actually foresaw the risk or not? I do not think any decided case has addressed this question, and I am conscious that application of an objective reasonableness test to other ingredients of duress has attracted criticism [...] The practical importance of the distinction in this context may not be very great, since if a jury concluded that a person voluntarily associating with known criminals ought reasonably to have foreseen the risk of future coercion they would not, I think, be very likely to accept that he did not in fact do so. But since there is a choice to be made, policy in my view points towards an objective test of what the defendant, placed as he was and knowing what he did, ought reasonably to have foreseen [...] The policy of the law must be to discourage association with known criminals, and it should be slow to excuse the criminal conduct of those who do so. If a person voluntarily becomes or remains associated with others engaged in criminal activity in a situation where he knows or ought reasonably to know that he may be the subject of compulsion by them or their associates, he cannot rely on the defence of duress to excuse any act which he is thereafter compelled to do by them. It is not necessary in this case to decide whether or to what extent that principle applies if an undercover agent penetrates a criminal gang for bona fide law enforcement purposes and is compelled by the gang to commit criminal acts.

I would answer this certified question by saying that the defence of duress is excluded when as a result of the accused's voluntary association with others engaged in criminal activity he foresaw or ought reasonably to have foreseen the risk of being subjected to any compulsion by threats of violence.

SOURCE 3

Extract adapted from *Criminal Law*. 4th Edition. Alan Reed and Ben Fitzpatrick. Sweet and Maxwell. 2009. p 257.

Duress operates as a concession to human weakness. The defendant elects one evil, the apparent breaking of the law, when faced with a choice of two evils, the other dilemmatic choice being to suffer serious injury or death. The question is what test ought to be applied against which the conduct of the defendant can be assessed. Judicial opinions have culminated in the development of a two-prong test with subjective and objective elements determining when duress may be used as a defence. Lord Lane C.J. clearly enunciated this test in *Graham*, and the House of Lords has since affirmed it in *Howe*. The defence is available only if, from an objective standpoint, the accused can be said to have acted reasonably and proportionately to avoid a threat of death or serious injury. Assuming the defence is available to the accused based on the facts, the defence should be a question for the jury, with instructions to determine two questions: 5

“(1) Was the defendant, or may he have been, impelled to act as he did because, as a result of what he reasonably believed [the person issuing the threat] had said or done, he had good cause to fear that if he did not so act [that person] would kill him... or cause him serious personal injury? 15

(2) If so, have the prosecution made the jury sure that a sober person of reasonable firmness, sharing the characteristics of the defendant, would not have responded to whatever he reasonably believed [the person making the threat] said or did by taking part in the killing? The fact that a defendant’s will to resist has been eroded by the voluntary consumption of drink or drugs or both is not relevant to this test.” 20

SOURCE 4

Extract adapted from *Criminal Law*. 9th Edition. Catherine Elliott and Frances Quinn. Pearson Education Ltd. 2012. p 378.

The defendant must have had no opportunity to avoid the threat, except by complying with it. If there is time for defendants to report the threat to the police, or to escape without harming themselves or others, then the defence cannot apply. Therefore, evidence that the threat is unavoidable will be that the threat is imminent. In **Gill** (1963) the defendant was told to steal his employer's lorry, and threatened with violence if he failed to do so. At his trial for theft, the court stated, *obiter*, that he probably would not have been able to rely on the defence of duress: between the time of the threat and his carrying out the crime he had the opportunity to inform the police of the threat, so the threat was not sufficiently immediate to justify his conduct.

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Following the case of **R v Hasan**, this rule is likely to be strictly applied. The House of Lords stated that it should be made clear to juries that:

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...if the retribution threatened against the defendant or his family or a person for whom he feels responsible is not such as he reasonably expects to follow immediately or almost immediately on his failure to comply with the threat, there may be little if any room for doubt that he could have taken evasive action, whether by going to the police or in some other way, to avoid committing the crime with which he is charged.

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The House criticised the earlier case of **R v Hudson and Taylor** which had given a lenient interpretation to this requirement. That case had stated that a threat would be counted as imminent if, at the time of the crime, it was operating on the accused's mind, even though it could not have been carried out there and then. The defendants were two teenage girls who had been the main witnesses for the prosecution at the trial of a man charged with wounding. In court, neither identified the accused as the attacker, and both falsely testified that they did not recognise him. On being charged with perjury, they explained that before the trial they had been threatened with serious injury if they told the truth, and during the trial they had noticed in the public gallery a member of the gang who had made those threats. The threat to injure was held to have been immediate, even though it obviously could not have been carried out there and then in the courtroom. In light of the criticism of this case in **R v Hasan**, it is unlikely that it will be followed in the future. Commenting on the case, the House stated in **R v Hasan**: 'I cannot, consistently with principle, accept that a witness testifying in the Crown Court at Manchester has no opportunity to avoid complying with a threat incapable of execution then or there.'

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SOURCE 5

Extract adapted from the judgment of Stuart-Smith L.J. in *R v Bowen* [1996] EWCA Crim 1792.

In the case of duress, the [objective] question is: would an ordinary person sharing the characteristics of the defendant be able to resist the threats made to him?

What principles are to be derived from these authorities? We think they are as follows:

- (1) The mere fact that the accused is more pliable, vulnerable, timid or susceptible to threats than a normal person are not characteristics with which it is legitimate to invest the reasonable/ordinary person for the purpose of considering the objective test. 5
- (2) The defendant may be in a category of persons who the jury may think less able to resist pressure than people not within that category. Obvious examples are age, where a young person may well not be so robust as a mature one; possibly sex, though many women would doubtless consider they had as much moral courage to resist pressure as men; pregnancy, where there is added fear for the unborn child; serious physical disability, which may inhibit self protection; recognised mental illness or psychiatric condition, such as post traumatic stress disorder leading to learned helplessness. [...] 10
- (5) Psychiatric evidence may be admissible to show that the accused is suffering from some mental illness, mental impairment or recognised psychiatric condition provided persons generally suffering from such condition may 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. It is not admissible simply to show that in the doctor's opinion an accused, who is not suffering from such illness or condition, is especially timid, suggestible or vulnerable to pressure and threats. Nor is medical opinion admissible to bolster or support the credibility of the accused. [...] 15
- (7) In the absence of some direction from the judge as to what characteristics are capable of being regarded as relevant, we think that the direction approved in Graham without more will not be as helpful as it might be, since the jury may be tempted, especially if there is evidence, as there was in this case, relating to suggestibility and vulnerability, to think that these are relevant. In most cases it is probably only the age and sex of the accused that is capable of being relevant. If so, the judge should, as he did in this case, confine the characteristics in question to these. 20
- (7) In the absence of some direction from the judge as to what characteristics are capable of being regarded as relevant, we think that the direction approved in Graham without more will not be as helpful as it might be, since the jury may be tempted, especially if there is evidence, as there was in this case, relating to suggestibility and vulnerability, to think that these are relevant. In most cases it is probably only the age and sex of the accused that is capable of being relevant. If so, the judge should, as he did in this case, confine the characteristics in question to these. 25

SOURCE 6

Extract adapted from *Unlocking Criminal Law*. 5th Edition. Jacqueline Martin and Tony Storey. Routledge. 2015. pp 210–211.

Although there must be a threat of death or serious personal injury, it need not be the sole reason why D committed the offence with which he is charged. This was seen in *Valderrama-Vega*. D claimed that he had imported cocaine because of death threats made by a Mafia-type organisation. But he also needed the money because he was heavily in debt to his bank. Furthermore, he had been threatened with having his homosexuality disclosed. His conviction was upheld by the Court of Appeal: the jury had been directed he only had a defence if the death threats were the sole reason for acting. [...]

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At one time it seemed that, in cases of duress by threats, the threat had to be directed at D personally. However, in *Ortiz* (1986) 83 Cr App R 173, D had been forced into taking part in a cocaine-smuggling operation after he was told that, if he refused, his wife and children would 'disappear'. At his trial, D pleaded duress by threats, but the jury rejected the defence. The trial judge had directed them that 'duress is a defence if a man acts solely as a result of threats of death or serious injury to himself or another'. The Court of Appeal did not disapprove of the inclusion in the direction of 'threats...to another'.

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