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Criminal Law Special Study

PRE-RELEASED CRIMINAL LAW SPECIAL STUDY MATERIAL

For use in examination sessions: January 2008, June 2008, January 2009, June 2009, January 2010 and June 2010
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G144 CRIMINAL LAW

SPECIAL STUDY MATERIAL

SOURCE MATERIALS

SOURCE 1

Adapted from the judgment of Lord Lane, Lord Chief Justice in *R v Graham* [1982] 74 Cr. App. R. 235 (Court of Appeal, Criminal Division)

The law requires a defendant to have the self-control reasonably to be expected of the ordinary citizen in his situation. It should likewise expect him to have the steadfastness reasonably to be expected of the ordinary citizen in his situation.

The correct approach on the facts of this case would have been as follows: (1) Was the defendant, or may he have been, impelled to act as he did because, as a result of what he reasonably believed King had said or done, he had good cause to fear that if he did not so act King would kill him or cause him serious physical injury? (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 by taking part in the killing?

SOURCE 2

Adapted from the judgment of Lord Hailsham, LC in *R v Howe* [1987] 1 AC 417

Some degree of proportionality between the threat and the offence must, at least to some extent, be a prerequisite of the defence under the 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 70mph 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 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.

SOURCE 3

Adapted from the judgment of Lord Griffiths in *R v Howe* [1987] 1 AC 417 HL

As I can find no fair and certain basis on which to differentiate between participants to a murder and as I am firmly convinced that the law should not be extended to the killer, I would depart from the decision of this House in *DPP for Northern Ireland v Lynch* and declare the law to be that duress is not available as a defence to a charge of murder, or to attempted murder.

SOURCE 4

Adapted from the judgment of Lord Jauncey in *R v Gotts* [1992] 2 AC 412 HL

I share the view of Lord Griffiths that 'it would have been better had the development of the defence of duress not taken place and that duress had been regarded as a factor to be taken into account in mitigation *R v Howe'*. While it is not now possible for this House to restrict the availability of the defence of duress in those cases where it has been recognised to exist, I feel constrained to express the personal view that given the climate of violence and terrorism which ordinary law-abiding citizens now have to face Parliament might do well to consider whether the defence should continue to be available in the case of all very serious crimes. 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 points out [in *Howe*] intent to kill must be proved in the case of attempted murder but not necessarily in the case of murder. Is there 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?

Withholding the defence in any circumstances will create some anomalies but I would agree with Lord Griffiths (*R 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 withheld from a murderer.

SOURCE 5

Adapted from *Criminal Law Text and Materials* Clarkson and Keating (1998) Sweet and Maxwell pp. 328-9 & 335-6

In *Valderrama-Vega* the defendant was threatened with the disclosure of his homosexuality, was under financial pressure and received threats of death or serious harm. The first two are incapable of amounting to duress but the court held that the jury was entitled to look at the cumulative effects of all of the threats. It was wrong to direct the jury that the threat of death or serious injury had to be the sole reason for him committing the crime.

In *Cole* the defendant robbed two building societies and claimed that he had done so to pay off a debt to moneylenders who had hit him with a baseball bat and had threatened him and his family. The Court of Appeal held that the defence of duress is only available if the threats are directed at the offence committed. In this case the moneylenders had not stipulated that he commit robbery to meet their demands so there was insufficient nexus between the threat and the offence.

In *Hudson and Taylor* the threats could have been reported to the police, but the two young girls, aged 17 and 19, were convinced that the police protection would be ineffective. Are we to blame them for their failure to seek official protection? It would appear that their response was typical of the response of most ordinary girls of that age faced with such a predicament. It would surely be ludicrous to assert that the defence of duress would only be available to them if there had been a sniper sitting in the court ready to execute his threats immediately. These views were echoed by Lord Griffiths in *Howe*:

"If duress is introduced as a merciful concession to human frailty it seems hard to deny it to a man who knows full well that any official protection he may seek will not be effective." The Draft Criminal Law Bill 1993 has, however, not responded to these calls.

SOURCE 6

Adapted from *Principles of Criminal Law* Duncan Bloy and Philip Parry (2000) Cavendish pp. 259-60

The defence is likely to be denied if the accused has voluntarily joined a criminal organisation, because he has put himself into a position where he may expect others to use force to exert their will over him, particularly if he should try to resile from their operations. The leading case is *Sharp* (1987) where Lord Lane CJ stated the principle thus:

"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."

In *Shepherd* (1987) a number of men would enter the shop, some would distract the shopkeeper while the others took the goods. S claimed that after the first expedition he wanted to withdraw but was threatened by other gang members with violence to him and his family and so he felt compelled to carry on. The trial judge ruled that duress was not available. The appeal was allowed. This case can be distinguished from *Sharp* on the basis that the defendant was not at the outset joining a gang with

a known propensity for violence and who could anticipate what might happen if his nerve failed. In this case there would be no immediate assumption that should he wish to withdraw then he might be faced with serious violence. As the court said:

"There are certain kinds of criminal enterprises the joining of which, in the absence of any knowledge or propensity to violence on the part of one member, would not lead another to suspect that a decision to think better of the whole affair might lead him into serious trouble. In such cases, if trouble materialises unexpectedly and puts the defendant into a dilemma in which a reasonable man might have chosen to act as he did, the concession to human frailty is available to the defendant."

SOURCE 7

Adapted from *Criminal Law* CMV Michael Jefferson (1997) Pitman pp. 236-9

Looking at the law one might expect that necessity should be made consistent with duress by affording a defence in similar circumstances.

Surely there must be some kind of a defence in circumstances such as those which occurred in *Kitson* (1955), which is one of the more ludicrous cases in post-war English law. The passenger in a car, having taken drink, fell asleep. He awoke to find the driver gone and the car coasting downhill. He grabbed hold of the steering-wheel and in doing so prevented a crash. Surely he should be congratulated not prosecuted and if prosecuted he should have a defence.

Recently – and the law is not yet settled – the courts have shown themselves more amenable than previously in creating a defence. The Court of Appeal in *Conway* established a defence called 'duress of circumstances'. The defendant said that he had driven recklessly because he feared that two men who approached his car were going to kill his passenger. The court allowed his appeal. The judges held that the facts amounted to duress of circumstances; that duress was an example of necessity; and that whether duress of circumstances was called duress or necessity did not matter.

The court in Conway believed themselves bound by their decision in *Willer* (1986) where the term 'duress of circumstances' was not used.

These two cases were followed in *Martin* where the Court of Appeal drew the boundaries of the defence. There had to be a fear of death or serious bodily harm, and a question to be asked was whether a person of reasonable firmness sharing the defendant's characteristics would have responded as the accused did.

SOURCE 8

Adapted from the judgment of Lord Justice Kennedy in *Pommell* [1995] 2 Cr. App. R. 607

The strength of the argument that a person ought to be permitted to breach the letter of the criminal law in order to prevent a greater evil to himself or others has long been recognised but has, in English law, not given rise to a general defence of necessity, and to murder, the defence has been specifically held not to exist (see *Dudley* and *Stephens*). Even in relation to other offences there are powerful arguments against recognising the general defence.

However, that does not really deal with the situation where someone commendably infringes a regulation in order to prevent another person from committing what everyone would accept as being a greater evil with a gun. In that situation it cannot be satisfactory to leave it to the prosecuting authority not to prosecute.

In the present case the defence was open to the appellant but a person who has taken possession of a gun in circumstances where he has the defence of duress of circumstances must 'desist from committing the crime as soon as he reasonably can'.

SOURCE 9

Adapted from *Criminal Law Text and Materials* Clarkson and Keating (1998) Sweet and Maxwell pp. 357-8

In 1974 the Law Commission proposed that a general defence of necessity be introduced into English law. However, three years later it 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 allowing such a defence to a charge of murder could effectively legalise euthanasia in England. The Law Commission 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.

At the same time as making these "totally negative" proposals, the Law Commission was recommending that duress be extended to *all* crimes. The absurdity of this position was exposed by the Criminal Code Bill which emphasised that it was unacceptable to rely on prosecutorial discretion and instead proposed a defence of necessity called "duress of circumstances".

It is unfortunate that the Draft Bill perpetuates the terminology of "duress of circumstances". Perhaps it was introduced in *Willer* and *Conway* because the threats there came from other persons rather than from objective circumstances. However, *Martin* was a classic case of necessity and should be recognised as such.

The courts have come a long way in a short time in recognising that blame is inappropriate in circumstances of necessity.

SOURCE 10

Adapted from the judgment of Lord Justice Ward in *Re A (Conjoined Twins)* [2000] New Law Journal Law Reports October 6 2000 pp. 1453-4

J and M were conjoined twins. J was capable of independent existence, but an operation to separate the twins would inevitably have resulted in the death of M who was alive only because a common artery enabled her sister to circulate oxygenated blood for both of them. If there was no such operation they would both die. The parents would not consent but the doctors were convinced that they could carry out the operation so as to give J a life that would be worthwhile. The Trust therefore sought a declaration confirming the lawfulness of the proposed operation.

Ward LJ:

The judge was plainly right to conclude that the operation would be in J's best interest. The question was whether it would be in M's best interest. It could not be. It would bring her life to an end before its natural span. It denied her inherent right to life.

A balance had to be struck. The best interests of the twins was to give the chance of life to the twin whose actual bodily condition was capable of accepting the chance to her advantage even if that had to be at the cost of the sacrifice of the life which was so unnaturally supported. This was, however, subject to whether what was proposed to be done could be lawfully done.

The crucial question was whether the law should confer in any circumstances, however extreme; the right to choose that one innocent person should be killed rather than another.

The doctors could not be denied a right of choice if they were under a duty to choose. They were under a duty to M not to operate because it would kill M, but they were under a duty to J to operate because not to do so would kill her. It was important to stress that it made no difference whether the killing was by act or omission.

In those circumstances the law had to allow an escape through choosing the lesser of the two evils. Faced as they were with an apparently irreconcilable conflict the doctors should be in no different position from that in which the court itself was placed giving the sanctity of life principle its place in the balancing exercise that had to be undertaken. For the same reasons that led to the conclusion that consent should be given to operate, the conclusion had to be that the carrying out of the operation would be justified as the lesser evil and no unlawful act would be committed.

SOURCE 11

Adapted from *The Manchester Conjoined Twins Case* Christopher F Sharp QC New Law Journal October 6 2000 pp. 1460-2

The issue for the court was whether an act by the doctors which, while saving Jodie's life, and although not primarily intended to kill Mary, would have that inevitable effect, would be unlawful or could be justified. This led finally to a detailed consideration of the doctrine of necessity.

The Court's approach was to accept that the doctrine of necessity, which in its related form of duress has been rejected by the House of Lords in *Howe* as a defence to murder could nevertheless in the unique circumstances of this case be extended to cover the doctors' intended action. Robert Walker LJ concluded that in the absence of Parliamentary intervention the law as to the defence is going to have to develop on a case by case basis and this was an appropriate case to extend it, if necessary.

Ward LJ, having identified the rationale of the rejection of the defence of necessity as one based on the sanctity of life, and having identified as the crucial question in this case the question posed by Lord Mackay in *Howe* whether the circumstances could ever be extreme enough for the law to confer a right to choose that one innocent person should be killed rather than another, held that the law should allow an escape by permitting the doctors to choose the lesser of two evils.

Brooke LJ carried out an exhaustive review of the jurisprudence. From *Stephens*, he derived three necessary requirements for the application of the doctrine.

(i) The act is needed to avoid inevitable and irreparable evil.

(ii) No more should be done than is reasonably necessary for the purpose to be achieved.

(iii) The evil inflicted must not be disproportionate to the evil avoided.

Given that the law pointed irresistibly to the conclusion that the interests of Jodie must be preferred to the conflicting interests of Mary, he considered that all three of these requirements were satisfied in this case.