JUSTIFICATION DEFENCES: NECESSITY, PREVENTION OF CRIME

AND PROTECTION OF PROPERTY

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Stephen, A Digest of the Criminal Law (1877)

Article 32: Necessity

An act which would otherwise be a crime may be excused if the person accused can shew that it was done only in order to avoid consequences which could not otherwise be avoided and which if they had followed would have inflicted upon him or upon others whom he was bound to protect inevitable and irreparable evil that no more was done than was reasonably necessary for that purpose and that the evil inflicted by it was not disproportionate to the evil avoided

R v Martin (Colin) (1989) 88 Cr.App.R. 343, CA:

"First, English law does, in extreme circumstances, recognise a defence of necessity. Most commonly this defence arises as duress, that is pressure upon the accused's will from the wrongful threats or violence of another. Equally, however, it can arise from other objective dangers threatening the accused or others. Arising thus 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: first, 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 physical injury would result? Second, if so, may a sober person of reasonable firmness, sharing the characteristics of the accused, have responded to the situation as the accused acted? If the answer to both these questions was yes then the … defence of necessity would have been established" (at pp. 345–346, emphasis added)

R v Abdul-Hussain [1998] EWCA Crim 3528:

"1. Unless and until Parliament provides otherwise, the defence of duress, whether by threats or from circumstances, is generally available in relation to all substantive crimes, except murder, attempted murder and some forms of treason (*R v Pommell* [1995] 2 Cr App R 607 at 615C). …

2. The courts have developed the defence on a case-by-case basis, notably during the last 30 years. Its scope remains imprecise (*Howe*, 453G-454C; *Hurst* [1995] 1 Cr App R 82 at 93D.

3. Imminent peril of death or serious injury to the defendant, or those to whom he has responsibility, is an essential element of both types of duress (see *Southwark LBC v Williams* (1971) 1 Ch 734, per Lord Justice Edmund-Davies at 746A…).

4. The peril must operate on the mind of the defendant at the time when he commits the otherwise criminal act, so as to overbear his will, and this is essentially a question for the jury (*Hudson and Taylor* at 4; and Lynch at 675F. …

5. But the execution of the threat need not be immediately in prospect (*Hudson and Taylor* at 425). …

6. The period of time which elapses between the inception of the peril and the defendant's act, and between that act and execution of the threat, are relevant but not determinative factors for a judge and jury in deciding whether duress operates (*Hudson and Taylor*; *Pommell* at 616A).

7. All the circumstances of the peril, including the number, identity and status of those creating it, and the opportunities (if any) which exist to avoid it are relevant, initially for the judge, and, in appropriate cases, for the jury, when assessing whether the defendant's mind was affected as in 4 above. …

8. As to 6 and 7, if Anne Frank had stolen a car to escape from Amsterdam and been charged with theft, the tenets of English law would not, in our judgment, have denied her a defence of duress of circumstances, on the ground that she should have waited for the Gestapo's knock on the door.

9. We see no reason of principle or authority for distinguishing the two forms of duress in relation to the elements of the defence which we have identified. …

10. The judgment of the Court, presided over by Lord Lane CJ and delivered by Simon Brown LJ, in *Martin*, at 345 to 346 (already cited) affords, as it seems to us, the clearest and most authoritative guide to the relevant principles and appropriate direction in relation to both forms of duress. … "

R v Shayler [2001] EWCA Crim 1977

63.. So in our judgment the way to reconcile the authorities to which we have referred is to regard the defence as being available when a defendant commits an otherwise criminal act to avoid an imminent peril of danger to life or serious injury to himself or towards somebody for whom he reasonably regards himself as being responsible. That person may not be ascertained and may not be identifiable. However if it is not possible to name the individuals beforehand, it has at least to be possible to describe the individuals by reference to the action which is threatened would be taken which would make them victims absent avoiding action being taken by the defendant. The defendant has responsibility for them because he is placed in a position where he is required to make a choice whether to take or not to take the action which it is said will avoid them being injured. Thus if the threat is to explode a bomb in a building if defendant does not accede to what is demanded the defendant owes responsibility to those who would be in the building if the bomb exploded.

Lord Advocate's Reference No 1 of 2000 (2001) JC 143

"…the existence of a prior relationship as a pre-condition of necessity has nothing to commend it… If one had to define 'companion' it would be anyone who could reasonably be foreseen to be in danger of harm if action were not taken to prevent the harmful event.

There was considerable discussion whether the defence of necessity could be available where the place and person or persons under threat from the apprehended danger were remote from the locus of the allegedly malicious damage. We can see no reason in principle why the defence should not be so available. In the modern world many industrial processes have inherent in them the potential for mass destruction over a wide area surrounding a given plant. If a person damaged industrial plant to prevent a disaster which he reasonably believed to be imminent but which he could avoid by the actions taken, there is no compelling reason for excluding the defence of necessity solely on the grounds that persons at risk were remote from the plant provided they were within the reasonably foreseeable area of risk." (at [44-45])

In Re. A. (children) (conjoined twins: surgical separation) [2000] 4 All ER 961:

"I have described how in modern times Parliament has sometimes provided "necessity" defences in statutes and how the courts in developing the defence of duress of circumstances have sometimes equated it with the defence of necessity. They do not, however, cover exactly the same ground. In cases of pure necessity the actor's mind is not irresistibly overborne by external pressures. The claim is that his or her conduct was not harmful because on a choice of two evils the choice of avoiding the greater harm was justified."

"There are sound reasons for holding that the existence of an emergency in the normal sense of the word is not an essential prerequisite for the application of the doctrine of necessity. The principle is one of necessity, not emergency"

R v Hasan [2005] 2 AC 467

"27. …*R v Hudson* [1971] 2 QB 202, … was described by Professor Glanville Williams, Textbook of Criminal Law, 2nd ed (1983), p 636, as 'an indulgent decision', and it has in my opinion had the unfortunate effect of weakening the requirement that execution of a threat must be reasonably believed to be imminent and immediate if it is to support a plea of duress. …

"28. ….It should however be made clear to juries that if the retribution threatened against the defendant or his family or a person for whom he reasonably 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. " (at [28])

F v West Berkshire Health Authority [1990] 2 AC 1:

"In truth, the relevance of an emergency is that it may give rise to a necessity to act in the interests of the assisted person, without first obtaining his consent. Emergency is however not the criterion or even a pre-requisite; it is simply a frequent origin of the necessity which impels intervention. The principle is one of necessity, not of emergency." (at 24)

(IB) PREVENTION OF CRIME

Section 3 of the Criminal Law Act 1967

3. Use of force in making arrest, etc.

(1) A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.

R v Jones (Margaret) & Others [2007] 1 AC 136

"In *R v Baker* [1997] Crim LR 497, the Court of Appeal decided that in considering whether a defendant was entitled to rely upon section 3, it must be assumed that the events which the defendant apprehended were actually going to happen. Provided that his belief was honest, it did not matter that it was unreasonable. If those events would in law constitute a crime, he was entitled to use such force as was reasonable to prevent it. … I have no difficulty with these propositions. I am willing to assume that, in judging whether the defendant acted reasonably, it

must be assumed that the facts were as he honestly believed them to be. But the question remains as to whether in such circumstances his use of force would be reasonable. And that is an objective question."

R (DPP) v Stratford Magistrates' Court [2018] 4 WLR 47:

"something short of the application of force may give rise to a defence to a criminal offence, but that as in the case of the statutory defence, there must be a nexus between the conduct and the criminality" (at [51])

SECTION 5(2) CDA 1971 - PREVENTION OF DAMAGE TO PROPERTY

Section 5(2) Crimnal Damage Act 1971:

(2) A person charged with an offence to which this section applies, shall, whether or not he would be treated for the purposes of this Act as having a lawful excuse apart from this subsection, be treated for those purposes as having a lawful excuse—

(b) if he destroyed or damaged or threatened to destroy or damage the property in question …in order to protect property belonging to himself or another or a right or interest in property which was or which he believed to be vested in himself or another, and at the time of the act or acts alleged to constitute the offence he believed—

(i) that the property, right or interest was in immediate need of protection; and

(ii) that the means of protection adopted or proposed to be adopted were or would be reasonable having regard to all the circumstances.

R v Jones [2004] EWCA Crim 1981

"It is self-evident that this provision, on its face, gives considerable latitude to those who are minded to take direct action in the honestly held belief that in so doing they are protecting the property of others…." (at [45])

R v Hunt (1978) 66 Cr. App. R. 105

The question whether or not a particular act of destruction or damage or threat of destruction or damage was done or made in order to protect property belonging to another must be, on the true construction of the statute, an objective test.

R v Jones (Margaret) [2007] 1 AC 136

The crucial question, in my opinion, is whether one judges the reasonableness of the defendant's actions as if he was the sheriff in a Western, the only law man in town, or whether it should be judged in its actual social setting, in a democratic society with its own appointed agents for the enforcement of the law…. (at [74])

…In a moment of emergency, when individual action is necessary to prevent some imminent crime or to apprehend an escaping criminal, it may be legitimate, praiseworthy even, for the citizen to use force on his own initiative. But when law enforcement officers, if called upon, would be in a position to do whatever is necessary, the citizen must leave the use of force to them. (at [81])

> …The law will not tolerate vigilantes. If the citizen cannot get the courts to order the law enforcement authorities to act… then he must use democratic methods to persuade the government or legislature to intervene. (at [83])
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> The practical implications of what I have been saying for the conduct of the trials of direct action protesters are clear….In a case in which the defence requires that the acts of the defendant should in all the circumstances have been reasonable, his acts must be considered in the context of a functioning state in which legal disputes can be peacefully submitted to the courts and disputes over what should be law or government policy can be submitted to the arbitrament of the democratic process. In such circumstances, the apprehension, however honest or reasonable, of acts which are thought to be unlawful or contrary to the public interest, cannot justify the commission of criminal acts and the issue of justification should be withdrawn from the jury…. (at [94])

Attorney General for Northern Ireland's Reference (No 1 of 1975) [1977] AC 105:

> "There are, however, some classes of offences in which one of the constituent elements of the crime is a failure by the accused to conform to standards of care, of self-control, of foresight, of caution or of reasoning power to be expected of a "reasonable man." In criminal cases tried by jury, the jury represent the reasonable man. That is the justification for the jury system. So in this class of crime it is for the jury, not the judge, to determine whether or not the accused has fallen short of the requisite standard and in doing so it is for them to act upon their own opinion as to what that standard is.
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> Where upon trial by jury for an offence of this class an issue is raised as to whether the conduct of the accused fell short of the standard to be expected of the reasonable man it does not seem to me that a decision on that issue can ever be a point of law." (at 133D-F, emphasis added)
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> "What amount of force is "reasonable in the circumstances" for the purpose of preventing crime is, in my view, always a question for the jury in a jury trial, never a "point of law" for the judge." (at 137E, emphasis added)

Director of Public Prosecutions v Stonehouse [1978] AC 55:

> "It is the function of the presiding judge at a trial to direct the jury upon the relevant rules of law. This includes the duty, if the judge takes the view that the evidence led, if accepted, cannot in law amount to proof of the crime charged, of directing the jury that they must acquit. It is the function of the jury, on the other hand, not only to find the facts and to draw inferences from the facts, but in modern practice also to apply the law, as they are directed upon it, to the facts as they find them to be. I regard this division of function as being of fundamental importance, and I should regret very much any tendency on the part of presiding judges to direct juries that, if they find certain facts to have been established, they must necessarily convict. A lawyer may think that the result of applying the law correctly to a certain factual situation is perfectly clear, but nevertheless the evidence may give rise to nuances which he has not observed, but which are apparent to the collective mind of a lay jury. It may be suggested that a direction to convict would only be given in exceptional circumstances, but that involves the existence of a discretion to decide whether such circumstances exist, and with it the possibility that the discretion may be wrongly exercised.
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> Thus the field for appeals against conviction would be widened. The wiser and sounder course, in my opinion, is to adhere to the principle that, in every case where a jury may be entitled to convict, the application of the law to the facts is a matter for the jury and not for the judge. I see no reason to doubt that the good sense and responsible outlook of juries will enable them to perform this task successfully." (at 94, emphasis added)

R v Wang [2005] 2 Cr App R 8

"If there were to be a significant problem, no doubt the role of the jury would call for legislative "*R v Hill and Hall* (1988) 89 Cr App R 74 is not easy to reconcile with the majority opinions [in *Director of Public Prosecutions v Stonehouse* [1978] AC 55]. If in those cases [*Hill and Hall*] there was in truth *no* evidence of lawful excuse which the jury could be asked to consider, the trial judges were entitled to withdraw that issue from the jury. But the relevant conclusion appears to have been (p 77)

> "that the causative relationship between the acts which [the defendant] intended to perform and the alleged protection was so tenuous, so nebulous, that the acts could not be said to be done to protect viewed objectively."

Like the issue of proximity in *Stonehouse*, this was a question to be left to the jury, however predictable the outcome might reasonably be thought to be. In any event, the juries should not have been directed to convict, as they evidently were (p 81)". (at [14], emphasis added)

scrutiny. As it is, however, the acquittals of such high profile defendants as Ponting, Randle and Pottle have been quite as much welcomed as resented by the public, which over many centuries has adhered tenaciously to its historic choice that decisions on the guilt of defendants charged with serious crime should rest with a jury of lay people, randomly selected, and not with professional judges. That the last word should rest with the jury remains, as Sir Patrick Devlin, writing in 1956, said (Hamlyn Lectures, pp 160, 162):

> 'an insurance that the criminal law will conform to the ordinary man's idea of what is fair and just. If it does not, the jury will not be a party to its enforcement …. The executive knows that in dealing with the liberty of the subject it must not do anything which would seriously disturb the conscience of the average member of Parliament or of the average juryman. I know of no other real checks that exist today upon the power of the executive.'" (at [16])