
GARDEN COURT
CHAMBERS

Trial Issues in Protest Cases

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Trial Issues: Removing Defences

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DEFENCE OF NECESSITY

R v Martin (Colin) (1989) 88 Cr App R 343

"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)

DEFENCE OF NECESSITY

BRIEF SUMMARY (also arises in prevention of crime; s5 (2) (b) CD1971)

1. Defendant genuinely believes that there is a threat of death or serious injury to persons;
2. That belief must be reasonable; and
3. The actions of the defendant must be a reasonable and proportionate response to that threat

R v Martin (Colin) **(1989) 88 Cr App R 343**
Re A (Children) (Conjoined Twins: Surgical Separation)

Reasonableness

REASONABLENESS – to be judged by the jury

Lord Diplock justification of the jury system *Attorney General for Northern Ireland's Reference (No 1 of 1975)* – Jury represents the 'reasonable man'

Bello (1978) 67 Cr App R 288 should be considered:

The circumstances in which a judge can properly rule against a defendant that his defence is not a defence known to law are very, very few and far between

Lord Advocates' Reference No 1 of 2000 2001 J.C. 143

[100] […] We cannot see any substance at all in the suggestion that what the respondents did was justified by necessity. The actions of the respondents were planned over months. What they did on board "Maytime" was not a natural or instinctive or indeed any kind of reaction to some immediate perception of danger, or perception of immediate danger. Deployment of Trident shows that the United Kingdom had the capacity to threaten use of the weapon, or to use it. One might say that there is a chance or possibility that this might be done, in some situation that might emerge. But there is no apparent basis for saying that such a situation seemed likely to emerge. Even if such a situation had seemed imminent, the risk of its emerging must still be distinguished from the risk that in that situation there would be an actual threat or use. And even if the respondents were well-founded in regarding the deployment of Trident as some kind of standing or abiding threat, that possibility must be distinguished from any likelihood that Trident was about to be used. The circumstances are not in our opinion even remotely analogous to those which provide a justification for intervention to prevent imminent danger. Moreover, there is not the slightest indication that the damage which the respondents did, and which they apparently claim was necessary as a means of averting or perhaps reducing danger or harm, had or could have had any conceivable impact upon the supposedly immediate risk. […]

R v Bianco [2001] EWCA Crim 2516,

" It is important however to acknowledge the submission made by Mr Bell on the appellant's behalf that the ruling in truth usurped the function of the jury and therefore deprived the appellant of a fair trial or a proper trial in English law. He says that there should be no minimum evidential requirement for a defence to be left to the jury. It is certainly true that once a defence such as duress is left to the jury then it is for the Crown to disprove it to the criminal standard. In our judgment, **if the case is one where no reasonable jury properly directed as to the law could fail to find the offence disproved, no legitimate purpose is served by leaving it to the jury.** It is not generally within a jury's constitutional function to arrive at what ex hypothesis would be a perverse result in circumstances such as these. There must at least be some evidence upon which a jury could properly conclude the defence of duress had not been negative."

Lyness [2002] EWCA Crim 1759

16.. The only question for this Court, therefore, is whether the judge erred in withdrawing the question of duress from the jury. It is clear that it is open to a judge to take that course if there is no evidence upon which a defence of duress could properly be based or, which is probably the same point, if a defence of duress if accepted would have been perverse. That the court has that jurisdiction was made clear in the recent case of *R v Bianco* .

[…]

22.. As it seems to us, the mere fact that the Tropicana was one of two possible courses open to Mr Lyness is not enough in itself to deprive him of the defence of duress, if the jury were to conclude that his state of mind was that he would be punished if he did not rob the Tropicana itself. Whether he had an alternative open to him might arise, under the second question second limb of the *Graham* formulation. But the question under the first limb is whether Mr Lyness' will not to rob the Tropicana had been overborne.

Lyness [2002] EWCA Crim 1759

24.. Thirdly, once the possible relevant threat is established, one goes on to the second question posited by Lord Lane in *Graham* : had the prosecution made the jury sure that a sober person of reasonable firmness, showing the characteristics of the defendant, would not have responded to what the Yardies threatened.

25.. That, it seems to us, except in exceptional cases, is necessarily going to be an issue for the jury. As to the question of alternative courses of action, it has been determined in a recent authority in this Court, *R v Baker & Ward [1999] 2 Cr App R 335* , that once an evidential foundation has been laid for a claim that an alternative was not reasonably available to the defendant, then it is for the jury to decide whether or not they accept that point. Although it is correct to say that in this case the only "evidence" about going to the police was Mr Lyness' assertion, and it was no more than that, that it would have been futile to go to the police, that issue questionable though it may have been, was one that on the law as it stands at the moment he was entitled to have placed before the jury. More generally, question (ii) in *Graham* is a question of assessment of the behaviour of a reasonable person, in the circumstances that the jury find to have existed. That is very characteristically a matter for a jury. It will only be in exceptional circumstances, that once question (i) is satisfied, (as in *Bianco* it was not) question (ii) can properly be withdrawn from the jury.

R v Wang [2005] 2 Cr App R 8

But in England and Wales it has been possible to assume, in the light of experience and with a large measure of confidence, that jurors will almost invariably approach their important task with a degree of conscientiousness commensurate with what is at stake and a ready willingness to do their best to follow the trial judge's directions. If there were to be a significant problem, no doubt the role of the jury would call for legislative 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."

R v Wang [2005] 2 Cr App R 8

No matter how inescapable a judge may consider a conclusion to be, in the sense that any other conclusion would be perverse, it remains his duty to leave the decision to the jury and not to dictate (to use the language of *R v Hendrick*, above, p 155) what that verdict should be. (at 13)

R v Hammond [2013] EWCA Crim 2709

6. It is important at the outset to remind everyone of the the limited scope for a judge to withdraw a defence from the jury. The issue often arises in circumstances where the defence seek to put forward the defence of duress. It is tempting for a court to believe that the evidence is most unlikely to be of a sufficient cogency or strength, bearing always in mind that the burden is on the prosecution to disprove it and that it is a waste of time and misleading to leave such a defence to the jury. It is in those circumstances that a judge will often be tempted to withdraw such a defence, for fear that the extremely limited circumstances in which it ought to be deployed will become extended by a fanciful or unduly sympathetic verdict from the jury. But the judge must resist that temptation. Whilst the law is that it can only be deployed in limited circumstances, strictly confined, any court comes face-to-face with the difficulty that once the matter is left to the jury, an unduly sympathetic jury might in reality and on the ground extend such a defence far beyond its scope. It is in those circumstances that where the defence is left to the jury it is incumbent upon the judge to give robust and strict directions to the jury to prevent them, so far as it is humanly possible, extending the defence in that way. But nonetheless any court must remind itself of the principles identified in *R v Lang* [2005] 2 Cr App R(S) No 8, page 136, where, however perverse or absurd the judge thinks that the defence might be on the facts, it is nevertheless incumbent upon him not to withdraw the defence from the jury and not to make up his own mind upon the facts. There is thus a thin line, but a clear line to be drawn between those cases where a judge is entitled to withdraw the defence of duress from the jury and where, on the other hand, he is impermissibly reaching a conclusion on the facts.

R v Hammond [2013] EWCA Crim 2709

"…There is a thin line, but a clear line to be drawn between those cases where a judge is entitled to withdraw the defence of duress from the jury and where, on the other hand, he is impermissibly reaching a conclusion on the facts."

"*8. The judge had to consider the facts on their highest as they were put by the defendant because he had not yet had the opportunity of giving evidence. There was no other basis upon which the defence could be considered. Thus, it was incumbent upon the judge to analyse what was said in the defence statement and in those circumstances consider the question whether, if the jury accepted that evidence, it was open to them to acquit this defendant of prison escape.*

w/drawn on DCS – facts as agreed

Trial Issues in Protest Cases: Legal Strategies

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7 July 2020

Expert evidence and sentencing in protest cases

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7 July 2020

Expert evidence

- Why instruct an expert?
- Dependant on defence (Necessity, Lawful excuse, Freedom of Expression etc)
- Client's instructions

Necessity

Elements of necessity – distilled from *R v Martin (Colin)* (1989) 88 Cr App R 343

- D must have a genuine belief that there is a threat of death or serious injury to persons;
- That belief must be reasonable; and
- The actions of the D must be a reasonable and proportionate response to that threat

Section 3, Criminal Law Act 1967

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…

Section 3, Criminal Law Act 1967

Therefore the defence is made out if the court is satisfied:

- A defendant honestly believed she was acting to prevent a crime, even if she was mistaken (subjective test); and

- In the circumstances as the defendant believed them to be, the force used was reasonable (objective test).

Criminal Procedure Rules, Part 19

Expert's duty to the court

19.2.—(1) An expert must help the court to achieve the overriding objective—
(a) by giving opinion which is—
(i) objective and unbiased, and
(ii) within the expert's area or areas of expertise; and
(b) by actively assisting the court in fulfilling its duty of case management under rule 3.2, in particular by—
(i) complying with directions made by the court, and
(ii) at once informing the court of any significant failure (by the expert or another) to take any step required by such a direction.
(2) This duty overrides any obligation to the person from whom the expert receives instructions or by whom the expert is paid.
(3) This duty includes obligations—
(a) to define the expert's area or areas of expertise— (i) in the expert's report, and
(ii) when giving evidence in person;
(b) when giving evidence in person, to draw the court's attention to any question to which the answer would be outside the expert's area or areas of expertise;
(c) to inform all parties and the court if the expert's opinion changes from that contained in a report served as evidence or given in a statement; and
(d) to disclose to the party for whom the expert's evidence is commissioned anything—
(i) of which the expert is aware, and
(ii) of which that party, if aware of it, would be required to give notice under rule 19.3(3)(c).

Pabon [2018] EWCA Crim 420

‘…this case stands as a stark reminder of the need for those instructing expert witnesses to satisfy themselves as to the witness' expertise and to engage (difficult though it sometimes may be) an expert of a suitable calibre.’

Clarke [2013] EWCA Crim 162

- Whether a witness is properly qualified in the subject calling for expertise is ultimately a question for the court

R(otao DPP) v Stratford magistrates' court [2017] EWHC 1794

'CPR Part19.2 sets out the expert's duty to the court. In the present case the witness statement… stated that he understood his duties to the court as contained in CPR Part 19. In my view the better practice is to set out (at least in summary) an express acknowledgement of the witness's duty to the court and the important obligation to provide objective and unbiased evidence: not least because the failure to do so invites a line of cross-examination.'

Admissibility

- Test of admissibility – *Bonython* (1984) 15 ACR 364
- 'Whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organised and recognised to be accepted as a reliable body of knowledge or experience'
- CPR PD19A.4 – repeats principle also set out in *R v Dlugosz* [2013] EWCA Crim 2
- Court assesses reliability with reference to CPR PD19A.5

Practice Direction 19A.5

Therefore factors which the court may take into account in determining the reliability of expert opinion, and especially of expert scientific opinion, include:

(a) the extent and quality of the data on which the expert's opinion is based, and the validity of the methods by which they were obtained;
(b) if the expert's opinion relies on an inference from any findings, whether the opinion properly explains how safe or unsafe the inference is (whether by reference to statistical significance or in other appropriate terms);
(c) if the expert's opinion relies on the results of the use of any method (for instance, a test, measurement or survey), whether the opinion takes proper account of matters, such as the degree of precision or margin of uncertainty, affecting the accuracy or reliability of those results;
(d) the extent to which any material upon which the expert's opinion is based has been reviewed by others with relevant expertise (for instance, in peer-reviewed publications), and the views of those others on that material;
(e) the extent to which the expert's opinion is based on material falling outside the expert's own field of expertise;
(f) the completeness of the information which was available to the expert, and whether the expert took account of all relevant information in arriving at the opinion (including information as to the context of any facts to which the opinion relates);
(g) if there is a range of expert opinion on the matter in question, where in the range the expert's own opinion lies and whether the expert's preference has been properly explained; and
(h) whether the expert's methods followed established practice in the field and, if they did not, whether the reason for the divergence has been properly explained.

Sentence

- The usual sentencing principles are of course the same as any other case but the courts have recognised that a conviction resulting from an act of protest may be a mitigating factor

- Conditional discharges may be appropriate and often the distinction between a guilty plea and conviction following trial is the length

R v Jones and others [2007] 1 AC 136

My Lords, civil disobedience on conscientious grounds has a long and honourable history in this country. People who break the law to arm their belief in the injustice of a law or government action are sometimes vindicated by history. The suffragettes are an example which comes immediately to mind. It is the mark of a civilised community that it can accommodate protests and demonstrations of this kind. But there are conventions which are generally accepted by the law-breakers on one side and the law-enforcers on the other. The protesters behave with a sense of proportion and do not cause excessive damage or inconvenience. And they vouch the sincerity of their beliefs by accepting the penalties imposed by the law. The police and prosecutors, on the other hand, behave with restraint and the magistrates impose sentences which take the conscientious motives of the protesters into account. The conditional discharges ordered by the magistrates in the cases which came before them exemplifies their sensitivity to these conventions.'

Roberts & others [2018] EWCA Crim 2739

'[Lord Hoffman's judgment in Jones] echoes the understanding that the conscientious motives of protestors will be taken into account when they are sentenced for their offences but that there is in essence a bargain or mutual understanding operating in such cases. A sense of proportion on the part of the offenders in avoiding excessive damage or inconvenience is matched by a relatively benign approach to sentencing. When sentencing an offender, the value of the right to freedom of expression finds its voice in the approach to sentencing…

But Lord Hoffmann's dicta do not support the proposition that there is a bright line between custody and non-custody in such cases. It should not be overlooked that public nuisance is a serious offence, the commission of which would suggest that the protestor in question has not kept his side of the bargain adverted to by Lord Hoffmann…

The underlying circumstances of peaceful protest are at the heart of the sentencing exercise. There are no bright lines, but particular caution attaches to immediate custodial sentences.'

However…

- *Akgöl and Göl v Turkey (28495/06 and 28516/06)*
- *Vural v Turkey (9540/07)*
- *Alekhina v Russia* (38004/12)
- In principle ‘peaceful and non-violent forms of expression should not be made subject to the threat of imposition of a custodial sentence’

Thank you

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