

DURESS 2

1. ARGUMENTS AGAINST DURESS

See the Handout "Duress by Threats" where the arguments against allowing the defence to (a) members of violent gangs voluntarily joined, (b) cases of murder, and (c) cases of attempted murder, can be found.

2. ARGUMENTS IN FAVOUR OF DURESS

Smith & Hogan, *Criminal Law*, Eighth edition 1996, p241-242, do not find the reasons for the decision in *R v Howe* convincing. They state:

(i) If the defence were available, it would apply only when a jury thought a person of reasonable fortitude *would* have yielded to the threat. The criminal law should not require heroism. Moreover, there are circumstances in which the good citizen of reasonable fortitude not only would, but probably should, yield to the threat because-

(ii) to do so might clearly be to choose the lesser of two evils, as where the threat is to kill D and all his family if he does not do, or assist in, an act which he knows will cause grievous harm but not death (though, ex hypothesi, it has resulted in death and so constitutes murder).

(iii) Parliament's failure to act on the Law Commission recommendation [ten years previously that duress should be a defence to the alleged principal offender] proves nothing. The government has not given Parliament the opportunity to consider the matter. By parity of reason, Parliament might be taken to have approved of *Lynch's* case, because there has been no move to overrule it.

(iv) Even if he were not prosecuted, the "duressee" would be, in law, a murderer and, if he were called as a prosecution witness, the judge would, at that time, have been required to tell the jury that he was an accomplice in murder, on whose evidence it would be dangerous to act in the absence of corroboration. A morally innocent person should not be left at the mercy of administrative discretion on a murder charge.

The following are the arguments advanced by Clarkson and Keating, ***Criminal Law: Text and Materials***, 1994:

A. Prior to *Gotts* [1992], *Howe* [1987] had already been roundly condemned as requiring unrealistic heroism.

B. Heroism might be a desirable quality but it is unduly harsh to sentence someone to life imprisonment for failing to achieve such heights.

C. The criminal law should rest content if its exhortations induce persons to act reasonably. It seems an odd and an unjust law that can proclaim that the defendant has acted perfectly reasonably but is to be guilty of murder.

D. And it is no answer to assert that injustice will be avoided by the use of administrative discretion, whether by the prosecution or the Parole Board. The whole thrust in recent criminal law thinking is against granting too much discretion to those administering the criminal justice system.

E. The better view is that duress should be an excuse to all crimes. What the defendant has done remains wrong but we can understand his predicament and excuse him. Given the severe threats his actions are in effect morally involuntary

3. PROPOSALS FOR REFORM

The Law Commission (1993, No. 218) defines the defence in the following terms in clause 25 of the draft Criminal Law Bill:

“A person does an act under duress by threats if he does it because he knows or believes-

- (a) that a threat has been made to cause death or serious injury to himself or another if the act is not done; and
- (b) that the threat will be carried out immediately if he does not do the act or, if not immediately, before he or that other can obtain official protection; and
- (c) that there is no other way of preventing the threat being carried out; and

the threat is one which in all the circumstances (including any of his personal characteristics that affect its gravity) he cannot reasonably be expected to resist.”

Bearing in mind the fact that the defence is not available to members of terrorist groups, the Law Commission has recommended that the defence of "duress by threats" be available to all offences (paras. 30-31), thus signalling a departure from *Howe*. Amongst the arguments put forward in its Consultation Paper for extending the defence to murder and attempted murder it is noted that:

- * at present innocent life is not effectively protected by a rule of which the actor is unlikely to be aware, and that
- * there is little point in the law requiring heroism from those incapable of it.

In the event that the proposal to extend duress as a complete defence is rejected, the Law Commission's view is that it should at least operate as a partial defence, reducing liability to manslaughter.