Recent criminal cases in the High Court

TAIAPA v THE QUEEN (2009) 240 CLR 95

Defence of compulsion; reasonable belief that police protection is ineffective against the threatener; Criminal Code (Qld), s 31(1)(d).

Is a person who is threatened with serious harm by a violent criminal unless he or she commits a crime, duty bound to seek police protection? What if such protection were ineffective? Should police efficacy in affording protection be a relevant issue, who is to assess this matter – the court (be it judge or jury) or the accused? If it is the accused, can his or her assessment be honest alone or must it be based on reasonable grounds? Should reasonable grounds be required, how is this matter to be dealt with from an evidential point of view? These were some of the questions which were raised in the High Court of Australia case of *Taiapa v The Queen*,[1] on appeal from the Queensland Court of Appeal.

THE FACTS AND HOLDINGS

The applicant had been convicted of the offences of unlawful trafficking in a prohibited drug, and possessing a quantity of that drug. He confessed to the crimes but claimed to have committed them in order to save himself, Kristy (his de facto wife) and his mother from serious harm. As such, the applicant was relying on the defence of compulsion which is provided for under s 31(1)(d) of the Queensland *Criminal Code*. The relevant part of that provision states that a person is not criminally responsible for an act or omission:

> when –
> (i) the person does or omits to do the act in order to save himself or herself or another person … from serious harm … threatened to be inflicted by some person in a position to carry out the threat; and
> (ii) the person doing the act or making the omission reasonably believes he or she or the other person is unable otherwise to escape the carrying out of the threat.

The applicant's story was that he had owed Tony and Salvatore, drug dealers, a sum of money which they demanded to be repaid by holding a gun to his face. The two men gave the applicant four weeks to repay them, and instructed him not to go to the police; otherwise he or Kristy would be shot. The applicant sought to evade Tony and Salvatore by moving to new premises but they tracked him down and threatened him again at gunpoint. They ordered the applicant to collect something for them and warned him not to "try anything stupid" or he, Kristy and his mother would pay for it. They repeated their warning that he was not to report the matter to the police. The applicant did as he was told and collected two parcels, knowing that they contained prohibited drugs. He was in the car in which the parcels were hidden when he was arrested. During the course of the proceedings, the applicant said that he had not gone to the police because he did not have sufficient information about Tony and Salvatore for the police to identify them; that he did not believe that police protection was "100 per cent safe"; and that Tony and Salvatore were "not your everyday drug dealers" and were unlikely to fall into a police trap.

The trial judge had withdrawn the defence of compulsion on the ground that Tony and Salvatore were not in a position to carry out their threat at the time when the applicant was committing the crimes charged. The Court of Appeal held that the trial judge was in error in so ruling since it was sufficient under s 31(1)(d) for the compulsion operating on the mind of the applicant to be of a threat of future harm. However, the Court of Appeal went on to dismiss the applicant's appeal upon noting that he had ample opportunity to alert the police of his predicament and there was no evidentiary basis on which to support reasonable grounds for his belief that the police would be unable to afford effective protection for him, and his wife and mother. On further appeal to the High Court, the applicant contended that the Court of Appeal had erred in concluding that the evidence did not disclose a case fit for consideration by the jury that there were reasonable grounds for the applicant's

[1] *Taiapa v The Queen* (2009) 240 CLR 95.

belief. The High Court (delivering a joint single judgment by French CJ and Heydon, Crennan, Kiefel and Bell JJ) rejected this contention and dismissed the appeal.

The High Court commenced its discussion of s 31(1)(d) by noting that, before the Crown is called upon to bear the legal burden of excluding the proposition that the accused was acting under compulsion beyond reasonable doubt, there must first be some evidence capable of raising the issue of compulsion. The accused bears the evidential burden of tendering such evidence or else must point to prosecution evidence to that effect. The trial judge has then to consider whether, on the version of events most favourable to the accused that is suggested by the evidence, a jury acting reasonably might fail to be satisfied beyond reasonable doubt that the accused was not acting under compulsion.[2]

After briefly tracing the legislative history of s 31(1)(d) which involved several amendments, the High Court devoted some attention to that part of the current provision which requires that the accused "reasonably believes" he or she or the other person threatened was unable otherwise to escape the carrying out of the threat. The court acknowledged that, while it was for the jury to judge whether there were reasonable grounds on which to base the accused's belief (and therefore a factual question), there was an anterior question of law which was whether there was material upon which it would be open to a reasonable jury to determine the issue in the accused's favour. On this matter, the court found helpful the following comment by Professor Glanville Williams:

> [S]ome questions, such as the question of reasonableness … are value-judgments marking the boundary between criminal and non-criminal conduct, and therefore really decisions on law; yet, they are made by the jury, except that there must be evidence that, in the view of the trial judge, would justify the jury in finding that there has been reasonableness or unreasonableness or whatever.[3]

Turning to the case before it, the High Court agreed with the finding of the Court of Appeal that the police could have placed the applicant's premises under surveillance and organised a controlled delivery of drugs to Tony and Salvatore which might have led to their arrest. While no evidence was tendered as to the investigative methods and resources available to the police, that did not undermine the conclusion of the Court of Appeal. Furthermore, the fact that the applicant believed he had insufficient information on Tony and Salvatore failed to take into account the possibility that the police knew more about those men than he thought they did, or that the police could have found out more about them than the applicant thought they could. As for the applicant's belief that police protection may not be 100% safe, it merely explained his preference for complying with Tony and Salvatore's orders. Such an unparticularised concern that police protection would be inefficacious could not, without more, provide reasonable grounds for the applicant's belief that his only option was to break the law in order to escape the carrying out of the threat. Consequently, the High Court decided that the Court of Appeal was correct to have held that no reasonably acting jury could have failed to be satisfied beyond reasonable doubt that there were no reasonable grounds for the applicant's belief within s 31(1)(d).

COMMENTARY

The High Court and Queensland Court of Appeal were uncontroversial in ruling that the applicant had not discharged his evidential burden that he reasonably believed police protection would be ineffective. Based on this case, it is insufficient for accused persons to contend, without more, that they genuinely believed that the police would be unable to guarantee their safety against the threats. The condition of "reasonable belief" under s 31(1)(d) of the Queensland *Criminal Code* requires some more particularised evidence to substantiate that belief, with the courts taking as their starting point the assumption that "the ordinary way in which a citizen renders ineffective criminal intimidation is to report the intimidators and to seek the protection of the police".[4] This assumption may certainly be made with respect to all of the Australian States and Territories. However, there may be cases where

[2] *Taiapa v The Queen* (2009) 240 CLR 95 at [5].

[3] Williams G, *Textbook of Criminal Law* (2nd ed, 1983) p 49 and reproduced in *Taiapa v The Queen* (2009) 240 CLR 95 at [30].

[4] *R v Brown* (1986) 43 SASR 33 at 40 (King CJ); 21 A Crim R 288 and cited by the High Court in *Taiapa v The Queen* (2009) 240 CLR 95 at [31].

the assumption cannot stand because the persons threatened were residing in a foreign country where the police force was not as efficient or well resourced as the Australian police. This scenario is very real especially in relation to cross-border offences like drug importation and people smuggling.

The Supreme Court of Canada in *R v Ruzic*[5] had to deal with just such a case. The appellant was charged with unlawful importation of narcotics when she landed in Toronto airport from Europe. She claimed that she had committed the offence only because she had been threatened by a violent drug dealer in her home city of Belgrade in the former Yugoslavia who said that he would kill her mother if she refused. This claim invoked the defence of duress under s 17 of the Canadian *Criminal Code*, one of the conditions of which was that the threat "must deprive the accused of any safe avenue of escape in the eyes of a reasonable person, similarly situated".[6] The Supreme Court acknowledged that in cases of this kind, a court might be faced with the delicate task of assessing the validity of a claim that in a foreign country, no police protection was available or effective. In the case before it, the court held that it was proper to consider the defence because an expert witness had testified at the trial that during the period when the appellant claimed to have been threatened, large paramilitary groups roamed Belgrade and engaged in criminal and Mafia-like activities. Furthermore, the people of that city did not feel safe and could not trust the police. Conceivably, Australian courts would require similar types of evidence to substantiate the reasonableness of an accused's belief that police protection in a foreign country was ineffective against the threats being carried out.

A study of the law of compulsion (sometimes called duress) in the Australian States and Territories and other common law jurisdictions shows that there are basically four approaches in the treatment of the efficacy of police protection and its role in that defence. At one end of the spectrum of these approaches is the rule that police efficacy cannot be questioned, and that an accused person is duty bound to seek police protection should a reasonable opportunity avail itself. This was proposed by the English Law Commission in its report, *A Criminal Code for England and Wales*[7] and embodied in its draft *Criminal Code* in cl 42(4). This approach stems from the concern that permitting members of the community to evaluate police efficacy would unduly undermine confidence in the police force. By way of criticism, this approach fails to recognise the human and social reality that there may be some circumstances where the police will be unable to provide effective protection to the threatened person, however efficient the police might be. In such cases, the law would be highly unjust to ignore this reality and deny an accused the defence of compulsion.

At the opposite end of the spectrum of approaches is the rule that the accused need only honestly believe that the police would not be effective in providing protection against the threatener. This used to be the position under the Queensland *Criminal Code* by virtue of an amendment to s 31(1)(d) in 1997, and is the law under s 20(1) of the Tasmanian *Criminal Code*. This approach may be criticised for involving a risk of abuse through unverifiable assertions of danger, and allowing people to escape criminal responsibility because they were "unreasonably timorous" or simply found it more convenient to comply with a threat than to seek police assistance to remove it.[8]

In between these two extreme approaches are what may be described as the modified objective approach and the modified subjective approach. The difference between them is that the former is more objective in nature since the inquiry concerning police efficacy in affording protection is gauged as it were, through the eyes of a reasonable person in the accused's circumstances, compared to the latter which is cast in the more subjective terms of the accused's belief on reasonable grounds (which is the same as "the accused's reasonable belief").[9] The Australian and English common law subscribe

[5] *R v Ruzic* [2001 1 SCR 687.

[6] *R v Ruzic* [2001 1 SCR 687 at [62].

[7] English Law Commission, *A Criminal Code for England and Wales*, Report No 177 (HMSO, 1989).

[8] *R v Taiapa* (2008) 186 A Crim R 252 at 258.

[9] *Marwey v The Queen* (1977) 138 CLR 630 at 641 and cited in *Taiapa v The Queen* (2009) 240 CLR 95 at [29].

to the modified objective approach,[10] and it is also to be found in s 40(1)(d) of the Northern Territory *Criminal Code* and, as seen above, the Canadian *Criminal Code*. The Queensland Code, s 32(2)(b) and (c) of the Western Australian *Criminal Code* and s 10.2(2) of the Commonwealth *Criminal Code* have adopted the modified subjective approach.

The difference between these two approaches has been most clearly expressed by the High Court in relation to an accused's "reasonable belief" concerning the nature of a threat in self-defence cases. Thus, in *Viro v The Queen*, Mason J cautioned that "[b]y the expression 'reasonably believed' is meant, not what a reasonable man would have believed, but what the accused himself might reasonably believe in all the circumstances in which he found himself".[11] Similarly, in *Marwey v The Queen*, Stephen J said that the term "believes, on reasonable grounds" contained in s 271 of the Queensland *Criminal Code* requires the jury to consider two questions: "whether there was a belief on the part of the accused that the force he used was necessary and whether there existed reasonable grounds for that belief".[12] Stephen J said that this inquiry was distinguishable from that of "whether the force used was reasonable in all the circumstances"[13] because the last form of question omits or at best slurs over the first and subjective element of the accused's honest belief.[14]

Reverting to *Taiapa*, it is disappointing that the High Court chose not to engage in a comparison between the modified subjective approach which was before it, and some of other approaches. Indeed, the court even studiously avoided expressing an opinion over whether the requirement of reasonable belief for the defence of compulsion under the Queensland *Criminal Code* differs from the requirement of reasonable belief for the defence of duress under the Commonwealth *Criminal Code*.[15] At the very least, the High Court should have made clear the distinction between the modified objective approach and the modified subjective approach. For example, the court said that the requirement that the accused "had no means, with safety to himself, of preventing the execution of the threat" proposed by the Taskforce on Women and the Criminal Code was "addressed in the defence of compulsion [under the Queensland *Criminal Code*] by the requirement of reasonable belief that the accused was unable otherwise to escape the carrying out of the threat".[16] It is uncertain whether, by saying this, the court regarded the two formulations as synonymous or whether they dealt with the same subject matter but had material differences.

In jurisdictions such as Queensland, which subscribes to the modified subjective approach to assessing the efficacy of police protection, it is arguable that more personal characteristics of an accused could be recognised than is allowed for in jurisdictions having the modified objective approach. For example, a personality disorder could affect an accused's ability to judge whether the police could afford adequate protection to the person threatened.[17] Perhaps the courts would refuse to recognise such a characteristic on the ground that it would unduly dilute the objective component of the modified subjective approach. This and other similar questions could have usefully been

[10] For example, see *R v Hurley* [1967] VR 526 at 543 where Smith J states, as one of the elements of the defence of duress, that the accused "had no means, with safety to himself, of preventing the execution of the threat". Smith J's definition of duress has been cited as authoritative in *R v Dawson* [1978] VR 536; *R v Lawrence* [1980] 1 NSWLR 122; *R v Brown* (1986) 43 SASR 33; 21 A Crim R 288; and *R v Abusafiah* (1991) 24 NSWLR 531; 56 A Crim R 424. For the English law, see the quotation from the Court of Appeal decision in *R v Hudson* [1971] 2 QB 202, reproduced in *Taiapa v The Queen* (2009) 240 CLR 95 at [34].

[11] *Viro v The Queen* (1978) 141 CLR 88 at 146.

[12] *Marwey v The Queen* (1977) 138 CLR 630 at 640.

[13] This is an expression of the modified objective approach.

[14] *Marwey v The Queen* (1977) 138 CLR 630 at 641.

[15] *Taiapa v The Queen* (2009) 240 CLR 95 at [22].

[16] *Taiapa v The Queen* (2009) 240 CLR 95 at [28].

[17] In this regard, it is noted that English common law, which adopts the modified objective approach, nevertheless regards the accused's age, sex, physical and recognised psychiatric condition, as relevant to the assessment of the reasonableness of his or her response to the threat: see *R v Bowen* [1996] 2 Cr App R 157.

considered by the High Court in *Taiapa* as part of its role in developing and advancing the criminal law, rather than waiting for a case where they were directly raised.

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