HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **The King**
Appellant

and

Anna Rowan – A Pseudonym
Respondent

APPELLANT'S SUBMISSIONS

Part I: Internet publication certification

1. The appellant certifies that this submission is in a form suitable for publication on the internet.

Part II: Statement of issue on appeal

2. This appeal raises the following issue for resolution: whether the law of duress should countenance "duress of circumstances" and, if so, whether the element of proportionality ought feature as a condition of this law's application?

Part III: Notice under section 78B of the *Judiciary Act 1903*

3. The appellant certifies that notice is not required.

Part IV: Citations of the reasons for judgment of the primary court and intermediate court

4. The reasons for sentence of the County Court of Victoria (primary court) are cited as: *Director of Public Prosecutions v Anna Rowan (a pseudonym)* [2021] VCC 1135.[1]

[1] Contained in Core Appeal Book at 110, (**CAB**).

The trial judge's ruling on duress[2] was delivered on 27 February 2020 but does not possess a medium neutral citation.

5. The reasons for judgment of the Supreme Court of Victoria, Court of Appeal ("the Court below") are cited as: *Anna Rowan (a pseudonym) v The King* [2022] VSCA 236 ("the judgment below").

Part V: Statement of the relevant facts

The trial court

6.1 The respondent was charged on Indictment C1711475.1 and on 30 June 2021 a jury found the respondent guilty of 11 charges of incest and one charge of an indecent act with a child under 16.[3]

6.2 The offences were alleged to have been committed against her two daughters, Paige and Alicia,[4] between 27 November 2009 and 26 November 2015.

6.3 The prosecution case was that the respondent had committed the offences with her then partner and father of the two girls, James Rowan ("JR").[5] JR had been convicted by a separate jury in relation to other sexual offences against the same complainants in respect of which the respondent had not been involved.[6]

6.4 The necessary factual and procedural background can be found in the judgment below.[7]

6.5 The respondent's primary case at trial was that the charged conduct did not occur. She did not dispute that JR offended against the complainants but contended that she was not present and did not do any of the acts for which she was charged. In the alternative, she sought to rely on the defence of duress.

6.6 For the offences with charged periods commencing prior to 1 November 2014,[8] the defence of duress was governed by the common law. For the offence alleged to have

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[2] ("The trial judge's ruling"). The trial judge's ruling is contained within the "Appellant's Further Materials" at 4, (**AFM**).
[3] The respondent was acquitted of one charge of incest, CAB at 109.
[4] Paige and Alicia are pseudonyms.
[5] A pseudonym.
[6] JR had originally been charged together with the respondent in relation to the 13 charges the respondent faced at trial. However, following an order made on 12 March 2020 for separate trials, those charges against JR were discontinued.
[7] At [7]–[54], CAB at 147 – 154.
[8] Charges 1–12 in relation to the complainant Paige.

been committed after that date,[9] the defence of duress was contained at section 322O of the *Crimes Act 1958* (Vic).[10]

6.7 Prior to the empanelment of a jury, a ruling was sought from the trial judge concerning whether the defence of duress was open on the evidence in relation to each of the charges the respondent faced on the indictment. In support of the defence of duress, the respondent sought to rely primarily upon a report prepared by a forensic psychologist, Pamela Matthews, dated 13 May 2019.[11] The Matthews 2019 report detailed the respondent's intellectual functioning (which fell within the "mildly intellectually disabled" category), and a history given to Ms Matthews by the respondent of JR's controlling behaviour towards the respondent, and JR's physical and sexual abuse of the respondent.[12] Ms Matthews opined that the respondent presented with behaviours consistent with battered woman syndrome.

6.8 The trial judge considered that the applicable principles of duress at common law were those summarised by Smith J in *R v Hurley*.[13]

6.9 After considering the evidence sought to be relied on by the respondent, the trial judge ruled that the evidence did not provide a sufficient factual basis for the defence of duress to be properly raised before the jury. The trial judge concluded that the evidence was incapable of establishing that the respondent had been required to do any of the relevant acts under a threat that serious harm would be inflicted on any person if she failed to do the acts.[14]

6.10 In relation to the evidence, the trial judge found that it was difficult to identify the threat or threats which attached to or motivated the respondent's alleged offending, and that no proximal link was established between the alleged family violence and the alleged offending.[15]

6.11 The trial judge considered that the respondent's stated concerns to Ms Matthews of the consequences for not complying with JR's sexual wishes in relation to Paige, namely not speaking for a couple of days, bad looks and feelings of worthlessness and fear, were of insufficient magnitude to constitute a threat of harm of the kind to which a

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[9] Charge 13, in relation to the complainant Alicia.
[10] ("the *Crimes Act*").
[11] ("the Matthews 2019 report"). The respondent also relied on some aspects of the complainants' evidence and tendency evidence contained in a tendency notice filed on her behalf dated 17 February 2020.
[12] Outlined in detail in the judgment below at [90]–[116], CAB at 163 – 168.
[13] [1967] VR 526 at 543 ("*Hurley*").
[14] The trial judge's ruling at [57]–[64], AFM at 20 – 22.
[15] The judgment below at [123], citing the trial judge's ruling at [58] and [60], CAB at 173.

person of ordinary firmness would have yielded by sexually abusing that person's children.[16]

6.12 Pursuant to the trial judge's ruling, the defence of duress was not left to the jury and the respondent was convicted of 12 of the 13 charges on the indictment.

The Court below

6.13 The respondent appealed her convictions to the Court below, ultimately arguing a single ground: "The learned judge erred in ruling that the defence of duress was not open on the evidence to be [led] at trial and thereby causing a substantial miscarriage of justice."[17]

6.14 The respondent argued that the evidence was capable of demonstrating that it was reasonably possible that she was acting under duress in relation to all of the charges because of the "ongoing, constant, high-level rape, violence, intimidation and manipulation to which [JR] subjected her."[18] It was contended that JR's abuse of the applicant created and maintained a "standing threat" of significant ongoing harm. In those circumstances, any refusal of JR's demands had consequences, which had the effect of overbearing the respondent's will so that she always submitted to JR's will.[19]

6.15 The respondent further submitted that there was no need for a separately articulated threat to be tied to each offence.[20]

6.16 The plurality in the Court below acknowledged that "no previous case has expressly accepted the proposition that a continuing or ever present threat — whether overt or tacit — as distinct from a specific, overt threat, is sufficient."[21] However the plurality also considered that no case had expressly considered that proposition and rejected it.[22]

6.17 The plurality concluded that "a continuing or ever present threat which is subsisting at the time an accused committed the charged offence can suffice if, in all other respects, the defence of duress can be made out. We cannot think of any reason in principle or

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[16] The trial judge's ruling at [62]–[63], AFM at 21-22.
[17] The particulars to the ground are set out in the judgment below at [4], CAB at 146.
[18] The judgment below at [132], CAB at 175 – 176. The appellant notes that the sexually abusive behaviours of JR were not characterised as rape nor as giving rise to a constant threat of rape in the evidence or submissions before the trial judge. The respondent's account to Ms Matthews of JR's abusive behaviours are reproduced in the trial judge's ruling at [17(3)(a)(iii)], AFM at 10.
[19] The judgment below at [132], CAB at 175 – 176.
[20] Ibid at [134], CAB at 176.
[21] Ibid at [155], CAB at 181.
[22] Ibid.

policy that requires exclusion of a continuing or ever present threat where, due to the threat, the accused has lost his or her freedom to choose to refrain from committing the charged offence. In this context, it is relevant to note the additional limiting factors identified in element (iii) which requires that the threat be present and continuing, imminent and impending at the time each offence is committed."[23]

6.18 Having concluded that a "continuing or ever present threat" could found the defence of duress, the joint judgment extrapolated a number of possible findings a jury might make from the Matthews 2019 report regarding the respondent's circumstances at the time of the alleged offences by virtue of JR's violent and controlling behaviour in the family home.[24] It went on to find that based on those circumstances: "it would have been open to the jury to conclude that it was reasonably possible that the [respondent] understood that there was a continuing or ever present threat of physical and sexual violence (including rape) by JR if she did not do what he demanded of her. If the jury reached this conclusion, it would have been open to them to find that it was reasonably possible that, when JR requested the [respondent] to be involved in each of the sexual offences against the complainants, she understood that, if she did not comply, he would physically and sexually harm her, including by raping her."[25]

6.19 The plurality went on to conclude that: "For all of the offences, it would be open to the jury to conclude that there was a reasonable possibility that the [respondent] would not have been present or undertaken the specific acts that constituted the offending had it not been for an unstated demand from JR that she do so, otherwise he would physically and sexually abuse her. In relation to the offending the subject of charge 1, the existence of such a reasonable possibility is supported by the [respondent's] statement to Ms Matthews that she 'tried to say no, but [JR] made [her]'."[26]

6.20 Ultimately it was determined that a substantial miscarriage of justice had been occasioned by the trial judge ruling that the defence of duress could not be left to the jury.[27]

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[23] Ibid at [156], CAB at 181. The judgment of McLeish JA was to a similar effect albeit predicated upon a narrower evidential base: see at [208], [215], [218], [222], [223] and [226], CAB at 192, 193, 194, 195 – 196.
[24] Ibid at [168], CAB 184 – 185.
[25] Ibid at [169], CAB at 185.
[26] Ibid at [174] (citations omitted), CAB at 186.
[27] Ibid at [189], CAB at 188.

Part VI: Outline of the appellant's argument

Introduction

7.1 At the heart of this appeal is the issue of whether the law of duress ought include, or extend to, what in the United Kingdom has come to be known as "duress of circumstances". The law of duress has traditionally demanded that a person communicate a threat to an accused enjoining the accused to engage in criminal activity with the consequence that the accused will suffer serious injury or death should they refuse. In the UK, however, the law of duress has developed so as to include cases where no such threat has been communicated by a person, but the accused feels sufficiently pressured nevertheless due to the existence of objective contextual circumstances. The appellant contends that the Court below, in the present case, has extended the law of duress so as to include "duress of circumstances".

7.2 The appellant's contention is that the Court below was in error to take this step. Alternatively, it was in error to take this step without also including within the law of duress certain protective features adopted by the UK courts which operate so as to keep duress within its proper limits. In short, the appellant contends that the Court below has significantly, and erroneously, lowered the threshold applicable to the defence of duress.

7.3 It is important to recall (as referred to above) that Charges 1 to 12 of the present indictment would have been covered by duress at common law, whereas Charge 13 would have had applied to it the defence of duress as expressed in section 322O of the *Crimes Act*. Section 322O was introduced by the Victorian legislature in 2014. It had the effect of abolishing the previous common law.

7.4 For the purposes of the present case, the Court below treated the common law and its later statutory manifestation, relevantly, as equivalent.[28] When it comes to the duress defence, other jurisdictions within Australia either appeal to the common law (importantly, in this respect, NSW) or possess their own relevant statutory

[28] Section 322O was modelled on s 10.2 of the *Criminal Code Act 1995* (Cth) which would appear to have altered the common law in no manner lessening the need that there be a threat coupled with a demand for criminal action. The Commonwealth provision did apparently lower the level of harm threatened and it applied also to murder. Section 322O's earlier incarnation, s 9AG of the *Crimes Act*, applied to homicide offences in Victoria since 2005.

formulations. All statutory formulations speak in terms of the delivery of a threat to the person supposedly prevailed upon.[29]

The nature of duress

7.5 A short, but helpful, history of the law of duress can be found in the judgment of Lord Edmund-Davies in *DPP v Lynch*.[30] Certainly it has been recognised that the precise metes and bounds of duress are difficult to define.[31] Nevertheless, the definition of duress arrived at by Smith J in *Hurley* at 543 has consistently been regarded as "authoritative".[32] The conditions requiring satisfaction, as stipulated by Smith J, are set out in the judgment below.[33] Central to the test is that an accused "has been required to do an act charged against him … under a threat that death or grievous bodily harm will be inflicted unlawfully upon a human being if the accused fails to do the act."[34] All, or most, of the other conditions either refer-back, and build upon, in some manner, the existence of this initial threat. The threat is, of course, assessed against certain objective considerations: for instance, the person of "ordinary firmness" and "reasonable" apprehension.

7.6 Save for some muted suggestions to the contrary, it appears that hitherto in Australia the law has not permitted the threat under which an accused was required to act to arise out of, or be inferred from, the objective circumstances which contextualise the accused's position. It seems, rather, that an actual or explicit threat in the form "do this, or else" is required.

7.7 For instance, in *R v Lorenz*[35] the accused had committed armed robbery with a knife upon a supermarket employee obtaining $360. The money was obtained by the accused in order that she might get enough money so that her male de-facto partner could re-

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[29] Section 31 of the *Criminal Code Act 1899* (Qld); s 32 of the *Criminal Code Act Compilation Act 1913* (WA); s 20 of the *Criminal Code Act 1924* (Tas); s 15D of the *Criminal Law Consolidation Act 1935* (SA); ss 1, 23 and 40 of the *Criminal Code Act 1983* (NT); s 40 of the *Criminal Code 2002* (ACT).
[30] [1975] AC 653 at 706–708 ("*Lynch*").
[31] See, for instance, *Lynch* at 686 per Lord Simon of Glaisdale ("it is actually an extremely vague and elusive juristic concept."), and at 679 per Lord Wilberforce ("The principle upon which duress is admitted as a defence is not easy to state."). See also *R v Howe* [1987] 1 AC 417 at 428 per Lord Hailsham ("duress has, in my view, never been defined with adequate precision …), and at 436 per Lord Bridge ("[duress] is difficult to rationalise or explain by reference to any coherent principle of jurisprudence.") ("*Howe*").
[32] See, for instance, *Taiapa v The Queen* (2009) 240 CLR 95 at 105 [28] per French CJ, Heydon, Crennan, Kiefel and Bell JJ.
[33] At [61], CAB at 156.
[34] *Hurley* at 543.
[35] (1998) 146 FLR 369 ("*Lorenz*").

register his car. At the time of the offence the accused was pregnant with her de-facto's third child. It was accepted that the de-facto partner had threatened to kill the accused unless the money that he required was obtained – a sum of about $550. This threat had been delivered to the accused by her de-facto partner on the night before the robbery and was repeated on the morning of the robbery. The accused had no other legitimate means to obtain the money. She had attempted to secure an advance payment from the Department of Social Security but this was unsuccessful.

7.8 As is alleged in the present case, in addition to threatening to kill the accused in this manner, the de-facto had for years in the past perpetrated upon the accused the most brutal form of domestic violence. Since she was around 17 her de-facto had frequently beaten the accused. The beatings extended to being hit, kicked, jumped on and thrown against walls. The Court further described this violence:

> On at least one occasion she was threatened with a machete and on another she was attacked with a baseball bat which had nails and screws protruding from it. She … had been admitted to hospital and as a result of assaults by [the de-facto] at least four or five times because of injuries which he had inflicted. The assaults often occurred after he had been drinking and frequently related to arguments about money … he was very jealous and exerted considerable control over her lifestyle, refusing to allow her to go out socially without him, contacting her by telephone at lunchtime each day to ensure that she was still at home and demanding receipts for everything that she spent." [36]

7.9 As in the present case, in *Lorenz* the defence called expert evidence of battered woman syndrome and the "learned helplessness" that the accused felt due to the beatings that had been inflicted upon her by the de-facto. It was this syndrome, so it was accepted, that led to the accused's intense fear of being physically attacked by her de-facto and led her to act in an impulsive and socially deviant way.

7.10 It was accepted that the armed robbery was "an impulsive act committed due to a fear that [the de-facto] might carry out his threat to kill her", that the accused's failure to extricate herself from the situation was "largely explicable by her fear and confusion",

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[36] Ibid at 371 per Crispin J.

and that "any escape would have been only temporary and that sooner or later [the de-facto] would have been bound to have caught up with her and carried out his threat".[37]

7.11 Nevertheless, the Court concluded that the accused's defence of duress could not succeed because the de-facto did not, by means of any threat, "direct her to commit the offence with which she [was] charged".[38] The need at law for such a condition to exist and require satisfaction was explained by the Court.

> There are theoretical and public policy reasons for confining the defence of duress in this manner. The theoretical basis of the defence of duress is that if a person has carried out an act because his or her will has been overborne by threats then that act cannot be said to have been committed voluntarily. If the threat was related to a more generalised demand such as one for the production of money then whilst the accused may have acted under a significant compulsion his or her will would not have been overborne in relation to the particular act chosen in order to satisfy the demand and it could not be regarded as involuntary. As a matter of public policy it is important to ensure that the ambit of the defence is not expanded to relieve people from criminal responsibility for offences to which the coercion was not directed. The fact that a person has acted in response to such a pressing need will obviously be regarded as a strong mitigating factor. However, pressing needs arise for reasons unrelated to threats. It would not be practicable to effectively excuse criminal behaviour in every case in which it was so motivated.[39]

7.12 Similarly in *R v Dawson*[40] a prisoner was charged with having escaped from prison. The prisoner's case for duress was that he had escaped because he was in fear of his life in prison as he had over the past few months, and as recently as a day or so before the escape, received information that threats had been made that he would be stabbed or killed in B Division — that part of the prison in which he was then being held and from which he escaped. Anderson J, with whom Starke J agreed, observed that in all of the cases relating to duress the offence which the accused person had been constrained to commit had been nominated by the person making the threats.

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[37] Ibid at 375.
[38] Ibid at 377.
[39] Ibid.
[40] [1978] VR 536 ("*Dawson*").

Anderson J held that this was an element of the defence.[41] Harris J also expressed the view that the defence was limited to cases in which the threats had been made to coerce the accused into committing the act which was the basis of the offence with which he was charged.[42] Thus, duress could not succeed.

7.13 Consistent with the above, the Law Reform Commissioner for Victoria in his Report No 9 published in 1980 — after extensive analysis of relevant authority — concluded that the common law of duress could apply in circumstances where "there is a threat to a person made by another that if he does not commit some breach of the criminal law he or another or others to whom he stands in close relation will suffer harm" but *not* where "there is a threat of harm to one person by another or others, *not coupled with a demand for criminal action*, but criminal action is taken to avoid the harm threatened".[43]

7.14 In *Clarkson v The Queen*[44] the Court of Criminal Appeal of NSW accepted as "correct" a Crown submission that the defence of duress requires that an accused "was required to commit the offences under threat if he failed to do so" and that a "defence of duress of circumstances" was rather a "defence of necessity".[45]

7.15 The defence of necessity, and its different theoretical underpinning when compared to duress, will be returned to below.

The development in the UK of "duress of circumstances"

7.16 In the UK, however, and as the learned editors of *Archbold* have put it:

> There has in recent years developed the expression 'duress of circumstances'. The use of the word 'duress' in this context is misleading. Duress, whether in criminal law or civil law, suggests pressure being brought to bear by one person on another person to persuade that other person to do something which he is unwilling to do. *'Duress of circumstances' has nothing to do with one person being told to commit a crime 'or else': it relates to a situation where a person is driven to commit a crime by force of circumstances*.[46]

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[41] Ibid at 538–539.
[42] Ibid at 542–543.
[43] See Law Reform Commissioner for Victoria, *Duress, Necessity and Coercion* (Report No 9, 1980) at 41–42 (emphasis added).
[44] (2007) 171 A Crim R 1 ("*Clarkson*").
[45] Ibid at 19 [86]–[87] per Beazley JA, Sully J agreeing at 46 [252], Howie J agreeing at 47 [253].
[46] Mark Lucraft et al (eds), *Archbold: Criminal Pleading, Evidence and Practice* (Sweet & Maxwell, 2022) at 2202 [17-112] (emphasis added).

7.17 In the last number of decades courts in the United Kingdom have been willing to accept "duress of circumstances" into the law of duress.[47] This development, it seems, grew initially out of a series of driving cases. It has in recent times found expression in the oft-quoted restatement of general principles crafted by Simon Brown J (as he then was) in *Martin*. Only the first of those principles need be set out here:

> [F]irst, 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'.[48]

7.18 One example might suffice to give colour to this development in English law. In *Willer* the defendant was convicted of reckless driving because he had been seen driving quite slowly on the pavement in front of a shopping precinct. He wished to defend the case on the basis that this had seemed to him to be the only way in which he could escape from a gang of 20 to 30 youths who had already banged on his car and threatened to kill him. The defendant considered that those youths were now bent on doing him further violence. The defence of necessity had been ruled unavailable at trial. On appeal Watkins LJ said that the court doubted whether the defence of necessity was in point, but held that the jury ought to have been left to decide whether "the appellant was wholly driven by force of circumstance into doing what he did and did not drive the car otherwise than under that form of compulsion, i.e. under duress".[49]

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[47] See *R v Kitson* (1955) 39 Cr App R 66 (no suggestion that "duress of circumstances" could be relied upon). Cf *R v Willer* (1986) 83 Cr App R 225 ("*Willer*"); *R v Conway* [1988] 3 All ER 1025; *R v Martin* [1989] 1 All ER 652 ("*Martin*"); *R v Pommell* [1995] 2 Cr App R 607; *R v Abdul-Hussain* [1999] Crim LR 570 ("*Abdul-Hussain*").

[48] *Martin* at 653.

[49] At 227. The development of "duress of circumstances" is charted in the judgment of Brooke LJ in *Re A (children) (conjoined twins: surgical separation)* [2000] 4 All ER 961 at 1044–1048 ("*Re A*").

7.19 This development in the law of duress in England has led the editors of *Smith & Hogan* to record as follows:

> It seems now to be generally accepted that duress and duress of circumstances will be treated as identical by the courts as regards all elements other than the obvious one of the source of the threat. This seems unobjectionable.[50]

7.20 It is perhaps appropriate to note that the development of the law of duress so as to include "duress of circumstances" was described by Brooke LJ in *Re A* as a "significant development in the common law",[51] and one that was willing to be entertained in cases that His Lordship described as "extreme".[52] The sort of "extreme" case that His Lordship had in mind was, it seems, the case of *Abdul-Hussain*. In that case the accused had wished to mount a defence to the effect that the reason why they had hijacked a Sudanese airbus on a flight from Khartoum to Amman and had forced it to fly to Stanstead Airport in England was that they were terrified that the Sudanese authorities might deport them to Iraq where they faced the prospects of imprisonment in conditions of extreme hardship, torture, and summary execution. Nevertheless, the evidence revealed that in the course of that hijacking an air hostess was seized and threatened with a plastic knife, an imitation grenade was produced (accompanied by a threat to blow up the plane), a knife was held for a very long time to the captain's back, passengers believed to be security officials were tied up, and one of the accused pretended to instruct the others to blow up the plane if there was any movement on board. The accused had declined to release the women and children at Larnaca, in Cyprus, where the plane stopped to refuel. The atmosphere on board was said to have been very tense.[53] As Brooke LJ observed (after his survey of the "duress of circumstances" cases found in the UK and, in particular, the facts of the hijacking case, *Abdul-Hussain*):

> I mention these facts to show that the Court of Appeal is now willing to entertain the possibility of a defence of duress even in a case as extreme as this if it is arguable that 'the will of the accused has been overborne by threats of death or

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[50] David Ormerod and Karl Laird, *Smith, Hogan, & Ormerod's Criminal Law* (Oxford University Press, 16th ed, 2021) at 397 (citation omitted). See also 383–386, 397–399 ("*Smith & Hogan*").
[51] *Re A* at 1044.
[52] See *Re A* at 1047. See also the reservations regarding relaxing the threshold for duress expressed in *R v Z* [2005] 2 AC 467 ("*R v Z*") at 491 [22], per Lord Bingham of Cornhill.
[53] See *Re A* at 1047.

> serious personal injury so that the commission of the alleged defence was no longer [his] voluntary act'… The defence is available on the basis that if it is established, the relevant actors have in effect been compelled to act as they did by the pressure of the threats or other circumstances of imminent peril to which they were subject, and it was the impact of that pressure on their freedom to choose their course of action that suffices to excuse them from criminal liability.[54]

A concern to keep the law of duress within its proper confines

7.21 The concerns raised by Brooke LJ in *Re A* are perhaps reflective of the more generalised, and oft-expressed, concern that the proper boundaries of duress as a defence must be jealously guarded. It has been feared, for instance, that the law of duress might set up a rival regime of coercion and threats — "a charter for terrorists, gang-leaders and kidnappers".[55] Lord Lane CJ as quoted in *Howe* (in the context of murder), put it thus:

> It seems to us that it would be a highly dangerous relaxation in the law to allow a person who has deliberately killed, maybe a number of innocent people, to escape conviction and punishment altogether because of a fear that his own life or those of his family might be in danger if he did not; particularly so when *the defence of duress is so easy to raise and may be so difficult for the prosecution to disprove beyond reasonable doubt, the facts of necessity being as a rule known only to the defendant himself*.[56]

7.22 These sentiments are echoed in the observations of Professor Sir John Smith as quoted by Lord Bingham in *R v Z*: "duress is a unique defence in that it is so much more likely than any other to depend on assertions which are peculiarly difficult for the prosecution to investigate or subsequently to disprove".[57] Lord Bingham added relevantly: "The prosecution's difficulty is of course the greater when, as is all too often the case, little

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[54] Ibid.
[55] *Lynch* at 687–688 per Lord Simon of Glaisdale.
[56] See *Howe* at 444 (emphasis added).
[57] *R v Z* at 490.

detail of the alleged compulsion is vouchsafed by the defence until the trial is under way".[58]

7.23 Nevertheless, and despite these concerns, courts of the highest authority in the UK have observed an apparent expansion in the operation of duress. A "progressive latitude"[59] has held sway. The defence of duress has been "extended, particularly since the second war".[60] "(W)here policy choices are to be made …" Lord Bingham would have been inclined "towards tightening rather than relaxing the conditions to be met before duress may be successfully relied on".[61]

The theoretical bases of duress and necessity

7.24 As traditionally understood, important differences exist between the defence of duress, on the one hand, and the defence of necessity, on the other. This is of note, if, as the NSW Court of Criminal Appeal held in *Clarkson*, it is true to say that duress of circumstances is more correctly characterised as a manifestation of the defence of necessity.

7.25 Brooke LJ in *Re A* set out Sir James Stephen's celebrated definition of the doctrine of necessity: "(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; and (iii) the evil inflicted must not be disproportionate to the evil avoided."[62]

7.26 The theoretical underpinning of the law of necessity is justification. Duress relies upon excuse. The latter operates as a concession to human frailty. Not so for necessity. A claim of necessity asserts that the charged conduct was not harmful in the sense that it was the lesser of two evils.[63]

7.27 Notwithstanding recognition of the two very different theoretical underpinnings applicable to duress and necessity respectively, it has been observed of the UK decisions concerning duress of circumstances that "the distinction between duress of

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[58] Ibid.
[59] *Lynch* at 708 per Lord Edmund-Davies.
[60] *Howe* at 439 per Lord Griffiths.
[61] *R v Z* at 491.
[62] *Re A* at 1052.
[63] See *Smith & Hogan* at 398. See also *Re A* at 1047–1048 per Brooke LJ.

circumstances and necessity has, correctly, been by and large ignored or blurred by the courts".[64] There seems no reason to doubt this observation.[65]

7.28 A function of this theoretical blurring appears to have been that in cases of duress of circumstances in the UK a condition requiring satisfaction before the defence may successfully be relied upon is that the charged act be proportional to the threatened harm.[66] The significance of this for the present case will be considered below.

The present case

7.29 In the present case there was no suggestion that, prior to the charged offending, the respondent's partner, JR, had communicated to the respondent a threat that she offend sexually against her children or suffer serious harm or death should she refuse.

7.30 The complainants gave no evidence of the communication by JR to the respondent of such a threat. In summary, evidence from the complainants went no further than asserting that JR "made" the respondent offend against them, that it did not look like the respondent was acting voluntarily, and that it was not known why the respondent would have sexually abused them unless JR forced the respondent to do so.[67]

7.31 The respondent gave no evidence of the communication of such a threat as a precursor to the alleged offending.

7.32 Unsurprisingly, no evidence of such a threat connected with offending against the respondent's children communicated by JR to the respondent could be found in the tendency evidence.

7.33 This meant that in order to fashion her case for duress the respondent was required to argue that, on the basis of her and her children's past serious mistreatment at the hands of JR (the circumstances in which the respondent found herself), she feared, quite

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[64] *R v Shayler* [2001] 1 WLR 2206 at 2226–2227 [53]–[55] per Lord Woolf CJ (for the Court) ("*Shayler*").
[65] See *Lynch* at 692 per Lord Simon of Glaisdale ("Duress is, thus considered, merely a particular application of the doctrine of 'necessity'"), at 701 per Lord Kilbrandon ("The difference between the defence of duress, which comes from coercion by the act of man, and that of necessity, which comes from coercion by the forces of nature, is narrow and unreal"). See also *Howe* at 429 per Lord Hailsham ("There is, of course, an obvious distinction between duress and necessity as potential defences; duress arises from the wrongful threats or violence of another human being and necessity arises from any other objective dangers threatening the accused. This, however, is, in my view a distinction without a relevant difference, since on this view duress is only a species of the genus of necessity which is caused by wrongful threats").
[66] See the reasons of Rose LJ in *Abdul-Hussain* extracted in *Re A* at 1065 by Robert Walker LJ. See also *Shayler* at 2228 [64].
[67] See the judgment below at [170], CAB at 185.

reasonably, that if she did not comply with JR's requests that she offend against her children she would suffer serious harm as a consequence.

7.34 The threat contended for by the respondent was said thus to arise from the circumstances in which the respondent found herself (based on her and her children's past mistreatment), as distinct from a threat of serious harm or death communicated to her by JR's words or actions.

7.35 So much is evident from the manner in which the respondent characterised her case for duress in the Court below. In "Speaking Notes"[68] relied upon by the respondent for this purpose reliance was placed on a "standing threat"[69] which in turn was predicated upon the fact of earlier mistreatment. Reliance was not placed upon a "separately articulated threat … tied to each offence".[70] The submission by the respondent was that "[d]uress arose because of the on-going, constant, high-level rape, violence, intimidation and manipulation to which the principal offender [JR] subjected the [respondent]."[71] It was submitted that the respondent's "[r]efusal always had its consequences, and submission to the will of [JR] was always obtained in the setting that he was free to intimidate, bully and rape, with violence as he pleased … [a] standing threat of ongoing, violent domination, made to so vulnerable a person as the [respondent], may be inferred to be causally relevant or potentially relevant to each and any of the crimes alleged here".[72] And further: "[n]o demand made by [JR] was free of the ongoing threat he created".[73]

7.36 JR's "standing threat" was not, unsurprisingly, of a type expressly articulated in the form of: "I will, in the future, require you to offend sexually against our children; if you do not comply with any such requirement I will seriously harm or kill you". It was, rather, something unarticulated by JR that the respondent inferred from the nature of JR's earlier behaviour.

7.37 The case articulated was thus one of duress of circumstances. The plurality in the Court below accepted this case as articulated.

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[68] See the "Application for Leave to Appeal Against Conviction – Speaking Notes/Further Submissions On Ground 2" ("The Respondent's Speaking Notes"), AFM at 28.
[69] The Respondent's Speaking Notes at 1, AFM at 28.
[70] Ibid at 3, AFM 30.
[71] Ibid at 1, AFM at 28.
[72] Ibid at 3, AFM at 30.
[73] Ibid. Much the same can be found at 4, AFM at 31.

7.38 The plurality found evidence of a "continuing or ever present" threat which was subsisting at the time the offences were committed. This was based on the evidence of JR's past mistreatment of the respondent.[74]

7.39 In determining whether the first *Hurley* condition was satisfied, that is to say, whether there was a "threat that death or grievous bodily harm will be inflicted unlawfully upon the respondent" if the respondent failed sexually to abuse her children, the Court below determined it sufficient that the respondent merely "*understood*" that there was a continuing or ever present threat of physical and sexual violence (including rape) by JR if the respondent did not do what JR demanded of her. It was enough that the respondent "*understood*" that if she did not comply she would be physically and sexually harmed (including by being raped).[75]

7.40 Such "understanding" on the respondent's part could only have related to the circumstances of JR's past mistreatment which, as it happened, did not involve the respondent in any offending against her children.

7.41 Moreover, the plurality determined that it was not fatal to the respondent's case for duress in consideration of the first *Hurley* limb that there was no direct evidence of JR having threatened physically and sexually to abuse the respondent. This was because "it would be open to the jury to infer that this … [JR's abuse of the respondent] … was a reasonable possibility based upon the history of the relationship between JR and the [respondent] as set out in the Mathews 2019 report and, in particular, the complainants' evidence".[76]

7.42 Further, the plurality held that it would have been open to the jury to conclude that there was a reasonable possibility that the respondent would not have been present or undertaken the specific acts that constituted the offending had it not been for the "unstated demand" from JR that she do so, otherwise he would physically and sexually abuse her.[77]

7.43 The plurality was concerned to accept the case for duress that had been formulated by the respondent, namely, one which appealed to the objective circumstances in which she found herself rather than "a separately articulated threat". Thus the plurality observed: "[f]or the above reasons, we are of the opinion that it would have been open

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[74] See the judgment below at [156], CAB at 181.
[75] The judgment below at [169] (emphasis added), CAB at 185.
[76] Ibid at [174], CAB at 186.
[77] Ibid.

to the jury to conclude that there was a reasonable possibility that the [respondent] committed the offences against the complainants as a result of her will being overborne by the continuing or ever present threat *of JR* to which we have referred".[78]

7.44 The plurality's appeal was to JR's past mistreatment giving rise to the continuing or ever present threat *of him*. These can only be the objective circumstances in which the respondent found herself, and from which the respondent inferred, or "understood", the existence of the threat perceived.

7.45 It is not to be thought that McLeish JA concluded any differently. For, as His Honour expressed it: "It might be *inferred* that the general conduct of JR as revealed by the other evidence meant that when he talked the applicant into acceding to his desires *there was an implicit threat* of serious physical harm if she refused."[79]

A threat "left unsaid"

7.46 Authority recognises that a threat may be "left unsaid". The provenance of this is the case of *Hurley*. Smith J stated as follows:

> In the second place where armed men, who appear to be fully prepared to kill to gain their ends, have taken possession of a house at gunpoint, and they have sent the accused out to execute a commission for them, retaining a hostage to ensure obedience to their commands, the threat to the hostage's life, whether it is formulated in words or left unsaid, may be held to be, during the execution of the commission, sufficiently present and continuing, imminent and impending to found the defence of duress[80]

7.47 What can be said of those facts is that the hostage-takers, *by their actions*, had communicated a threat of sufficient magnitude to the accused. Neither as articulated by the respondent, nor as found by the Court below, was it said that as a precursor to the acts of alleged offending committed by the respondent against her children JR had communicated this type of threat to the respondent, either by word or deed. On the respondent's case she *perceived* such a threat, but whether JR was sensible of this (unlike many brutish husbands and fathers) and thus applied it to his purposes was

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[78] Ibid at [175] (emphasis added), CAB at 186.
[79] Ibid at [218] (emphasis added), CAB at 194. Paragraph [222] is to the same effect, CAB at 195.
[80] *Hurley* at 543.

entirely speculative. Had things been different, there would thus have been no need for the Court below — in determination of the first *Hurley* condition, namely, whether there existed a relevant "threat" as a matter *a priori* — to determine what the respondent "understood". There would have been no need to appeal — as part of this exercise — to the "reasonable possibility" of JR's harming of the respondent should she not have sexually abused her children, nor to the objective threat "*of JR*"; nor to the existence of an "implicit threat" to be inferred from JR's general conduct.

Conclusion

7.48 It has been accepted in academic circles that the law of duress — as traditionally understood — would need modification if it were to accommodate claims by "battered offenders" such as the respondent.[81]

7.49 Having thus made the transition into "duress of circumstances" the Court below has, it is submitted, and perhaps for the first time in Australia, ventured into territory that has been occupied by the UK courts for some years. But the law of duress in Australian law has yet, it appears, seen fit to blur the theoretical underpinnings of duress and necessity in the manner that has taken place in the UK. As a result of the present case, through extension of the law of duress, a jury may be asked, in essence, to consider a modified form of the defence of necessity without any need to consider proportionality. Certainly that which is already 'objective' about the law of duress, as traditionally understood, will not suffice for proportionality. This is because the objective sounding board of traditional duress[82] is suffused with so much that is subjective. Even a recognised mental illness or psychiatric condition such as post-traumatic stress disorder may be included.[83] But this concession to human frailty will not correlate with asking whether an accused has chosen the lesser of two evils.

7.50 The answer in the present case is for the law either not to take the step that has already been taken in the UK,[84] or, if such a step is to be taken, for the new law of duress to

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[81] See, for instance, Laurie Kratky Doré, 'Downward Adjustment and the Slippery Slope: The Use of Duress in Defense of Battered Offenders' (1995) 56(3) *Ohio State Law Journal* 665.
[82] The person of ordinary firmness.
[83] See the judgment below at [71]–[74] and the authorities referred to therein, CAB at 158 – 159.
[84] On this basis it is submitted that the trial judge's ruling did not contain error, and, in particular, was correct in adhering to the law of duress as it hitherto has been traditionally conceived: cf the judgment below at [153]–[164], CAB at 180 – 183.

carry with it further protection such as the need for proportionality (as, it appears, is required in the UK).

7.51 Both approaches would make a difference in the present case. Obviously, if the law of duress is not modified so as to include duress of circumstances, then the trial judge in the present case committed no error — or so it is submitted. If, to the contrary, duress of circumstances carries with it something akin to proportionality then it may legitimately be asked: "on what basis could it ever be the lesser of two evils to sexually abuse one's children rather than to suffer physical and sexual violence (or even rape) at the hands of one's intimate partner?" This appeal should be allowed.

Part VII: Orders sought by the appellant

8. The orders sought by the appellant are:

(i) That the appeal to this Court be allowed;

(ii) That the orders of the Court below given on 28 October 2022 granting leave to appeal, allowing the appeal to that Court and quashing the respondent's convictions be vacated;

(iii) That the respondent's application to the Court below for leave to appeal against conviction be refused.

Part VIII: Time required for presentation of appellant's oral argument

9. The appellant estimates 2 hours are required for presentation of the appellant's oral argument.

Dated: 4 August 2023

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ANNEXURE

Pursuant to item 3 of the Practice Direction No 1 of 2019, below is a list of each of the particular constitutional provisions, statutes and statutory instruments referred to in the submissions above.

Number	Description	Version	Provision
1	*Crimes Act 1958* (Vic)	248 (as at 1 November 2014)	s 322O
2	*Criminal Code Act 1899* (Qld)	As at 22 March 2023	s 31
3	*Criminal Code Act 1913* (WA)	As at 13 April 2023	s 32
4	*Criminal Law Consolidation Act 1935* (SA)	As at 22 June 2023	s 15D
5	*Criminal Code Act 1983* (NT)	As at 1 August 2023	ss 1, 23 and 40
6	*Criminal Code Act 1924* (Tas)	As at 13 June 2023	s 20
7	*Criminal Code 2002* (ACT)	R50 (as at 11 December 2021)	s 40