# HIGH COURT OF AUSTRALIA

FRENCH CJ,
HEYDON, CRENNAN, KIEFEL AND BELL JJ

---

DION ROBERT TAIAPA APPLICANT

AND

THE QUEEN RESPONDENT

*Taiapa v The Queen* [2009] HCA 53
*16 December 2009*
B6/2009

**ORDER**

1. *Extend the time for filing the application for special leave to appeal to 20 February 2009.*

2. *Special leave to appeal granted.*

3. *Appeal treated as instituted and heard instanter, and dismissed.*

On appeal from the Supreme Court of Queensland

**Representation**

G D Wendler for the applicant (instructed by John D Weller & Associates)

M J Copley SC for the respondent (instructed by Director of Public Prosecutions (Qld))

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

## CATCHWORDS

### Taiapa v The Queen

Criminal law – Defences – Compulsion – Applicant convicted of possession of and trafficking in a dangerous drug – Whether Court of Appeal erred in holding that evidence did not disclose a case fit for consideration by jury that there were reasonable grounds for applicant's belief that he was otherwise unable to escape the carrying out of the threat within the meaning of s 31(1)(d) of the *Criminal Code* (Q).

Words and phrases – "reasonable belief".

*Criminal Code* (Q), s 31(1)(d).

1 FRENCH CJ, HEYDON, CRENNAN, KIEFEL AND BELL JJ. The applicant, Dion Robert Taiapa, was convicted in the Supreme Court of Queensland of the offences of carrying on the business of unlawful trafficking in a dangerous drug, methylamphetamine, and the possession of a quantity of that drug[1]. The factual basis of the Crown case was not in issue at the trial. It was the applicant's case that he did the acts that were said to constitute the offences in order to save himself and members of his family from threatened serious harm. He contended that he was not criminally responsible for his admitted conduct in collecting and transporting a substantial quantity of methylamphetamine because he had acted under compulsion within the meaning of s 31(1)(d) of the *Criminal Code* (Q).

2 The trial judge withdrew the issue of compulsion from the jury's consideration, thereby making the applicant's conviction of each offence inevitable. The applicant appealed against his conviction on the ground that the trial judge erred in not leaving compulsion for the jury's determination.

3 The Court of Appeal of the Supreme Court of Queensland (Keane and Fraser JJA and Lyons J) dismissed the appeal. The applicant applied out of time for special leave to appeal from the order of the Court of Appeal. On 25 June 2009 French CJ, Kiefel and Bell JJ referred his application to extend time in which to bring the application and his application for special leave to the Full Court. The applicant's solicitor provided a satisfactory explanation for the delay in filing the application in an affidavit that was sworn on 18 August 2009. An order extending the time for filing the application should be made. For the reasons that follow, the application for special leave to appeal should be granted, but the appeal should be dismissed.

---

**1** Count 1 charged an offence contrary to s 5(1)(a) of the *Drugs Misuse Act* 1986 (Q) that, on 22 July 2006 at or near Ingham in the State of Queensland, Dion Robert Taiapa and Robert John Ackers carried on the business of unlawfully trafficking in the dangerous drug methylamphetamine. Count 2 charged an offence contrary to s 9(a) of the *Drugs Misuse Act* 1986 that, on 22 July 2006 at or near Ingham in the State of Queensland, Dion Robert Taiapa and Robert John Ackers unlawfully had possession of the dangerous drug methylamphetamine, in a quantity exceeding 2.0 grams.

Justification and excuse – compulsion: s 31(1)(d)

4 Section 31(1)(d) of the *Criminal Code* provides that a person is not criminally responsible for an act or omission[2]:

> "when –
>
> (i) the person does or omits to do the act in order to save himself or herself or another person, or his or her property or the property of another person, from serious harm or detriment 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; and
>
> (iii) doing the act or making the omission is reasonably proportionate to the harm or detriment threatened."

5 While it is conventional to describe s 31(1)(d) as providing the *defence* of compulsion, it is well-settled that if there is some evidence capable of raising the issue, the legal or persuasive burden is on the Crown to exclude the proposition that the accused was acting under compulsion beyond reasonable doubt – that is, exclude any reasonable possibility that the proposition is true[3]. In deciding whether the evidence sufficiently raises the issue to leave compulsion to the jury, it is necessary for the trial judge to be mindful of the onus of proof. The question is 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[4]. It

---

**2** The protection of the provision does not extend to certain offences specified in s 31(2) nor to an accused who has by entering into an unlawful association or conspiracy rendered himself or herself liable to have such threats made to the person.

**3** *R v Mullen* (1938) 59 CLR 124 at 136-137 per Dixon J; [1938] HCA 12; *Ugle v The Queen* (2002) 211 CLR 171; [2002] HCA 25; *Murray v The Queen* (2002) 211 CLR 193; [2002] HCA 26.

**4** *Stingel v The Queen* (1990) 171 CLR 312 at 334 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ; [1990] HCA 61; *Van Den Hoek v The*

(Footnote continues on next page)

was not disputed that the onus on that question – an evidential burden – is on the accused[5]. It is the accused who must tender evidence, or point to prosecution evidence, to that effect.

The facts

6 What follows is a summary of the facts giving rise to the prosecution and of the applicant's account of the circumstances leading to his involvement in the enterprise.

7 The applicant was arrested on 22 July 2006. The police intercepted the vehicle in which he, his co-accused, Robert Ackers, and a young woman were travelling. They located 364.213 grams of methylamphetamine in the course of searching the vehicle. The estimated value of the drug, which varied according to how it was to be sold, was between $459,000 and $1.15 million. The sum of $3,200 in cash was found on the applicant and a further sum of $25,220 in cash was found in the boot of the vehicle.

8 The applicant had a history of marijuana and cocaine use. In the period 1999 to 2002 he had dealt in drugs to support his use of them. His suppliers were two men named Tony and Salvatore. By 2002 he had accumulated a debt to Tony and Salvatore of $60,000. At around this time the applicant was convicted of trafficking in drugs and sentenced to a term of six years' imprisonment. He had not repaid the debt to Tony and Salvatore at the time he was taken into custody. He was released on parole in December 2005. Following his release the applicant and his de facto wife, Kristy Jarvis, moved to Cairns and took up residence in premises in Kidston Street. It was a condition of his parole order that he reside in the Cairns area.

9 On the evening of 29 May 2006 the applicant and Ms Jarvis were at home in the Kidston Street premises. At around 8.00pm the applicant answered a knock on the front door. As he opened the door he was seized around the neck and forced backwards into the lounge room by Tony, who was holding a gun to his face. Salvatore was also present. The two men demanded the repayment of

---

*Queen* (1986) 161 CLR 158 at 161-162 per Gibbs CJ, Wilson, Brennan and Deane JJ; [1986] HCA 76.

**5** It was so at common law: *R v Bone* [1968] 1 WLR 983; [1968] 2 All ER 644. There is nothing in the *Criminal Code* altering that position.

their money. They instructed the applicant not to go to the police and threatened that, if he did, he or Kristy would be shot. The two men left, telling the applicant that he had four weeks in which to repay the money and that they would return in a fortnight.

10 Kristy was pregnant with the applicant's child at the time of this confrontation. The applicant and she agreed that she should leave Cairns and return to her home on the Gold Coast. The applicant was not able to accompany her under the terms of his parole order. Kristy left Cairns and returned to the Gold Coast on 2 June. The applicant moved out of the Kidston Street premises and into premises in Alfio Street, Cairns. Thereafter he made unsuccessful attempts to raise the money that he owed to Tony and Salvatore. Ultimately the applicant sought his mother's assistance and she agreed to lend him $29,000 in cash, which she had on hand.

11 On Saturday 15 July Tony and Salvatore confronted the applicant at the Alfio Street premises. They threatened him, again, at gunpoint and taunted him over his unsuccessful attempt to evade them. They rejected his offer to repay them $29,000 immediately and the balance by instalments. They told the applicant that in addition to giving them $29,000 he was to travel to Sydney and collect something for them. They said that they would give him further instructions in this regard the following night. They told the applicant not to try anything stupid or that he, Kristy and his mother would pay for it. They repeated their earlier instruction that the applicant was not to report the matter to the police.

12 The following evening Tony and Salvatore returned to the Alfio Street premises. On this occasion they instructed the applicant that he was to meet a man in Ettalong, which is a township to the north of Sydney, at 11.00pm on Thursday 20 July and to collect two parcels from him. The applicant understood that the parcels would contain prohibited drugs. He was instructed to remove two sections of foam upholstery from under the rear seat of his vehicle and to secrete the parcels in the cavities. They told him that they would return to the Alfio Street premises to collect the parcels and the money on the evening of Sunday 23 July.

13 The applicant did not have a driver's licence at the time of these events. He asked Robert Ackers to drive him to Ettalong. The two of them and a female friend embarked on the trip. The applicant collected the parcels from the man at the nominated time and place. He collected the money from his mother's premises the following day. He was apprehended in the course of the return journey.

14 The applicant was asked about his reasons for failing to report the threats to the police or to his parole officer. In the course of the cross-examination the following exchange took place between the trial judge and the applicant:

> "But you understand that the police – it's their job to investigate criminal behaviour and bring people who have committed it before the Court and have them dealt with? – – Yeah, I would have had to go – there's – oh, protection – there was always protection there, but there's no guarantee if I was to put in – be put in police protection, that I'd still be safe.
>
> Yes. At any rate, what do you mean by that, that – that you'd – did you weigh these things up, did you? – – Yes."

15 The suggestion that an alternative course of action was to report the matter to the police was raised again later in the course of the cross-examination:

> "You could have driven the vehicle yourself and called in at a police station and declared yourself to be – – –? – – I could have done that. Yes. I could have done that. But in my – – –
>
> – – – a disqualified – – –? – – – – – circumstances – in my position I was in no position whatsoever to be going to the police about it.
>
> HIS HONOUR: I'm sorry. What do you mean by that? – – Well, the threats and that were – that were made to me I was in no position at all to do that. I wasn't going to take that risk at all to go to the police.
>
> But I mean why do you say that? Because the – the police are the – are the people to whom you report threats made against you, aren't they? – – Yes. They are.
>
> Well, I – I don't understand why you say – – –? – – Well – – –
>
> – – – in your position? – – – – – well, if I went to – to police they could have put me in protection. There was no – is that a hundred – I don't believe that – that is 100 per cent safe. Secondly, that these blokes, they're not your every day drug dealers. They're – like there's drug dealers and then there's drug dealers. These blokes are up there.
>
> Yes? – – And who is to say that they wouldn't – like if I tried setting them up or – they're not going to fall into a booby trap or anything like that, I believe."

16 The Crown Prosecutor put to the applicant that he had made a choice to engage in the world of drug dealing rather than to take other options that were available to him. The applicant responded saying:

> "In my position the only option for me was – for me was to do as I was told. I didn't want anyone else getting hurt. I didn't – I especially didn't want a bullet in my head."

17 The applicant's mother and Kristy Jarvis were called in his case and gave evidence that was supportive of the acceptance of his account.

The Court of Appeal's reasons

18 The trial judge withdrew the issue of compulsion from the jury because there was no evidence that Tony and Salvatore were in a position to execute the threats at the time the applicant engaged in the conduct. The Court of Appeal (Keane JA, with whose reasons Fraser JA and Lyons J agreed) said that it was an error to hold that it was a requirement of the defence that the person making the threat be in a position to carry it out at the time of the commission of the offence[6]. The Court of Appeal held that following amendments to s 31(1) in 1997[7] it is sufficient that the compulsion operating on the mind of the accused is a present threat of future harm[8].

19 The Court turned to consider the requirement of s 31(1)(d)(ii). It observed by reference to its earlier decision in *R v Smith*[9] that the question is "whether the [accused] reasonably believed that he was unable otherwise to escape the carrying out of the threat"[10].

20 The Court of Appeal said that the relaxation of the statutory requirement of immediacy of connection between the prospect that the threat will be carried

---

**6** *R v Taiapa* (2008) 186 A Crim R 252 at 258 [30] per Keane JA (Fraser JA and Lyons J concurring); [2008] QCA 204.

**7** *Criminal Law Amendment Act* 1997 (Q), s 13.

**8** *R v Taiapa* (2008) 186 A Crim R 252 at 258 [31].

**9** [2005] 2 Qd R 69.

**10** *R v Taiapa* (2008) 186 A Crim R 252 at 259 [34].

out and the commission of the offence was not intended to permit those who engage in criminal acts to do so free of criminal responsibility because they are "unreasonably timorous" or because they find it more convenient to comply with a threat than to seek the assistance of the police to remove it[11]. In this context the Court of Appeal said[12]:

> "The requirements of s 31(1)(d)(ii) mean that those who find themselves subjected to pressure to engage in criminal activities cannot avail themselves of the defence of compulsion under s 31(1)(d) of the *Criminal Code* to excuse their part in criminal activities merely by reason of their subjective willingness to be used as pawns of more aggressive criminals. It is a feature of civilised society that one may render threats of personal violence ineffective by seeking the help of agencies of law enforcement. A defence under s 31(1)(d) can arise for the consideration of the jury only where there is an evidentiary basis for a reasonable belief on the part of the accused that he or she is 'unable otherwise to escape the carrying out of the threat'. If it is to be asserted by an accused that he or she reasonably believed that there was no other means of avoiding a threat than complying with an unlawful demand then the reasonableness of that belief must be considered in the light of the other alternatives available to the accused. That necessarily means that the accused must have a reasonable basis for believing that the law and its enforcement agencies cannot afford protection from the threat."

21 The Court of Appeal noted that the applicant had ample opportunity to alert the police to his predicament[13]. In the Court of Appeal's opinion there was no evidentiary basis for a conclusion that the applicant's lack of faith in the ability of the police to defeat the threat was based on reasonable grounds and for this reason the trial judge had been right not to leave the issue of compulsion to the jury[14].

---

**11** *R v Taiapa* (2008) 186 A Crim R 252 at 258 [32].

**12** *R v Taiapa* (2008) 186 A Crim R 252 at 259 [36].

**13** *R v Taiapa* (2008) 186 A Crim R 252 at 260 [38].

**14** *R v Taiapa* (2008) 186 A Crim R 252 at 260-261 [40]-[42].

The submissions

22 In the written submissions filed on the applicant's behalf the application was said to raise the question of "[w]hether and to what extent s 31(1)(d)(ii) of the [*Criminal Code*] contains objective limitations on the availability of the defence of … compulsion". On the hearing, counsel for the applicant accepted that par (d)(ii) imports an objective element into the defence. The analysis of the operation of the provision in *Smith*, which was applied by the Court of Appeal, was not challenged. The applicant and the Crown each submitted that the reasonableness of the grounds for the belief is to be assessed by reference to the circumstances as the accused perceives them. This application does not provide the occasion to consider the correctness of the latter submission, nor the extent to which, if at all, 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].

23 The sole issue raised by the application is whether the Court of Appeal erred in its conclusion that the evidence did not disclose a case fit for consideration by the jury that there were reasonable grounds for the applicant's belief. The applicant points to the evidence that his life and the lives of members of his family were under threat from high-level, armed, drug dealers who had directed him not to report the matter to the police. He did not have information about the identity of Tony and Salvatore sufficient to enable the police to locate them. He was not confident that the police could offer effective protection to him and to his family. In his submission, the matters addressed by the Court of Appeal as demonstrating the absence of reasonable grounds were factual considerations for the jury to weigh.

24 The Crown submits that the Court of Appeal's invocation of public policy, including its reference to the authorities dealing with the common law defence of duress[16], is to be understood in the context of the legislative history.

---

**15** See *R v Oblach* (2005) 65 NSWLR 75.

**16** *R v Taiapa* (2008) 186 A Crim R 252 at 258-260 [32], [37], citing *Director of Public Prosecutions for Northern Ireland v Lynch* [1975] AC 653 at 670 per Lord Morris of Borth-y-Gest; *R v Brown* (1986) 43 SASR 33 at 40 per King CJ. See also *R v Z* [2005] 2 AC 467 at 493 [26].

Amendments introduced into s 31(1) in 1997[17] and 2000[18] widened the defence conformably with developments in the common law defence. These changes, which operated to lessen the strictness of the defence, are said to have been balanced by the requirement created by par (d)(ii) for the existence of reasonable grounds for the belief. The Crown called in aid the provisions of the *Police Service Administration Act* 1990 (Q) in support of the Court of Appeal's reference to the attributes of a civilised society. Section 2.3 of that Act sets out the functions of the Queensland Police Service, which include the protection of members of the community from the actions of criminal offenders, and the detection of offenders and bringing of offenders to justice. Given that the execution of Tony and Salvatore's threats was not imminent and that the applicant had the opportunity to report the matter to the police, in the absence of evidence raising as a reasonable possibility that the police would not act in accordance with their statutory duty, the Crown submits that the Court of Appeal was correct to hold that no arguable case of compulsion was raised.

The legislative history

25 As originally enacted the defence of compulsion under the *Criminal Code* was confined to threats to kill or to inflict grievous bodily harm directed against the accused by a person who was actually present and in a position to carry out the threat at the time of the conduct[19]. The requirements that the maker of the threat actually be present and that the threat be directed at the accused personally were removed by the amendments to s 31(1) that were introduced in 1997[20]. The removal of these restrictions mirrored the development of the common law

---

**17** *Criminal Law Amendment Act* 1997 (Q), s 13.

**18** *Criminal Law Amendment Act* 2000 (Q), s 16.

**19** Section 31(4) provided: "When he does or omits to do the act in order to save himself from immediate death or grievous bodily harm threatened to be inflicted upon him by some person actually present and in a position to execute the threats, and believing himself to be unable otherwise to escape the carrying of the threats into execution".

**20** *Criminal Law Amendment Act* 1997 (Q), s 13. The amendments followed the recommendation of the *Report of the Criminal Code Advisory Working Group to the Attorney-General*, July 1996 at 25-26.

defence of duress[21]. As amended s 31(1) relieved the accused of criminal responsibility:

> "(d) when he or she does or omits to do the act in order to save himself or herself or another person from immediate death or grievous bodily harm threatened to be inflicted on him or her or the other person by some person in a position to execute the threats, and believing himself or herself or the other person to be unable otherwise to escape the carrying of the threats into execution."

26 In its present form, set out earlier in these reasons, s 31(1)(d) reflects the further amendments that were introduced in 2000[22]. The scope of the defence was widened to include threats to the property of the accused or of another person. At the same time the requirements of reasonable belief and proportionality were introduced. The 2000 amendments would appear to have been made, at least in part, in response to a recommendation of the Taskforce on Women and the Criminal Code[23]:

> "That the defence of duress in section 31 of the *Criminal Code* be amended to provide that conduct is carried out by a person under duress if he or she reasonably believes that a threat has been made which will be carried out unless an offence is committed; and there is no reasonable way in which the threat could be rendered ineffective; and the conduct is a reasonable response to the threat."

27 The Taskforce's recommendation incorporates aspects of the elements of duress proposed by the Criminal Law Officers Committee of the Standing Committee of Attorneys-General[24], which was later enacted as s 10.2(2) of the *Criminal Code* (Cth). It provides:

---

**21** *R v Williamson* [1972] 2 NSWLR 281 at 298-299 per Lee J; *R v Brown* (1986) 43 SASR 33 at 55-56 per Zelling J; *R v Abusafiah* (1991) 24 NSWLR 531 at 537.

**22** *Criminal Law Amendment Act* 2000 (Q), s 16.

**23** Queensland, *Report of the Taskforce on Women and the Criminal Code*, February 2000, Recommendation 56 at 170; and see Explanatory Notes to the Criminal Law Amendment Bill 2000.

**24** *Model Criminal Code, Chapters 1 and 2: General Principles of Criminal Responsibility – Report*, December 1992.

"A person carries out conduct under duress if and only if he or she reasonably believes that:

(a) a threat has been made that will be carried out unless an offence is committed; and

(b) there is no reasonable way that the threat can be rendered ineffective; and

(c) the conduct is a reasonable response to the threat."

28 The Taskforce's proposal that the defence of compulsion require that "there is no reasonable way in which the threat could be rendered ineffective" is in line with the statement of the defence of duress at common law. While that defence has been criticised as being in a "vague and unsatisfactory state"[25], one element accepted in Australian common law jurisdictions is that the accused "had no means, with safety to himself, of preventing the execution of the threat"[26]. This concept is addressed in the defence of compulsion by the requirement of reasonable belief that the accused (or the other person who is the subject of the threat) is unable otherwise to escape the carrying out of the threat.

Reasonable belief

29 Reasonable belief is a familiar concept in the context of criminal responsibility in the *Criminal Code* and at common law. Section 271(2) of the *Criminal Code* speaks of a belief "on reasonable grounds". As Stephen J observed in *Marwey v The Queen*, to ask whether a person has a reasonable belief is not different in substance from asking whether a person has reasonable grounds for belief[27]. His Honour explained that in a case in which self-defence under s 271(2) is raised the jury are required to consider two questions. The first is an inquiry as to the state of the accused's mind. The second is an objective

---

**25** *R v Hurley* [1967] VR 526 at 529 per Winneke CJ and Pape J.

**26** *R v Hurley* [1967] VR 526 at 543 per Smith J. His Honour's statement of the elements of the common law defence has frequently been cited as authoritative: *R v Dawson* [1978] VR 536; *R v Lawrence* [1980] 1 NSWLR 122; *R v Brown* (1986) 43 SASR 33; *R v Abusafiah* (1991) 24 NSWLR 531.

**27** (1977) 138 CLR 630 at 641; [1977] HCA 68.

question that his Honour said is "exclusively concerned with the jury's view of the grounds, whether they constitute reasonable grounds"[28]. Barwick CJ also observed that it is for the jury to judge whether such grounds exist[29]. The recognition that the determination of whether grounds are reasonable is a factual question for the jury is not to overlook the anterior question of law, which is whether there is any material upon which it would be open to a reasonable jury to determine the issue favourably to the accused[30].

30 Professor Glanville Williams explains the respective functions of judge and jury in this way[31]:

> "Burdens are in respect of facts; questions of law are decided by the judge, without any question of burden. But some questions, such as the question of reasonableness, are in an intermediate position. They are value-judgments marking the boundary between criminal and non-criminal conduct, and therefore are 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."

Discussion

31 In concluding that there was no evidence that would justify the jury in finding as a reasonable possibility that there were reasonable grounds for the applicant's belief, the Court of Appeal took as its starting point the assumption stated by King CJ in *R v Brown*[32]:

> "The ordinary way in which a citizen renders ineffective criminal intimidation is to report the intimidators and to seek the protection of the

---

**28** *Marwey v The Queen* (1977) 138 CLR 630 at 640.

**29** *Marwey v The Queen* (1977) 138 CLR 630 at 638.

**30** *R v Muratovic* [1967] Qd R 15 at 20 per Gibbs J, cited with approval in *Zecevic v Director of Public Prosecutions (Vict)* (1987) 162 CLR 645 at 665 per Wilson, Dawson and Toohey JJ; [1987] HCA 26.

**31** Glanville Williams, *Textbook of Criminal Law*, 2nd ed (1983) at 49.

**32** (1986) 43 SASR 33 at 40.

police. That must be assumed, under ordinary circumstances, to be an effective means of neutralizing intimidation. If it were not so, society would be at the mercy of criminals who could force pawns to do their criminal work by means of intimidation."

32 In *Brown* King CJ considered that in the circumstances of that case the accused's failure to report a threat to the police and to seek the protection of the police for himself and his son was fatal to the common law defence of duress[33]. His Honour acknowledged that there may be circumstances in which a failure to seek the protection of the police would not deprive an accused of the defence[34]. His Honour cited the judgment of the English Court of Appeal in *R v Hudson*[35] in this respect[36].

33 *Hudson* was a case in which two teenage girls were convicted of perjury. At their trial Hudson gave evidence that she had been approached by a group of men, including one Farrell, who had a reputation for violence. Farrell warned her that if she gave truthful evidence they would get her and "cut her up". Hudson passed on the warning to her co-accused. Farrell had been present in the public gallery of the court when each of the accused gave the perjured evidence. The trial judge withdrew duress from the jury because there had not been an immediate threat capable of being carried out: the recorder and police officers were present and able to afford protection to the girls at the time each gave her evidence. The appeal raised the question whether the defence of duress may be unavailable if the accused fails to take steps to remove the threat by seeking police protection. The effect upon the defence of a failure by the person threatened to take steps to remove the threat had not previously arisen in an English case. However, the Court of Appeal appears to have accepted the statement in *Hurley*[37] that an ingredient of the defence is the absence of a safe

---

**33** (1986) 43 SASR 33 at 40. King CJ's opinion on this question was a minority one; Zelling J would have allowed the appeal holding that duress was sufficiently raised (at 59) and Millhouse J, while concurring in the order dismissing the appeal, did not adopt King CJ's reasons on this issue (at 61).

**34** *R v Brown* (1986) 43 SASR 33 at 40.

**35** [1971] 2 QB 202.

**36** *R v Brown* (1986) 43 SASR 33 at 40.

**37** [1967] VR 526 at 543: see above at fn 26.

means of preventing the execution of the threat[38]. The Court of Appeal observed[39]:

> "[Counsel for the Crown] submits on grounds of public policy that an accused should not be able to plead duress if he had the opportunity to ask for protection from the police before committing the offence and failed to do so. The argument does not distinguish cases in which the police would be able to provide effective protection, from those when they would not, and it would, in effect, restrict the defence of duress to cases where the person threatened had been kept in custody by the maker of the threats, or where the time interval between the making of the threats and the commission of the offence had made recourse to the police impossible."

34 The Court continued[40]:

> "In the opinion of this court it is always open to the Crown to prove that the accused failed to avail himself of some opportunity which was reasonably open to him to render the threat ineffective, and that upon this being established the threat in question can no longer be relied upon by the defence. In deciding whether such an opportunity was reasonably open to the accused the jury should have regard to his age and circumstances, and to any risks to him which may be involved in the course of action relied upon."

35 *Hudson* has been the subject of some academic criticism[41]. However, the proposition that the failure of the accused to take advantage of an opportunity to report the threat to the police does not necessarily defeat the defence has been accepted[42]. In *Hudson* the failure of teenage girls to seek police protection in circumstances in which their potential assailant was present in court at the time

---

**38** *R v Hudson* [1971] 2 QB 202 at 207.

**39** *R v Hudson* [1971] 2 QB 202 at 207.

**40** *R v Hudson* [1971] 2 QB 202 at 207.

**41** Glanville Williams described the decision as "surprisingly indulgent": *Textbook of Criminal Law*, 2nd ed (1983) at 631.

**42** *R v Brown* (1986) 43 SASR 33 at 40 per King CJ; *Goddard v Osborne* (1978) 18 SASR 481; and see *R v Howe* [1987] AC 417 at 443 per Lord Griffiths.

they gave their perjured evidence was held not to negate an arguable case that their conduct was excused by duress. In other circumstances, in the absence of an explanation, or reasons apparent from the circumstances, for the failure to seek the protection of the law enforcement authorities there will be no basis on which to leave consideration of duress to the jury.

36 *Morris v The Queen*[43] was a case in the Court of Appeal of Western Australia on the defence of duress under s 10.2(2) of the *Criminal Code* (Cth) in which the accused failed to report threats to the police. McLure JA observed that prima facie the appropriate means of rendering a threat made by another ineffective is to report the matter to, and obtain the protection of, law enforcement authorities[44]. Her Honour drew on the observations of Gleeson CJ in *Rogers*[45] with reference to the policy that informs this area of the law[46]. In *Rogers* a prisoner sought to rely on the defence to excuse his escape from lawful custody to avoid threatened lethal violence. At issue was the availability of the common law defence of necessity, which shares features in common with the defence of duress[47]. Gleeson CJ said[48]:

> "The corollary of the notion that the defence of necessity exists to meet cases where the circumstances overwhelmingly impel disobedience to the law is that the law cannot leave people free to choose for themselves which laws they will obey, or to construct and apply their own set of values inconsistent with those implicit in the law. Nor can the law encourage juries to exercise a power to dispense with compliance with the law where they consider disobedience to be reasonable, on the ground that the conduct of an accused person serves some value higher than that implicit in the law which is disobeyed."

---

**43** (2006) 201 FLR 325.

**44** *Morris v The Queen* (2006) 201 FLR 325 at 353 [153].

**45** (1996) 86 A Crim R 542 at 546.

**46** *Morris v The Queen* (2006) 201 FLR 325 at 353 [154].

**47** See the discussion in *R v Howe* [1987] AC 417 at 429 per Lord Hailsham of Marylebone LC; and Fisse, *Howard's Criminal Law*, 5th ed (1990) at 540.

**48** *Rogers* (1996) 86 A Crim R 542 at 546.

37 Gleeson CJ rejected the view that the defence of necessity required proof of urgency and immediacy as technical elements. Instead he favoured treating these as factual considerations relevant to the accused person's belief and the reasonableness of the grounds for it[49]. He went on to observe[50]:

> "Reasonableness is not designed to allow people to choose for themselves whether to obey the law. … A reluctance or (as will appear in the case with the present appellant), an unwillingness to go on protection may be understandable, but the principle of necessity is not intended to give prisoners who are threatened a choice between going on protection and removing themselves, permanently or indefinitely, from custody."

38 The decision of the trial judge, that the evidence did not raise an issue of necessity proper to be left to the jury, was upheld[51]. His Honour's observations set out above are pertinent to the consideration of the issue raised in this application.

Conclusion

39 The belief that s 31(1)(d)(ii) posits is that the accused or the other person who is subject to the threat is unable otherwise to escape the carrying out of the threat. "Otherwise" in this context means other than by engaging in the unlawful conduct. It was necessary for the applicant to identify some basis in the evidence raising as a reasonable possibility the existence of reasonable grounds for his belief, that he had no alternative other than to collect and transport a quantity of prohibited drugs in order to avoid the carrying out of the threats made by Tony and Salvatore. This necessarily requires consideration of the basis for the applicant's belief that reporting the matter to the police would not have prevented the carrying out of the threats.

40 The circumstance that the demands and threats made by Tony and Salvatore were made with a gun and were accompanied by instructions not to report the matter to the police does not support the reasonableness of the applicant's belief that he had no option other than to comply with the demands in order to escape the carrying out of the threats. The applicant had, as he

---

**49** *Rogers* (1996) 86 A Crim R 542 at 547.

**50** *Rogers* (1996) 86 A Crim R 542 at 547.

**51** *Rogers* (1996) 86 A Crim R 542 at 550.

acknowledged, ample opportunity to seek the assistance of the police. He offered three reasons for his failure to do so. The first was that he did not have sufficient information to enable the police to identify Tony and Salvatore. The second was that he did not believe that police protection was "100 per cent safe". The third was that Tony and Salvatore were "not your every day drug dealers" and were unlikely to fall into a booby trap. The Court of Appeal said that the police could have placed surveillance on the applicant's premises and that a controlled delivery of the drugs to Tony and Salvatore might have led to their arrest. It is true that there was no evidence about the investigative methods or the resources available to the police. However, this does not undermine the Court of Appeal's conclusion. There is no reason to doubt it. The applicant's belief that he did not have sufficient information to enable the police to identify Tony and Salvatore does not take into account that the police may have known more about these men than he thought that they did or that the police may have been able to find out more about them than he thought they could. In any event, it does not explain his failure to report the matter to the police in order to seek their protection. The applicant's belief that police protection may not be 100 per cent safe provided no basis for a reasoned conclusion that it was not. It may explain the applicant's preference for complying with the unlawful demands. However, an unparticularised concern that police protection may not be a guarantee of safety cannot without more supply reasonable grounds for a belief that there is no option other than to break the law in order to escape the execution of a threat.

41 The Court of Appeal was correct to hold that no jury, acting reasonably, could fail to be satisfied beyond reasonable doubt that there were not reasonable grounds for the applicant's belief within s 31(1)(d)(ii).

Orders

42 For these reasons the following orders should be made. The time for filing the application for special leave to appeal is extended to 20 February 2009; the application for special leave to appeal is granted; and the appeal is dismissed.