

LA2-3

They key to understanding duress, as a defence, can be found in the phrase: "a concession to human frailty". Discuss.

Written by Jade Benson (November 2009)

Plan

Introduction

Duress can be considered as being a concession to human frailty

Two types of duress: Duress of Circumstances, Duress of Threats

The allowance of the defences

Duress of Threats

-Valderrama-Vega (1985) – threat must be in the least of serious harm

-Martin (1989) – threat does not have to be against the defendant

Subjective and objective tests

-tests laid out in Graham (1982)

-Martin (DP) (2000) – takes into account certain characteristics which affect defendant's mental condition

-Bowen (1996) – characteristics of reasonable person same as defendant = age, pregnancy, physical disability, gender. IQ is irrelevant.

Conditions which affect the acceptance of the concession

-Gill (1963) – no safe avenue of escape

-Hudson & Taylor (1971) – imminence of threat

-Cole (1994) – threat to make defendant commit specific offence

-Sharp (1987), Shepherd (1987) – self-induced duress

Duress of Circumstances

-Willer (1986)

-Conway (1988)

-Cairns (1999) – not required to show threat was actual or real

Duress as a Defence to Murder

-DPP for Northern Ireland v Lynch (1975) – permitted duress for secondary party to murder

-Howe (1987) – suggests that committing murder in any sense cannot be considered a human frailty, as an ordinary man would have the will not to concede to commit such an act

-Gotts (1992) – duress of threats not available in attempted murder

-Pommell (1995) – duress of circumstance is not permitted for murder or attempted murder

Conclusion

-Duress of threats can be seen as a concession to human frailty in response to the will of others. Duress of circumstances is the concession to human frailty in response to the situation. However, there is no concession to human frailty where an individual commits murder or attempted murder.

They key to understanding duress, as a defence, can be found in the phrase: "a concession to human frailty". Discuss.

Duress can be understood through looking at the phrase "a concession to human frailty". There are two types of duress, these are: duress of threats, and duress of circumstances. These shall be discussed in relation to the aforementioned phrase using various cases. It shall also be discussed as to the availability of such defences and how far the concession to human frailty is accepted as a defence to the committal of crimes.

Duress of Threats

In terms of a concession to human frailty, duress of threats can be seen as a concession to the will of others. Duress of threats occurs where the defendant has been threatened with either serious injury or death.

It was held in 'Valderrama-Vega (1985)' that the threat must be of serious harm at the least, and anything less than this does not provide the defence. In this case the defendant had imported an illegal substance due to death threats received from a mafia-style organisation of drug-smugglers. He also did so in response to threats to expose his homosexuality and because of financial pressures. The Court of Appeal quashed his conviction. They did so, on the basis of the fact that the trial judge had not permitted the defence of duress, stating that the death threat must have been the sole motivation for committing the offence. The Court of Appeal held that the jury were entitled to look at the cumulative effects, and therefore the defence should have been permitted. They held that it was enough that there was a death threat involved. Had there been no death threat, the other threats would not have been serious enough for the defence to apply.

When dealing with duress of threats, the threat need not be against the person committing the offence. In 'Martin (1989)' the threat had been of the suicide of the defendant's wife. She had threatened to kill herself unless her husband agreed to drive their son to work while on a disqualification from driving. The courts held that this was sufficient for the defence to apply.

Subjective and Objective tests

For the duress of threats defence to be successful, the jury must consider both the subjective, and the objective tests. The subjective test looks at whether the defendant reasonably believed that there was a cause to fear that non-compliance would result in death or serious injury. The objective test asks whether a sober person, with the same characteristics as the defendant and of reasonable firmness, would respond in the same way. These tests were laid out in the case of 'Graham (1982)'. In this case the defendant was

homosexual, living with his wife and another homosexual man, K. K was a violent man, and after drinking heavily with the defendant, he put a flex around the neck of the defendant's wife and told the defendant to pull the other end. This resulted in the death of the wife. The defendant claimed to have only done what he did because of a fear of K. However, his conviction for murder was upheld.

In 'Martin (DP) (2000)' the Court of Appeal decided that the subjective test should be interpreted as being whether the defendant felt fear for his safety. This means that certain characteristics of the defendant which would make him more responsive to threats could be taken into account. In this case the defendant had been in a schizoid-affective state meaning that he took things said to him to be threatening and believed that the threats would be carried out. As a result he had been forced to commit two robberies by men who lived on the same estate as the defendant. The Court of Appeal held that the defendant's mental condition is a relevant factor in determining whether he reasonably believed that his or his family's safety was at risk. The effect of this is that specific frailties of the defendant are considered as well as a more general human frailty in terms of responding to threats.

The subjective test is more concerned with the general human frailty in relation to conceding to threats. In 'Bowen (1996)' the defendant was of a low IQ, he obtained goods through deception for two men who had threatened to petrol-bomb his family. The court decided that the defendant's IQ was irrelevant to his ability to resist pressure and threats; therefore it is not a characteristic to be taken into account when considering the objective test. However, characteristics that the courts held could be considered include: age, people of a very young or a very old age are more susceptible to threats; pregnancy, as pregnant women will have the additional fear of protecting their unborn child; serious physical disability, this could make it more difficult for the individual to defend himself; recognised mental illness, this could affect the individual's susceptibility to threats; and gender. Gender was mentioned, however, the Court of Appeal did state that many women do have as much moral courage as men.

Conditions Which Affect the Acceptance of the Concession

There are certain circumstances in which the concession must occur for the defence to be accepted. One of these conditions is that there is no safe avenue of escape available to the defendant. For example, in 'Gill (1963)' the defendant and his wife had been threatened unless he stole a lorry. However, during the committal of the offence, there was a period in which the defendant was left alone and thus would have had the opportunity to raise the alarm. Due to this fact, he was not able to rely on the defence of duress of threats.

The imminence of the threat is also a determinant factor in whether the defence can be allowed. In 'Hudson & Taylor (1971)' the two defendants, girls aged 17 and 19, committed perjury while giving evidence in court for the prosecution in the trial of a man charged with wounding someone else. They claimed that they had lied because a man, who had a

reputation for violence, had told one of the girls that he would “cut her up”¹ unless she gave evidence against the attacker. They were convicted, but the convictions were quashed on appeal. The Court of Appeal held that the threat had to be a ‘present’ threat; however, this was in the respect that the threat posed to the defendant would eliminate his or her will at the time of committing the offence. The threat was still hanging over the girls, therefore the defence was permitted.

Another condition which must be present for the defence of duress of threats to be available is that the threat must be to make the defendant commit a specific offence. This is something which applies only to duress of threats. In ‘Cole (1994)’ the defendant claimed that he, his girlfriend and their child had been threatened with violence in order to make him pay back some money that he owed. However, because he did not have the money, the defendant committed two robberies of a building society in order to get the sufficient money. His conviction was upheld by the courts because he had not been told by the person making the threat to commit a robbery.

A final condition that must be considered is as to whether the defendant induced the duress on himself. If the individual is aware that he may be putting himself into a position in which he may be under duress to commit an offence, then the defence does not apply. This is because his concession is not that of human frailty in response to the will of others; it is in fact a result of their own free will in getting into such a situation in the first place. For example in ‘Sharp (1987)’ the defendant had joined a gang who committed robberies. He claimed that he had wanted to withdraw before the last robbery by the gang in which a postmaster was killed. However, the Court of Appeal held that the defendant had known about the gang’s violent nature when he joined them, therefore he could claim that he was under duress when they threatened him with violence.

In contrast to ‘Sharp’, the defendant in ‘Shepherd (1987)’ was permitted the defence of duress of threats. He had joined a gang of shoplifters who usually stole cigarettes, which was a non-violent crime. When he tried to stop taking part in the shoplifting, he was threatened with violence unless he continued. The Court of Appeal quashed his conviction because the defendant had no knowledge that the gang were likely to use violence on him when he joined them.

Duress of Circumstances

Duress of circumstances is, in terms of human frailty, a concession to the situational pressures. This means that the individual has committed an offence because the situation that he has been placed in, i.e. the surrounding circumstance, requires him to take certain actions. Duress of circumstances has most commonly occurred in regulatory offences such as those concerning driving. For example, the first case in which the defence of duress of

¹ Taken from page 187 of ‘OCR Criminal Law for A2 – second edition’ by Martin. J

circumstances was recognised as 'Willer (1986)' in which the defendant was driving down a narrow alley. His car became surrounded by a gang of youths who were threatening the driver and his passenger. In order to escape from the youths, the defendant realised that it was necessary to drive onto the pavement; he did so at only 10 miles per hour. Once out of the alley, the defendant drove to the police station to report the gang, at which point he was arrested and later convicted of driving on the pavement. The Court of Appeal held that the jury should have been allowed to consider whether the defendant had been under the 'form of compulsion'² that is duress.

Another case in which the concession to human frailty due to circumstance was recognised was in 'Conway (1988)'. The passenger in the defendant's car had recently been shot by two men. The car was stationary, when the passenger saw two men running towards the car. Thinking that they were the two men who had shot him (they were in fact plain clothed police officers), he shouted at the defendant to drive off. As a result of the defendant doing so at great speed, he was charged with reckless driving. The Court of Appeal quashed the conviction because, objectively, the defendant was acting to avoid a threat of death of serious injury.

The case of 'Cairns (1999)' indicates that the threat reasonably perceived by the defendant does not need to be proved to be actual or real. The facts of this case are that the victim threw himself onto the bonnet and windscreen of the defendant's car. Several of the victim's friends nearby were shouting and the defendant felt threatened. The defendant began to drive with the victim on the car, and when approaching a speed hump, he braked making the victim fall under the car, causing him serious injury. The victim's friends had in fact been trying to help rather than threaten the defendant. The trial judge directed the jury that they needed to consider whether the defendant's actions were 'actually necessary'³. However, the conviction was quashed on appeal because the defendant reasonably perceived a threat of serious harm or death.

Duress as a Defence to Murder

Although the defences of duress are available for the majority of offences, the courts do not permit them for all offences.

It was held in 'DPP for Northern Ireland v Lynch (1975)' that duress of threats could be available to a secondary party to a murder charge. However, this was overruled by 'Howe (1987)', in which the defendant was involved in the torture of two men, the first of whom was strangled by another man, and the second who the defendant himself strangled. The trial judge permitted the defence of duress for the first killing because the defendant had only been a secondary party, and in accordance with 'Lynch', the defence of duress is permissible in

² Taken from page 192 of 'OCR Criminal Law for A2 – second edition' by Martin. J

³ Taken from page 193 of 'OCR Criminal Law for A2 – second edition' by Martin. J

such a circumstance. However, the House of Lords held that the defence of duress was never allowed for any charge of murder. This indicates that the acceptance of the concession to human frailty only exists in so far as the defendant's actions are done in order to preserve life. Where the defendant's actions result in death, the defendant cannot rely on the defence because, were it to be permitted, the courts would be condoning the judgement of one life being more important than another. Lord Hailsham stated in this case:

“I do not at all accept in relation to the defence of murder it is either good morals, good policy or good law to suggest... that the ordinary man of reasonable fortitude is not to be supposed to be capable of heroism if he is asked to take an innocent life rather than sacrifice his own.”⁴

What this statement suggests is that committing murder would not be a human frailty; an ordinary man should have the will to not concede to such an act. The same would apply to attempted murder, as was found in the case of 'Gotts (1992)', in which a sixteen year old boy threatened his father with violence unless the father stabbed the boy's mother. He did so, but she did not die. He was convicted of attempted murder, and the Court of Appeal upheld the conviction on the grounds that the defence of duress was not available for such an offence.

There have been similar findings in case law relating to duress of circumstances. In 'Pommell (1995)' the defendant had been found by the police in bed with a loaded sub-machine gun. He claimed that he had taken it from someone else in order to prevent them from using it to shoot someone. He stated that he had intended for his brother to hand the gun in at the police station later that morning. The Court of Appeal ordered a re-trial because the trial judge had not permitted the defence because of the time delay between obtaining the weapon and the time he intended to go to the police. The Court of Appeal also held in this case that the defence of duress of circumstances was not permitted for the offences of murder, attempted murder, and some types of treason. This case shows that a concession to human frailty is not seen to exist where an individual puts the life of one person over the life of another due to the situation that he finds himself in. A concession in such a case is not to human frailty, because the ordinary man should have the will to accept his own situation rather than take the life of someone else.

Conclusion

In conclusion, duress can be understood through the phrase 'a concession to human frailty'. Duress of threats can be seen as a concession to human frailty in response to the will of others. The 'human' in question is a reasonable person of the same characteristics of the defendant such as gender and age. But there are certain conditions, for example, the imminence of the threat and the lack of opportunity to escape that must be fulfilled for the concession to be acceptable. Duress of circumstances can be viewed as being the concession

⁴ Quote taken from page 184 of 'OCR Criminal Law for A2 – second edition' by Martin. J

to human frailty in response to the pressures of the situation one finds himself in. There need not be a real threat, the defendant merely needs to perceive there to be a threat to exist. However, a concession to human frailty can never exist were the individual commits murder or attempted murder due to either the circumstance of threats received. This is because an ordinary and reasonable person would have the will to sacrifice themselves; therefore a human frailty does not exist in such circumstances. This was found in the cases of 'Howe (1987)' and 'Pommell (1995)'.

Bibliography

- Martin. J 'OCR Criminal Law for A2 – second edition' Hodder Education 2009