HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	M47/2023
File Title:	The King v. Anna Rowan – A Pseudonym
Registry:	Melbourne
Document filed:	Form 27F - Outline of oral argument
Filing party:	Appellant
Date filed:	13 Nov 2023

Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **The King**
Appellant

and

Anna Rowan – A Pseudonym
Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Internet publication certification

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

Part II: Outline of propositions to be advanced in oral argument

2. In this case there was no evidence of a purposefully coercive threat either express or implied ("do this or else this will follow") issued by JR. Thus the plurality in the Court below, in satisfaction of the first *Hurley* condition, invoked the notion of a "continuing or ever present threat of physical and sexual violence".[1] That is, something that the respondent "understood"[2] might carry consequences; something that could be inferred by the jury as a "reasonable possibility";[3] something that could be thought of objectively as a threat, essentially, "*of* JR".[4] McLeish JA, similarly, invoked the notion of "an implicit threat", but one that could be inferred by the jury from "other evidence" of JR's "general conduct".[5]
3. Thus, the Court below must be seen to have extended the law of duress as that law has been traditionally understood. As conventionally understood, that law confined itself to

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[1] The judgment below at [156] and [169]; **CAB** at 181, 185.
[2] Ibid at [169]; **CAB** at 185.
[3] Ibid at [174]; **CAB** at 186.
[4] Ibid at [175] (emphasis added); **CAB** at 186.
[5] Ibid at [218] and [222]; **CAB** at 194, 195.

instances of purposefully coercive threats (express or implied) the explicit purpose of which was to induce a person to commit the very invasions to which these threats referred in circumstances where an essential feature, *as conveyed by the terms of the threat itself*, was the sense of immediate or imminent death or serious harm if the actor did not do as he or she was instructed. The extension which has occurred in the Court below has seen the law of duress now embrace "duress of circumstances" (as it has come to be described in the UK) or "situational duress" (as it is described in the US).

4. Such a development vastly enlarges the scope of duress, and, unless corrected, does so in a manner even more broadly than obtains in the UK where the notion of "duress of circumstances" has been countenanced for some time. This is so because, as several of the UK "duress of circumstances" cases reveal, the UK courts have — correlative with the development of "duress of circumstances" in the first place — insisted in such cases upon satisfaction of a further limiting principle, namely, that of proportionality.[6] Proportionality does not find expression in the traditional *Hurley* test.
5. It can be understood why the UK courts might have taken this step; that is to say, insisted on the additional limiting notion of proportionality in "duress of circumstances" cases.
6. Where there is no purposively coercive threat (express or implied) requiring commission of a specific act on pain of dire consequences should there be a refusal, but where such consequences are intuited in any event by dint of objective circumstances (even on reasonable grounds) if the person does not act as sought, such a situation is qualitatively different from duress as it has been traditionally or conventionally understood. Where there is no purposive coercive threat (that would satisfy all other *Hurley* criteria) such a state of affairs is necessarily less imminent or immediate than would otherwise be the case. The existence of a purposive coercive threat introduces its own sense of proportionality which is lost in its absence and thus must be replaced where absent.
7. This is not novel. Cases of "duress of circumstances" or "situational duress" have often been thought of as, in essence, akin to the doctrine of "necessity". And the doctrine of necessity has traditionally been thought to demand proportionality. This is enough to conclude against extending the law as, it is submitted, the Court below has done. The extension would, or at least ought, require that duress in essence align with necessity, but the doctrine of necessity already exists properly to cope with cases like the present.

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[6] See, for instance, *R v Abdul-Hussain* [1998] EWCA Crim 3528 at 11 and 13 (**JBA** at 380, 382), and *R v Shayler* [2001] 1 WLR 2206 at 2228 [64] (**JBA** at 595).

8. Here the respondent relied on duress and not necessity. It can be understood, in the circumstances of this case and given necessity's reliance on proportionality, why that was so.
9. The extension developed by the Court below should not be permitted unless it is to be thought that policy warrants extension of the law of duress beyond even what, it appears, is considered acceptable in the UK. The appellant submits that such an extension is unwarranted.
10. Insofar as section 322O of the *Crimes Act* is concerned, it appears that the Court below did not substantively distinguish between this section and the common law. It is not to be thought that the Court below committed any error in approaching matters thus.
11. In 2005, via the *Crimes (Homicide) Act 2005*, the Victorian legislature introduced a new offence of "defensive homicide." The legislature introduced provisions that related to "family violence" which it considered were reflective of the pre-existing common law. An alteration was made to the common law, however, by extending duress to murder. The common law of duress would continue to endure in respect of offences of a non-fatal nature. It is not apparent that the legislature considered that the substance of the law of duress, as it applied by statute to murder, would be any different to the then enduring common law of duress.
12. Then, in 2014, the legislature abolished defensive homicide via the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014*. The legislature maintained however (a) duress' application to murder and (b) the general and pre-existing relevance of "family violence". It was thought appropriate, nevertheless, to legislate duress as a general defence and, thus, for it to be abolished at common law. Again, and consistently with what had occurred in 2005, it is not apparent that the legislature intended by its statutory codification of duress any alteration of relevant substance.

Dated: 13 November 2023

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