HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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Form 27F – Outline of oral submissions

Note: see rule 44.08.2.

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

The King
Appellant

and

Anna Rowan – A Pseudonym
Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: The respondent certifies that the outline is in a form suitable for publication on the internet.

Part II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

The Respondent will adopt the submissions already filed. The Respondent will seek to respond to any matters raised by the Court, or by the Appellant in argument. The only area where such submissions are developed is in respect to the argument re-advanced in the Appellant's *Reply*, that there is no evidence that JR intended or was 'sensible' of the coercive nature of his abusive conduct when making the demand.

1. ***The CA correctly identified and applied the common law regarding duress.*** The CA correctly identified the common law regarding duress, as authoritatively expressed by Smith J in *R v Hurley & Murray* [1967] VR 526, at 543 JBA 497
   CA majority [61] CAB 156
   CA McLeish JA [208] CAB 192
2. ***The CA correctly understood and applied the evidentiary onus applicable to duress.*** The CA adopted the formulation of Ashley JA in *Martin v The Queen* ('*whether by any possibility the jury might not unreasonably discover in the material before them enough to enable them to find a case of duress*'). Denying duress was held a large step, to be confined to extreme cases.
   CA majority [84] CAB at 161; *[136]* CAB 176; *[163]* CAB 183.
   CA McLeish JA [206] CAB 192.
   Martin v The Queen (2010) 202 A Crim R 97, 104 [21] per Ashley JA.
3. ***The CA correctly analysed the notion of 'threat' for Hurley (i) purposes.*** The CA majority correctly identified the stipulation to establish a requirement backed by a threat in *Hurley* (i) (at [61] CAB156) and considered the internal limits of what can constitute a threat. The CA rejected any requirement that the threat need be a specific overt threat; McLeish JA likewise.
   CA majority [61 - 66] CAB 156, *[154]-[156]* CAB 181.
   CA McLeish JA [208] CAB 192.
4. ***The CA correctly found that the 'threat' referred to in Hurley (i) and limited in scope by Hurley (iii) could be constituted by a standing threat***: '*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*' (at [156] CAB181). No authority stood against that approach – not *Lorenz*, not *Dawson*,[1] not *Clarkson* – and *Runjanjic* appears to have proceeded on that very basis.[2]
   CA majority [66]-[69], CAB 157-158; *[155]-[156]* CAB 181.
   CA McLeish JA [208], CAB 192.
   R v Runjanjic (1991) 56 SASR 114, 115-118 per King CJ JBA 562 -565.
   R v Lorenz (1998) 146 FLR 369, at 377 [38] & [41] per Crispin J ('*he did not direct her*') JBA 513
   R v Dawson [1978] VR 536, 538 and 542-543 per Anderson J JBA 418-419

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[1] In these cases the issue was not the nexus between the requirement or demand and the threat, but the existence – at all – of a requirement or demand to commit the criminal acts.

[2] The dicta of Doyle CJ in *Warren v The Queen (1996) 88 A Crim R 78 at 81-82* are at least not inconsistent with this approach.

5. ***The CA correctly applied these findings to the evidence.*** The majority correctly decided at [174] CAB186 that – for all offences – a jury could find a reasonable possibility that the applicant 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*". Hence at [177] CAB 186 the majority found that '*it would have been open to the jury to conclude that the prosecution had not proved beyond reasonable doubt that elements (i) and (iii) of the defence of duress were not established.*' McLeish JA found "*the possibility is raised that a jury could not unreasonably infer that there was at least an implicit threat of serious physical harm to the [Respondent] if she did not likewise comply*".

   CA majority [174], [177] CAB 186.

   CA McLeish JA [222] CAB 195

6. ***The CA correctly found there is no need for direct evidence from the accused of the threat.*** This has two aspects. First, the existence of a threat may be inferred as a reasonable possibility by the jury. As McLeish JA held '*There is no reason in principle why the requisite threat might not be found by a process of inference from other evidence. That inference may, in principle, be drawn from evidence about an ongoing course of conduct.*" This foregrounds the evidence in a given case. Second, the threat may be conveyed to an accused by a process of inference, rather than by direct communication. As McLeish JA observed '*the threat may be conveyed to the accused by implication rather than by direct words*', echoing Smith J in *Hurley* at 542. JBA497

   CA McLeish JA [208] CAB 192

7. ***The evidence clearly sufficed to raise duress for jury.*** The CA did not err in finding a sufficient evidentiary base to leave duress to the jury. Indeed, the Appellant did not seek to establish an erroneous understanding or use of evidence. The Appellant did not challenge the CA's criticisms (at [159]-[163] CAB182-183) of the Trial Judges approach to the evidence. In Reply, the Appellant conceded that "*taking the respondent's case at its highest*" it was reasonably possible that the respondent did perceive a threat "*and one that had some basis in objective reality*".

   CA majority [38]-[54] CAB 151-154; [159]-163] CAB 182-183; [168]-[177] CAB 184-186.

8. ***Proof of the principal offender's precise state of mind when making a demand backed by a threat is not necessary.*** The Appellant submitted (at [7.47]) that even if AR perceived such a threat, it was '*entirely speculative*' whether JR was '*sensible*' of this. The Respondent met this argument at [6.36]. The Appellant submitted in Reply (at [6]) that '*the existence of this threat can only have been inferred from the objective circumstances in which she found herself: what the Court below characterised as a "continuing or ever-present threat*"'. This is wrong.

   (i) First, this argument appears to inject a new component into *Hurley* (i) – a requirement that the principal offender (the threatener) be 'sensible' that his conduct is producing the relevant fear in the person in AR's position. But *Hurley* (i) only stipulates that the accused was '*required to do the act ... under a threat ...*'; it does not stipulate the mental state of the threatener.

(ii) Secondly, the argument is artificial. The state of mind of the principal offender may never be known: he may coerce in a cold and self-aware manner, but also may be mistaken, deluded, intoxicated, insane, or multi-purposed when making and/or maintaining a demand backed by a threat. A threatener who is not 'sensible' of the coercive potential of his conduct is an artificial concept. The natural inference is that a person who creates a threat and exploits it instrumentally to have others perform acts does so with that awareness – indeed, that purpose. Therefore, it is the nexus between the threat and the accused's criminal conduct which matters to admissibility, without regard to the subjective purpose of the threatener.

(iii) Thirdly, and in any event, the evidence supports the reasonable possibility – indeed the overwhelming likelihood – that JR intentionally relied on the ever-present and obvious threat of harm when he made the demands he did. The '*he made her do it*' evidence of the Complainants raises this; so does the tendency evidence, so does the narrative provided to Ms Matthews. The abuse began long before the charge dates. The domineering, repetitive and performative nature of the violence of AR founds a reasonable possibility that he intended to cow his victims whenever he made his demands. The CA found that there was evidence to ground a reasonable possibility that an express or implied demand was made before or during each alleged offence by AR. The Appellant makes no attempt to analyse the evidence to show over-reach or error by the CA.

(iv) Fourthly, the Appellant submits in Reply at [2]–[3] that the CA approach represents an extension of principle and a 'refashioning of duress'. We submit not. But even if the CA approach can be characterised as an 'extension in principle', then it is an acceptable, cautious, consistent and uncontroversial extension. It certainly does not represent the abrupt adoption of 'duress of circumstances' into the law of duress.

(v) Finally, section 322O(2) of the Crimes Act 1958 JBA 10 does not contemplate the state of mind of the principal offender, but merely requires reasonable belief that 'a threat of harm has been made'.

Hurley 543 JBA 497

CA majority [61] CAB 156 (and passages flagged above regarding evidence).

Crimes Act 1958 s322O(2) JBA10.

9. ***Duress of circumstances was not necessary to the CA's findings.*** 'Duress of circumstances' was not raised by AR, or relied upon by the Court (contrary to AS 7.49). It was not necessary to establish error by the learned Trial Judge (contrary to AS 7.51), nor to the finding of substantial miscarriage of justice.

10. ***Common law duress in Australia does not extend to duress of circumstances as articulated in certain English authorities.*** The argument and authorities in filed submissions are adopted.

11. ***In the event of an adverse finding, the Respondent will seek the appeal against conviction to be remitted to the CA.*** The Respondent will seek to address the scenarios which arise.

Dated: 13 November 2023

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