HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **The King**
Appellant

and

Anna Rowan – A Pseudonym
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Internet publication certification

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

Part II: Statement of issue on appeal

2. This appeal may raise the issue articulated by the Appellant in its Statement of issue on appeal.

3. However, the fundamental issue, which precedes consideration of that issue, is whether the Court of Appeal was correct in holding that, for the purpose of the excuse of duress, '*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'*.

Part III: Notice under s78B of the Judiciary Act 1903

4. The Respondent certifies that notice is not required.

Part IV: Statement of relevant facts

5. The Appellant's response is adopted.

Part V: Outline of the respondent's argument

Introduction

6.1. Contrary to the Appellant's opening submission,[1] what lies at the heart of this appeal is not 'duress of circumstances'. Instead, it is whether the Court of Appeal ('CA') was correct at [156] of its Reasons[2] in holding that, for the purpose of the excuse of duress, '*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'.*

6.2. The Respondent ('AR') maintains that the CA correctly identified and applied the common law regarding duress, as expressed by Smith J in ***R v Hurley & Murray*** [1967] VR 526 ('*Hurley'*) at 543.[3] If that is so, the appeal can be dismissed.

6.3. AR also raises a threshold objection to the Appellant's characterisation of the Courts reasoning, and of the Respondent's argument below (and here). It is incorrect to impute, to AR and to the Court, an argument neither advanced nor accepted. 'Duress of circumstances' was not raised by AR or relied upon by the Court (contrary to AS 7.49). It was not necessary to finding error on the trial judges part (contrary to AS 7.51) nor to the finding of substantial miscarriage of justice.

6.4. If the Appellant prevails, however, the defense of 'duress of circumstances' is a legitimate subcategory of the defense of necessity.[4] In this case, if duress were not held available, the facts were capable of supporting a necessity argument on that basis. Thus, even if a relevant error is found in the Court of Appeal's approach, the matter should be remitted back to the CA for further consideration (see below under 'Orders').

The CA correctly identified and applied the existing law concerning duress

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[1] Appellants Submissions ('AS') 7.1.
[2] *Rowan (a pseudonym) v The King* [2022] VSCA 236 (*Rowan),* Core Appeal Book (CAB) at 181.
[3] Nor, in relation to Charge 13, did it err at [78] or [83] in applying the statutory defence in s322O of the *Crimes Act* 1958 (Vic)
[4] In this respect AR notes the Appellant's references to the endemic uncertainty which besets relations between duress and necessity.

6.5. Before the CA a single ground (Ground 2) was pursued, complaining that the learned trial judge erred in ruling that the defense of duress was not open on the evidence to be led at trial, and thereby causing a substantial miscarriage of justice.

6.6. Central to this issue was the application of the principles governing duress in *Hurley*. The majority at [61], CAB 156 expressly applied the test enunciated by Smith J in *Hurley* at 543.[5] The relevant passage is this:

> *Where the accused has been required to do the act charged against him (i) 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 and (ii) the circumstances were such that a person of ordinary firmness would have been likely to yield to the threat in the way the accused did and (iii) the threat was present and continuing, imminent and impending (as previously described) and (iv) the accused reasonably apprehended that the threat would be carried out and (v) he was induced thereby to commit the crime charged and (vi) that crime was not murder, nor any other crime so heinous as to be excepted from the doctrine and (vii) the accused did not, by fault on his part when free from the duress, expose himself to its application and (viii) he had no means, with safety to himself, of preventing the execution of the threat, then the accused, in such circumstances at least, has a defence of duress.*

6.7. That formulation has been regarded as authoritative.[6] It is applied in duress cases in Victoria, NSW and SA.[7] It provides a basis for case-sensitive jury directions.[8] The notion of threat is central to this formulation: it is founded in *Hurley* (i) and limited and qualified in *Hurley* (iii) and other requirements. The nature of the threat has proved to be amenable to judicial development: for example, the requirement for a threat of 'death or serious injury' has been palliated in subsequent decisions.[9]

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[5] *Rowan*, CAB at 156. See also McLeish JA at [208], CAB at 192.
[6] *Taiapa v The Queen* (2009) 240 CLR 95 *(Taiapa*)
[7] *R v Dawson* [1978] VR 536 *(Dawson)*; *R v Zaharias* (2001) 122 A.Crim.R. 586 *(Zaharias); R v Abusafiah* (1991) 24 NSWLR 531 *(Abusafiah)*; *Taiapa*.
[8] See *Zaharias*, see *Abusafiah*.
[9] CA [70], referring to *Martin v The Queen* (2010) 202 A Crim R 97 *(Martin), Dawson* and *R v Runjanjic* (1991) 53 A.Crim.R. 362, CAB at 158. The Appellant does not take issue that the harm threatened in this case was too trivial to constitute a relevant 'harm' for *Hurley* (i).

6.8. The Court expressly applied the test from *Hurley*. As will appear, they did not need to expand it by reference to 'duress of circumstances'. The real question for the CA was whether the evidence permitted 'by any means' a reasonable possibility of a threat under *Hurley* (i), surmounting the evidentiary onus. The CA found affirmatively.

6.9. Before submitting the CA was correct, the evidentiary onus should thus be considered.

The evidentiary onus

6.10. The majority correctly applied the evidentiary onus facing a Defendant raising duress at [80], CAB at 160: *where there is evidence from which it could be inferred that there is a reasonable possibility that the accused acted under duress, the defence of duress should be left to the jury.* The majority also referred to the onus under s322O, for the purpose of Charge 13. They also adopted (at [84], CAB at 161) the formulation of Ashley JA in *R v Martin*[10]: '*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*'. The CA added this observation of His Honour:

> *It is a large step for a judge to take a defence away from the jury's consideration. The step is a particularly significant one where ... what was done by the judge effectively meant that the applicant must be found guilty. In an extreme case, however ... the step will be justified. But the step should be confined to a case which is clearly of that kind.*[11]

6.11. This is consistent with the general approach in ***Braysich v The Queen***[12] where, at [36], a majority of this court said:

> *If a trial judge has to consider whether, at the close of the evidence in a criminal trial, a particular defence should be left to the jury, the question which the trial judge will have to ask himself or herself will be (...) in a case where the legal burden is on the prosecution and the evidential burden on the accused – is there evidence which, taken at its highest in favour of the accused, could lead a reasonable jury, properly instructed, to have a*

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[10] *Martin* 102-3 [13]-[16], CAB at 161.
[11] *Ibid* 104 [21], CAB at 162
[12] [2011] 243 CLR 434 (*Braysich*)

reasonable doubt that each of the elements of the defence had been negatived?

6.12. If the Court correctly understood and applied *Hurley* (i), this was the lens through which to view the evidence. As appears below, the evidence was fertile ground from which jury might reasonably have found the reasonable possibility of a relevant demand and threat, in each charge.

Hurley (i) and Hurley (iii): the Court applied the law correctly

6.13. The Court correctly understood and applied *Hurley* (i). That requirement focusses on the threat, and not on a mere understanding of danger by a defendant. From [61], CAB at 156, the majority focused closely upon the nature of the 'threat' contemplated in *Hurley* (i). The analysis at [63] – [66], CAB 156-157, reveals attention to the internal limits of what can constitute a threat. The Court correctly noted the need for a threat, whilst considering and rejecting the idea that threat had to be a specific overt threat'.[13] Contrary to the Appellants submission at AS 7.6 ('*an actual or explicit threat in the form 'do this or else' is required'*) an explicit threat is not required. As McLeish JA observed at [208], CAB 192, '*the requisite threat may in principle be drawn from evidence about an ongoing course of conduct'*. More will be said below about conclusions from evidence at 7.27.

6.14. The Court did not adopt or refer to 'duress of circumstances' or to necessity at all. Rather, what the majority concluded at [174], CAB 186 (consistently with the Respondent's argument) was that:

> *For all of the offences, it would be open to the jury to conclude that there was 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.*

[13] *Rowan*, per Majority at [154] – [156], CAB at 181; per McLeish JA [208], CAB at 192. This is consistent with authority: for example, in *Dawson* Jarris J remarked at 542 '*the demand or the requiring does not have to be in any particular form*.'

6.15. The pathway to that conclusion was the finding at [156], CAB 181, that the 'threat' referred to in *Hurley* (i) and limited in scope by *Hurley* (iii) could be constituted by a 'continuing or ever-present threat':

> *In our opinion, 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 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.*

6.16. The majority had correctly noted (at [155], CAB 181) that this issue had not been faced by or determined by authority. The Court also noted at [156], CAB 181, that the limiting factor in *Hurley* (iii) requires '*the threat be present and continuing, imminent and impending at the time each offence is committed.*' Having made those findings relating to 'threat' under *Hurley* (i), the Court turned at [176], CAB 186, to *Hurley* (iii): the requirement that the threat be *present and continuing, imminent and impending.*

6.17. The majority concluded at [177], CAB 186, 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 likewise at [222], CAB 195: *'the possibility is raised that a jury could not unreasonably infer that there was at least*[14] *an implicit threat of serious physical harm to the [Respondent] if she did not likewise comply*'.

6.18. The majority therefore recognised the need for a demand (stated or otherwise) backed by threat (express or implied, but '*present and continuing, imminent and impending*'). So did McLeish JA. They did not abjure the need for a threat, or substitute for that requirement the mere existence of a subjective perception of peril on the part of a given defendant.

6.19. Further, they found that the evidence sufficed to raise these issues for a jury. In reaching those conclusions at [177], CAB 186 about *Hurley* (i) and (iii), the majority

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[14] *Rowan* [222], CAB at 195.

sought (at [159] – [171], CAB 182-185) to ground their position on the whole of the evidence. The majority referred in detail to a great range of evidence: the context of the relationship between JR and AR, the evidence of the complainants Paige and Alicia (including evidence that, on occasions JR 'made her' participate), the tendency evidence and reasoning, the representations made to Ms Matthews and Ms Matthews' opinions.

6.20. McLeish JA proceeded on a narrower evidentiary basis (at [208] – [226], CAB 192-195). The majority indicated at [87], CAB 86, that had they adopted this approach, they would have reached the same conclusion. But in any case, McLeish JA was satisfied (at [222], CAB 195) that, even on that narrower evidentiary base, *Hurley* (i) and (iii) were made out.

6.21. All judges emphasized the importance of the direct evidence of the primary victims Paige and Alycia.[15] A jury could regard this as powerful evidence founding a reasonable possibility of demand and threat on each occasion.

6.22. All members of the Court considered that a jury was entitled to consider the reasonable possibility of a relevant demand backed by a relevant threat on each occasion, based on all the evidence. At [174], CAB 186 the majority said:

> *We are also of the opinion that it is not fatal in this case that there is no direct evidence that JR told the applicant shortly prior to each offence that, unless she performed the acts that constitute each of the charged offences, he would physically and sexually abuse her. That is because it would be open to the jury to infer that this was a reasonable possibility based upon the history of the relationship between JR and the applicant as set out in the Matthews 2019 report and, in particular, the complainants' evidence. It must be borne in mind that the offending conduct of the applicant for all but charges 1, 11 and 13 constituted being present during JR's offending. For all of the offences, it would be open to the jury to conclude that there was a reasonable possibility that the applicant would not have been present or undertaken the specific acts*

[15] See *Rowan* majority reasons regarding Paige at [117(e) & (h)], [161] – [162] and [170], CAB at 169, 182 and 186 and per McLeish JA at [218] – [223], CAB 194 to 195; and regarding Alicia per the majority at [117(g) & (h)], [170], CAB at 169 and 186; and per McLeish JA at [223] – [226]. CAB 195

> *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 applicant's statement to Ms Matthews that she 'tried to say no, but [JR] made [her]'. (emphasis added)*

6.23. The majority therefore contemplated a demand backed by a threat.

6.24. It is respectfully submitted that a standing threat is a coherent notion for the purposes of duress in *Hurley*. Self-evidently, an unstated or implicit threat can arise in a multitude of scenarios. One such scenario is the scenario of ongoing bullying and abuse, where each demand by the abuser is accompanied by the understanding, borne of previous patterns of behaviour, that any refusal will result in consequences by way of continuation and/or aggravation of the abuse. Context, usage and shared understandings may permit the conveying of a threat without any words.

6.25. Such a threat may conveniently be labelled a 'standing threat'. Prisoners, slaves of all types, and battered women and other abuse victims for whom the prospect of escape or succor is remote may face such standing threats. To illustrate starkly: the *sonderkommando* at Auschwitz, attending work for the tenth time to help deceive new arrivals, acted under a threat whether or not the consequences were spelt out on each occasion the order was given. A standing threat may implicitly accompany any demand made by the abuser of the victim and be characterized as a 'threat' for *Hurley* (i). Neither the demand nor the threat need be reiterated on each occasion; indeed there may be no direct evidence of the demand and threat. The surrounding context allows for that reasonable possibility. To raise such a threat for jury consideration in accordance with *Braysich* and *Martin*, the defendant need only point to evidence allowing a jury to discern the reasonable possibility of such a threat.

6.26. Where a standing threat is alleged, a genuine issue will be whether evidence supports a reasonable possibility thereof. But for *Hurley* purposes, the threat is just a threat.

The evidence

6.27. In this case, plentiful evidence founded the relevant reasonable possibilities. It does not matter, for admissibility purposes, whether either the demand or the threat is overt or express. Importantly, as McLeish JA observed at [208], CAB 192 '*the threat may be conveyed to the accused by implication rather than by direct words*'. This is not novel reasoning: in *Dawson* Harris J remarked at 542 '*the demand or the requiring does not have to be in any particular form*. Indeed, Smith J in *Hurley* at 543 accepted that a threat can be 'formulated in words or left unsaid'. To raise duress (see below), a reasonable possibility of a relevant demand and threat can sensibly arise from a matrix of other evidence. That was the position of the majority at [161], CAB 182 and [170], CAB 185. The evidence concerning Paige and Alicia powerfully supports that position.

6.28. It is incorrect to rely on *Lorenz*[16] or *Dawson* to demonstrate the need for any explicit threat (AS 7.7 – 7.13). In neither case was there evidence that the defendant was directed to offend, or to act in any particular way. The Appellant referred to *R v Clarkson*[17] (AS 7.14), but the formulation of duress approved in *Clarkson* ('*the appellant was required to commit the offences under threat if he failed to do so*') does not require an explicit threat. But there were cases which at least left the issue of a standing threat open, referred to by the majority at [67] – [69], CAB 157.[18]

6.29. Thus there was a clear evidentiary matrix within which their Honours considered whether there was a basis on which to leave duress to the jury. McLeish JA at [208] set this out fully: the entire paragraph demonstrates His Honours view that the possible weakness (or otherwise) of indirect evidence of demand and threat does not govern admissibility:

> *It is not necessary that the threat which underpins a defence of duress be the subject of direct evidence of the accused. 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. The threat may also be conveyed to the accused*

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[16] [1998] ACTSC 81*(Lorenz)*
[17] (2007) 171 A Crim R 1, *(Clarkson)* 19 [86]-[87] per Beazley JA.
[18] *R v Warren* (1996) 88 A.Crim.R. 78 *(Warren); Runjanjic,*

> *by implication rather than express words. Naturally, the defence may very well be weaker in the absence of direct evidence from the accused; but that is not the only way it may be raised.*

6.30. This evidentiary basis has not been the subject of detailed criticism or analysis. The Appellant's comments at AS 7.46 and 7.47 do not address the issue, but seek to recast what the Court must have meant. In the face of the Court's express words and careful evidentiary analysis, this should not be accepted.

The Appellant's recasting of the Court of Appeal's reasons is artificial

6.31. Rather, the Appellant argues that this was 'really' a case about 'duress of circumstances', despite the express terms. It is respectfully submitted that the Appellant's arguments in this respect are artificial. It was wrong to contend (AS 7.29) that there was '*no suggestion that prior to the charged offending … JR had communicated to the respondent a threat (of the relevant kind)*' (see also AS 7.36 and 7.43). This positive statement goes too far; the Court was prepared to allow a jury to consider the reasonable possibility that a threat of the relevant kind was indeed made, on each occasion. Indeed, the evidence was that the regime of coercive and violent sexual abuse commenced some years before the first charged date.[19]

6.32. As a preliminary, it was clearly wrong for the Appellant to attribute to AR reliance on a 'duress of circumstances' or contend that [AR] 'fashioned' such a case (AS 7.33 to 7.37). This contention was directed to buttress an argument (AS 7.37 to 7.45), that the Court 'accepted this case as articulated' (AS 7.37) and was, by implication, led astray. The Appellant proceeds in this way: first, it seeks (at AS 7.34, 7.35 and 7.37) to characterize AR's submissions: '*the case articulated below was one of duress of circumstances'*. Secondly, it asserts the plurality '*accepted this case as articulated*'. But the Appellant mischaracterises the submissions of AR below. They argue (AS 7.34) that the threat contended for by the respondent arose '*from the circumstances in which the respondent found herself … as distinct from a threat of serious harm or death communicated to her by JR's words or actions.*' They further argue (at AS 7.35, in a somewhat selective summation of ARs submissions) that AR effectively abjured reliance on an actual threat.

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[19] See *Rowan* majority at [11], [97] and [168], CAB at 147, 164 and 184.

6.33. AR did not abjure reliance on a threat. The two written submissions are before this Court,[20] and the CA summarised at [132] – [144], CAB 175-178, the arguments advanced. Duress of circumstances does not require the sort of demand and threat in *Hurley* (i), but the Respondent AR's argument was founded on *Hurley*. Like the Court, the Respondent did not mention or rely on 'duress of circumstances', and did not advance argument about proportionality.[21] AR expressly raised and pursued the notion of a 'standing threat' within the confines of *Hurley* (i) and (iii), and disputes the Appellant's arguments, which aim to cast into doubt the CA's approach by reference to its putative adoption of defence arguments on appeal. In any case, the Court's findings are to be analysed on their own terms. AR's submissions on appeal did not and could not lead the Court astray.

6.34. But more substantially and importantly, the Court simply did not accept any such case, despite the Appellant's submission that the plurality 'accepted this case as articulated'. Their express words (extracted above, and throughout the judgment) are emphatic contradiction.

6.35. Thus, it is wrong for the Appellant to assert (AS 7.39) that the Court *'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*

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[20] The Respondents submissions summarised at AS 7.35 are here set out in full:

> *Any jury could accept that Rowan's conduct created and maintained a serious, standing threat of continued harm of many sorts. There was no controversy that the Applicant acted, in each case, at the behest of Rowan. Refusal always had its consequences, and submission to the will of Rowan was always obtained in the setting that he was free to intimidate, bully and rape, with violence as he pleased. His conduct was horrific and sustained: it was well open to a jury to find it constituted harm. A standing threat of ongoing, violent domination, made to so vulnerable a person as the Applicant, may be inferred to be causally relevant or potentially relevant to each and any of the crimes alleged here. No demand made by Rowan was free of the ongoing threat he created.*
>
> *There was thus no need for a separately articulated threat to be tied to each offence. Given the family situation and the broad 'between-dates' nature of the charges pleaded by the prosecution, it would be startling if such were required. (emphasis added)*

A threat (however conveyed), and not a mere subjective appreciation of danger, was always central to the Respondents argument.

[21] We submit, however, that if necessity were pursued, there was (and is) evidence fit to have the issue of proportionality left to the jury.

respondent did not do what JR demanded of her". On the contrary, the majority referenced the need for a demand backed by a threat on each occasion, and analysed the evidence to see if such could reasonably supposed. It was wrong (AS 7.43) to recast the express words of the Court in light of a supposed '*case formulated by the respondent'*.

6.36. Similarly, it was not correct to say (AS 7.47) that '*on the respondents 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 entirely speculative*'.[22] It is no part of the evidentiary onus for raising duress to point to a particular state of mind in the principal offender; this would be over-refinement. But in any case, both judgments admitted the reasonable possibility of a relevant demand backed by threat based upon the whole of the evidence; they did not abandon the need for such a threat, but found it established indirectly.

Conclusion regarding the Courts approach to Hurley (i) and (iii)

6.37. The fact of a demand backed by a relevant threat in each case was one which a jury could find reasonably possible, based upon all the evidence, and the court so found. Given that the evidentiary onus is to be beneficially applied, as *Martin* makes clear, and given that the date-range of each charge was measured in 4 or 5 year stretches, and given the strength of the evidence from which the reasonable possibility arose (including the direct 'he made her' evidence of the primary victims), the reasonable possibility clearly arose, justifying leaving duress to the jury.

6.38. It is thus submitted for completeness that, if a standing threat can be a sufficient threat for *Hurley* (i) the evidence in this case clearly sufficed to raise the matter for jury consideration. What the jury made of this was a matter entirely for them.

The other Hurley elements are not controversial

6.39. The majority then analysed the requirements of *Hurley* (ii) (at [178] – [181], CAB 186-187), and finally at [182] – [187], CAB 187-188 the further limiting factors in

[22] It was consequently wrong to reason that, if '*things were different*', there was no need to for the Court to determine what the Respondent understood. Her understanding that she must acquiescence in barbaric acts, which on at least some occasions 'he made her' do, founds a strong reasonable possibility that she acted under threat – like many a victim of brutes – and not under some other unspecified basis.

Hurley (iv), (v), (vii) and (viii). Ultimately, the majority found at [188] CAB 188 that:

> *there was a possibility that the jury might not unreasonably discover in the evidence to which we have referred enough to enable them to find a case of duress. This conclusion applies to charges 1 and 3–12, in respect of which the common law defence of duress applies. The conclusion also applies to charge 13, in respect of which the statutory defence applies.*

Conclusion

6.40. In conclusion, the Court applied *Hurley* conscientiously. The characterisation of a standing threat as potentially sufficient to satisfy *Hurley* (i) was consistent with – and subject to – the operation of the other *Hurley* factors. There was – and is – no basis categorically to exclude a standing threat from the threats encompassed by *Hurley* (i). Where a standing threat is alleged, a trial judge will have regard to the evidence to determine whether there was a possibility that the jury might not unreasonably discover in the evidence enough to enable them to find a case of duress, including the threat required by *Hurley* (i). A standing threat does not depend upon 'duress of circumstances', but upon the evidence.

6.41. The Appellant is therefore in error when submitting (at AS 7.51) that '*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*'. It is the Appellant, and not AR, who relies upon the existence of 'duress of circumstances'.

6.42. Finally, two scenarios can illustrate why *Hurley* (i) accommodates a standing threat:

(a) An accused acts responding to a demand backed by threat, not necessarily expressly articulated on each occasion but unspoken and implied – a standing threat which, whether verbally or expressly repeated or not, by common understanding and long practice was an inevitable accompaniment to each demand;

(b) An accused acts responding to a subjective fear of danger (including from a person), without a demand backed by a threat at all.

6.43. In the former case, duress can be left to the jury: there is a demand, backed by a threat, for the purposes of *Hurley* (i). In this case, the Court found that a jury could

reasonably entertain such a possibility. The precise details of the threat need not be proved, so long as there is the reasonable possibility of a relevant demand and threat. This does not entail excluding the possibility of a more express threat.

6.44. In the latter case, there is no such demand or threat, and any excuse or justification in that scenario must be in the nature of 'duress of circumstances' via the defence of necessity.

Necessity & duress of circumstances

6.45. This submission addresses the issue of 'duress of circumstances', said by the Appellant to be at the heart of this appeal. If submissions at AS 7.34-7.36 are accepted, if *Hurley* (i) cannot encompass threats of type found to be raised here, then the defence of necessity may well be available to AR, by a path of reasoning analogous to the English formulation 'duress of circumstances'. That is so, notwithstanding that the defence of necessity was not the subject of the appeal.

6.46. That is relevant to the Orders available to this Court on appeal.

6.47. In Victoria, duress and necessity are distinct. Following the decision in *R v Loughnan* [1981] VR 443 (*Loughnan)*, necessity is now recognised as a defence at common law in Victoria.[23] Like duress, necessity is viewed as an excuse.[24] Like duress, necessity casts an evidentiary onus on the Defendant, and a substantive onus on the prosecution.[25] Necessity as a defence has developed significantly since *R v Dudley & Stephens* (1884) 14 Q.B.D. However, it has not been held to have subsumed duress in any Australian jurisdiction.

6.48. An important development occurred in the related cases of *Loughnan* and *R v Dawson* [1978] VR 536. Both cases arose from an escape from Pentridge prison in May 1977 by 4 men (including Loughnan and Dawson). Dawson's appeal proceeded first; he had alleged a fear of threatened harm, and argued that both duress and necessity should have been left to the jury. Applying the *Hurley* factors, the

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[23] In principle, it was therefore available for charges 1 – 12 here; the statutory defence under s322R of the *Crimes Act* 1958 was available for charge 13.
[24] *R v Rogers* [1996] 86 A Crim R 542 *(Rogers)* at 544 per Gleeson CJ.
[25] *Ibid* 550;

Court found that Mr Dawson failed on the facts on duress: there was no evidence of a demand, far less a demand to escape. All members of the Court doubted (without determining) the existence of a general doctrine of necessity (Anderson J at 539, Harris J at 543).

6.49. Subsequently, Loughnan (who had also alleged a fear of threatened harm) likewise argued that duress and necessity should have been left to the jury. He conceded that the decision in *Dawson* foreclosed duress (at 446). In his favour, the Court now recognised the existence of the defence of necessity. The majority at [448] set out three elements: *(i) the criminal act was done to avoid certain consequences which would have inflicted irreparable evil upon the accused or upon others whom he or she was bound to protect; (ii) the accused honestly believed on reasonable grounds that he or she was placed in a situation of imminent peril; and (iii) the acts done to avoid the imminent peril were not be out of proportion to the peril to be avoided*. However, Mr Loughnan too failed upon the facts. The majority noted at 451 that '*ordinarily it is a question for the jury to say whether acts of an accused are no more than are necessary to avoid the threatened harm'*; but here the evidence was complete, and there was no evidence, direct or otherwise, to ground the reasonable possibility of proportionality.

6.50. The requirements needed to make out necessity in *Loughnan* has been applied subsequently: for example in *Rogers*, another prison escape case in which the defence failed on the facts. In *Rogers*, Gleeson CJ at 546 qualified requirements such as immediacy, treating them '*not as technical legal conditions for the existence of necessity, but as factual considerations relevant … to the issues of a person's belief as to the position in which he or she is placed, and as to the reasonableness and proportionality of the response'*. The three requirements are also consistent with the three point doctrine enunciated in UK decisions such as *Re A*[26] at 1047-1048.

6.51. The majority in *Loughnan* made explicit the distinction between the two defences (for example at 546). Duress, to be raised, requires a demand backed by a threat; but it has no independent requirement of proportionality. Necessity, to be raised,

[26] *In re A (Children) (Conjoined Twins)* [2001] WLR 480; [2000] 4 All ER 961;

requires the establishment of sufficient 'consequences'; these consequences may – but need not – embrace a threat, real or otherwise, without the requirement of a demand to act. The excuses are distinct, as both *Loughnan* and *Clarkson* demonstrate. To the extent that there is common law dicta suggesting that duress is 'merely a particular application of the doctrine of necessity'[27], that appears contrary to the law in Australia, not binding and highly contentious.

6.52. It may not matter whether one is an excuse and the other a justification; but the components are different, and a jury may rationally entertain one and reject the other. The availability of each defence may also vary, depending on the offence charged.

Duress of circumstances

6.53. 'Duress of circumstances' is not a phrase currently in use in Australia. It is a phrase which is apt to confuse: for example, in directions to a jury facing alternative defences. It is not clear that it adds greatly to necessity. Arguably it may clarify that '*certain consequences which would have inflicted irreparable evil*' may extend beyond blind catastrophic danger to situations where a human has made threats generating the prospect of those consequences (such threats failing to qualify under *Hurley* (i) because, for example, the threat was not one linked to procuring the charged criminal act, as in *Lorenz*, *Dawson*, *Loughnan* or *Rogers*). It is not self-evident that this represents a 'development'; rather, it is an application of established principle to the flood of human scenarios in the criminal jurisdiction.

6.54. Necessity, rather than duress, appears to embrace the factual scenarios arising in cases of 'duress of circumstances', and the *Loughnan* requirements (as qualified in *Rogers*) are apt to be applied. As the Appellant points out at AS 7.27 – 7.28, English law does not speak clearly concerning the distinction between the defences, and any shared theoretical underpinning is fraught. In Victoria and New South Wales, the factual scenarios in the English cases referred to (*R v Willer* (1986) 83 Cr.App.R. 225 and *Abdul-Hussain* [1998] EWCA Crim 3528)[28] appear unlikely to attract the

[27] For instance, dicta in dissenting opinions in *Lynch v DPP Northern Ireland* [1975] AC 653 at 692 per Lord Simon of Glaisdale, at 701 per Lord Kilbrandon, and the cases cited in AS footnote 65.

[28] Concerning AS 7.20, it is not the case that Lord Brooke suggested that necessity and/or duress of circumstances applied only in extreme cases; rather, he extended the reach of duress of circumstances even unto such cases.

availability of duress, but may attract the availability of necessity. There seems no need to 'develop' the law of necessity to enable defendants to avail themselves of the defence in appropriate cases, though clarification would promote good forensic decision-making.

6.55. But an extension of duress to embrace scenarios where there really was no reasonable possibility of a *Hurley* (i) demand-backed-by-threat would constitute a significant alteration to duress. AR, therefore, cannot argue that the English cases referring to 'duress of circumstances' represent a development of the law of duress.

Application to this case

6.56. However, this Court determines the future of 'duress of circumstances', it is relevant to the Orders to be made whether, on a proper analysis of the evidence, a defence of necessity could be left to the jury.

6.57. If the Appellant establishes that the Court erred by erroneously broadening duress, finds that the facts could never allow duress properly to be left, and turns to consider orders, the Respondent would seek to have the conviction appeal (as well as the sentence appeal) matter remitted to the Court, to permit argument to proceed that further evidence might be led in support of duress, and that necessity (in the nature of 'duress of circumstances' might also be left). It should be recalled that this ruling occurred pre-trial, and without evidence from the Defendant.

6.58. It is certainly arguable, on the evidence referred to above, that a jury might doubt that the prosecution disproved necessity beyond reasonable doubt. The balancing factors inherent in a proportionality calculation are quintessentially jury matters, and the 'consequences' faced by the Defendant were dire enough to enliven a genuine issue. It seems just to permit the Defendant to make those arguments to the Court of Appeal.

6.59. This Court has broad powers under ss36 and 37 of the *Judiciary Act* (1903), including the power to remit. At worst for AR, the appeal must be remitted to consider the sentence appeal. In this case the Court of Appeal, applying the correct test, could still decide whether there had been a substantial miscarriage of justice

under s276(1)(b) or (c), by virtue of the defendant being denied the availability of a relevant excuse which could result in acquittal on all or some charges.

6.60. Only if this Court determined that by no means could any of these defences be available at the close of the case in future would it be safe to hold that there could be no "substantial miscarriage of justice", uphold the appeal and reinstate the verdicts of guilty, thereafter remitting the matter to the Court of Appeal to determine the sentence appeal.

6.61. If this Court finds that the CA applied the correct test, and *Hurley* (i) does not exclude a standing threat which otherwise complied with the *Hurley* factors, the order sought is: ***That this appeal should be dismissed.***

6.62. If this Court finds that the If the Court of Appeal applied the test incorrectly with respect to Hurley (i) but, on a correct application the result is that duress should have been left to the jury, the order sought is: ***That this appeal should be dismissed.***

6.63. If this Court finds that the If the Court of Appeal applied the test incorrectly with respect to Hurley (i) and, on a correct application the result is that duress may not have been left to the jury, then the case should be remitted back to the Court of Appeal to determine that question.

Part VI: Statement of respondent's argument on the respondent's notice of contention or notice of cross-appeal

7. Not applicable

Part VII: Time required for the presentation of the respondent's oral argument

8. The respondent estimates 2 hours are needed.

Dated 1 September 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, statues and statutory instruments referred to in the submissions above.

Number	Description	Version	Provision
1	*Crimes Act 1958* (Vic)	248 (as at 1 November 2014)	ss 3220, 322R
2	*Criminal Procedure Act* (Vic) 2009	095 (as at 1 September 2023)	s276
3	*Judiciary Act* 1903	06 (as at 1 July 2016)	ss 36, 37