HIGH COURT OF AUSTRALIA

13 March 2024

THE KING v ANNA ROWAN - A PSEUDONYM
[2024] HCA 9

Today, the High Court unanimously dismissed an appeal from the Court of Appeal of the Supreme Court of Victoria. The issue for determination was whether the Court of Appeal erred in concluding that evidence adduced before a trial judge on a voir-dire of "a continuing or ever-present threat" was sufficient to raise the defence of duress both at common law and under s 322O of the *Crimes Act 1958* (Vic).

In June 2021, the respondent was tried before a jury in the County Court of Victoria for 13 counts of sexual offences, committed with her partner, "JR", against two of their daughters between 2009 and 2015. The respondent denied committing the offences. Before the trial commenced, the respondent sought to have a defence of duress put to the jury. That is, the respondent contended that, even if she was found to have committed the acts, she was not guilty of the offences as she reasonably believed that JR had threatened harm to both her and their children, which would be carried out unless she committed the offences. In support of her application, the respondent relied on evidence given by her two daughters, a forensic psychologist's report and tendency evidence concerning JR, all of which described JR's threatening, violent and controlling behaviour towards the family. The trial judge ruled that there was no factual basis for the defence of duress to be properly raised before the jury. The jury found the respondent guilty of 12 of the 13 counts. The respondent sought leave to appeal against her convictions and sentence.

The Court of Appeal (Kyrou, McLeish and Niall JJA) upheld the respondent's appeal on the basis that the trial judge had erred in not allowing the defence of duress to be put to the jury. Relevantly, Kyrou and Niall JJA held that it could be inferred, given the combined psychological, physical and sexual abuse inflicted by JR against the respondent over a period of years, that she was "the subject of a continuing or ever present threat", which was a sufficient form of harm to establish the threat required for the defence of duress. In the High Court, the appellant contended that, by this finding, the Court of Appeal had erroneously extended the law of duress so as to include "duress of circumstances", which does not require evidence of any threat to inflict harm if an accused failed to commit the offences. Kyrou and Niall JJA also found that, based on the evidence given by the respondent's daughters and the forensic psychologist's report, it would have been open to the jury to conclude that the respondent was subject to an "unstated" demand that she commit the acts that constituted the offences or she would be subject to physical and sexual abuse. The appellant contended that although duress of circumstances is now an accepted defence in England and Wales, it has not been adopted in those non-code Australian jurisdictions that apply the common law defence of duress.

The High Court held that the Court of Appeal did not adopt or apply the doctrine of duress of circumstances. The Court of Appeal's approach was consistent with the accepted understanding of the nature of the threat required for the defence of duress at common law in Australia, which is derived from the judgment of Smith J in *R v Hurley* [1967] VR 526. Accordingly, the Court of Appeal was correct in finding that a substantial miscarriage of justice had occurred by not allowing the defence of duress to be put to the jury.

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