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Neutral Citation no. [2006] NICA 47

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Judgment: approved by the Court for handing down
(subject to editorial corrections)

Delivered:	**15/12/06**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

PATRICK JOSEPH HUTCHINSON

Before: NICHOLSON LJ, CAMPBELL LJ and SHEIL LJ

NICHOLSON LJ

[1] The appellant was convicted of two counts of possession of firearms and ammunition with intent to enable another person or persons by means thereof to endanger life, contrary to Article 17 of the Firearms (Northern Ireland) Order 1981 by the Recorder of Belfast, His Honour Judge Burgess (the trial judge) sitting without a jury at Belfast Crown Court on 13 March 2006. He was also convicted of possessing explosives with intent to enable another person or persons to endanger life.

[2] The date on which the offences were alleged to have been committed was 21 January 2004. The first count on which he was convicted concerned a 7.62 x 39mm calibre AKM assault rifle designed to selectively produce automatic and semi-automatic fire. It was loaded with a 30-round capacity magazine containing 6 7.62/39 mm cartridges, was wrapped in a blue fleece jacket and contained in a black grip bag in the boot of a red Hyundai car driven by the appellant which was stopped by police at the junction of New Lodge Road and Antrim Road, Belfast at 7.56pm on that date. The second count on which he was convicted concerned a 9mm P calibre Star pistol beside which was a magazine containing 2 9mm P calibre cartridges. They were found by police in a blue plastic bag in the bottom of a sports bag in a built-in wardrobe in a flat in Fianna House, Queens Parade, Belfast. In the same sports bag was a Quality Street tin filled with ammunition. This ammunition consisted of 100 cartridges, calibre .38 Special, generally used in

revolvers, 37 cartridges, calibre .38 S & W/.380, 12 7.62 x 39mm cartridges suitable for use in the rifle, 6 cartridges, calibre 9mm P, suitable for use in the pistol and 5 12 bore cartridges. The loose ammunition was included in the second count.

Four unmarked, translucent white plastic cylindrical fireworks (rocket bodies) having a length of green igneous fuse protruding from one end and 57 assorted lengths of red and green firework type igniferous fuses were also found. Fireworks, their explosive contents and fuses have been frequently found, either by themselves or in combination with each other or with other materials, in various pipe bomb type improvised explosive devices in Northern Ireland. The count of possessing explosives concerned the fireworks and fuses.

[3] On 24 May 2006 the trial judge sentenced the appellant to 4 years' imprisonment followed by 2 years of post-custodial probation on all three counts, the sentences to run concurrently.

[4] Throughout interview he admitted that he at one time or another had possession of all the firearms and explosive substances which were the subject of the charges before the court. He stated that the rifle and magazine, the Star pistol, ammunition and the tin containing the ammunition and explosive substances, had been for some time in his house but then he had given the sports bag with the Star pistol, magazine and explosive substances to his co-accused. He however had retained possession of the AK 47 assault rifle and ammunition. He stated that on the night in question he had taken the black bag containing the assault rifle and ammunition to the home of his co-accused. He was also carrying a yellow glow jacket and hard hat. He was accompanied by his wife and on arrival at the flat they were admitted by his co-accused. He took the bag and yellow jacket and placed them in one of the bedrooms and then went with his wife and co-accused into the lounge of the house. There they had some wine to drink. At some point a telephone call was taken by him which he stated in interview was from someone telling him to take the AK 47 assault rifle and magazine to a bar in the Cliftonville Road. In interview he could only say that he was "near sure" it was the Clifton Bar. He then left the flat with his co-accused, taking the bag and jacket down to the car. He put them into the boot and set off on the journey which resulted in being stopped by the police. The intention was, as set out in his reply to the police at the scene where the car was stopped, to take the rifle to an unknown pub to meet an unknown person. The other firearm, that is, the Star pistol and the ammunition and explosives were not taken out of the co-accused's flat but left there.

[5] On his own admissions he accepted that he had possession of all of the firearms, ammunition and munitions contained in the charges on the bill of indictment. At one point he had all of them in his house and was fully aware

of the particular nature of each gun, the ammunition and munitions. By his own admissions he looked at these before putting them into safekeeping into his house. He admitted giving the Star pistol, ammunition and munitions to his co-accused and he admitted to having possession of the AK 47 assault rifle and ammunition throughout, that is in his house and in his possession on the evening in question, taking it to his co-accused's flat and from the flat with the intention of bringing it to a destination given to him when in the flat by the telephone caller.

[6] It was not in dispute that the trial judge was entitled to find that in respect of all the materials involved in each of these charges the appellant was in possession of them. Secondly, the appellant had the requisite intent under Article 17 of the Firearms Order and also under Section 3(1)(b) of the 1883 Act. That left the issue of duress which formed the defence of the appellant to all of these charges. The defence was raised by the appellant at interviews with the police and in evidence given by him. The trial judge rightly directed himself that the prosecution had to prove beyond reasonable doubt that the appellant was not acting under duress. In our view he was also right to approach the appellant as a man of good character.

[7] The law on the defence of duress has not been fully developed but the most fruitful discussion of it is set out in R v Z [2005] 2 AC 467 (also reported under the title of R v Hasan [2005] 2 Cr. App. R 22). The trial judge in R v Z put four questions to the jury.

> "Question 1. Was the defendant driven or forced to act as he did by threats which, rightly or wrongly, he genuinely believed that if he did not burgle [the] house, his family would be seriously harmed or killed? If you are sure that he was not forced by threats to act as he did, the defence fails and he is guilty. But if you are not sure go on to question 2. Would a reasonable person of the defendant's age and background have been driven or forced to act as the defendant did? If you are sure that a reasonable person would not have been forced to act as the defendant did, then the defence fails and he is guilty. If you are not sure, then go on to question 3. Could the defendant have avoided acting as he did without harm coming to his family? If you are sure he could, the defence fails and he is guilty. If you are not sure go on to question 4. Did the defendant voluntarily put himself in a position in which he knew he was likely to be subjected to threats? If you are sure he did, the defence fails and he is guilty. If you are not sure, he is

not guilty. Those four questions are really tests."

In the course of his opinion in R v Z Lord Bingham said at paragraph 21:

> "(4) The relevant tests pertaining to duress have been largely stated objectively, with reference to the reasonableness of the defendant's perceptions and conduct and not, as is usual in many other areas of the criminal law, with primary reference to his subjective perceptions. It is necessary to return to this aspect, but in passing one may note the general observation of Lord Morris of Borth-y-Gest in Director of Public Prosecutions for Northern Ireland v Lynch [1975] AC 653, 670:
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> > 'it is proper that any rational system of law should take fully into account the standards of honest and reasonable men. By those standards it is fair that actions and reactions may be tested.'
>
> (5) The defence of duress is available only where the criminal conduct which it is sought to excuse has been directly caused by the threats which are relied upon.
>
> (6) The defendant may excuse his criminal conduct on grounds of duress only if, placed as he was, there was no evasive action he could reasonably have been expected to take. It is necessary to return to this aspect also, but this is an important limitation of the duress defence and in recent years it has, as I shall suggest, been unduly weakened."

At paragraph 23 he said:

> "The appellant did not challenge the judge's direction to the jury on questions 1 and 2. Save in one respect those directions substantially followed the formulation propounded by the Court of Appeal (Criminal Division) (Lord Lane CJ, Taylor and McCullough JJ) in R v Graham (Paul) [1982] 1 WLR 294, 300, approved by the House of Lords in R v Howe [1987] AC 417, 436, 438, 446, 458-459. It is

> evident that the judge, very properly, based himself on the Judicial Studies Board's specimen direction as promulgated in August 2000. That specimen direction included the words, adopted by the judge, "he genuinely believed". But the words used in R v Graham (Paul) and approved in R v Howe were "he reasonably believed". It is of course essential that the defendant should genuinely, ie actually, believe in the efficacy of the threat by which he claims to have been compelled. But there is no warrant for relaxing the requirement that the belief must be reasonable as well as genuine."

At paragraph 24 he said:

> "It is true, as the Court of Appeal recognised in its judgment, that there may be an area of overlap between questions 2 and 3: a reasonable person of a defendant's age and background would not have been forced and driven to act as the defendant did if there was any evasive action reasonably open to him to take in order to avoid committing the crime. But the third question put by the judge, and regularly put in such cases, whether or not correctly put on the facts of this case, in my opinion focuses attention on a cardinal feature of the defence of duress, and I would wish to warn against any general notion that question 3 'collapses' into or is subsumed under questions 1 and 2."

At paragraphs 26 and 27 he said:

> "26. The recent English authorities have tended to lay stress on the requirement that a defendant should not have been able, without reasonably fearing execution of the threat, to avoid compliance. Thus Lord Morris of Borth-y-Gest in Director of Public Prosecutions for Northern Ireland v Lynch [1975] AC 653, 670, emphasised that duress 'must never be allowed to be the easy answer of those who can devise no other explanation of their conduct nor of those who readily could have avoided the dominance of threats nor of those who allow themselves to be at the disposal and under the sway of some gangster-tyrant.'

> Lord Simon of Glaisdale, at p 687, gave as his first example of a situation in which a defence of duress should be available: 'A person, honestly and reasonably believing that a loaded pistol is at his back which will in all probability be used if he disobeys ...' In the view of Lord Edmund-Davies, at p 708, there had been "for some years an unquestionable tendency towards progressive latitude in relation to the plea of duress".
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> 27. In making that observation Lord Edmund-Davies did not directly criticise the reasoning of the Court of Appeal in its then recent judgment in R v Hudson [1971] 2 QB 202, but that was described by Professor Glanville Williams, *Textbook of Criminal Law*, 2nd ed (1983), p 636, as "an indulgent decision", and it has in my opinion had the unfortunate effect of weakening the requirement that execution of a threat must be reasonably believed to be imminent and immediate if it is to support a plea of duress.

At paragraph 28 he said:

> "28. The judge's direction on question 3 was modelled on the Judicial Studies Board specimen direction current at the time, and is not in my opinion open to criticism. It should however be made clear to juries that if the retribution threatened against the defendant or his family or a person for whom he reasonably feels responsible is not such as he reasonably expects to follow immediately or almost immediately on his failure to comply with the threat, there may be little if any room for doubt that he could have taken evasive action, whether by going to the police or in some other way, to avoid committing the crime with which he is charged."

We comment that the harm must be death or serious bodily injury.

Although judgment was delivered in R v Z on 17 March 2005 it may not have been drawn to the attention of the trial judge.

[8] Before we discuss the directions which the trial judge gave to himself on the law of duress and the manner in which he applied the law to the facts, we wish to say something about the procedure which was adopted in this non-jury trial. In his judgment the trial judge records that he was advised by

counsel on behalf of the prosecution and defence that the facts in the case were not in dispute and that therefore under the provisions of Article 18(1)(c) of the 2004 Criminal Justice (Northern Ireland) Order the evidence could be read by him to himself as having been by agreement admitted in evidence. This advice by counsel related to the depositions of all of the police officers. A certain amount of editing of the interviews was undertaken and subject to that editing interviews again were admitted under the same provisions. He was asked to hear each of the defendants and also to listen to the interviews of Hutchinson in order to form a judgment in relation to the defence of duress raised by him.

[9] One can understand why this advice was given and why the trial judge adopted it. The wording of Article 18(1) of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 reads:-

> "In criminal proceedings a statement not made in oral evidence in the proceedings is admissible in evidence of any matter stated if, but only if –
>
> (a) any provision of this Part or any other statutory provision makes it admissible,
>
> (b) any rule of law preserved by Article 22 makes it admissible,
>
> (c) all parties to the proceedings agree to it being admissible, or
>
> (d) the court is satisfied that it is in the interests of justice for it to be admissible."

Counsel for the prosecution and the defence agreed that all the evidence for the prosecution was admissible. As it was a non-jury trial it was convenient for the trial judge to read the evidence to himself, they doubtless suggested, and the trial judge agreed.

But this was a criminal trial conducted in open court and the practice followed before the passing of the 2004 Order should have been followed. Thus prosecuting counsel should have read out aloud relevant portions of the evidence, which includes the interviews. Had there been an audience this case might have resembled a secret trial. No injustice was done, of course. But this practice is not permitted by the Order, however convenient it may seem.

[10] We note that the trial judge found that the appellant had been in continuous employment. But in the course of his interviews it became

apparent that he had stopped work in March 2003 and between then and his arrest spent £17,500 (borrowed to set up a chip business with his wife by way of mortgage on his house) on buying a car and drinking heavily (two bottles of red wine every evening).

[11] The Judicial Studies Board of England and Wales suggested in 2000 that Question 1 should be: "You must first ask whether D was or may have been driven to do what he did because he genuinely [even if mistakenly] believed that if he did not do so [he/a member of his immediate family … would [there and then/in the near future] be killed or seriously injured. If your answer is 'no', the defence of duress does not apply [and D is guilty].

The trial judge asked himself a series of questions which raised the same issues. We comment that in the light of R v Z the question should be:-

> "You must ask whether D was or may have been driven to do what he did because he genuinely and *reasonably* believed that if he did not do so he or a member of his immediate family …. would there and then or in the near future be killed or seriously injured."

Lord Bingham was dealing with a case concerning England and Wales. We leave open whether the use of the words "the near future" as distinct from "the future" is always appropriate in Northern Ireland.

[12] The trial judge posed the first question as suggested by the Judicial Studies Board. He answered it in favour of the appellant. He stated that there was an ongoing campaign of pressure before the final request to hold the Star pistol, ammunition and munitions was made. He then said: "That and its terms would have had [quaere: led] any reasonable person to have considerable apprehension as to the motives of those approaching him". Had he stopped at that point, his judgment would not have presented any difficulty for this court. But he proceeded:

> "I have referred earlier to the nature of such [paramilitary] organisations in the context of the use to which they would put the weapons and ammunition involved in this case, and therefore any threat of violence would have reasonably have been thought to be real. Therefore, while no specific threat was made I am satisfied the implied threat in the context of the behaviour to which I have referred was all too real."

[13] It was argued that this finding was, in effect, a finding that a reasonable person, that is to say, a person of reasonable firmness, would have felt under threat that violence would be visited on him and his family. We consider that there is force in this submission.

[14] The next question which he asked himself, when applying the second question, was "whether at this point the threat was at a level which could be considered such as a reasonable man in the position of the defendant, with his personal circumstances, could be expected to resist." It is easier to use the JSB formula or the wording used by the trial judge in R v Z. The trial judge had used the JSB formula earlier. But he now departed from it. However, it is clear that he was then saying that he was satisfied beyond a reasonable doubt that the defendant "was not under duress to the extent that acting as a reasonable man with his personal characteristics that he would not have resisted the taking into his possession of such lethal weapons." He was there referring not merely to the pistol but to the rifle.

It was argued that this was inconsistent with his findings on the first question about a reasonable person. We consider that there is force in that contention.

[15] He did not go on to the third question though he stated that he was reinforced in his answer to the second question by matters arising out of the third question.

He did not consider other than as re-enforcing his answer to the second question the difference between keeping a weapon in a safe house where the householder is under pressure and moving a loaded weapon to another place to be delivered to an 'unknown person' for what appears to have been immediate use.

[16] Reference is made in the case-law and was made by the trial judge to the characteristics of the individual which "the reasonable man" is assumed to share. Assistance is to be gained by the decision of the Court of Appeal in England and Wales in R v Bowen [1996] 2 Cr. App. R. 157 as to the proper approach to the characteristics of the defendant which the tribunal of fact should consider.

[17] In view of the difficulties set out at paragraphs 12 to 14 of this judgment we have decided to order a re-trial on all three charges before another judge.

[18] Question 4 does not arise on the findings of fact of the trial judge. On a new trial the findings of fact of that judge will determine whether it arises. Accordingly we merely draw attention to the passages in the opinion of Lord

Bingham concerning it in R v Z, which are to be found at paragraphs [29] to [40].