17/81

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v LOUGHNAN

Young CJ, Crockett and King JJ

1 October 1979 — [1981] VicRp 43; [1981] VR 443

CRIMINAL LAW – ESCAPING FROM PRISON – DEFENCE OF NECESSITY – ACCUSED CLAIMED THAT HE WAS THREATENED WITH DEATH WHILST IN PRISON – SCOPE OF THE DEFENCE OF DURESS AND NECESSITY – TRIAL JUDGE REFUSED TO ALLOW SUCH DEFENCES TO BE LEFT TO THE JURY – ACCUSED CONVICTED – WHETHER JUDGE IN ERROR: *COMMUNITY WELFARE SERVICES ACT* 1970, S132(1).

L. was charged with escaping from prison. He said he was forced to escape because of threats which he had received from other prisoners to the effect that he should watch out for himself and that he was going to be killed. The trial judge refused to allow the defences of duress or necessity to be left to the jury. Upon application for leave to appeal—

HELD: Application refused.
1. The defence of necessity exists in both Common Law and Statutory Offences and the elements involved are:
(a) to avoid certain consequences that would leave inflicted irreparable evil upon the accused;
(b) to avoid immediate peril and proportion.
(c) The accused must believe on reasonable grounds that it is necessary to do the acts which are alleged to avoid the threatened danger and those acts must not be disproportionate to the threatened danger.

2. There was no evidence upon which the jury could have found that L's escape from prison was reasonably proportionate to the threat which he said he feared. If the matter had been left to the jury they could not properly have concluded on the evidence that L. had no alternative to escaping from the prison in order to escape the peril which he said he feared or at the time L. escaped prison with an intention to avoid imminent violence.

YOUNG CJ: The applicant was presented for trial on a charge of escaping from Pentridge Prison. He pleaded not guilty but after a trial at which he was represented by counsel he was convicted and sentenced to be imprisoned for three months. At the trial the Crown case was not really challenged. Instead the applicant relied upon the defences of duress and necessity. The applicant said that the other prisoners concluded that he (the applicant) was either working for the prison officers or was an informer. During the next few weeks the applicant remained particularly in the company of two prisoners, Lawless and Power, and was insulted and threatened by other prisoners on numerous occasions. The applicant did not say what form the insults and threats took. Lawless and Power were moved from the Division and the threats and intimidation continued. On the day of the escape two prisoners told him to watch out for himself and later a third told him he was going to be killed that night. There was no evidence that the applicant had ever told any prison officer that he feared for his life.

The learned trial Judge expressed the view that on the facts of the case no reasonable jury could find the defence of duress or necessity sustained. In other words, His Honour said there was no evidence in the case fit to be left to the jury on the questions of duress or necessity. The learned Judge explained to the jury that they would not be called upon to consider the evidence led to establish those defences.

The only ground relied upon in support of the present application is that the learned Judge was wrong in law in refusing to allow the defence or defences of duress or necessity to be considered by the jury. So far as duress was concerned Mr Sharp conceded that unless the Court was prepared to reconsider the recent decision of *R v Dawson* [1978] VicRp 51; (1978) VR 536, he could not succeed. In that case this Court (Starke, Anderson and Harris JJ) held that the defence of duress is not available to exculpate an accused who commits a crime in order to evade the possible consequences of a threat made against him. The Court indicated that it was not prepared to reconsider that decision and the argument therefore proceeded without further reference to duress.

Mr Sharp contended that the defence of necessity was recognised by our law and that the elements of it of which there had been no evidence in *Dawson's Case* had been established in this case or at any rate that there was evidence fit to be considered by the jury which if accepted by them would establish those elements. In this case we have come to the conclusion that the application should fail because even if there be a defence of necessity available to a prisoner who escapes from lawful custody we do not think that the facts adduced justified the leaving of the defence to the jury. If there be no such defence recognised by the law, of course, *cadit quaestio*. However since we are of the opinion that a prisoner who escapes may in certain circumstances raise a defence of necessity, we think it is necessary or at any rate desirable that we should state briefly the foundation for the conclusion which we have reached.

We do not find it difficult to accept a general proposition to the effect that the law in some cases does recognise a defence of necessity. The concept of necessity finds its place in various branches of the criminal law. There is also much reference to the question in academic writings not all of which are readily available here, but we mention some of those that we have consulted in addition to those already mentioned: Gardner, *The Defense of Necessity and the Right to Escape from Prison* 49 Southern California Law Review 110; Davies, *Law of Abortion and Necessity* (1939) 2 Mod LR 126; Edwards, *Compulsion, Coercion and Criminal Responsibility* (1951) 14 Mod LR 97.

Sir James Fitzjames Stephen states that there are three elements involved in the defence of necessity. First, the criminal act or acts must have been done only in order to avoid certain consequences which would have inflicted irreparable evil upon the accused or upon others whom he was bound to protect. The limits of this element are at present ill defined and where those limits should lie is a matter of debate. But we need not discuss this element further because the irreparable evil relied upon in the present case was a threat of death and if the law recognises the defence of necessity in any case it must surely do so where the consequence to be avoided was the death of the accused. We prefer to reserve for consideration if it should arise what other consequence might be sufficient to justify the defence.

The other two elements involved, which were identified by Menhennitt J in *R v Davidson* (*supra*) at p671) can for convenience be given the labels, immediate peril and proportion, although the expression of what is embodied in those two elements will necessarily vary from one type of situation to another. The element of imminent peril means that the accused must honestly believe on reasonable grounds that he was placed in a situation of imminent peril. As Edmund Davies LJ (as he than was) pointed out in *Southwark LBC v Williams* (1971) Ch 734 at p746; [1971] 2 All ER 175; [1971] 2 WLR 467, all the cases in which a plea of necessity has succeeded are cases which deal with an urgent situation of imminent peril. Thus if there is an interval of time between the threat and its expected execution it will be very rarely if ever that a defence of necessity can succeed. The element of proportion simply means that the acts done to avoid the imminent peril must not be out of proportion to the peril to be avoided.

Put in another way, the test is: would a reasonable man in the position of the accused have considered that he had any alternative to doing what he did to avoid the peril? The two tests of imminent peril and proportion we have adapted from the tests propounded by Smith J in *R v McKay* [1957] VicRp 79; (1957) VR 560 at p572-3; [1957] ALR 648, where they are referred to as necessity and proportion. It will be seen that in the application of the defence of necessity to a given situation these two elements may become interwoven. A person who receives a threat that he will be killed on a future day cannot seek out the person making the threat and kill him and escape liability on the ground that the killing was necessary in order to avoid his own death unless no other way of avoiding the danger was open to him. In such a case the accused will not be held to have had reasonable grounds for believing that it was necessary for him to do as he did in order to avoid the peril feared and it would also be hold that his killing was in the circumstances out of proportion to the threat made to him.

First, an urgent situation of imminent peril must exist in which the accused must honestly believe on reasonable grounds that it is necessary for him to do the acts which are alleged to constitute the offence in order to avoid the threatened danger. Secondly, those acts must not be disproportionate to the threatened danger. In other words, if a prisoner were confined in a small country gaol and were placed in a position where he honestly believed on reasonable grounds that to preserve his own life he had to escape from the place where he was confined, he might be

allowed with impunity to escape to the outside world. But if he were confined in a large metropolitan prison containing many divisions a similar threat might only be held to justify escape from the particular division in which he was confined. In such a case the accused might not of course be charged with escaping from lawful custody but no doubt he might be open to a charge of some lesser offence.

A question was raised during the argument whether a defence of necessity can be raised to a statutory offence such as that with which the applicant was charged. The offence of escaping from prison is created by s132(1) of the *Community Welfare Services Act* 1970 which reads:

> "132. (1) Every prisoner who escapes or attempts to escape—
> (a) from a prison or Police gaol; or
>
> (b) from the custody of a member of the police force or a prison officer in whose legal custody he is or is deemed to be—
> shall be guilty of an indictable offence. Penalty: Imprisonment for five years."

The section does not attach the word "unlawfully" to the word "escapes" but in our opinion the failure to do so does not exclude the possibility that a lawful justification or excuse may provide an answer to a charge under it. Many indictable offences are created without the use of the word "unlawfully" or some word of similar effect and yet the law has allowed the absence of *mens rea* or some lawful justification or excuse to be raised by way of defence. We therefore think that a defence of necessity is open to a person accused of escaping from prison contrary to s132(1) of the *Social Welfare Act*.

Next it is necessary to consider whether there was in this case sufficient evidence to justify leaving the defence of necessity to the jury. There was we think evidence from which if accepted the conclusion might have been reached that when the applicant was in the chapel there was an urgent situation of imminent peril in which the applicant honestly believed on reasonable grounds that it was necessary for him to take the opportunity which presented itself of escaping from "B" Division. But when the other element of the defence is considered, namely, whether his acts were proportionate to the danger which he feared, we think that the inevitable conclusion must be that they were not. Once the applicant was clear of "B" Division and on the catwalk, he had put himself out of reach of the danger which he feared and there was no necessity for him to go further. It was never part of the applicant's case that he had to put himself beyond the prison walls to be safe from the threat which he feared.

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 danger. But in this case there was no evidence upon which the jury could have found that the applicant's escape from the prison was reasonably proportionate to the threat which he said he feared. If the matter had been left to the jury they could not properly have concluded on the evidence that he had no alternative to escaping from the prison in order to avoid the peril which he said he feared.

If our analysis of the case is correct there was thus no basis upon which the learned Judge was required to leave the defence of necessity to the jury. But if we were wrong on this question we would nevertheless be of the opinion that the application should fail, for His Honour's refusal to leave the defence of necessity to the jury cannot have involved a substantial miscarriage of justice. We think the application should be refused.

CROCKETT J: This application for leave to appeal against conviction invites attention to, and requires resolution of, a question as interesting as it is novel. That question arises in this way: the applicant was at the relevant time a prisoner, that he was confined within a prison and that he escaped therefrom.

At his trial the applicant sought to rely on a defence of necessity. He maintained that shortly prior to the commencement of the escape he was faced with specific threats of death in the immediate future and that no avenue alternative to escape from the prison existed whereby he could avoid the homicide with which he had been threatened. Fortuitously, on the very evening that he had been so threatened, Dawson and his companions were ready to undertake the escape for which for some time they had been preparing and planning. Even more provident

for the applicant was the fact that as the escape was about to commence he found himself in the escapers' company and was able, as he put it, to "tag" along with them.

What has to be determined is:
(a) Is there a defence of necessity known to the law?
(b) If yes, then—
(i) what are the constituent elements of that defence?
(ii) was there evidence fit for the jury's consideration which could enable it to hold that the Crown had not satisfied it beyond reasonable doubt that the applicant's escape was not occasioned by necessity?

I turn, then, first to the question: Is the defence of necessity known to the law in this State? The answer is far from clear not only because of the paucity of authority, but also because of the lack of unanimity in that which does exist. Some common law offences contain the negative component of absence of justification. The obvious example is murder with respect to which it must be shown that the homicidal act or omission occurred "without lawful justification or excuse." The typical justification is self-defence. This is no more than reliance upon necessity. But it may be more than self defence. The extent to which justification may go in a charge of murder was considered by this Court in *R v McKay* [1957] VicRp 79; (1957) VR 560; [1957] ALR 648.

Whilst lacking in unanimity, the effect of the more modern authorities and commentators, Smith J (in *R v McKay* [1957] VicRp 79; (1957) VR 560; [1957] ALR 648) concluded was to have rationalised the requirements so that the present test is twofold and may be stated as (p573):

> "(1) Did the accused honestly believe on reasonable grounds that it was necessary to do what he did in order to prevent the completion of the felony or the escape of the felon? and
>
> (2) Would a reasonable man in his position have considered that what he did was not out of proportion to the mischief to be prevented?"

In the result I am persuaded that, but for one possible difficulty that remains to be dealt with hereafter, a defence of necessity is, in the appropriate circumstances, available to be relied upon in answer to a charge of escape from lawful custody. It may be (and it is of course, unnecessary for present purposes to determine the matter) that the doctrine will have no application where the act performed under compulsion of necessity is the infliction of death on an innocent person so as to allow the aggressor's survival: *R v Dudley and Stephens* (1884) 14 QBD 273; (1884) 54 LJMC 32; (1884) 52 LT 107; (1884) 49 JP 69; (1884) 33 WR 347; (1884) 15 Cox CC 624; (1884) 1 TLR 118 – the facts of which are too well known to require restatement. But clearly what must be present before the defence can be entertained is, "an urgent situation of imminent peril."

Moreover, reference to American writings leaves it clear that the status of necessity as a defence in the substantive criminal law in many jurisdictions in that country is unimpeachable. In particular, its application to prison escape has been specifically recognised in the landmark decision of *People v Lovercamp* (1974) Cal App 3rd 823, in which *People v Whipple* referred to by Anderson J in *Dawson's Case* was distinguished. *Lovercamp's case*, as are many of the American authorities, was concerned with an escape carried out in the purported attempt to avoid a homosexual attack by other inmates.

The offence of escaping from a prison is a statutory offence: s132(1) *Social Welfare Act* 1970. The ingredients of the offence are created expressly or impliedly by the statute, namely, that the place from which the escape is said to have occurred is a prison, that the accused was being lawfully held in the prison and that he in fact escaped from the prison. The section, of course, says nothing of requirement of an absence of justification or excuse, or (to put the matter affirmatively) even that the escape should be "unlawful". Many statutory offences create in terms the requirement that the offence perpetrated be committed "unlawfully" or "maliciously" or both – those expressions usually (but not always) being judicially interpreted as importing the requirements of absence of justification and the existence of intention respectively.

The Court was asked to adopt as a canon of statutory interpretation that all statutes creating statutory offences are to be construed as being subject to the common law doctrine of necessity. This contention is probably correct. There are to be found in the *Crimes Act* 1958 many indictable

offences created without the employment of any of the usual prefatory expressions such as – "unlawfully", "maliciously", "intentionally" or "knowingly". Yet in relation to such offences judges have never hesitated to instruct juries that absence of *mens rea* is an answer to such offences. Strict liability has no application to indictable offences. They cannot be committed "accidentally" or "unconsciously". Accordingly, for the reasons that I have endeavoured to give, I consider that proof of necessity will constitute a lawful justification for a prison escape. The next question, however, is what conditions must be met before the prisoner's actions will be held justified? The defence must obviously be very limited in its application. The essential conditions, I consider, so far as presently relevant, are that:

> 1. The harm to be justified must have been committed under pressure either of physical forces or exerted by some human agency so that "an urgent situation of imminent peril" has been created.
>
> 2. The accused must have acted with the intention of avoiding greater harm or so as to have made possible "the preservation of at least an equal value".
>
> 3. There was open to the accused no alternative, other than that adopted by him to avoid the greater harm or "to conserve the value."

In judging the intention with which the accused acted the facts must be taken as they appeared to him. On the other hand, the defence must be objective in the determination of equality or supremacy between competing values so that it is for the judge to decide on the facts as they appeared to the accused whether a case of necessity in law was indeed made out; that is whether the value assisted was greater than the value defeated.

I come then, finally, to a consideration of whether there was sufficient evidence to justify leaving the defence to the jury – the trial Judge having in fact refused to do so. The intent with which the applicant escaped was a question of fact and as such a matter for the jury's determination. Accordingly the defence was one that ought properly to have been left to the jury. The failure of the Judge to have done so amounted to a miscarriage and such as would ordinarily require that a new trial be ordered. The Crown, however, to support a contention that no new trial should be ordered because no substantial miscarriage of justice had occurred, relied upon what it contended was the weight of evidence that established an inculpatory intent on the part of the applicant. That is, the proviso to s568(1) of the *Crimes Act* 1953 was sought to be invoked.

The evidence and argument to which I have referred, and upon which great reliance was placed by the Crown, constitute a formidable justification for, and, indeed, must compel, the rejection by a jury of the applicant's version as to the intent with which his escape occurred. To remove the issue from the jury's consideration did not, I consider, deprive the applicant of "a chance fairly open to him of being acquitted." Or, to put it another way, I am satisfied that "any reasonable jury would have inevitably" concluded that it was satisfied beyond reasonable doubt that the applicant did not at the relevant time escape the prison with an intention to avoid imminent violence. See *R v Nilson* [1971] VicRp 105; (1971) VR 853 at 859. Accordingly, the application in my opinion should be dismissed.
