44/89

COURT OF APPEAL (ENGLAND) CRIMINAL DIVISION

R v MARTIN

Lord Lane CJ, Simon Brown and Roch JJ

29 November 1988

[1988] EWCA Crim 2; [1989] 1 All ER 652; (1988) 88 Cr App R 343; [1989] RTR 63; [1989] Crim LR 284; (1988) 153 JP 231; noted (1989) Crim LR 611, 622

MOTOR TRAFFIC – DRIVING WHILST DISQUALIFIED – DRIVER FORCED TO DRIVE DUE TO EXTREME CIRCUMSTANCES – WHETHER NECESSITY A DEFENCE RECOGNISED BY LAW – WHETHER DEFENCE APPLIES TO CASES INVOLVING DRIVING.

The defence of necessity is available in cases of driving a motor vehicle whilst disqualified from driving. When the defence is raised, a court should ask itself (a) whether the accused was impelled to act because of a reasonable belief that otherwise death or serious physical injury would result; and if so (b) whether a sober person of reasonable firmness, sharing the accused's characteristics would have responded to that situation by acting in the same manner as the accused.

SIMON BROWN J delivered the following judgment of the Court **[652]** On 2 February 1988 this appellant pleaded guilty in the Crown Court at Snaresbrook to driving whilst disqualified. He was sentenced by his Honour Judge Finney to four months' imprisonment suspended for two years. In addition, for breach of a sentence of four months' imprisonment suspended for two years, imposed at Waltham Forest Magistrates' Court **[653]** on 20 June 1986 for driving whilst unfit through drink or drugs, the operational period of the suspension was extended for a further two years. The appellant now appeals against his conviction as of right on a pure point of law.

The point is whether the defence of necessity is available to a charge of driving whilst disqualified when that driving occurs in circumstances such as the appellant was contending arose in his case. To those circumstances I shall come in a moment. In a private-room hearing before the appellant was arraigned, the judge held not. He concluded that, once it was established that the defendant was driving and that he was disqualified at the time, the offence was established. It was, in short, in those circumstances an absolute offence.

In consequence of that ruling the appellant pleaded guilty and merely prayed in aid as mitigation the circumstances on which he relied to establish the necessity of breaking the law. But for the ruling he would have contested the case. The appeal is brought under s2(1)(b) of the *Criminal Appeal Act* 1968, namely on the basis that the judgment of the court of trial should be set aside on the ground of a wrong decision on a question of law.

The circumstances which the appellant desired to advance by way of defence of necessity were essentially these. His wife has suicidal tendencies. On a number of occasions before the day in question she had attempted to take her own life. On the day in question her son, the appellant's stepson, had overslept. He had done so to the extent that he was bound to be late for work and at risk of losing his job unless, so it was asserted, the appellant drove him to work. The appellant's wife was distraught. She was shouting, screaming, banging her head against a wall. More particularly, it is said she was threatening suicide unless the appellant drove the boy to work.

The defence had a statement from a doctor which expressed the opinion that 'in view of her mental condition it is likely that Mrs Martin would have attempted suicide if her husband did not drive her son to work'. The appellant's case on the facts was that he genuinely, and he would suggest reasonably, believed that his wife would carry out that threat unless he did as she demanded.

Despite his disqualification he therefore drove the boy. He was in fact apprehended by the police within about a quarter of a mile of the house. Sceptically though one may regard that defence on the facts (and there were, we would observe, striking difficulties about the detailed evidence when it came finally to be given before the judge in mitigation), the sole question before this court is whether those facts, had the jury accepted they were or might be true, amounted in law to a defence. If they did, then the appellant was entitled to a trial of the issue before the jury. The jury would of course have had to be directed properly on the precise scope and nature of the defence, but the decision on the facts would have been for them. As it was, such a defence was pre-empted by the ruling. Should it have been?

In our judgment the answer is plainly not. The authorities are now clear. Their effect is perhaps most conveniently to be found in the judgment of this court in *R v Conway* [1988] EWCA Crim 1; [1989] QB 290; [1988] 3 All ER 1025; (1988) 88 Cr App R 159; [1988] 3 WLR 1238. The decision reviews earlier relevant authorities. The principles may be summarised thus: first, English law does, in extreme circumstances, recognise a defence of necessity. Most commonly this defence arises as duress, that is pressure on the accused's will from the wrongful threats or violence of another. Equally however it can arise from other objective dangers threatening the accused or others. Arising thus it is conveniently called 'duress of circumstances'.

Second, the defence is available only if, from an objective standpoint, the accused can be said to be acting reasonably and proportionately in order to avoid a threat of death or serious injury.

Third, assuming the defence to be open to the accused on his account of the facts, the issue should be left to the jury, who should be directed to determine these two questions: first, was the accused, or may he have been, impelled to act as he did because as a result of what he reasonably believed to be the situation he had good cause to fear that otherwise death or serious physical injury would result; second, if so, would a sober person of reasonable firmness, sharing the characteristics of the accused, have responded to that situation by acting as the accused acted? If the answer to both those questions was Yes, then the jury would acquit; the defence of necessity would have been established.

That the defence is available in cases of reckless driving is established by *R v Conway* itself and indeed by an earlier decision of the court in *R v Willer* (1986) 83 Cr App R 225. *R v Conway* is authority also for the proposition that the scope of the defence is no wider for reckless driving than for other serious offences. As was pointed out in the judgment, 'reckless driving can kill' (see [1988] 3 All ER 1025 at 1029, [1988] 3 WLR 1238 at 1244).

We see no material distinction between offences of reckless driving and driving whilst disqualified so far as the application and scope of this defence is concerned. Equally we can see no distinction in principle between various threats of death; it matters not whether the risk of death is by murder or by suicide or indeed by accident. One can illustrate the latter by considering a disqualified driver being driven by his wife, she suffering a heart attack in remote countryside and he needing instantly to get her to hospital.

It follows from this that the judge quite clearly did come to a wrong decision on the question of law, and the appellant should have been permitted to raise this defence for what it was worth before the jury. It is in our judgment a great pity that that course was not taken. It is difficult to believe that any jury would have swallowed the improbable story which this appellant desired to advance.

There was, it emerged when evidence was given in mitigation, in the house at the time a brother of the boy who was late for work who was licensed to drive, and available to do so; the suggestion was that he would not take his brother because of 'a lot of aggravation in the house between them'. It is a further striking fact that when apprehended by police this appellant was wholly silent as to why on this occasion he had felt constrained to drive. But those considerations, in our judgment, were essentially for the jury, and we have concluded, although not without hesitation, that it would be inappropriate here to apply the proviso to s2(1) of the 1968 Act. In the result this appeal must be allowed and conviction quashed.