22/79

SUPREME COURT OF SOUTH AUSTRALIA

OSBORNE v GODDARD

Hogarth ACJ, Zelling and King JJ

17, 18 August, 1 September 1978

(1978) 21 ALR 189; (1978) 18 SASR 481; 35 FLR 122 (Noted 2 Crim LJ 340)

CRIMINAL LAW – WELFARE FRAUD COMMITTED BY WIFE – WIFE CLAIMED THAT SHE SO ACTED BECAUSE OF HER HUSBAND'S THREATS OF SERIOUS PERSONAL VIOLENCE – DURESS AND COERCION – DISCUSSION OF VARIOUS REPORTS – MEANING OF DURESS – FINDING BY MAGISTRATE THAT CHARGE PROVED: *SOCIAL SERVICES ACT* 1947, S138(1)(d).

The respondent was tried summarily and found guilty of two offences of presenting a false document to an officer of the Commonwealth Department of Social Security. She had done the acts charged under unspecific threats of serious personal violence from her husband, who had behaved violently towards her on previous occasions. The magistrate accepted evidence that the respondent received beatings and threats from her husband which caused her to do the acts, but found that she could have avoided committing the offences by complaining to the police or leaving her husband, thus defeating the plea of duress. On appeal from the decision of a single judge, reversing the decision of the magistrate, the appellant sought to support the magistrate's decision and argued in addition that no defence of marital coercion was available because s328.a of the *Criminal Law Consolidation Act* 1935-1975 (S.A.) had not been "picked up" by the *Judiciary Act* 1903 (Cth) so as to apply in the case at hand.

HELD: The Full Court of the Supreme Court of South Australia: The defences of duress and marital coercion are applicable to summary offences where a State Court in South Australia is dealing with Commonwealth offences under s138(1)(d) of the *Social Services Act* 1947.

DURESS:
In arriving at their decision of duress as a defence – "Against the background that injuries are often more serious than intended by the person delivering the blow, threats of bodily injury sufficient to overpower the victim will amount to duress," – the court considered English decisions and the criteria set out in those decisions.

The test for duress was stated in the Irish case *Attorney-General v Whelan* (1934) IR 581, 526;

> "It seems to us that threats of immediate death or serious personal violence so great as to overbear the ordinary power of human resistance should be accepted as a justification for acts which would otherwise be criminal."

This test was quoted with approval by Lord Morris in *DPP for Northern Ireland v Lynch* [1975] UKHL 5; [1975] AC 653, 673; [1975] 1 All ER 913; (1975) 61 Cr App R 6; [1975] 2 WLR 641. The South Australian court favourably considered serious injury/voluntariness as set out by Lord Parker CJ in *R v Hudson & Taylor* [1971] EWCA Crim 2; [1971] 2 QB 202, 206; [1971] 2 All ER 244; 56 Cr App R 1; [1971] 2 WLR 1047; 135 JP 403; "Threats of death or serious personal injury so that the commission of the alleged offence was no longer the voluntary act of the accused", and that the threats in the case to the woman brought her within this test.

The question of withdrawal or sufficient opportunity, to escape from her husband's threats and seek police protection was considered. Reference was made to Lord Parker CJ in *R v Hudson and Taylor* [1971] EWCA Crim 2; [1971] 2 QB 202, 207; [1971] 2 All ER 244; 56 Cr App R 1; [1971] 2 WLR 1047; 135 JP 403, as to the liability of the police to provide effective protection 24 hours a day, and the statement of Bray CJ in *R v Brown & Morley* (1968) SASR 467, 497; that if there is no reasonable opportunity to withdraw, the same reasons which excuse the initial participation must surely excuse also the failure to withdraw.

The court also took into consideration that to withdraw would result in the termination of the respondent's marriage. It was held that: "termination of the marriage would have followed the exercise of any opportunity to escape from the husband's threats. Depending on the gravity of the offence, the law does not require a wife to terminate her marriage to escape bodily injury and the compulsion of committing the offence."

As to whether or not duress is a defence to a summary offence, the court followed Reed J in *O'Sullivan v Fisher* (1954) SASR 33; where it was held to be a defence to being drunk in a public place under the *Police Offences Act*.

EDITORIAL COMMENT: DURESS IN VICTORIA
The effects of duress as a defence in Victoria have recently been extensively considered by the Law Reform Commissioner in "Working Paper No 5", which has been supplied to Magistrates. The position of duress as a defence in Victoria is uncertain, having been rejected as defence to a principal in either the first or second degree in murder in *R v Harding* [1976] VicRp 11; (1976) VR 129. This case was decided before *DPP for Northern Ireland v Lynch (supra)*, although not reported until after *Lynch's case*.

In a case dealing with possession of cannabis and threats made, duress was not accepted as a defence, although the Full Court said: "Leaving on one side the crime of murder or any other crime so heinous as possibly to be excepted as to which we say nothing, we think the authorities cited supported the view that, in general, duress affords justification or excuse for acts which would otherwise be criminal". *R v Tawill* [1974] VicRp 11; (1974) VR 84, 87.

In view of this statement of the Full Court, and the recommendations of the Law Reform Commissioner in his Working Paper, Nos 2.67; 2.68; 2.69, it is suggested that duress would be available as a defence in this State for offences within the limits set out in *R v Tawill*.

COERCION:
It was held that the concepts of marital coercion and duress are cognate, applying the statements of Lord Simon in *DPP for Northern Ireland v Lynch (supra)*. The court could not see any good ground for differentiating between the two defences. If duress was made out to the charges so also was marital coercion made out.

It was argued for the appellant that s328.a of the *Criminal Law Reform Consolidation Act* required the offence to be committed in the presence of, as well as under the coercion of the husband, and that this was not so in the presence of, as well as under the coercion of the husband, and that this was not so in the instant case because the wife was in the office and the husband outside.

In rejecting this argument the court referred to *R v Connolly* (*Sarah Connolly's Case*) (1829) 2 LEW CC 229; 168 ER 137; *R v Whelan* (1937) SASR 237; where the husband was outside the premises whilst the wife was inside and the presumption of marital coercion applied. In *R v Baines* (1900) 69 LJQB 681, the court referred to the husband "being in the neighbourhood" and then left as a question for the jury whether the wife was taking an independent part so as to negative the coercion.

In the instant case it was held that marital coercion does not require the offence to be committed in the presence of the husband. It sufficient that the husband is in a situation where he is close enough to influence the wife into doing what he wants done, even if he is not physically present in the room. S228.a. of the SA Act of similar context to s336(1)(2) of the *Crimes Act* inserted by Act 9073, operative from 1/2/78. S328.a. does not have any equivalent provisions to sub-sections (3), (4), (5) of our s336. Any application of s336 as a defence must necessarily rely on the particular fact situation.

COMMENT:
It is suggested that the S.A. finding in relation to presence/proximity would be favourably considered in this State if the other elements required pursuant to s336 were present.

It was further argued for the appellant that marital coercion was not available as a defence

in a court of summary jurisdiction. The defence has been applied to misdemeanours in *R v Torpey* (1871) 12 Cox CC 45, 49; Assault occasioning actual bodily harm; and *R v Smith* (1916) 12 Cr App R 42; falsification of accounts and fraudulent conversion. It was held that the defence of marital coercion is available in S.A. in proceedings taken in summary jurisdiction.

In so finding the court relied on the concepts of marital coercion and duress being cognate, and held that as duress was available as a defence in summary jurisdiction (*O'Sullivan v Fisher* (1954) SASR 33), so too was marital coercion. The decision of Napier CJ in *Manuels v Crafter* (1940) SASR 7 that marital coercion could not apply in a court of summary jurisdiction was overruled. In overruling this decision the court relied upon the reasons set out by the Full Court of the Supreme Court of Victoria in *Ewart v Fox* [1954] VicLawrp 96; (1954) VLR 699, 703-4. In that case, one under the *Licensing Act* 1928, s161, the presumption was held not applicable. It was stated: "... the answer to the question whether the doctrine of marital coercion recognized by the common law is available as a defence to a prosecution for a statute offence must depend upon an examination of the statute which creates the offence..."

COMMENT:
The issue does not appear to have been further considered in Victoria. It was also argued for the appellant, in the alternative that s328.a. only applied to offences created under the law of South Australia. It was held that s328.a. in its general terms applies primarily to offences created or existing under the law of South Australia, but it applies to offences under the laws of the Commonwealth by reason of the effect of s39(2) of the *Judiciary Act* which gives jurisdiction to the State court to be invested with federal jurisdiction and of s79, which provides for the application of State laws in matters heard in a court so invested with jurisdiction.

At the summary hearing the Magistrate ordered that repayment of $402 be made to the Clerk of the Adelaide Magistrates' Court for transmission to the Director of Social Services. This order for reparation was made pursuant to 21B of the *Crimes Act* (Cth.). This order on appeal was held to be invalid as there was no proof that the Clerk of the Court was empowered to act as an agent for the Director of Social Services. In so holding the court followed *Re Weetra* (1978) 18 SASR 321:(1978) 78 LSJS 309.

COMMENT:
It would appear to follow that any orders for reparation made in Victoria should not be made payable through the Clerk of Courts but to the Department in Commonwealth matters.
[Editorial Comments by John E Wallace SM]
