Duress by indirect threats

*R v Brandford* [2016] EWCA Crim 1794, [2017] 4WLR 17, Court of Appeal

**Keywords**

Conspiracy to supply controlled drugs; duress by threats

Olivia Brandford (B) was in a relationship with Dean Alford (A). In August 2014, the pair was arrested when driving from London to Portsmouth. Upon her arrest, B was found to have concealed within her body 121 wraps containing Class A drugs – 77 of the wraps contained cocaine and 44 contained heroin. Collectively, the wraps had a street value of between £1500 and £2300. A and B, along with another man, Michael Karemera (K), were charged with two counts of conspiracy to supply controlled drugs (cocaine and heroin) contrary to s. 1 of the Criminal Law Act 1977. They appeared before HHJ Downing and a jury at Woolwich Crown Court in January 2016.

At trial, all three defendants pleaded duress. A and K both claimed that they had been forced into selling the drugs and threatened if they did not do so. B claimed that, the day before her arrest, A had told her that he was being compelled to sell the drugs and that if he did not do so ‘something bad would happen to him’. B claimed that she was so afraid for his safety that she had agreed to carry the drugs for him. The trial judge allowed A and K to run a defence of duress based on the alleged threats (these defences were rejected by the jury). However, the trial judge withdrew B’s defence from the jury’s consideration, holding that she could not rely on threats of which she had no first-hand knowledge (something which HHJ Downing described as ‘hearsay duress’). B was convicted and appealed, contending that the trial judge should have left duress to the jury.

Held, dismissing the appeal, the trial judge had been entitled to withdraw B’s defence from the jury, albeit for different reasons than the one given (at [45]). B’s defence failed because no reasonable jury, properly directed, could have found that she had acted under duress. The threat was vague; it lacked immediacy; she had opportunities to contact the police or otherwise escape from the threat; she had voluntarily associated with known criminals (at [46]). Although the authorities did not discount the indirect relaying of a threat, the more indirectly the threat was conveyed, the more readily the Crown would be able to disprove a defence of duress (at [39]).

Commentary

Indirect threats

The most interesting aspect of the present case is the acceptance of the possibility that a threat could be conveyed indirectly and still be capable of supporting a defence of duress. Gross LJ explained that while there was a correlation between the directness of a threat and its strength in terms of supporting a defence of duress, the mere fact that a threat was indirect was not a ‘fatal bar’ to the defence. Gross LJ said:

For our part, we can envisage a situation where a threat is indeed very real, regardless of the fact that it is indirectly relayed. Take a threat made to a hypothetical D and her family by a messenger from an organised crime group, conveying a threat from a ‘crime boss’ or the equivalent passing on of a threat from an emissary of a terrorist group . . . It is very likely that the more directly a threat is conveyed, the more it will be capable of founding a defence of duress. Conversely, the more indirectly the threat is relayed the more, all other things being equal, a defendant will struggle to satisfy the requirements of the defence, or (put in burden of proof terms) the more readily the prosecution will disprove it. However, the mere fact that the threat was conveyed indirectly does not seem to us to constitute a fatal bar to the defence. All must depend on the circumstances, of which the manner in which the threat is conveyed is but one, however important it may be. (at [39])

Duress in the context of a relationship

During HHJ Downing’s ruling on B’s defence of duress at trial, she referred to a ‘a basic incompatibility and a basic irreconcilability’ between, on one hand, ‘the pressure based upon love and the exploitation of a relationship and the ability to convince a loved one to act in a particular way’ and on the other hand ‘the fear that a defendant who is threatened directly and acts as a result of duress’. She concluded that it was ‘crystal clear’ that B acted as she did out of love for her boyfriend, A, and that ‘the threat was something of a secondary matter’.

The Court of Appeal was critical of the trial judge for describing pressure (derived from a relationship) and fear (derived from threats) as ‘irreconcilable’. Gross LJ acknowledged that there was a difference between ‘the pressure based on a relationship and the fear that lies at the heart of duress. The two plainly are different. The first exploits affection or infatuation. The second is based on fear’ (at [40]; emphasis in original). However, he rejected the suggestion that they were irreconcilable; rather, in some circumstances at least, they could ‘operate in a cumulative manner’ (at [40]).

Limitations on duress

The rest of the judgment is a useful reminder of the limits placed on duress. The present case does not establish anything else new but does confirm the following principles:

1. If successful, duress is a complete defence (*Hasan* [2005] UKHL 22, [2005] 2 AC 467). Because of that, its scope is ‘narrowly and carefully confined’ (*Brandford* at [30]).
2. As a minimum, it requires that D be confronted with a threat of death or serious injury if he/she does not commit an offence (Hasan). Threats to property are insufficient (*Brandford* at [32]). Other case law has elaborated on this point, holding inter alia that injury means physical, as opposed to psychological, injury (*Baker & Wilkins* [1997] Crim LR 497). A threat to commit rape is a threat of serious injury (*A* [2012] EWCA Crim 434, [2012] 2 Cr App R 8). A threat of false imprisonment is insufficient (*Dao, Mai & Nguyen* [2012] EWCA Crim 1717). A threat to reveal secrets about D, such as his secret sexual orientation, is insufficient (*Valderrama-Vega* [1986] Crim LR 433).
3. Duress is only available if it is D, or a close family member, or someone for whom D reasonably regards him/herself as responsible, that is threatened (*Hasan; Brandford* at [32]). Several cases have involved D pleading duress on the basis that their spouse or girlfriend or boyfriend was threatened with death or serious injury (e.g. *Ortiz* (1986) 83 Cr. App. R. 173, *Martin* [1989] 1 All ER 652, *Wright* [2000] Crim LR 510). It is noteworthy that B’s defence in the present case was not rejected on this ground.

Duress includes a ‘reasonable person’ test (*Graham* [1982] 1 WLR 294), that is, D’s reaction to the threat will be compared with that of a hypothetical reasonable man or woman sharing D’s characteristics (*Brandford* at [31]). However, only certain characteristics are relevant, that is, age, pregnancy, ‘serious physical disability’ and ‘recognised mental illness or psychiatric condition’ but not low IQ (*Bowen* [1997] 1 WLR 372, [1996] 4 All ER 837). Self-induced characteristics are irrelevant (*Bowen*).

1. The threat has to be one that D reasonably expects to follow ‘immediately’ or ‘almost immediately’ (*Hasan; Brandford* at [33]).
2. Duress is not available if D ‘voluntarily’ associates with others engaged in criminal activity in a situation where D knows or ought reasonably to know that he/she may be the subject of compulsion by threats of violence (*Hasan; Ali* [1995] Crim LR 303; *Heath* [2000] Crim LR 109; *Harmer* [2001] EWCA Crim 2930; *Ali* [2008] EWCA Crim 716; *Hussain* [2008] EWCA Crim 1117; *Brandford* at [34] and [35]). Thus, if D joins a gang of armed robbers (*Sharp* [1987] QB 853, [1987] 3 WLR 1) or becomes involved with a violent gangster/drug dealer (*Hasan*), the defence will fail. But duress will still be available if D joins a non-violent criminal gang (*Shepherd* (1988) 86 Cr App R 47).
3. Duress may be excluded if D had an opportunity to contact the police and/or escape from the threat and failed to take it (*Pommell* [1995] 2 Cr App R 607; *Brandford* at [46]).
4. D must provide ‘some evidence’ that he/she committed a crime while under threat (*Bianco* [2001] EWCA Crim 2516). Thereafter, the burden of disproving duress is on the prosecution (*Brandford* at [36]). However, ‘where no reasonable jury properly directed could fail to find the defence of duress disproved, the judge is entitled to withdraw it from the jury’ (*Brandford* at [37]).

Indeed, the *Bianco* case is very similar both factually and legally to the present case. Leonardo Bianco was caught by customs officers at Dover driving off the ferry from Calais with 2 kg of heroin hidden inside his car. He was charged with being knowingly concerned in the importation of controlled drugs, to which he pleaded duress. He claimed that a man called ‘Molly’ had said something like, ‘We know where your family are, and we know how to get even with you’. After the threat, Bianco drove from Wolverhampton down to Dover, took the ferry to Calais and then drove to a service station on the outskirts of the city where he was met by Molly. The pair of them drove to Holland to collect the drugs. Bianco drove back to Calais, dropping Molly off near Ostend in Belgium, then caught the ferry to Dover. At Bianco’s trial at Canterbury Crown Court, the trial judge refused to put the defence of duress to the jury, who subsequently returned a guilty verdict. Bianco appealed, unsuccessfully. The Court of Appeal held that the trial judge had correctly withdrawn the defence for two reasons: (i) Molly’s threat was too vague and (ii) Bianco had several opportunities to escape and/or contact the police – during the drive from Wolverhampton down to Dover; in France before he met up with Molly; and during the drive from Ostend to Calais.

There are other principles underpinning the defence of duress that were not raised in the present case. They include:

1. The threat must derive from an extraneous source, that is, from another person or from the surrounding circumstances. Duress is not available if D perceives threats which are purely internal, for example, suicidal thoughts (*Rodger & Rose* [1998] 1 Cr App R 143).
2. Duress is never a defence to murder (*Howe* [1987] AC 417, [1987] 2 WLR 568; *Wilson* [2007] EWCA Crim 1251, [2007] 2 Cr. App. R. 31) or attempted murder (*Gotts* [1992] 2 AC 412, [1992] 2 WLR 284), even if D is young (in both *Gotts* and *Wilson* D was a teenage boy threatened by his own father).
3. Duress is otherwise potentially available as a defence to all crimes, some very serious offences such as robbery (*Sharp; Cole* [1994] Crim LR 582; *Baker & Ward* [1999] 2 Cr App R 335), aggravated burglary (*Hasan*), hijacking (*Abdul-Hussain* [1999] Crim LR 570; *Safi & Others* [2003] EWCA Crim 1809, [2004] 1 Cr App R 14), firearms offences (*Pommell*; *Gregory* [2011] EWCA Crim 1712) and causing GBH with intent (*Cairns* [1999] 2 Cr App R 137). Several cases involve duress being invoked as a defence by those accused of drug dealing or trafficking, albeit rarely successfully, Examples included *Aikens* [2003] EWCA Crim 1573; *McDonald* [2003] EWCA Crim 1170; *Heath; Harmer; Ortiz; Valderrama-Vega* and *Wright*. Very often, the defence fails in drugs cases for one or more of the grounds given in *Brandford* – the accused’s voluntary association with known criminals and/or his or her failure to contact the police.