THE DEFENCE OF DURESS UNDER THE PENAL CODE

Mohamed Yusof Bin Haji Ahmad v. *Public Prosecutor*[1]

MOHAMED Yusof Bin Haji Ahmad v. *Public Prosecutor* affords a striking illustration of how narrowly the scope of the defence of duress, under the Penal Code, can be construed. In an earlier case[2] it had been said that for a plea, under section 94 of the Code, to succeed, the duress must be "imminent, extreme and persistent." A similar, strict approach was taken in the present case.

The accused was charged with trafficking in cannabis.[3] He was found in possession of a large quantity of the drug at the railway station, Padang Besar, Perlis. In his defence he claimed he had carried the drug under threat from aThai man whom he had met, by chance, at a hotel in Sadau. This man, said the accused, threatened him with a pistol and told him to carry the cannabis across the border into Malaysia. If he did so he would be paid M$400. If he did not he would be shot. The man gave him a lift on his motor cycle from Sadau to Pekan and then followed him, on foot, across the border and to the railway station. He was, claimed the accused, twenty feet away from him when he (the accused) was arrested by police officers.

At trial, the learned President of the Sessions Court concluded that the accused had failed to bring himself within the provisions of section 94 of the Penal Code. On appeal, the learned High Court Judge stated that the President "concluded that the alleged threat was improbable."[4] If, by that, it was meant that it was thought improbable that the accused's story was true then the duress plea would obviously fail. What is interesting is that the tenor of the High Court judgment, affirming the conviction, is to the effect that even if the accused's story were true, the defence would fail. It is noteworthy that though the conviction and sentence of life imprisonment were confirmed, the additional punishment of whipping, imposed at trial, was quashed because "in the light of the extenuating circumstances which led him to commit the offence, he (the appellant) should be spared the rotan."[5]

If the circumstances were "extenuating", why did they not serve to entitle the defendant to the benefit of section 94? The section reads as follows:—

> Except murder and offences included in Chapter VI punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence: Provided that the person doing

[1] [1983] 2 M.L.J. 167.

[2] *Tan Seng Ann* v. *Public Prosecutor* [1949] M.L.J. 87.

[3] Section 39(B)(1)(a) of the Dangerous Drugs Ordinance, 1952. The events took place in 1977. The ordinance has now been superseded by the Dangerous Drugs Act, Act 234, revised 1980.

[4] [1983] 2 M.L.J. 167, at p. 171. The defence of duress is available in non-Code offences. Section 40 provides that in Chapter IV of the Penal Code (the General Exceptions) the word "offence" denotes a thing punishable under the Code or under any other law for the time being in force.

[5] *Ibid*., at p. 171.

> the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint.[6]

There then follow two Explanations, though in some respects they seem, in part, to be more akin to "Illustrations" inasmuch as they touch on particular hypothetical situations.

> Explanation 1 — A person who, of his own accord, or by reason of a threat of being beaten, joins gang-robbers knowing their character, is not entitled to the benefit of this exception on the ground of his having been compelled by his associates to do anything that is an offence by law.
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> Explanation 2 —A person seized by gang robbers, and forced by threat of instant death to do a thing which is an offence by law — for example, a smith compelled to take his tools and to force the door of the house for the gang-robbers to enter and plunder it — is entitled to the benefit of this exception.

The learned judge in *Mohamed Yusof,* having cited the whole of the section summarised its effect in these words:—

> Under this section, there must be reasonable fear, at the very time, of instant death. Persons who do criminal acts from fear of anything but instant death do them at their peril. If an offence is completed when all danger of instant death has been removed the person committing the offence is not protected under this section. Further if the accused on his own accord places himself in a situation by which he became subject to the threats of another person, whatever threats may have been used towards him, the provisions of this section do not apply.[7]

This "summary" of section 94 merits some comment both in general terms and in relation to the accused's story in *Mohamed Yusof.*

The High Court judgment gives, in effect, emphatic emphasis to the words, in the 'summary' of section 94, *"at the very time"*. The learned judge seems to suggest that the threat should be capable of being carried out then and there, for his lordship drew particular attention to the illustration in Explanation 2, saying,

[6] These are the terms of section 94 of the Malaysian Penal Code, (F.M.S. Cap. 45). Section 94 of the Singapore Penal Code, Cap. 103 Singapore Statutes (Revised Ed., 1970) and section 94 of the Indian Penal Code are worded almost identically. The difference is that instead of the words "and offences included in Chapter VI punishable with death," there appear the words "and offences against the State punishable with death". Chapter VI of the Code creates offences against the State. The effect of this difference in wording would seem to be that in Malaysia duress would, in principle, be available as a defence to a capital offence against the State created by a statute other than the Penal Code. That would not be so in Singapore. Of course, in Malaysia, it is possible for the statute creating capital offences against the State to provide that duress shall not be an available defence. This has been done. See, for example, section 69 of the Internal Security Act 1960, Act 82, which provides:

> Section 94 of the Penal Code... shall have effect as if offences punishable with death under this Part were offences included in Chapter VI of the Penal Code punishable with death.

Singapore's Internal Security Act, Cap. 115, Statutes of Singapore (Revised Ed. 1970) includes an identical provision, Section 70, perhaps unnecessarily.

[7] [1983] 2 M.L.J. 167, at p. 170.

> Applying the principle stated above it is apparent that [in] the illustration at Explanation 2 of section 94, the threat of instant death to the smith who was forced to open the door of the house for the gang-robbers to enter and plunder it, is imminent, extreme and persistent, as to entitle him to the benefit of the exception even though he had committed an offence under the law which is not punishable with death. In the presence of the robbers it was reasonable for him to have the apprehension of being killed instantly if he refused to carry out their threat.[8]

To stress this point, to allow the illustrative example given in the Explanation so vividly to colour the interpretation of the section, is to demand that the pistol must, so to speak, be pointed at the accused's head at the very moment he commits the criminal act; only then, can he claim the benefit of section 94. Is that really the law? The language of section 94, and the observations in *Tan Seng Ann v. Public Prosecutor*[9] (which were cited in the instant case) seem, at first sight, to support such a view. However, it is arguable that the words of section 94 and the passage in *Tan Seng Ann* v. *Public Prosecutor* may be interpreted as requiring only that the *threat* is imminent and operating on the mind of the accused when he does the criminal act. That the threat could not be carried out *at the very instant* when the accused did the criminal act should not be a fundamental objection. At common law it was, as Smith and Hogan state,[10] usual to say that the threat must be "immediate" or "imminent". In *R. v. Hudson,*[11] however, it was accepted, by the English court, that the fact that the threatened violence could not have been effected at the every moment the person threatened committed the offence did not preclude that person from raising the defence of duress.

That is an English case and however valuable it may be in shedding light and reasoning on the considerations of justice and policy which ought to govern the interpretation of section 94, its application has limitations here in Singapore and Malaysia. According to the report of *Mohamed Yusof,* no mention was made of *Hudson. Tan Seng Ann,*[12] as has been mentioned, was cited. In that case there was no consideration given as to whether a threat which cannot immediately be put into effect, necessarily fails to 'qualify' as a threat for the purposes of section 94. That point *was* considered by the Privy Council in *Subramaniam* v. P.P.[13]

In that case, the accused had been found, by a security forces patrol, in the vicinity of a deserted terrorist camp. He was wounded. He had with him a belt containing twenty rounds of ammunition and in respect of the ammunition he was charged with an offence under the Emergency Regulations. At his trial he claimed that he had been captured by terrorists and forced to carry the ammunition. The trial judge told the assessors to "remember when he was captured there was nobody else with him and he was not in fear of being killed."[14]

[8] *Ibid*., at p. 171.
[9] [1949] M.L.J. 87.
[10] Smith and Hogan, *Criminal Law,* 5th Ed. (1983) at p. 214.
[11] [1971] 2 Q.B. 202, a decision of the Court of Appeal (Criminal Division).
[12] *Supra,* fn. 9.
[13] (1956) 22 M.L.J. 220, an appeal from the Supreme Court of the Federation of Malaya.
[14] *Ibid*., at p. 223.

The Assessors expressed doubt as to whether duress had been established but the judge rejected their views saying, "I can find no evidence from which duress can be said to have been proved by the defence."

The opinion of the Privy Council, which advised His Majesty to allow the appeal, contains the following passage.[15]

It is also possible, though, in their Lordships' view improbable, that the learned trial judge directed himself and the assessors that there was no evidence of duress because at the actual moment of capture the terrorists had left and the learned judge, thought that duress if it had existed, had then ceased to exist. *But threats previously made could have been a continuing menace at the moment the appellant was captured, and this possibility was at least a matter for consideration by a jury or by a judge and assessors. The territorists or some of them may have come back at any moment.* (Emphasis added)

Here, it is submitted, is authority for the view that a duress plea should not fail simply because the threatener could not have killed his victim at the moment he committed the offence of possession of drugs or firearms — which moment will, in the charge, usually be stated to be the moment when the arrest took place. It might be said that more attention should be given to the Privy Council's observations in *Subramaniam.*

The threat must be "imminent, extreme and persistent". How *persistent* was the threat in *Mohamed Yusof?* In the High Court the learned Judge said, in the reported version of his judgment:—[16]

> In the present case apart from being threatened by the Thai of being shot the man also followed him on foot by keeping a distance of about 20 feet or so away. However, from the appellant's own version he had complied with the request to carry the two bags to the railway station and had successfully alluded (eluded?) the customs check point.

The learned judge then describes the events:

> He had been carrying the drug for about one and half hours and had made no attempt to approach any member of the public or police authorities for help. In short he had already completed his mission except for the handing over the drugs to the Thai who was according to him also at the station platform and collect, the $400 from him. In the circumstances it is my considered judgment that there is nothing to suggest that when the appellant placed the bags on the platform and went to purchase the ticket, such duress was present or continued to be present.
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> Secondly, although according to the appellant the Thai was about 20 feet away on the platform when he last saw him, the presence of some people there, not to mention the four police personnel (then not known to the appellant) considered with the facts stated above, rendered the duress no longer imminent, extreme or persistent. I find that there are no merits in this appeal and accordingly dismiss it.

15 *Ibid.*
16 [1983] 2 M.L.J. 167, at p. 171.

In saying that the duress was "no longer" imminent the learned judge may be taken to be suggesting that there had been duress at some stage but that its effect was no longer present at the time the appellant was apprehended. It is true that if a threatened person has an opportunity to escape from his threatener but neglects to take that opportunity he cannot claim that his later conduct was done under duress.[17] Such an opportunity way well present itself during an hour and a half journey in public places. Whether it could be taken, or whether a person of ordinary fortitude could reasonably be expected to take it, when he is being closely followed by his armed threatener is another matter. It may be that it would be unreasonable to fear that the threatener would be foolhardy enough to shoot when other people were around. Certainly that would hardly be conducive to the threatener's objective in the sort of situation involved in *Mohamed Yusof's* case. It does not help his purpose for the drug trafficker to gun down his carrier. Yet it is not impossible for the carrier placed in the sort of situation described by Mohamed Yusof to entertain, and perhaps reasonably entertain, such a fear. That could happen if the trafficker seemed to be a desperate type of person.

It may be that, at trial, facts emerged showing there had been real opportunities for the accused to escape from the Thai man during the journey but no such facts seem to be highlighted in the High Court judgment. On the facts given in that judgment, it is respectfully submitted that the plea of duress did not deserve to be rejected for the reasons given.

It is unfortunate that the Privy Council's views in *Subramaniam* were overlooked in *Mohamed Yusof.*

The defence of duress, under the Penal Code, is very limited, more so indeed that the defence at Common Law. Under the Code it is not available on a charge of murder or of an offence against the State punishable with death. At Common Law the defence is available on a treason charge and to a person charged as a secondary party to murder.[18] Under the Code the threat must be of death and the death threatened must be that of the accused. At common law threats of violence less than death can suffice and a threat of violence to a close relative will be within the scope of duress.[19] So, if a husband is threatened that unless he performs some criminal act his wife will have acid thrown over her, he would be able to plead duress. Under the Code he would not be able to do so. Plainly the Code is very strict.

It is sometimes suggested that defences other than duress might be available to cover the situation where violence is threatened against someone other than the accused:

[17] See the observations in the very early English case *R.* v. *McGrowther* (1746) 168 English Reports 8:
the "force and fear must continue all the time the party remains with the rebels. It is incumbent on every man who makes force his defence to show an actual force, and that he quitted the service as soon as he could". See also *Mirza Zahid Beg* v. *Emperor* AIR (1938) All 91.

[18] See Smith and Hogan, *supra* fn. 10, at p. 209 *et seq.* For a recent review of the position, with regard to murder, in Commonwealth countries, see Sornarajah, "Duress and Murder in Commonwealth Criminal Law" (1981) 30 I.C.L.Q. 660.

[19] See Smith and Hogan, *supra,* fn. 10, at p. 213.

> Of the many restrictions on duress under these rules (the Australian Codes) perhaps the most regrettable is the absence of any excuse for acting under threats to others whom one desires to protect. Possibly a court troubled with this problem could find a way round it in the sections contemplating defence of others or prevention of crime.[20]

That might be a possibility under the Australian codes but it does not appear to be so under the Penal Code. Section 97 grants a right to defend the body of any other against any offence affecting the human body. However, sections 100 and 101 [21] (which state the circumstances under which force may justifiably be used) contemplate force being used *on the assailant* and not on an innocent party. Section 106 [22] is the only provision, in that part of the Code dealing with Private Defence, which mentions harm "to an innocent person" and it only goes as far as to sanction the running of the risk of harming an innocent party when the right of private defence is being exercised against a deadly assault. The Code's private defence provisions do not therefore provide a way round this particular problem.

Could section 81 — the necessity defence — be of assistance? The wording is somewhat opaque:

> Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done without any criminal intention to cause harm, and in good faith for the purpose of preventing or avoiding other harm to person or property.

What is the force of the word "merely" and the phrase "without any criminal intention"? Whether the intent was "criminal" might, it could be suggested, depend on whether the section afforded a defence, but the section will only do so *it* a 'criminal' intention was absent!

[20] Howard, *Criminal Law,* 4th ed., (1982) at p. 410. Professor Howard was commenting on the duress provisions in Australian Code.

[21] Section 100 of the Singapore Penal Code, reads, in part:

> The right of private defence of the body extends, under the restrictions mentioned in section 99, to the voluntary causing of death or of any other harm *to the assailant,* if the offence which occasions the exercise of the right is of any of the following descriptions:—
>
> (a) such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;
>
> (b) such as assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault; ....
>
> (Emphasis added). The Malaysian s. 100 is virtually identical.

Section 101 reads:

> If the offence is not of any of the descriptions enumerated in section 100, the right of private defence of the body does not extend to the voluntary causing of death *to the assailant,* but does extend, under the restrictions mentioned in section 99, to the voluntary causing *to the assailant* of any harm other than death.
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> (Emphasis added).

[22] Section 106 reads:

> If, in the exercise of the right of private defence against an assault which reasonably causes the apprehension of death, the defender is so situated that he cannot effectually exercise that right without risk of harm to an innocent person, his right of private defence extends to the running of that risk.
>
> Illustration
>
> A is attacked by a mob who attempt to murder him. He cannot effectually exercise his right of private defence without firing on the mob, and he cannot fire without risk of harming young children who are mingled with the mob. A commits no offence if by so firing he harms any of the children.

Illustration (b)[23] does, however, indicate that the intentional pulling down of property, during a fire, in order to prevent the fire spreading and so save life or other property will not be criminal. So the 'necessity' defence will be available to one who intentionally damaged property in order to save life. It may be, then, that, to revert to the 'duress' situation, the husband who commits a property crime under the influence of a threat of violence to his wife could bring himself within section 81. If the crime he committed, under the coercion, was a crime against the person it is doubtful indeed whether he would have the defence. Illustration (a)[24] only seems to go so far as saying that one may *take a risk* of injuring a few people in order to save many. It does not expressly sanction *intentional* harm and furthermore, it is not apt to be applied to a situation where the choice of evils is evenly balanced — harm one person or one other person will be harmed.

Attempts to mitigate the rigours of section 94 by resorting to other provisions in the Code may have little success. Indeed it may well be said that one should not have to strain the language of some other provisions of a Penal Code in order to deal with inadequacies in one particular provision. If the duress provision is too restricted, which, in the writer's opinion, section 94 is, it should be amended.

Some years ago the Indian Law Commission had the opportunity, in their review of the Indian Penal Code, to comment on the defence of duress, and to propose amendments.[25] The Commission recommended that the defence should be extended to embrace threats of harm to persons other than the accused and that the defence should be available even though the harm threatened was less than death.

The Commission proposed that a threat to "someone very near and dear" to the accused should be capable of constituting duress, as such a threat "can be even more compelling than threat of injury to a person himself."[26] Section 94, it was proposed, should be amended to take account of threats "to any near relative of that person present when the threats are made...." "Near relative" is to mean "parent,

23 The illustration reads:
A in a great fire pulls down houses in order to prevent the conflagration from spreading. He does this with the intention, in good faith, of saving human life or property. Here, if it be found that the harm to be prevented was of such a nature and so imminent as to excuse A's act, A is not guilty of the offence.

24 The illustration reads:
A, the captain of a steam vessel, suddenly and without any fault or negligence on his part, finds himself in such a position that, before he can stop his vessel, he must inevitably run down a boat B, with 20 or 30 passengers on board, unless he changes the course of his vessel, and that, by changing his course *he must incur risk* of running down a boat C, with only two passengers on board, which he may possibly clear. Here, if A alters his course without any intention to run down the boat C, and in good faith for the purposes of avoiding the danger to the passengers in the boat B, he is not guilty of an offence, though he may run down the boat C, by doing an act which he knew was likely to cause that effect, if it be found as a matter of fact that the danger which he intended to avoid was such as to excuse *him in incurring the risk* of running down the boat C.
(Emphasis added).

25 Forty-Second Report of the Law Commission of India, *Indian Penal Code* 1971, at pp. 98 *et seq.* As far as the writer is aware, the proposals have not been en-acted.

26 *Ibid.,* at pp. 99-100.

spouse, son or daughter".[27] The reader of the Commission's Report will note, with wry interest perhaps, the progress — or regression — of the thinking here. One starts with the humane proposition that threats of injury to someone "very near and dear" can be as compelling as threats of injury to oneself. It is strongly implied that the law should acknowledge this. The law that is proposed will only cover threats to a parent, spouse, son or daughter *who is present* when the threats are made. Hence, a threat to a wife that her husband would suffer would not suffice if he was being held captive, at some other place, by confederates of the threatener. A threat to a brother that his sister would suffer would not suffice *even if she were present.* Nor would a threat to a man that his *de facto,* but not *de jure,* "wife" would suffer. One need not add to the examples of people "very near and dear" to the accused who do not fall within the Indian Law Commission's proposed definition of "close relative". The non-lawyer would probably suggest including the very words "someone very near and dear" and leaving it at that. A happy thought — but not one likely to be acceptable to the draftsman — alas!

At the very least, it is suggested that it would be better to leave the words "close relative" un-defined or to adopt alternative words like "family member." The requirement that the close relative should be present should be removed. A more radical change would be to dispense altogether with the requirement that the threat be of injury to the accused or someone close to him or her. A threat of injury to *any* other person should be capable of constituting duress if the court is satisfied that those threats overbore the will of the accused. The Model Penal Code, drafted by the American Law Institute,[28] contains the following provision:

> It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person *or the person of another,* which a person of reasonable firmness in his situation would have been unable to resist.[29] (Emphasis added).

An objection to such a provision could be that it would be too easy for a defendant to claim that he was moved to commit the crime out of solicitude for the safety of the other person, who could be a remote relative or even a stranger, when in reality, he may have been indifferent to that person's fate. Doubtless spurious claims could be advanced but that possibility should not be allowed to obscure the fact that legislation drafted tightly with the object of eliminating, *in limine,* the spurious claims may eliminate, also *in limine,* some genuine claims. The Model Penal Code provision contains the requirement that the threat be such that a person "of reasonable firmness in his situation would have been unable to resist." That is a safeguard against spurious claims. If any similar provision were introduced into the criminal law of Singapore or Malaysia there would be a further safeguard. It is not enough for an accused to 'claim' the defence. To succeed, the

[27] *Ibid.* The Commission's precise proposed amendment was that after the words "instant death" in Section 94, there should be inserted the words "or grievous bodily harm, either to that person or to any near relative of that person present when the threats are made." The definition of near relative would be given in an Explanation.

[28] A.L.I. Model Penal Code, Proposed Official Draft, 1962.

[29] *Ibid.*, Section 2.09(1), at p. 40 of the text.

accused must prove, on the balance of probabilities, that he comes within the scope of the defence.[30]

The Indian Law Commission's second proposal, regarding amendment to section 94, was that threats of harm less than death should suffice. The Commission thought that a person "threatened with grievous bodily harm should … be permitted to plead duress as an excuse."[31] A definition of grievous bodily harm was suggested, in these terms: —

> 'Grievous bodily harm' means permanent privation or impairment of the sight of either eye, or the hearing of either ear, or privation of any organ, member or joint of the body.[32]

This is narrower, in scope, than 'grievous hurt', as defined under section 320 of the Penal Code, and deliberately so. The Commission described the definition of grievous hurt as "very wide".[33] For the purposes of the definition of that degree of hurt which ought to 'qualify' within the law of duress that is a fair comment. The dislocation of any bone is 'grievous hurt'. So, too, is hurt which causes the sufferer to be unable to follow his ordinary pursuits during the space of twenty days. A threat to inflict either of such injuries ought not to excuse the commission of crime.

Even so, the Law Commission's definition of "grievous bodily harm" seems too narrow. It is not difficult to imagine an injury not within that definition, which could fairly be considered to be a "serious bodily injury" which is the phrase the Commission used in their general discussion on the point. Very serious disfiguration for example would not necessarily involve privation of sight, hearing, limb or organ but would, in anybody's language, be considered "serious bodily injury." It might be better to leave those words un-defined. In England the phrase 'grievous bodily harm', which appears in legislation and in the Common Law definition of murder,[34] has been defined only to this extent — it means "really serious bodily harm".[35] It is left to the court of trial, in each case, to decide whether the particular injury merits such a description. Likewise, it is submitted, in a duress case it should be left to the court, unhampered by any definition, to determine whether the injury threatened falls within the words 'grievous bodily harm' or 'really serious injury'.

[30] In Singapore, by reason of Section 107 of the 1982 Reprint of the Evidence Act, Cap. *5,* Singapore Statutes 1970. The section reads:

> Where a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the court shall presume the absence of such circumstances.

Corresponding provisions appear in the Indian and Malaysian Evidence Acts. See *Jayasena* v. *The Queen* [1970J A.C. 618 for a discussion of the provision.

[31] *Supra,* fn. *25, supra,* at p. 99.

[32] *Ibid*., at p. 100.

[33] *Ibid*., in fn. 1.

[34] Sections 18 and 20 of the Offences against the Person Act 1861 create offences of wounding and causing grievous bodily harm. One form of murder, under English law, is causing death having intended to cause grievous bodily harm — see *R.* v. *Cunningham* [1981] 2 All E.R. 863.

[35] *D.P.P.* v. *Smith* [1961] A.C. 290. *R.* v. *Metharam* (1961) 45 Cr. App. Rep. 304.

The Indian Law Commission's proposals, if implemented, would provide welcome changes to the present law of duress. In the writer's view they do not go far enough but they do point in the right direction. If one was, so to speak, 'starting from scratch' one would consider further questions about the law of duress.[36] Why should it not be available as a defence to murder and capital crimes against the State? Why should only threats of violence to the person suffice? If a person is threatened that unless he joins in a theft his home will be burned down he has no defence at Common Law and certainly not under the Penal Code. Should not some element of proportionality be introduced so that whereas only a threat of serious injury will excuse a major crime, a minor crime might be excused by threat of a lesser injury? Should account be taken of the accused's characteristics, so that a threat which might not have influenced an ordinary person may avail the accused if that threat was *to him* a real menace, because of his particular characteristics?[37] 'Ordinary people' may ridicule threats of witchcraft but if an accused genuinely believed in such things the threat would be very real to him.

All these questions are relevant in a general consideration of the defence of duress. This note has only considered those aspects of the defence which seem, in the writer's view, to arise from the case of *Mohamed Yusof* and the deliberations of the Indian Law Commission. The case, it is suggested, reveals the potentiality for a too restrictive interpretation of a defence which the Law Commission have clearly shown to be too limited in any event.

In some legal systems the narrowness of the scope of the duress defence might be of little practical consequence. The musings of theorists, interesting though they might be in terms of criminal law principles, need not be of great social significance. If there are no death penalties and no mandatory sentences matters which amounted to duress in the ordinary sense, albeit not within the legal sense, can be taken into account when it comes to sentence. The defence may fail, in law, but the sentencer can take account of it, even perhaps to the extent of imposing a nominal penalty. In addition, there are the powers of the Executive to commute sentences and there is prosecutorial discretion not to press charges.[38] The prosecutor can take account of the very real threats which compelled the accused to act in deciding whether to drop charges even though those threats did not amount, in law, to duress. This indeed is comforting and serves in some countries to assuage concern about the limited scope of the duress defence — and other defences. The question still remains whether it should be left to judicial or executive *discretion* to temper the severity of the law. If it is thought that a person who acted under threats

[36] See *e.g.* the discussions in Smith and Hogan, *supra,* footnote 10, at pp. 209 *et seq,* Glanville Williams *Textbook of Criminal Law* 2nd ed. (1983) at pp. 624 *et seq,* Colin Howard *Criminal Law* 4th ed. (1982) at pp. 401 *et seq,* and in Fletcher *Rethinking Criminal Law* (1978) at pp. 829 *et seq.*

[37] See *R. v. Graham* [1982] 1 All E.R. 801 where the English Court of Appeal (Criminal Division) accepted that limited account could be taken of the accused's characteristics.

[38] In *D.P.P. for N.I.* v. *Lynch* [1975] A.C. 653. Lord Simon of Glaisdale, for example suggests, at p. 687, that a "sane and humane" system of criminal justice, with discretion in prosecution and in the executive power to commute sentences, provides adequate flexibility. His Lordship concluded, at p. 689, "the law has found that an arbitrary line mitigated by discretionary powers provides the most satisfactory solution."

which no ordinary person would have been capable of resisting should not be punished, then he ought not to be *liable to be punished.*[39]

In some countries capital punishment is mandatory for a range of offences, and not just murder and treason. Other offences carry mandatory penalties — minimum sentences for drug trafficking, for example. If such is the case one cannot, with regard to those offences, rely on judicial discretion, in the sentencing process, to mitigate the effects of a too narrowly defined duress defence. There remains only the executive discretion in prosecution and commutation and remission of sentences to temper the law's strictness. The need for the legal definition of duress to be realistic, in terms of what can be expected of ordinary people, is strong. "[T]he criminal law should not be applied as if it were a blue print for saintliness, but rather in a manner in which it can be obeyed by the reasonable man."[40]

Section 94, as it stands, demands quite enough saintliness. Let it be hoped that in its interpretation and application it will not appear that even more saintliness is being demanded of ordinary mortals.

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[39] Such a view finds expression in Lord Wilberforce's speech in Lynch, *supra.* "It is said that such persons as the appellant can always be safeguarded by action of the executive which can order an imprisoned person to be released. I firmly reject any such argument. A law, which requires innocent victims of terrorist threats to be tried for murder and convicted as murderers is an unjust law even if the executive, resisting political pressures, may decide, after it all, and within the permissible limits of the prerogative, to release them. Moreover, if the defence is excluded in law, much of the evidence which would prove the duress would be inadmissible at the trial, not brought out in court, and not tested by cross-examination. The validily of the defence is far better judged by a jury, after proper direction and a fair trial, than by executive officials". *Ibid*., at p. 685. The question under consideration in *Lynch* was whether duress is available to a person charged as a secondary party to murder. The House of Lords, by a majority of 3-2, held that it was.

[40] The comment was made by counsel, in argument, in the South African case, *State v. Goliath* (1972) 3 S.A. 1, at p. 6.