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DEVELOPMENTS IN DURESS: COERCION, MORAL CHOICE AND SUBJECTIVISM

Public Prosecutor v. Ng Pen Tine[1]
Public Prosecutor v. Nagaenthran a/l K Dharmalingam[2]

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I. INTRODUCTION

Twenty-seven years ago, Peter English rightfully lamented that the scope of the defence of duress in criminal law in Singapore was far too limited, and this was especially worrying in view of the availability of capital and mandatory sentences in this jurisdiction.[3] Criticisms of the defence being too restrictive and proposals for reform have also been made by other writers[4] and the Law Commission of India.[5]

It would seem that the plea for the duress defence to be more compassionate, in line with what can be expected of an ordinary person caught in the situation where he will have to resort to this defence, has been partially answered. First, the Singaporean

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1 [2009] SGHC 230 [*Ng Pen Tine*]. The appeals by the first accused against his conviction and by the prosecution against the acquittal of the second accused were dismissed by the Court of Appeal on 3 December 2010 without a written judgment. For comment on the High Court decision, see Stanley Yeo, "Criminal Law" (2009) 10 Sing. Ac. L. Ann. Rev. 263 at paras. 12.4 – 12.9.

2 [2011] 2 S.L.R. 830 (H.C.) [*Nagaenthran*]. The appeal by the accused against his conviction was dismissed by the Court of Appeal on 27 December 2011 which agreed with the High Court's finding on the facts that duress was not proven: *Nagaenthran a/l K Dharmalingam v. Public Prosecutor* [2011] 4 S.L.R. 1156 (C.A.) at para. 33.

3 Peter English, "The Defence of Duress under the Penal Code" (1983) 25 Mal. L. Rev. 404.

4 See for example Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Malaysia and Singapore*, 2d ed. (Singapore: LexisNexis, 2012) at Chapter 22.

5 India, Law Commission of India, *Indian Penal Code*, 42nd Report (India: Government of India, 1971). Before it was amended in 2007, the defence of duress in s. 94 of the Singaporean *Penal Code* (Cap. 224, 1985 Rev. Ed. Sing.) was virtually identical to s. 94 of the *Indian Penal Code*, Act No. 45 of 1860. The only difference is that the Indian version uses the word "dacoits" in place of "gang-robbers" in the explanations to the section.

legislature amended s. 94 of the *Penal Code*[6] in 2007 such that threats of instant death directed to "any other person" may also be considered for the purposes of the duress defence if it compelled the accused to commit an offence.[7] The previous law required the threat to be directed at the accused only such that even a threat to kill the accused's spouse or children will not be sufficient for the defence. This change recognises that a threat of death directed at another person, such as a loved one, may be even more compelling than a threat directed at the accused himself.

The second development is one of case law which is the subject of this case note. Two High Court decisions, *Ng Pen Tine* and *Nagaenthran*,[8] have widened the scope of the duress defence by allowing more situations to be considered as a threat of 'instant' death and allowing consideration of subjective factors in the assessment of the defence. Both cases involved the familiar situation where an accused, in answer to a charge of drug trafficking, claimed to have been forced to deliver drugs through threats made on his life if he refused.[9] This note examines the recent developments of the duress defence in these two cases and offers suggestions for improving the scope of the defence.

II. Basis and Requirements of the Duress Defence

The defence of duress basically excuses accused persons who have little or no moral choice in committing a criminal offence in view of the threat of death made either to themselves or to other persons. Although the defence has been said to rest on a "merciful concession to human frailty",[10] a certain degree of moral courage is

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[6] The present wording of the defence in s. 94 of the Singaporean *Penal Code* (Cap. 224, 2008 Rev. Ed. Sing.) [*Penal Code*] states:

> Except murder and offences against the State 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 or any other person will otherwise be the consequence:
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> Provided that the person doing 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.
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> *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 force the door of a house for the gang-robbers to enter and plunder it—is entitled to the benefit of this exception.

[7] *Penal Code (Amendment) Act* (No. 51 of 2007). The change in the Singapore law was attributed to a suggestion by an opposition member of Parliament, Ms. Sylvia Lim: see Sing., *Parliamentary Debates*, vol. 83, col. 2175 (22 October 2007) (Assoc. Prof. Ho Peng Kee).

[8] Both cases were decided by Chan J.

[9] Examples of cases where the duress defence has been rejected in such scenarios include: *Mohamed Yusof bin Haji Ahmad v. Public Prosecutor* [1983] 2 M.L.J. 167 [*Mohamed Yusof*]; *Public Prosecutor v. Goh Hock Huat* [1994] 3 S.L.R.(R.) 375 (C.A.) [*Goh Hock Huat*]; *Mohd Sairi bin Suri v. Public Prosecutor* [1997] SGCA 57 [*Mohd Sairi*]; *Public Prosecutor v. Danial Punithanayagam* [2011] SGDC 342.

[10] *R v. Howe* [1987] 1 A.C. 417 at 443 (H.L.), *per* Lord Griffiths.

nevertheless demanded such that the defence is not available to murder and offences against the State punishable with death. In such cases, accused persons are expected to sacrifice themselves (or the other persons threatened) rather than commit these serious offences.

In *Ng Pen Tine*, Justice Chan Seng Onn itemised the following requirements which had to be satisfied before the plea of duress could be made out:[11]

(i) The harm that the accused was threatened with was death;
(ii) The threat was directed at the accused or other persons which would include any of his family members;
(iii) The threat was of "instant" death;
(iv) The accused reasonably apprehended that the threat will be carried out; and
(v) The accused had not, voluntarily or from a reasonable apprehension of harm to himself short of instant death, placed himself in that situation.

III. Background of the Cases

The case of *Ng Pen Tine* concerned two accused persons who were separately charged with drug trafficking under the *Misuse of Drugs Act*.[12] The second accused, a Malaysian national, was instructed to drive his Malaysian-registered car into Singapore to meet the first accused. He discovered on his arrival at the Singapore destination that he was to hand over six bundles hidden without his knowledge in the rear signal compartment of the car to the first accused. These bundles turned out to contain various prohibited drugs.

With regard to the first accused, Chan J. ruled that he failed to rebut the presumption that all the drugs in his possession were for the purpose of trafficking. The first accused was therefore convicted of the offence and sentenced to the mandatory death penalty. With regard to the second accused, however, Chan J. ruled that the charge of drug trafficking was not made out, on the basis that he did not have actual knowledge that he was carrying drugs in his car into Singapore, and that neither was he wilfully blind to this fact, and furthermore, that the second accused was acting under duress at all material times. The second accused was therefore acquitted of the capital charge against him.

In *Nagaenthran*, the accused was found to have a bundle containing heroin strapped to his left inner thigh when he was searched at the Woodlands Checkpoint. He was subsequently charged with importing a prohibited drug into Singapore under the *Misuse of Drugs Act*. Chan J. found that he did have actual knowledge of the contents of the bundle and also rejected the duress defence in his case.

IV. Threat of Death

In the case of *Ng Pen Tine*, Chan J. accepted that a gangster by the name of "Ah Xiong" had put the second accused in "reasonable and genuine fear for his and his

[11] *Ng Pen Tine*, *supra* note 1 at para. 154.
[12] Cap. 185, 2008 Rev. Ed. Sing. [*Misuse of Drugs Act*].

family's safety"[13] by a remark that Ah Xiong made that he could "easily use $3000 to 'buy [the 2nd accused's] life and the lives of [his] family members"'.[14] In contrast, in *Nagaenthran*, Chan J. did not accept the accused's evidence that a person named "King" had coerced him into delivering drugs by threatening to kill his girlfriend in Malaysia.[15]

The difference in holding of the two cases can be explained on the basis that the accused in *Nagaenthran* had failed to mention the threat made by King on his arrest despite the importance of this element on his decision to carry the drugs.[16] Furthermore, there was no evidence of any harm befalling the accused's girlfriend when he failed to deliver the drugs because of his arrest, thus suggesting that the allegation of a threat could be a "fabrication or afterthought".[17] In comparison, in *Ng Pen Tine*, the threat was disclosed in his long statement.[18] Chan J. also accepted that Ah Xiong's men "were watching the 2nd accused very closely, from the very moment he left [in the car] till he entered Singapore".[19]

V. Threat Directed to Himself or any other Person

In *Ng Pen Tine*, the threat was made on the lives of the second accused as well as his family members, so there would have been no difficulty in satisfying this requirement under either the present law on duress or the previous law before its amendment in 2007. In *Nagaenthran*, the threat was directed at the accused's girlfriend which could have qualified for the duress defence only under the amended law.

It is, however, questioned if the present scope of the duress defence is too generous in allowing threats made against "any other person" to suffice. This formulation makes the defence even more generous than what was proposed by the Law Commission of India,[20] which suggested including threats of instant death or grievous bodily harm to the accused or to "any *near relative* of that person *present* when the threats are made". "Near relative" was defined as meaning a "parent, spouse, son or daughter" only. Another possible balance can be achieved by amending s. 94 so as to allow for threats of "grievous hurt" besides death[21] but restricting the threats to the accused and "persons closely connected to him".[22]

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[13] *Ng Pen Tine, supra* note 1 at para. 162.

[14] *Ibid*. at para. 156.

[15] *Nagaenthran, supra* note 2 at para. 18.

[16] *Ibid*. at para. 19.

[17] *Ibid*. at para. 18.

[18] *Ng Pen Tine, supra* note 1 at para. 89.

[19] *Ibid*. at para. 158. In his second long statement, the second accused claimed that "a motorcyclist and a car with three men followed him" on his way out of Malaysia: *Ng Pen Tine, supra* note 1 at para. 89.

[20] *Supra* note 5 at para. 4.45.

[21] The phrase "grievous hurt" is preferred to that of "grievous bodily harm" since the former is used in the Singaporean Penal Code. Yeo, Morgan & Chan, *supra* note 4 at para. 22.15 preferred the phrase "serious personal harm" in order to encompass psychological harm, but this is already covered by the concept of "hurt", see para. 11.23.

[22] *Supra* note 4 at para. 22.16. This concept will include boyfriends/girlfriends and other significant others but will not be so wide as to include "any other persons". English common law requires the threat to life or serious injury to be directed at the accused himself or persons for whom he reasonably regards himself as being responsible: *R v. Shayler* [2001] 1 W.L.R. 2206.

VI. Threat of 'Instant' Death

In *Ng Pen Tine*, Chan J. followed earlier case law which has interpreted the word "instant" to mean "imminent, persistent and extreme".[23] In *Nagaenthran*, Chan J. refined this approach by suggesting that the use of the word "imminent" was not meant to supplant the requirement of 'instant' death.[24] *Both* elements are in fact required such that:[25]

> …[A] threat must both be "imminent, persistent and extreme" in its character *and* capable of impressing upon the accused person (and did in fact impress or was still impressing upon the accused person at the time of the commission of the offence) a reasonable apprehension that "instant death" would otherwise be the consequence of the accused's failure to commit the crime. (emphasis in the original)

Hence, a very short time frame (threat of 'instant' death) is allowed between the time when the accused is supposed to commit the crime as instructed by the coercer and the time when the coercer's threat will be executed if the accused fails to commit the crime. However, a longer time frame ('imminent, persistent and extreme' threat) is allowed between the threat and the time when the accused is supposed to commit the crime.[26] The case of *Ng Pen Tine* gives a good example of this bifurcated approach to the threat: the accused was threatened with death if he failed to drive a car loaded with drugs into Singapore from Malaysia. This threat of death can still qualify for the duress defence ('imminent, persistent and extreme' threat) even though the road journey will take several hours to complete. Furthermore, the threat is one of 'instant' death since the accused was closely watched all the way during his drive to Singapore such that the threat to kill the accused could be executed immediately should he fail to drive to the destination as instructed.

Nagaenthran's approach allows the scope of the duress defence to be widened despite the apparently narrow requirement of the threat being one of 'instant' death only. This approach is in line with the understanding that the accused is not criminally culpable for his acts since his freedom of choice has been substantially undermined by the threat.[27] In deciding if the accused truly had freedom of choice, the whole factual matrix must be considered.

However, could it be argued that there may come a point when the time lapse is so long that it cannot objectively be said to be a threat of 'instant' death? According to s. 94 of the *Penal Code*, it is the *apprehension* of 'instant' death that is important and such apprehension must be a reasonable one. In *Ng Pen Tine*, it was accepted

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[23] *Ng Pen Tine, supra* note 1 at para. 155. The following cases were referred to: *Goh Hock Huat*, *supra* note 9; *Wong Yoke Wah v. Public Prosecutor* [1995] 3 S.L.R.(R.) 776 (C.A.); *Shaiful Edham bin Adam v. Public Prosecutor* [1999] 1 S.L.R.(R.) 442 (C.A.). The source of this interpretation is actually *Tan Seng Ann v. Public Prosecutor* [1949] 1 M.L.J. 87 (Malayan Court of Criminal Appeal).

[24] *Nagaenthran, supra* note 2 at para. 27.

[25] *Ibid*. at para. 28

[26] A diagram is given in the judgment to illustrate this point, *ibid*. at para. 28. It may therefore be correct after all to use the phrase "imminent threat of instant death", for example in *Ng Pen Tine*, *supra* note 1 at para. 158. The threat of "instant" death must also be "imminent".

[27] *Supra* note 4 at para. 22.21. See also the Privy Council decision of *Subramaniam v. Public Prosecutor* [1956] 1 M.L.J. 220 (P.C., Malaya).

that Ah Xiong could hire a killer with "relative ease"[28] and "his men were watching the 2nd accused very closely".[29] There was therefore no difficulty in holding that the reasonable apprehension of 'instant' death was made out.

Chan J. also clarified in *Ng Pen Tine* that there was no need for the person who actually issued the threat to be physically proximate to the second accused at the time of the offence in order for the duress defence to succeed. All that mattered was that the second accused reasonably believed that the threat of 'instant' death could be carried out at the time—that is, by the men instructed by Ah Xiong who were watching his every move.[30]

VII. Reasonable Apprehension

The duress defence requires an assessment of the accused's belief of the threat made against him to see if such belief was reasonably held.[31] In *Nagaenthran*, Chan J. held that the accused could not be said to have reasonably apprehended that King's threat would be carried out if he refused to obey him since there was no sign of anyone suspicious when he left King's company and went home to prepare for his trip to Singapore.[32] Unlike in *Ng Pen Tine*, "there was no indication that King was a very influential and powerful gangster who had a team of followers".[33]

However, in assessing the reasonableness of the accused's belief, consideration can also be given to the accused's subjective beliefs of the potency of the threat. In *Ng Pen Tine*, the second accused "believed Ah Xiong to be a 'very influential and powerful' gangster in Malaysia" and "feared the consequences that would flow should he have alerted the… authorities".[34] This position strikes an appropriate balance between accepting a purely subjective belief held by the accused which may be too lax and a purely objective stance which may be too strict.

Are considerations of the accused's age and sex and possibly other personal characteristics which affect the perception of the gravity of the threats made relevant? The impact of a particular threat may be very different on a relatively young and inexperienced person, a woman or a person suffering from a mental disorder such as schizophrenia. In *Ng Pen Tine* and *Nagaenthran*, there were no features in the accused persons which marked them out of the ordinary. It will therefore be left to another case to decide if the objective test of "reasonable apprehension" can be further tempered with personal characteristics of the accused which affect the perception of the gravity of the threats made.[35]

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[28] *Ng Pen Tine*, *supra* note 1 at para. 157.

[29] *Ibid*. at para. 158.

[30] *Cf.* the Malaysian case of *Chu Tak Fai v. Public Prosecutor* [1998] 4 M.L.J. 246 (Court of Appeal) [*Chu Tak Fai*], which imposed this requirement even though it is not expressly required in s. 94 of the *Malaysian Penal Code* (Act No. 574) which is virtually identical to the Singaporean *Penal Code*.

[31] This is also the position at English common law: *R v. Graham* [1982] 1 W.L.R. 294 (C.A.).

[32] *Nagaenthran, supra* note 2 at paras. 20, 21.

[33] *Ibid*. at para. 21.

[34] *Ng Pen Tine, supra* note 1 at para. 160. This development is also important for the defence of private defence where the reasonableness of the accused's belief is required, see *e.g*. ss. 100 and 102 of the *Penal Code*.

[35] *Cf. Derrick Gregory v. Public Prosecutor* [1988] 2 M.L.J. 369 (Malaysian Supreme Court), where the accused's personality disorder was rejected as being relevant to the perception of the threat.

Comparisons with English common law may be made on this issue. In *R v. Bowen*,[36] the English Court of Appeal held that the relevant consideration was whether the defendant responded "as a sober person of reasonable firmness sharing the characteristics of the defendant would have done". In applying the test, considerations that the defendant was more pliable, vulnerable, timid or susceptible to threats than a normal person and characteristics due to self-abuse such as alcohol or drugs should be left out, but age, sex, pregnancy, serious physical disability or a recognised psychiatric condition could be considered.[37] In *R v. Martin*,[38] it was also accepted that the accused's schizoid affective disorder making him more likely to regard things said as threatening and to believe that threats would be carried out could be taken into account.

VIII. No Reasonable Opportunity to Escape

Although the absence of a reasonable opportunity to escape was not listed by Chan J. in *Ng Pen Tine* as a requirement for a successful duress defence, the prosecution's arguments that the second accused could have done so were noted by Chan J.[39] This is proper, considering that if the second accused had an avenue for escape, it cannot be argued that he was coerced to break the law.

Whether there is a reasonable opportunity to escape is an important consideration because if one may render threats of personal violence ineffective by escaping or seeking the help of law enforcement agencies, then the accused's claim to be excused from criminal liability does not stand to moral scrutiny. The duress defence requires a moral evaluation of the choice made by the accused between what society deems as acceptable or unacceptable options. If this were not so, "society would be at the mercy of criminals who could force pawns to do their criminal work by means of intimidation".[40]

The prosecution pointed out four instances in *Ng Pen Tine* when the opportunity to escape was presented to the second accused.[41] First, he could have sought help at the petrol station where he stopped to refuel. Second, he could have sought help from the Malaysian Police and Immigration personnel or the Singapore Customs and Immigration Checkpoints Authority officers at the respective checkpoints. Third, he

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[36] [1997] 1 W.L.R. 372 (C.A.) [*Bowen*].

[37] *Ibid*. at 379.

[38] [2000] 2 Cr. App. R. 42. This makes the duress defence in England more generous than the provocation defence (see *Attorney-General for Jersey v. Holley* [2005] 2 A.C. 580 (P.C.)) even though the duress defence operates as a complete defence and is applicable to all offences, unlike provocation which is only applicable to murder and lowers it to manslaughter. The Law Commission for England and Wales at one time considered the possibility of creating a special exception to murder based on duress which will closely mirror the provocation defence. However, the undue complexity created by this proposal and the view that it is unfair to hold a person who kills under compulsion which he is unable to resist criminally liable eventually led the Law Commission to recommend that duress be a full defence to murder as well: see U.K., Law Commission for England and Wales, *Murder, Manslaughter and Infanticide*, Law Com No. 304 (London: The Stationery Office, 2006) at para. 1.56.

[39] That this is also a relevant factor in the duress defence has been endorsed by Yeo, Morgan & Chan, *supra* note 4 at paras. 22.24, 22.25. See also the cases of *Mohamed Yusof*, *supra* note 9 and *Mohd Sairi*, *supra* note 9, where this requirement was alluded to.

[40] *R v. Brown* [1986] 43 S.A.S.R. 33 at 40 (S.A.S.C.).

[41] *Ng Pen Tine, supra* note 1 at para. 159.

could have used one of two mobile phones he had when driving to Singapore to call either the Malaysian or Singaporean police. Finally, he could have driven away or used his mobile phone to seek help when he realised that Ah Xiong's men were no longer following him in Singapore.

Chan J. dismissed these arguments. It was held that these actions would not have been available "in reality" because of the second accused's belief that Ah Xiong was a "'very influential and powerful' gangster in Malaysia" and "had a team of men working under his charge" who was keeping watch over him.[42]

This result may be compared with other cases in the past where the fact that an accused could have sought help from the police and therefore neutralised a threat of death made against him had been used to deny him the duress defence.[43] Arguably, what made a difference in *Ng Pen Tine* was an assessment of whether the second accused *subjectively* believed that it was possible to neutralise the threats made against him and his family by using those means.[44]

However, it is submitted that there are dangers in going down this path of subjective assessment. The second accused's claims that Ah Xiong was a "'very influential and powerful gangster' in Malaysia" and that the authorities would be "ineffective in dissipating any threat on the lives of both the 2nd accused and his family in Johore"[45] should be tested. The only evidence presented appeared to be claims by the second accused that Ah Xiong was able to resolve some trouble he had with another gangster in Malaysia and that Ah Xiong had a team of men working under his charge.[46]

This laxity can also be seen in the judicial statement that "[a]s a general rule, there could be situations where no amount of police protection would be effective to counter the threats levied at the accused and the accused's family members".[47] No evidence was given as to the inability of the authorities to protect the second accused and his family. What is the nature or degree of the "ineffectiveness" of the police? What if the belief of ineffectiveness is based on inaccurate information or bias against the authorities? Such concessions on the basis of the ineffectiveness of police protection in English law has also been doubted as correct.[48]

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[42] *Ibid*. at para. 160.

[43] For example, *Teo Hee Heng v. Public Prosecutor* [2000] 2 S.L.R.(R.) 351 (H.C.) at para. 11:

> … even if [the coercer] had made any threats on [the accused's] life… he could easily have extricated himself out of the situation by seeking help from the police instead of continuing to act on [the coercer's] instigation.

See also *Chu Tak Fai, supra* note 30.

[44] Objective and subjective elements were juxtaposed in *Ng Pen Tine, supra* note 1 at para. 160, but there is no doubt that it was the subjective elements that dominated:

> The test for whether there was a reasonable opportunity to escape is a *subjective* one, *ie*, it was the 2nd accused's reasonable belief which mattered. The *2nd accused believed* Ah Xiong to be a "very influential and powerful" gangster in Malaysia… As such, I believe that the *2nd accused feared* the consequences that would flow should he have alerted the respective authorities… [emphasis added].

[45] *Ng Pen Tine, supra* note 1 at para. 160.

[46] *Ibid*.

[47] *Ibid*.

[48] Whether the police would be able to provide effective protection was regarded as relevant in the English case of *R v. Hudson and Taylor* [1971] 2 Q.B. 202. But note the description of it as "an indulgent decision" by Glanville Williams, *Textbook of Criminal Law*, 2d ed. (London: Stevens & Sons Ltd, 1983) at 636, and as having "the unfortunate effect of weakening the requirement that execution of a threat must be reasonably believed to be imminent and immediate" by *R v. Z* [2005] 2

In the Australian High Court case of *Taiapa v. The Queen*,[49] one of the reasons advanced by the accused for not contacting the police for help was that "he did not believe that police protection was 100 percent safe". It was aptly put in that case that:[50]

> The applicant's belief that police protection may not be 100 per cent safe provided no basis for a reasoned conclusion that it was not. It may explain the applicant's preference for complying with the unlawful demands. However an unparticularised concern that police protection may not be a guarantee of safety cannot without more supply reasonable grounds for a belief that there is no option other than to break the law in order to escape the execution of a threat.

Furthermore, allowing allegations of the ineffectiveness of the police without supporting evidence opens the duress defence to misuse.[51] For example, can it be argued that a prison inmate was acting under duress if he subjectively thought that official protection would not be effective to protect him from threats from a fellow inmate?[52] If the effectiveness of police protection is thought relevant, there is much value in the suggestion made by Yeo, Morgan and Chan that the law should presume that police protection will be effective unless shown otherwise by credible evidence and that such situations will generally be regarded as exceptional.[53] This approach emphasises the need for persons in a modern society like Singapore to place their trust in the abilities of law enforcement authorities unless proven otherwise.

IX. Did not Voluntarily Place himself in Situation

The source of this requirement is the proviso to s. 94 of the *Penal Code*, and the requirement is amplified by the two explanations which follow it. Yeo, Morgan and Chan give three justifications for this requirement, the first of which is based on the concept of "prior fault" in denying the defence, and the second and third which are based on deterrent rationales. Firstly, persons who become intimately involved with known criminals do so with foresight that they might subsequently coerce him into committing offences against his wishes.[54] Secondly, a person will

W.L.R. 709 at 721 (H.L.) [*R v. Z*], *per* Lord Bingham who also expressed doubt as to the correctness of the decision. See also U.K., Law Commission for England and Wales, *Legislating the Criminal Code: Offences against the Person and General Principles*, Consultation Paper No. 122 (London: Her Majesty's Stationery Office, 1992), at para. 18.7 which pointed out that an investigation of the likely effectiveness of official protection raises difficult collateral issues. The position was however changed later in the final report, *Legislating the Criminal Code: Offences against the Person and General Principles*, Law Com No. 218 (London: Her Majesty's Stationery Office, 1993), at paras. 29.3–29.7.

[49] (2009) 240 C.L.R. 95 (H.C.A.).

[50] *Ibid*. at para. 40.

[51] This is particularly the case if the ineffectiveness of another country's police is alleged. Now that the duress defence can apply to threats of instant death to other persons, situations can easily arise involving other countries as in *Ng Pen Tine*: the second accused's family in Malaysia was threatened with death unless he commits an offence in Singapore.

[52] See *e.g.*, *Public Prosecutor v. Seow Khoon Kwee* [1988] 2 S.L.R.(R.) 310 (H.C.) for such a scenario involving private defence.

[53] *Supra* note 4 at para. 22.28.

[54] See *e.g.*, *R v. Z, supra* note 48.

be dissuaded from becoming involved in gangs if it is known that he will not be excused from offences committed (albeit unwillingly) as a consequence of such involvement. Thirdly, without this proviso, the defence will be readily resorted to by leaders of criminal gangs and terrorist organisations by threatening new recruits with harm if they refuse to comply with these leaders' orders.[55]

In *Ng Pen Tine*, Chan J. found that far from voluntarily placing himself in a situation where he was subject to the threat of instant death, he was "compelled" to join Ah Xiong and his group. This was so even though the second accused had sought the help of Ah Xiong before and knew that he owed Ah Xiong a favour.[56] What this case suggests is that the proviso may not apply to a situation where the accused was forced into committing an offence even though he had voluntarily associated with the criminal group before, knowing their nature. On the facts of this case, the second accused intentionally moved to another state in Malaysia to stay away from Ah Xiong and only came back when his family was threatened.

Thus, although there was some 'prior fault' in that the second accused had engaged Ah Xiong initially, it was for the purpose of getting Ah Xiong's help to resolve a dispute with another drug supplier/gangster. The 'prior fault' was not of such a nature as to disqualify him from the duress defence.

It can also be seen that a subjective approach was taken as to whether the second accused had foreseen the risk of being subjected to compulsion by threats of instant death to commit criminal offences. It is not an objective approach of whether he *ought* to have foreseen such a risk, which is the position taken in English common law in order to discourage people from associating with known criminals.[57] The subjective approach taken in *Ng Pen Tine* is supported by Explanation 1 to s. 94 of the *Penal Code* which states:

> A person who, of his own accord, or by reason for 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. [emphasis added]

One area of improvement in the drafting of the duress defence is that the proviso should be revised to include threats to the accused himself or to any other person to make it consistent with the scope of the main provision. At present, an accused who joins in a gang owing to a threat of instant death made to any other person will not be able to argue for the duress defence.[58] The amended proviso should read as follows (the additional words are in italics):

> Provided that the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself *or any other person* short of instant death, place himself in the situation by which he became subject to such constraint.

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[55] *Supra* note 4 at para. 22.29.

[56] *Ng Pen Tine, supra* note 1 at para. 161.

[57] *R v. Z*, *supra* note 48.

[58] See *supra* note 6 for the present wording of s. 94 of the *Penal Code*. However, as noted above in the text accompanying note 22, my preferred option is to replace the phrase "any other person" with "persons closely connected to the accused".

X. Conclusion

The cases of *Ng Pen Tine* and *Nagaenthran* are remarkable in giving new life to the duress defence in Singapore. A broader approach had been taken by Chan J. in several ways: Firstly, in adopting a partially subjective approach to whether the threat was operating on the mind of the accused and whether he had a reasonable opportunity to escape; secondly, in using a totally subjective approach in determining whether the accused knew of the nature of Ah Xiong and his men such that the duress defence would not apply; and thirdly, explaining the basis for accepting a longer interval (than suggested by the words threat of 'instant' death) between the time when a threat was made and the time when the threat was to be executed.

It may be argued that a more restrictive approach should be adopted instead, since the duress defence will result in a full exoneration of the accused person for the deliberate crime committed and that innocent victims may have been hurt by the crime. However, such arguments should be seen in the light of the regime of mandatory sentences, in particular mandatory capital sentences in Singapore. In those circumstances, it is not possible for a judge to adjust the sentence to reflect his assessment of the accused's true culpability.[59] The duress defence operates in an all-or-nothing fashion with no discretion on the part of the judge, resulting in either a full acquittal if the defence were made out or the mandatory death sentence if it were not.[60] Unlike common law jurisdictions, the burden of proving the duress defence is also placed on the accused on a balance of probabilities in Singapore, which limits the availability of the defence.[61] A restrictive approach will be unduly harsh in view of the extreme pressure exerted on the accused at the time. While improvements to the duress defence have been suggested above, the present developments in tempering its rigours should be welcomed.

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[59] In *Ng Pen Tine*, *supra* note 1 at para. 163, Chan J. described the second accused sympathetically as "honest, truthful and credible".

[60] In the case of *Mohamed Yusof*, *supra* note 9, the duress defence was rejected by the appeal judge. The sentence of life imprisonment was affirmed but the accused was spared the rotan "in the light of the extenuating circumstances that led him to commit the offence" (*Mohamed Yusof*, *supra* note 9 at 171). Unfortunately, such discretion would not be possible in view of the mandatory sentences under the *Misuse of Drugs Act*, *supra* note 12, in Singapore.

[61] *Evidence Act* (Cap. 97, 1997 Rev. Ed. Sing.), s. 107.