R v Talivakaola

Supreme Court, Nuku'alofa
10 Hampton CJ
Cr 654/96

20 January, 1997

Criminal law - bodily harm - duress or coercion - self defence
Criminal law - defences - duress or coercion - onus
Criminal law - bodily harm - sentencing
Sentencing - bodily harm

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The accused, tried by judge alone, pleaded defences of duress or compution, marital coercion; and also self defence:

Held:-

1. The onus was on the Crown to disprove or negative the defences raised beyond reasonable doubt.
2. Initially the complainant and defendant engaged in a fight involving some mutual hair pulling and scratching, but then with the defendant sitting on top of the complainant, the defendant's husband took hold of and restrained the hands of the complainant so that she was defenceless, and the defendant, at the urging of the husband, bit the complainant just above and to the outer corner of the left eye, taking out skin and flesh and causing permanent scarring. 30
3. That was bodily harm caused deliberately or wilfully i.e. intentionally, and without lawful justification. There could be no possible element of self-defence, which was negatived by the Crown.
4. There was no factual basis for the raised defences of compulsion (or duress) and/or marital coercion. There was no evidence to show any sort of threat by the husband over-bearing the defendant's mind and forcing her to act in this way. All the evidence showed was an aiding, abetting, counselling and inciting by the husband. 40
5. At common law the defences of compulsion (or duress) and of marital coercion were separate defences.
6. Duress or compulsion is on the basis that the defendant's will has been overborne by threat of death or serious personal injury, of sufficient immediacy, and threat of lesser harm or to property are not sufficient. The threat must be operative and effective at the time of the act charged.
7. When duress is relied on the defendant must point to a proper evidential foundation for the defence, to show it is fit to go to the court for decision; and 50

once that is done it is for the prosecution to negative it, if it can, beyond reasonable doubt.

8. As to marital coercion at common law there was a presumption, in relation to certain crimes, that where that crime was committed by a wife in the presence of her husband, the wife was presumed to have acted under the coercion of the husband. That presumption was abolished in the UK in 1925 and putting the burden of proving coercion on the wife, making that defence less favourable to a wife that a defence of duress.
9. Marital coercion consists of an overbearing of the will of the wife by threat of the husband, but the threat can be of lesser harm.
10. Such a defence does not apply in Tonga given s.22 Criminal Offences Act which provides that a married woman committing an offence in the presence of her husband shall not be presumed to have committed it in under his compulsion. The word compulsion was used. Marital compulsion was never a concept at common law.
11. Therefore the test when such matters were raised, in Tonga, between husband and wife, was whether (a) there was an evidential foundation for the defence i.e. a foundation for the claim of an overbearing of will by threats of death or serious personal injury; and (b) then had the prosecution established beyond reasonable doubt that the defence had not been made out.
12. The defendant was convicted and sentenced to 12 months imprisonment suspended in whole for 3 years, with an order for compensation of $500 to the complainant.

Cases considered:

Lynch v D.P.P. [1975] A.C. 653
A.G. v Whelan [1934] I.R. 518

Statutes considered:

Criminal Offences Act ss 107, 22
Criminal Justice Act 1925 (UK)

Counsel for prosecution : Ms Bloomfield
Counsel for accused : Mr Tu'utafaiva

Judgment

The accused faces one count of bodily harm contrary to section 107 subsections 1 and 2(c) of the Criminal Offences Act. This is a serious criminal charge and I remind myself at the start that the onus of proof is on the Crown to prove the elements of the crime beyond reasonable doubt and to negative certain defences that may be raised. That negativing or disproving is to that same standard, beyond reasonable doubt and the two heads of the defence raised are (i) duress or compulsion and/or marital coercion and also
50 (ii) self-defence.

The alleged offence arises out of some unseemly and rather stupid events of 23 November 1995 at Tofoa.

There were two stages to this incident:

- the first taking place at the defendant's home;
- the second taking place at the complainant's.

As to the first part of the incident, I am not convinced that the complainant's account is in all respects accurate and that she was not as calm or as unaggressive as she would make out. She was very angry about what had been said about the defendant and her husband, that is the complainant's husband.. As I am sure on the evidence that she made
100 the initial movement towards the towel that was the only garment that the defendant was wearing at that time. She (the complainant) started the events and the two of them then engaged in some sort of fighting which was broken up by the defendant's husband. The defendant's husband seemed to suggest that she (the defendant) should be dressed if she was going to engage in the fight. It would seem that there was a certain amount of scratching and hair pulling in that first part of the fight.

The complainant then went back to her own 'api and it would seem on the evidence I have heard that she had cooled down somewhat. The defendant, having put on some clothes, then left and followed down towards where the complainant was, accompanied
110 by her husband. The evidence again was clear: by then the roles were reversed and really she (the defendant) was the aggressor. That is clear not only from the complainant's evidence but also from the evidence of the other eye-witnesses who were heard, some 5 in number. And also in the interview which was carried out by the police the defendant said that she went down there to carry on the fight. As she told the police officer she was hurt with what had happened at her own place and she wanted to carry on the fight.

When she got down to where the complainant was, the complainant indicated to the defendant that she did not want to fight further, although she did not move away. The defendant's husband was with her and he seems to have been not only egging her on
120 verbally but also physically pushed her towards where the complainant was. But as I will come to it shortly, there was, I conclude, no forcing by him, forcing the defendant to engage in the fighting.

I conclude that the defendant was willing to fight and did so. And it would seem after the initial reluctance or turning away, the initial reluctance by the complainant, that she also was willing to engage in a fight. They struggled again, with the expectation that there would be some scratching and pulling and hitting of one to the other.

I conclude on the evidence they were both willing to engage in such a fight, and that is exactly what they did. On the basis of the evidence I heard, the type of fight that was
130 expected was what happened. There was some hair pulling, some scratching or gouging

and that was about the extent of events (and the extent of injuries that resulted) up until that stage.

But then what occurred was indeed beyond any of the original expectations on either side because, with the defendant sitting on the upper body of the complainant who had fallen on to the ground, the defendant's husband started to play a part physically in what happened. He took hold of and restrained the hands of the complainant, so she was defenceless in effect, and he said something to his wife, telling her to bite the other woman. And with him still holding the complainant's hands the defendant leaned forward and bit the complainant, just above and to the outer corner of the left eye.

140 In those circumstances it is hard to see as possible any element of self defence or any need for a pre-emptive strike as it were on the part of the defendant and the prosecution has negatived any suggestion of self defence in my view. Subject to what I will say shortly on the question of compulsion, or duress as it is sometimes called, and the issue of marital coercion I find this bite and the injury that it caused (which is a permanent scarring of the area that was bitten) was harm within the meaning of section 107(2) of the Criminal Offences Act. It was harm that was caused by the defendant on the complainant by her deliberately or wilfully (that is intentionally) biting on the temporal area and causing thereby considerable blood and injury. The remaining element which must be proved

150 beyond reasonable doubt is whether what was done was without lawful justification? In my view, there could be no lawful justification for such a biting injury, in the circumstances that were in fact present in this case, of a person whose hands were being held, defenceless, by another.

Mr Tu'utafaiva for the defendant has raised questions of compulsion or duress as it is sometimes called and/or marital coercion. I say at the outset that, whatever view I take of the law, and I will look at that in a moment, the factual basis for these defences, or the factual foundation for such defences, has not been shown on the evidence.

160 There is simply no evidence before me which would show any sort of threat by the husband towards the defendant over-bearing her will or mind and forcing her, in effect, to act in this way. All the evidence comes to, and shows in my view, is an inciting or a counselling, an aiding and abetting by the husband of the wife, in actively urging or egging on and indeed, then, in an active taking part by holding the other person's hands.

In the common law, there was a defence (and there is a defence) of duress or compulsion. And in addition, there was a defence, a separate defence, of marital coercion. The duress or compulsion defence is on the basis that the defendant's will has been over-borne by threats of death or serious personal injury, and the threat of lesser harm or a threat to property is not sufficient.

170 I refer to the case of Lynch v Director of Public Prosecutions for Northern Ireland [1975] A.C. 653 & 1 All E.R. 913. The threats have to be of sufficient immediacy and that is underlined by an Irish case of the Attorney General v Whelan [1934] I.R. 518, where it was said duress is a defence because "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" (526).

The defence is available only where the threat was operative and effective at the time of the act charged. When duress is relied on the defendant must point to a proper evidential foundation for the defence, to show that the issue was fit to go to the judge or the judge

180 and jury, i.e. the tribunal deciding the facts; and once that is done it is for the prosecution

to establish, beyond reasonable doubt, that the defence is not made out.

Having regard to section 22 of our Criminal Offences Act, which I will come to in detail in a moment, I believe that the above is the frame work within which a defence of compulsion or duress fits in Tongan law.

Here as I have said, on the facts the defendant cannot even show a proper foundation for the defence. There is simply no evidence before me of any threat at all, let alone a threat or threats of death or serious personal injury, let alone an overbearing of the defendant's will. On all accounts she willingly engaged in the fight twice, the second, admittedly, urged on, egged on, by her husband. I have no doubt that he was angry as well.

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Mr Tu'utafaiva raises the question of marital coercion. At common law there was a presumption, in relation to certain crimes, that where that crime was committed by a wife in the presence of her husband, the wife was presumed to have acted under the coercion of the husband.

That common law presumption was abolished in the U.K. in 1925 by the Criminal Justice Act of that year, which went on to provide that where a married woman was charged with an offence other than treason or murder it was a "defence to prove that the offence was committed in the presence of, and under the coercion of, the husband", the burden of proving coercion lying on the defendant, that is the wife. Because of that reverse onus it, rightfully, has been said that the defence of marital coercion in the United Kingdom is less favourable to the defendant than a defence of duress - because the defendant has to prove the coercion on the balance of probabilities whereas duress has to be disproved by the Crown (beyond reasonable doubt).

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Coercion it would seem, would include threats of a lesser character than threats of death or serious personal injuries, threats of lesser harm would suffice. But again there had to be, would have to be shown, some overbearing of the will of the wife by the threat of the husband. And because of the threats she could no longer act as it were "voluntarily" but had to go along with the husband.

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Now that is the U.K. position! Mr Tu'utafaiva says it should apply here, accepting, he says, then that the reverse onus applies to or falls on his client. Because of our section 22, which I will come to shortly, I have doubt whether that section of the U.K. Act does have application here, but even if it does then again, on the evidence, there has been no proof put before me of, and nothing from which I could have inferred, any sort of threat whether of the greater or the lesser character.

I have doubt whether the marital coercion defence, as now enshrined in the U.K.'s statute, is a defence in that form in Tonga. I say that because of the clear provision in our Criminal Offences Act contained in section 22. That says "a married woman committing an offence in the presence of her husband shall not be presumed to have committed it under his compulsion."

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It is clear, in my view, that the legislature in considering criminal offending, considered the position of marital relations between wife and husband and the ability a husband might have to influence or exert pressure on a wife. Deliberately, in my view, they referred to the matter as being compulsion.

Marital compulsion was never an existing concept in the common law; it was marital coercion and a lesser standard as I have stated. But here in our Act the legislature said quite clearly, that compulsion was what had to be looked at, in effect, between husband and wife, and that there was to be no presumption. Therefore the test when such matters were

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raised between wife and husband, was that serious test of whether there was (i) a proper evidential foundation for the defence, that is a proper foundation for the claim of an overbearing of will by threats of death or serious personal injury; and (ii) whether then the prosecution, if the foundation was there, whether the prosecution had established beyond reasonable doubt that the defence had not been made out.

Here, as I have said, the foundation has not been laid. Any suggestion in any event of compulsion or duress or indeed of marital coercion (and if I go to that lesser defence) has been negatived by the prosecution beyond reasonable doubt. I find the charge and all the constituent elements of the charge made out beyond reasonable doubt. The charge has been proved, the defendant will be convicted of it.

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SENTENCE

Two things I suppose, generally, can be said about this offence that might be favourable from your point of view. First is that the complainant really instigated the confrontation, but you then carried on. Secondly I am sure that there was a considerable urging, inciting or counselling by your husband to keep you up to the mark and carry on with this fight.

As to the first I accept there was some degree of provocation initially; and then there was a degree of inciting by your husband subsequently. But none of that justifies a barbarian's act of taking a sizeable piece of skin and flesh out of someone else's face with your teeth.

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The offence for which you have been convicted carries a maximum period of imprisonment for 5 years. In the circumstances the particular offence of which you have been convicted calls, in my view, for a sentence of imprisonment. I would be failing in my duty if I did not mark the conviction with imprisonment.

You are 21, married, with a young 3 year old dependent child. Importantly you have not previously offended. Those factors, along with the matters about the offence itself lead me to the view that a sentence of 12 months imprisonment would be the appropriate sentence. But I am, in the circumstances and particularly because of your age, your lack of earlier offending and your young dependent child prepared to suspend that sentence in whole for the maximum statutory period of 3 years.

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So you are sentenced to imprisonment for 12 months, that whole sentence suspended for a period of 3 years. That is on condition that you are not convicted of any offence punishable by imprisonment during the 3 years of suspension. If you are convicted of any other offence then you have to serve the 12 months imprisonment. Do you understand that? It is hanging over your head for the next 3 years; if you take a step out of line, you go to jail. You may count yourself lucky that I suspended it in whole; I was tempted to make you serve part and then suspend part but I am influenced by your young child.

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There is an ability in this Court to order payment of compensation to a person injured. It may be said to be hard on you with you not in employment yourself but your husband, I am told, is. I do intend to make an award, an order, that you make compensation to the complainant for the injuries she has suffered and will continue to suffer. Given the scarring she has left, and which is permanent, as a result of your bite the amount I am going to award is really a token award but I feel some efforts should be made by you to make some compensation is that form. I order you to make compensation to the complainant in the sum of $500-00 for the injury caused, that compensation to be paid by 28th February 1997 into this Court.