Court File No. 26930

IN THE SUPREME COURT OF CANADA
(On Appeal from the Ontario Court of Appeal)

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant

- and -

MARIJANA RUZIC

Respondent

**FACTUM OF THE INTERVENERS
THE CANADIAN COUNCIL OF CHURCHES AND
THE CANADIAN COUNCIL FOR REFUGEES**

PART I - STATEMENT OF FACTS

1. The Canadian Council of Churches and the Canadian Council for Refugees (the "Interveners") are public interest organizations which have been involved in advocacy and education on issues of refugee protection, as well as assistance to refugee claimants for many years. Their interest in this appeal is based on the effect that the definition of duress in Canadian criminal law will have on the rights of refugee claimants in Canada.

Affidavit of Janet Somerville and Sharryn Aiken, filed on Application for Leave to Intervene

PART II- POINTS IN ISSUE

2. The Interveners agree with the points in issue as set out in the Response to Appellant's Issues at page 6 of the Respondent's factum.

PART III - STATEMENT OF ARGUMENT

3. The Interveners submit that the decision of the Ontario Court of Appeal that the requirements of immediacy and presence in s. 17 of the *Criminal Code of Canada* violate s. 7 of the *Canadian Charter of Rights and Freedoms* is correct. The Interveners agree with the submissions in the Respondent's factum. In this factum, the Interveners make submissions on the following issues:

(i) Moral voluntariness as a principle of fundamental justice as found in the traditions and principles of the criminal law;

(ii) The analysis of substituted elements as proxies for constitutionally required elements for criminal liability;

(iii) The effect of the scope of the defence of duress on refugee claimants.

1. Moral Voluntariness and the Principles of Fundamental Justice

4. The constitutional issue raised in this case requires the Court to consider the meaning of moral blamelessness as a principle of fundamental justice. This Court has previously held that it is a principle of fundamental justice that criminal liability which may result in imprisonment cannot be imposed on the morally blameless. The Interveners submit that the notion of moral blamelessness is broader than the issue of the presence or absence of *mens rea*. It is submitted that a person who commits a criminal act as a result of threats which deny the person a real choice is morally blameless because the act is morally involuntary. The Interveners submit that notions of autonomy, choice, and free-will are fundamental to our legal system's traditions regarding when it is appropriate and just to impose criminal liability.

5. In *Reference Re: s. 94(2) of Motor Vehicle Act* and *R. v. Vaillancourt*, this Court held that it is a principle of fundamental justice that criminal liability not be imposed on the morally blameless. In the words of Mr. Justice Lamer, as he then was, in the Motor Vehicle Reference:

> A law that has the potential to convict a person who has not really done anything wrong offends the principles of fundamental justice and, if imprisonment is available as a penalty, such a law then violates a person's right to liberty under s. 7 of the *Canadian Charter of Rights and Freedoms* [citation omitted].

Reference Re: s. 94(2) of Motor Vehicle Act, [1985] 2 S.C.R. 486 at 492, 513-18
R. v. Vaillancourt, [1987] 2 S.C.R. 636 at 651-53

6. The principles of fundamental justice are to be found in "the basic tenets of our legal system." As Mr. Justice Lamer held in the Motor Vehicle Reference:

> Whether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 will rest upon an analysis of the nature, sources, *rationale* and essential role of that principle within the judicial process and in our legal system as it evolves.

Reference Re: s. 94(2) of Motor Vehicle Act, supra at 503-04; 511-13
R. v. Hebert, [1990] 2 S.C.R. 151 at 162-64

7. It is submitted that a review of different principles and legal rules in our criminal law reveals that moral involuntariness is a form of moral blamelessness, and thus a principle of fundamental justice. As Madam Justice McLachlin, as she then was, noted in *R. v. Hebert*, a principle of fundamental justice will often underlie and reconcile "diverse but related principles". The

Interveners submit that the principles underlying the examples which follow are the core values in our criminal law traditions of individual free-will, choice and autonomy. The Interveners submit that the following analysis by Professor Martha Shaffer regarding the importance of these values in our legal system is correct:

> What unites the seemingly disparate defences of mental disorder and self-defence, and what links them both to the concept of moral blameworthiness is that both defences are rooted in one of the criminal law's core values, the protection of autonomy. Autonomy is central to the criminal law in at least two fundamental ways. First, the criminal law demands that people be capable of exercising a degree of conscious and chosen action in order to be held responsible for their actions. It is for this reason that an act must be voluntary to constitute the *actus reus* of an offence and that mental disorder absolves an accused of criminal responsibility. As discussed above, the law requires voluntariness because an involuntary act cannot be said to be a product of a person's autonomous choice. . . . Second, the criminal law recognizes that in very limited some [sic] circumstances, one is entitled to commit what would ordinarily be a criminal offence in order to protect autonomy. Self-defence is the quintessential example of this, wherein a person is allowed to use force, even deadly force, to protect her autonomy. Where a defence implicates either of these core autonomy concerns, it will negate moral blameworthiness. It will do so because it will deny the accused's capacity for autonomous action, deny that the accused acted autonomously on the occasion in question, or on the basis that the situation confronting the accused was such that protecting autonomy required aggressive action.
>
> For similar reasons, the defences of duress and necessity — rooted as they are in moral involuntariness — also negate moral blameworthiness. The dire circumstances a person under duress is facing can be seen to implicate simultaneously the law's concern with ensuring that persons subject to punishment have acted autonomously and the recognition that aggression is sometimes necessary for autonomy to be protected. As both Fletcher and Hart argue, the highly constrained choice facing an accused under duress — commit a criminal offence or be subject to bodily harm or death — effectively removes any meaningful choice from the accused. Under these circumstances, the accused who yields to the threat is not acting autonomously, at least where reasonable people facing the same circumstances would have made the same choice. [emphasis added]

Martha Shaffer, "Scrutinizing Duress: The Constitutional Validity of Section 17 of the Criminal Code" (1998), 40 C.L.Q. 444 at 457-58 (and generally at 452-59)
R. v. Hebert, supra at 162-64

8. It is submitted that the examples referred to by Professor Shaffer, as well as others, illustrate the importance of the principles of individual autonomy, free-will and choice in our criminal justice system. These examples support the submission that the content of moral blamelessness as a principle of fundamental justice extends beyond the question of the presence or absence of *mens rea*, and includes the notion of moral voluntariness.

9. It is submitted that the requirement of *mens rea* as a principle of fundamental justice is rooted in the notions of free-will, choice and autonomy. An act is not a product of an individual's free-will if there is no intent.

Reference Re: s. 94(2) of Motor Vehicle Act, supra at 491, 513-18
R. v. Vaillancourt, supra at 651-53
R. v. City of Sault Ste. Marie, [1978] 2 S.C.R. 1299 at 1302-03; 1309-12
R. v. Martineau, [1990] 2 S.C.R. 643-46

10. The most extensive discussion of the importance of the concepts of free-will, choice and individual autonomy to our notions of criminal liability is that of Chief Justice Dickson in *R. v. Perka* in considering the theoretical basis for the defence of necessity. His analysis shows the importance of these concepts in our traditions of criminal liability:

> From earliest times it has been maintained that in some situations the force of circumstances make it unrealistic and unjust to attach criminal liability to actions which, on their face, violate the law.
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> . . .
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> Conceptualized as an 'excuse', however, the residual defence of necessity is, in my view, much less open to criticism. It rests on a realistic assessment of human weakness, recognizing that a liberal and humane criminal law cannot hold people to strict obedience of laws in emergency situations where normal human instincts, whether of self-preservation or of altruism, overwhelmingly impel disobedience. The objectivity of the criminal law is preserved; such acts are still wrongful, but in the circumstances they are excusable. Praise is indeed not bestowed, but pardon is, when one does a wrongful act under pressure which, in the words of Aristotle in the *Nicomachean Ethics* (translator Rees, p. 49), 'overstrains human nature and which no one could withstand'.
>
> George Fletcher, *Rethinking Criminal Law*, described this view of necessity as 'compulsion of circumstance' which description points to the conceptual link between necessity as an excuse and the familiar criminal law requirement that in order to engage criminal liability, the actions constituting the *actus reus* of an offence must be voluntary. Literally, this voluntariness requirement simply refers to the need that the prohibited physical acts must have been under the conscious control of the actor. Without such control, there is, for the purposes of the criminal law, no act. The excuse of necessity does not go to voluntariness in this sense. The lost Alpinist who, on the point of freezing to death, breaks open an isolated mountain cabin is not literally behaving in an involuntary fashion. He has control over his actions to the extent of being physically capable of abstaining from the act. Realistically, however, his act is not a 'voluntary' one. His 'choice' to break the law is no true choice at all; it is remorselessly compelled by normal human instincts. This sort of involuntariness is often described as 'moral or normative involuntariness.' Its place in criminal theory is described by Fletcher at pp. 804-05 as follows:
>
> > The notion of voluntariness adds a valuable dimension to the theory of excuses. That conduct is involuntary — even in the normative sense — explains why it cannot fairly be punished. Indeed, H.L.A. Hart builds his theory of excuses on the principle that the distribution of punishment should be reserved for those who voluntarily break the law. Of the arguments he advances for this principle of justice, the most explicit is that it is preferable to live in a society where we have the maximum opportunity to choose whether we shall become the subject of criminal liability. In addition Hart intimates that it is ideologically desirable for the government to treat its citizens as self-actuating, choosing agents. This principle of respect for individual autonomy is implicitly confirmed whenever those who lack an adequate choice are excused for their offences.
>
> I agree with this formulation of the *rationale* for excuses in the criminal law. In my view, this *rationale* extends beyond specific codified excuses and embraces the residual excuse known as the defence of necessity. At the heart of this defence is the perceived injustice of punishing violations of the law in circumstances in which the person had no other viable or reasonable choice available; the act was wrong but it was excused because it was realistically unavoidable.
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> . .

> Relating necessity to the principle that the law ought not to punish involuntary acts leads to the conceptualization of the defence that integrates in into the normal rules for criminal liability rather than constituting it as a *sui generis* exception and threatening to engulf large portions of the criminal law. Such a conceptualization accords with our traditional legal, moral and philosophic views as to what sorts of acts and what sorts of actors ought to be punished. [emphasis added]

The defence of necessity does not negate *mens rea*. Thus, it is clear that the notion of moral blameworthiness relied on by Chief Justice Dickson extends beyond the notion of *mens rea*.

R. v. Perka, [1984] 2 S.C.R. 232 at 241; 249-50

11. In *R. v . Hibbert*, Chief Justice Lamer, writing for the Court, recognized that the defence of duress rests on the same conceptual foundations as the defence of necessity described by Chief Justice Dickson in *R. v . Perka*; i.e., the concept that individuals should not be held criminally responsible for acts which were "normatively involuntary" — where they had no real choice. As with the defence of necessity, the defence of duress relies on the absence of moral blameworthiness, despite the fact that *mens rea* is present.

R. v. Hibbert, [1995] 2 S.C.R. 973 at 991-94; 1002-04; 1010-18

12. Blackstone's analysis of the defences of duress and necessity are also based on the notions of free-will and choice. He writes:

> A sixth specifies of defect of will is that arising from *compulsion* and inevitable *necessity*. These are a constraint upon the will, whereby a man is urged to do that which his judgment disapproves; and which, it is to be presumed, his will (if left to itself) would reject. As punishments are therefore only inflicted for the abuse of that free-will, which God has given to man, it is highly just and equitable that a man should be excused for those acts, which are done through unavoidable force and compulsion. [underlining added]

Blackstone, Commentaries on the Laws of England, volume 4, Of Public Wrongs, Chapter 2, pp. 21, 27

See also *Hale, History of the Pleas of the Crown, volume 1, at 14-16*

13. Similarly, the law of self-defence precludes the imposition of criminal liability where an individual reasonably believes she has no alternative but to act in self defence. Criminal liability is not imposed on a person who acts in self-defence in circumstances where that person had no other reasonable choice. Like the defences of necessity and common law duress, self-defence does not negate *mens rea*, but recognizes that there are circumstances in which an act is morally blameless despite the presence of *mens rea*.

R. v. Pétel, [1994] 1 S.C.R. 3 at 12

R. v. Lavallee, [1990] 1 S.C.R. 852 at 875-76; 889-91

R. v. Hibbert, supra at 1011-14

Martha Shaffer, "Scrutinizing Duress: The Constitutional Validity of Section 17 of the Criminal Code" (1998), 40 C.L.Q. 444 at 456

14. The reasoning underlying the defence of insanity is also based on the idea of individual choice and free-will. Madam Justice McLachlin, as she then was, described the underlying rationale as follows: [1]

> At the heart of our criminal law system is the cardinal assumption that human beings are rational and autonomous: Ferguson 'A Critique of Proposals to Reform the Insanity Defence', 14 Queen's L.J. 135 (1989), at p. 140. This is the fundamental condition upon which criminal liability reposes. Individuals have the capacity to reason right from wrong, and thus to choose between right and wrong. Ferguson continues:
>
> > It is these dual capacities — reason and choice — which give the moral justification to imposing criminal responsibility and punishment on offenders. If a person can reason right from wrong and has the ability to choose right or wrong, then attribution or responsibility and punishment is morally justified or deserved when that person consciously chooses wrong.
>
> The requirement of moral blameworthiness for attribution of responsibility and punishment dates back to the origins of western ethical and legal thought: I Keilitz and J.P. Fulton, *The Insanity Defence and its Alternatives: A Guide for Policy Makers* (1984), p. 5. Aristotle, for example, reasoned that capacity for choice was central to the issue of moral culpability: J.M. Quen, "Anglo-American Concepts of Criminal responsibility: A Brief History", in S.J. Hucker, C.D. Webster, M.H. Ben-Aron, eds, *Mental Disorder and Criminal responsibility* (1981), p. 1. Where a person lacks this capacity for choice because he or she is not capable of knowing that his or her acts are wrong, the moral justification for attribution of responsibility and punishment will be absent for, as Ferguson, *op. cit.*, observes: 'It is immoral to punish those who do not have the capacity to reason or to choose right from wrong.'
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> . .
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> These then are the historical and philosophical underpinnings of the universal notion that insane persons should not be held criminally responsible for their acts and omissions in the same way that sane persons are. They reflect a fundamental conviction that criminal responsibility is appropriate only where the actor is a discerning moral agent, capable of making choices between right and wrong. This is the fundamental pre-condition for imposition of criminal liability. [emphasis added]

The Court expressly recognized that the foundation of the defence of insanity is distinct from the issue of *mens rea*, and that a defence of insanity does not necessarily negate *mens rea* (although it may in some cases).

R. v. Chaulk, [1990] 3 S.C.R. 1303 at 1394-98 *per* McLachlin J.; at 1319-23 *per* Lamer C.J.C. (S.C.C.)

Martha Shaffer, "Scrutinizing Duress: The Constitutional Validity of Section 17 of the Criminal Code" (1998), 40 C.L.Q. 444 at 456-57

15. It is submitted that the same principles regarding free-will and choice underlie the defence of non-insane automatism. A person in an automatic state is not held criminally liable because his or her acts are not the product of free-will and choice.

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[1] Madam Justice McLachlin dissented in the result, but concurred with the majority regarding the constitutionality of s. 16(4) of the Criminal Code, although for different reasons. Her comments on the rationale underlying the insanity provisions are consistent with those of Lamer C.J.C. writing for the majority.

R. v. Parks, [1992] 2 S.C.R. 871
R. v. Stone, [1999] 2 S.C.R. 290 at 367-70

16. The defence of mistake of fact, as an example of a case where there is no *mens rea*, is also a situation where the criminal law recognizes the fundamental principles of free-will, choice and individual autonomy. The accused's act is found not to be a product of his will because the accused was not aware of the true state of facts at the time he committed the act.

R. v. Pappajohn, [1980] 2 S.C.R. 120 at 138-46 *per* Dickson J., dissenting in the result, but not on this issue
R. v. Nguyen, [1990] 2 S.C.R. 906 at 912-18; *per* Wilson J.; at 939-40 *per* McLachlin J.

17. In a slightly different context, the value of autonomy was recognized as a fundamental value giving rise to the right of an accused to control his own defence.

R. v. Swain, [1991] 1 S.C.R. 933 at 970-71

18. It is submitted that the foregoing analysis shows the importance of the concepts of free-will, choice and individual autonomy to our notions of criminal responsibility. Where an individual's acts are morally involuntary, in the sense that a reasonable person in the accused's situation would have felt he or she had no choice but to comply with the threat and break the law, it is a principle of fundamental justice that criminal liability cannot be imposed.[2] Indeed, it appears that the Appellant largely accepts this analysis (see Appellant's factum, pp. 15-16). Thus, the main issue in dispute is whether the presence and immediacy requirements in s. 17 of the *Criminal Code of Canada* can result in the imposition of criminal liability where an accused's acts were morally involuntary.

2. Substituted Elements of "Presence" and "Immediacy" in s. 17 Permit Conviction of for Morally Involuntary Acts

19. It is submitted that the "presence" and "immediacy" requirements of s. 17 of the *Criminal Code* violate ss. 7 and 11(d) of the *Charter* because they permit conviction for morally involuntary acts. The problem with the substituted tests of "presence" and "immediacy" is that there are situations where an individual's acts would be morally involuntary, in the sense that a reasonable person in the circumstances of the accused would feel no choice but to act on the threat, but the threatener would not be present and/or the threat would not be immediate. S. 17 creates an irrebuttable presumption that the accused had a real choice if the threatener is not present or the threat is not immediate.

20. This Court has previously considered the issue of when proxies or substituted elements will violate ss. 7 and 11(d) of the *Charter*. In *R. v. Vaillancourt*, Chief Justice Lamer held as follows:

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[2] Academic commentators and the comments of Chief Justice Dickson in *R. v. Perka* support the notion of some limit of proportionality in terms of the acts a person is justified in committing in response to a threat. The nature of this limit would have to be considered in an assessment of the constitutionality of the excluded offences in s. 17 of the *Criminal Code*. However, since the constitutionality of the excluded offences does not arise on the facts of this case, it need not be decided in this case.

> The presumption of innocence in s. 11(d) of the Charter requires at least that an accused be presumed innocent until his guilt has been proven beyond a reasonable doubt: [citations omitted]. This means that, before an accused can be convicted of an offence, the trier of fact must be satisfied beyond a reasonable doubt of the existence of all of the essential elements of the offence. These essential elements include not only those set out by the legislature in the provision creating the offence but also those required by s. 7 of the Charter. Any provision creating an offence which allows for the conviction of an accused notwithstanding the existence of a reasonable doubt on any essential element infringes ss. 7 and 11(d)"
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> . . .
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> Sections 7 and 11(d) will also be infringed where the statutory definition of the offence does not include an element which is required under s. 7. As Dickson C.J.C. wrote for the majority of the Court in *Oakes, supra* at p. 343, p. 222 D.L.R., pp. 132-33 S.C.R.
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> > In general one must, I think, conclude that a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence in s. 11(d). If an accused bears the burden of disproving on a balance of probabilities an essential element of an offence, *it would be possible for a conviction to occur despite the existence of a reasonable doubt*. This would arise if the accused adduced sufficient evidence to raise a reasonable doubt as to his or her innocence but did not convince the jury on a balance of probabilities that the presumed fact was untrue.
>
> (My emphasis) It is clear from this passage that what offends the presumption of innocence is the fact that an accused may be convicted despite the existence of a reasonable doubt on an essential element of the offence, and I do not think that it matters whether this results from the existence of a reverse onus provision or from the elimination of the need to prove an essential element.
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> . . .
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> Finally, the legislature, rather than simply eliminating any need to prove the essential element, may substitute proof of different element. In my view, this will be constitutionally valid only if upon proof beyond reasonable doubt of the substituted element it would be unreasonable for the trier of fact not to be satisfied beyond a reasonable doubt of the existence of essential element. If the trier of fact may have a reasonable doubt as to the essential element notwithstanding proof beyond a reasonable doubt of the substituted element, then substitution infringes ss. 7 and 11(d). [underlining added]

It is clear that the essential elements of an offence which must be proven beyond a reasonable doubt to impose liability include not only the statutory elements of an offence, but also any elements required by s. 7 of the *Charter*. Thus, if it is a principle of fundamental justice that criminal liability cannot be imposed for morally involuntary acts, a provision which allows for conviction for morally involuntary acts violates s. 7 of the *Charter*.

R. v. Vaillancourt, supra at 654-56
R. v. Robinson, [1996] 1 S.C.R. 683 at 708-09
R. v. Oakes, [1986] 1 S.C.R. 103
R. v. Downey, [1992] 2 S.C.R. 10 at 24-29
R. v. Daviault, [1994] 3 S.C.R. 63 at 87-92

21. Further, the requirement that criminal liability not be imposed if there can be a reasonable doubt about essential elements and constitutionally required elements applies whether the elements are characterized as elements of the offence, or components of a defence. As Chief Justice Dickson held in *R. v. Whyte*:

> The short answer to this argument is that the distinction between elements of the offence and other aspects of the charge is irrelevant to the s. 11(d) inquiry. The real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists. When that possibility exists, there is a breach of the presumption of innocence.
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> The exact characterization of a factor as an essential element, a collateral factor, an excuse, or a defence should not affect the analysis of the presumption of innocence. It is the final effect of a provision on the verdict that is decisive. If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused.

R. v. Whyte, [1988] 2 S.C.R. 3 at 17-18
R. v. Chaulk, supra at 1329-46
R. v. Keegstra, [1990] 3 S.C.R. 697 at 788-90

22. The test for whether a substituted element is a constitutionally sufficient proxy for the required element is a very strict one. As Mr. Justice Cory stated in *R. v. Daviault*:

> Only if the existence of the substituted fact leads inexorably to the conclusion that the essential element exists, with no other reasonable possibilities, will the statutory presumption be constitutionally valid.

Thus, it is submitted that the Appellant has applied the wrong test at paragraph 66 of its factum in arguing that the requirements of "immediacy" and "presence" are "not irrational and not arbitrary". That is not the test under ss. 7 and 11(d) of the *Charter*, but rather would only be one consideration in a s. 1 analysis, if a s. 1 justification were argued.

R. v. Whyte, supra at 18-19
R. v. Downey, supra at 24-29
R. v. Daviault, supra at 89-90

23. The immediacy and presence requirements of s. 17 of the *Criminal Code* violate ss. 7 and 11(d) of the *Charter* because they permit conviction in the absence of moral voluntariness, an element required for criminal liability by s. 7 of the *Charter*. The facts of this case and the reasonable hypothetical situations[3] discussed in paragraph 62 of the Respondent's factum clearly show the inadequacy of "immediacy" and "presence" as proxies for an inquiry into whether the accused had a realistic choice in the sense that a reasonable person in the accused circumstances would have felt no choice but to act on the threat. The jury in this case, instructed on the common law defence of duress acquitted the Respondent. Thus, they had a reasonable doubt as to whether her conduct was morally involuntary. But it is clear that s. 17 of the *Criminal Code* would have denied her that defence because the threatener was not present and the threat was not immediate at the time she committed the offence.

Martha Shaffer, "Scrutinizing Duress: The Constitutional Validity of Section 17 of the Criminal Code" (1998), 40 C.L.Q. 444 at 463-67

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[3] This Court has approved the use of reasonable hypotheses in determining whether legislation violates the *Charter*: *R. v. Heywood*, [1994] 3 S.C.R. 761 at 799; *R. v. Oakes, supra* at 142; *R. v. Smith*, [1987] 1 S.C.R. 1045 at 1054; *R. v. Goltz*, [1991] 3 S.C.R. 485 at 504-05.

Martha Shaffer, "Coerced into Crime: Battered Women and the Defence of Duress" (1999), 4 Can. Crim. L. R. 271 at 307-16

24. In *R. v. Lavallee*, this Honourable Court recognized that the use of imminence of a threat as a proxy for whether a reasonable person would apprehend death or grievous bodily harm thus justifying the need to act in self defence would lead to injustice in some cases. This was because there were factual situations, such as the case of a battered woman, where an accused could have a reasonable apprehension of death or grievous bodily harm despite the lack of imminence of threats. It is submitted that this recognition is equally applicable to the defence of duress. Although in many cases, lack of imminence or presence will mean that the accused does reasonably have a choice whether or not to act on the threat, because he or she will have other alternatives, this is not invariably true. While those factors are properly relevant evidentiary considerations in assessing a defence of duress, they cannot be a substitute for the determination of whether the accused had a real choice.

R. v. Lavallee, supra at 875-91
R. v. Pétel, supra at 12-14
R. v. Malott, [1998] 1 S.C.R. 123 at 139-41 *per* L'Heureux-Dube J., concurring

25. The attempt by the Appellant to reinterpret *R. v. Carker* and the plain wording of s. 17 (Appellant's factum, pp. 30-33), can only be seen as an implicit concession that "presence" and "immediacy" in their ordinary meanings are insufficient substitutes for the assessment of whether the accused had a real choice, and that those substitutes can result in the conviction of the morally innocent in some cases.

26. Juries are well-equipped to decide the question of whether a reasonable person in the circumstances of the accused would feel they had no choice but to act on the threat. Juries now decide almost exactly the same issue in cases of self-defence, necessity, and common law duress. Further, the requirement of an air of reality for the defence to be left to the jury will screen out unfounded duress defences.

R. v. Mena (1987), 34 C.C.C. (3d) 304 at 319, 323 (Ont. C.A.)
R. v. Lavallee, supra
R. v. Hibbert, supra
R. v. Perka, supra
R. v. Corbett, [1988] 1 S.C.R. 670 at 692-94

27. The Appellant has not sought to put forward any section 1 justification. The Interveners agree with the Respondent's submission at paragraph 85 of its factum that in light of this, there is no basis to conclude that s. 17 is justified under s. 1 of the *Charter*.

3. Effect of the Scope of the Defence of Duress on Refugee Claimants

(i) Convention Refugee Protection

28. The interests at stake for a Convention refugee claimant in accessing the refugee determination process, a fair hearing on the merits of his or her claim to persecution and finally, protection against refoulement, are profound. Persecution, that which triggers flight and underlies the need for shelter, transgresses upon fundamental human rights values and is universally condemned. Consequently, victims of persecution, or those who fear persecution, have been accorded unique status and protections by the international community. The Universal Declaration of Human Rights stipulates that everyone has the right to seek and enjoy asylum from persecution. The United

Nations Convention Relating to the Status of Refugees entrenches standards for refugee determination into international law and is the basis for domestic refugee legislation. This Court has further recognized the essential human rights character of the refugee determination process.

Universal Declaration of Human Rights, proclaimed by General Assembly resolution 217 A(III) of December 10, 1948.
United Nations Convention Relating to the Status of Refugees, adopted on July 28, 1951, entered into force April 22, 1954.
Immigration Act, R.S.C. 1985, c. I-2, s. 2
Pushpanathan v. Canada, [1998] 1 S.C.R. 982
Canada v. Ward, [1993] 2 S.C.R. 689

29. Canada's immigration policy reflects this country's dedication to the promotion of refugee protection. Section 3 of the Immigration Act stipulates that immigration objectives include the need to 'to fulfill Canada's international legal obligations with respect to refugees and to uphold its humanitarian tradition with respect to the displaced and the persecuted.' The 1985 decision of the Supreme Court of Canada in Singh recognized the high degree of due process required to ensure adherence to these principles.

Immigration Act, R.S.C. 1985, c. I-2, s. 3
Singh v. M.E.I., [1985] 1 S.C.R. 177

30. It is against this background of the interests at stake for a Convention refugee or refugee claimant, that the effects of the loss of that status or the loss of an opportunity to attain that status must be considered. Criminal law defences, such as duress, may have a direct bearing on the outcome of the refugee process where domestic or international crimes are alleged. Protection from refoulement to face persecution may therefore depend upon the scope of criminal liability, including the scope and application of any available defences.

31. One of the fundamental principles underlying immigration policy and practice has been to refuse entry into Canada of persons who are considered undesirable for reasons of criminal conduct. The purpose of assessing who is and who is not undesirable because of criminality is tied directly to the concept of blameworthiness. Those responsible for the proscribed conduct are deemed unworthy of immigration status or refugee protection. The objective of this principle has never been to restrict admission to Canada of the morally blameless.

Canada v. Burgon, [1991] 122 N.R. 228 (FCA)

32. In the immigration context, assessment of criminality draws heavily upon domestic criminal law principles, including the Criminal Code. A narrow definition of duress in the Criminal Code will therefore have a direct impact on immigration processes and is inconsistent with the principle that the morally blameless should not be denied admission to Canada.

33. The defence of duress is of particular concern to refugee claimants because their situation makes them particularly vulnerable to situations of duress. A Convention refugee has often left family and friends to flee his or her country. Those left behind are often vulnerable to the actions of parties who intend harm to the person who has escaped. It is not uncommon for families to be held hostage in such situations in order to compel the refugee to return or act in accordance with the wishes

of the hostage taker. As a result, some refugee claimants are particularly vulnerable to situations in which the defence of duress may be applicable. The requirements of immediacy and presence with respect to threats are often unrealistic and unreasonably difficult for a refugee claimant to establish. Civil unrest and chaos, the unravelling of judicial institutions or the inability or unwillingness of the police to function are common elements in country's that produce present day refugees. Threats made by paramilitary groups or death squads in such countries, are, for example, often subtle communications which, in the context of the country concerned, are easily understandable and real but when viewed from afar seem distant, unrealistic and lacking in immediacy.

34. The application of the defence of duress may arise in the stages leading up to the refugee determination process, when admission to make a claim is being sought, and following that process, when a recognized Convention refugee is facing removal on allegations of, inter alia, criminal conduct.

Immigration Act, R.S.C. 1985, c. I-2, ss. 19(1)(c), 19(1)(c.1)(I), 45(2), 46.01 (1)(e)

(ii) Admission

35. At the admission stage, an immigration officer must determine whether the refugee claimant is eligible to proceed to a hearing before the refugee board. One factor considered at this stage is criminality. In circumstances where it is alleged that the claimant is a person described in paragraph 19(1)(c) or 19(1)(c.1)(i) of the Immigration Act, the officer shall refer the case to an adjudicator for determination. If the adjudicator decides that the person does fall within either of these two sub-paragraphs, and the Minister of Citizenship and Immigration certifies that the person concerned is a danger to the public, then access to a refugee hearing will be barred and a deportation order issued, in some cases resulting in deportation to the place where the individual faces persecution.

Immigration Act, R.S.C. 1985, c. I-2, ss. 19(1)(c), 19(1)(c.1)(I), 45(2), 46.01 (1)(e)

36. Paragraph 19(1)(c) refers to persons convicted in Canada of an offence punishable by a maximum term of imprisonment of 10 years or more. The mere fact of the conviction itself will be enough for a finding under this provision and, coupled with a danger certification, the person shall be denied access to a refugee hearing. As the criminal process leading to the conviction in such cases takes place within Canadian jurisdiction, the defence of duress, as construed by Canadian courts and legislation, is necessarily of application.

Immigration Act, R.S.C. 1985, c. I-2, ss. 19(1)(c)

37. Persons convicted or who have committed serious offences outside of Canada are dealt with in paragraph 19(1)(c.1). This paragraph provides as follows:

> (c.1) persons who there are reasonable grounds to believe
>
> > (i) have been convicted outside of Canada of an offence that, if committed in Canada, would constitute an offence that may be punishable under any Act of parliament by a maximum term of imprisonment of ten years or more, or
> >
> > (ii) have committed outside of Canada an act or omission that constitutes an offence under the laws of the place where the act or omission occurred and that, if committed in Canada, would constitute an offence that may be punishable under any Act of Parliament by a maximum term of imprisonment of ten years or more,

Immigration Act, R.S.C. 1985, c. I-2, s. 19(1)(c.1)

38. In considering the application of s. 19(1)(c.1), an Adjudicator must determine whether the act alleged as constituting an offence in a foreign jurisdiction is also a crime in Canada. A determination is therefore made of equivalency between the foreign and domestic offences.

Brannson v. Canada, [1981] 2 F.C. 141 (F.C.A.)

39. As part of the equivalency determination, an Adjudicator considers any statutory or common law defences that may be available in Canada to the offences alleged. If the defence is established, the person concerned will not be "described" in the section and a removal order will not be issued. In the case of a prospective refugee claimant, access to the refugee process is then available.

Li v. Canada (1997), 1 F.C. 235, (F.C.A.)

40. In the event that the person is found described in either of the two sections, 19(1)(c) or (c.1), the Minister must then certify the person to be a danger to the public in order to bar access to a refugee hearing. The danger certification process is based almost exclusively on past criminal conduct and the risk posed to the public of future, similar criminal conduct. In practice, the Minister assesses risk based almost exclusively on the prior conviction, so the danger certification is almost invariably issued.

Canada v. Williams (1997) 212 N.R. 63 (F.C.A.)

41. If certified to be a danger, the person concerned is thereby denied refugee protection and is ordered removed from Canada. The effect of these provisions is to render inoperative the shelter of asylum and to expose a person who may have a genuine and well-founded fear of persecution to the harm which caused him to flee his country. The determination of whether a crime has or has not occurred is acutely important to a person seeking asylum. If they are to suffer these extreme sanctions imposed by removal, the notion of criminal and moral blameworthiness must be, at a minimum, deeply entrenched within the law which is applied. The defence of duress should therefore be wide enough in scope to protect persons are morally blameless. As noted above at paragraphs 23-25 above, a lack of immediacy or proximity to the threatening party do not necessarily mean an act is morally voluntary.

(iii) Denial of Landing

42. An additional impact of a finding of criminal conduct either abroad or within Canada within the scope of ss. 19(1)(c) or (c.1) is the denial of landing to a person found to be a Convention refugee. Pursuant to s. 46.06 of the Immigration Act an immigration officer will not grant landing to either of these categories of persons. The effect of a denial of landing leaves the refugee without permanent status in Canada, a situation of uncertainty and limbo affecting security of the person interests. A refugee denied landing is regularly required to seek and obtain authorization to work or attend school, is branded with the status of 'temporary' in being allocated a social insurance number beginning with the number 9, thereby impacting on their ability to secure work, and lives with the possibility of being removed from Canada.

Immigration Act, R.S.C. 1985, c. I-2, ss. 46.04, 96

Immigration Regulations, 1978, s. 18

(iv) Removal

43. The effect of a finding of criminal conduct on the protections of asylum is also relevant to the stage of removal from Canada and return to the country of persecution. Pursuant to section 53(1) of the Immigration Act a person found by the refugee board to be a Convention refugee can be deported to a country in which he or she faces a risk to life or freedom if an Adjudicator decides that the person is described in, inter alia, paragraphs 19 (1)(c) and 19(1)(c.1) and he or she is certified to be a danger to the public in Canada. If certified to be a danger, the person may then be returned to a country in which his or her life or freedom are at risk. As in the admission determination procedures previously described, a criminal equivalency test is relevant to the foreign offences and any defences which may arise are also considered. Again, a successful defence of duress to the crimes alleged will have significant impact as the Convention refugee will then be permitted to enjoy the sanctity of asylum from persecution.

Immigration Act, R.S.C. 1985, c. I-2, S. 53

44. The importance of the scope of possible defences is highlighted when considering the implications of the Federal Court of Appeal's recent decision in Suresh. Here the Court held that section 53(1) did violate s. 7 of the Charter because of the possibility that it allowed for removal to a country in which the refugee was at risk of torture. However, the Court decided that the section was saved by section 1 of the Charter, holding that returning a person to face torture was an acceptable limit in a free and democratic society when dealing with persons alleged to fundraise for organizations engaged in self determination struggles which may commit, from time to time, terrorist activities. If the Court of Appeal is prepared to allow a Convention refugee to be sent to a country that may torture him, any defences which prevent this from occurring become acutely important. The defence of duress is one such defence and should be liberally interpreted.

Suresh v. Canada, (unreported), (January 18, 2000), Docket No.: A-415-99

(v) Exclusion under Article 1F

45. The defence of duress has an impact on the application of Article 1F of the Convention and the exclusion of categories of persons from the refugee definition. However, for the reasons discussed below, the decision in this case will only have an indirect impact on cases involving Article 1F. Article 1F is incorporated into domestic law through section 2 (1) of the Immigration Act and reads as follows:

> F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

Immigration Act, R.S.C. 1985, c. I-2, s. 2

46. The principles which underlie exclusion are rooted in the notions of moral repugnance and public security. Persons falling within these sub categories are deemed unworthy of protection as refugees because they have 'committed' or been found 'guilty of ' acts or crimes for which they deserve blame. Moral blameworthiness is therefore a prerequisite element of their crimes. In his seminal book on refugee protection James Hathaway describes the underlying philosophy behind exclusion as follows:

> The drafters of the Convention were preoccupied to avoid the granting of refugee status to both war criminals and individuals that might jeopardize the internal security of asylum countries. The decision to exclude such persons, even if they are genuinely at risk of persecution in their state of origin, is rooted in both a commitment to the promotion of an international morality and a pragmatic recognition that states are unlikely to agree to be bound by a regime which requires them to protect undesirable refugees.
>
> James C. Hathaway, *The Law of Refugee Status*, Butterworths Canada Ltd. 1991, at p. 214

47. Article 1F is typically applied by the Refugee Division of the Immigration and Refugee Board (the board) during the hearing of a refugee claim. If the standard of 'serious reasons for considering ' is met in relation to any of the 1F allegations, the claimant is determined not to be a Convention refugee, notwithstanding the possibility that the claimant may be able to establish a well founded fear of persecution for a Convention ground. Having been found guilty of a crime or of committing the acts described in Article 1F, the person concerned is deemed not worthy of refugee protection. The consequences of exclusion include the possibility of return to a country in which he or she may face serious human rights abuses such as arbitrary detention, torture or summary execution. Applicable defences, including the defence of duress if applicable, must be considered in the application of article 1F.

Moreno v. Canada, [1994] 1 F.C. 298, (C.A.)
Ramirez v. M.E.I. (1992), 85 D.L.R. (4th) 173 (F.C.A.D.)

48. However, for two reasons, the decision in this case will not likely have direct impact on situations covered by Article 1F, and particularly those covered by subsections (a) and (c). First, unlike cases covered by ss. 19(1)(c) and 19(1)(c.1) of the Immigration Act, it is not clear that domestic criminal law definitions of defences are applicable, as opposed to definitions from international law. Thus, the scope of s. 17 of the *Criminal Code* may not be directly applicable to Article 1F. However, the nature of the constitutional minimum standard of the defence of duress would be relevant to Article 1F, because when being applied in a Canadian court or tribunal, the international law definition of duress would be subject to constitutional scrutiny.

Ramirez v. M.E.I. (1992), 85 D.L.R. (4th) 173 (F.C.A.D.)

49. The second reason that the decision in this case will not affect situations covered by Article 1F is the nature of the offences at issue in Article 1F(a) and (c). Subsections (a) and (c) apply to war crimes and crimes against humanity (Article 1F(a)), and acts contrary to the purposes of the United Nations. In *Pushpanathan v. Canada (M.C.I.)*, this Court held that acts contrary to the purposes of the United Nations are of similar gravity to war crimes, but in a non-war setting, that is "serious, sustained or systemic violations of fundamental human rights which amount to persecution

in a non-war setting". As noted above at paragraph 18, footnote 2, although not at issue in this case, it is likely that the principles of fundamental justice impose some limit of proportionality on the defence of duress (akin to, although perhaps not identical to, the excluded offences in s. 17 of the *Criminal Code*). In other words, some acts are so heinous in consequence that duress will never be a defence justifying that conduct. The most grievous war crimes and crimes against humanity would fall within this category.

Pushpanathan v. Canada (M.C.I.), [1998] 1 S.C.R. 982 at 1029-35 *per* Bastarache J.

50. These concerns about proportionality would not exclude the defence of duress in all cases involving Article 1F(b), which deals with serious non-political crimes. But since this subsection deals with "ordinary" criminality similar to that covered by ss. 19(1)(c) and (c.1) of the Immigration Act, it would not be contrary to Canada's immigration policy to permit a defence of duress where the act is morally blameless for the same reasons as discussed above at paragraphs 30-44.

Pushpanathan v. Canada (M.C.I.), supra at 1033-34

PART IV - NATURE OF THE ORDER REQUESTED

51. The Interveners respectfully request that the constitutional questions be answered as proposed by the Respondent, and that the appeal be dismissed.

All of which is respectfully submitted this day of February, 2000

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