IN THE SUPREME COURT OF NEW ZEALAND

SC 38/2013

[2013] NZSC Trans 17

I J A

Appellant

v

THE QUEEN

Respondent

Hearing:	14 August 2013
Court:	Elias CJ McGrath J William Young J Glazebrook J Gault J
Appearances:	L O Smith and B J Hunt for the Appellant M F Laracy and M L Wong for the Respondent

---

CRIMINAL APPEAL

MRS SMITH:

May it please Your Honours. Mrs Smith appearing with my learned friend Ms Hunt.

ELIAS CJ:

Thank you Mrs Smith, Ms Hunt.

MS LARACY:

May it please the Court. Counsel's name is Ms Laracy, I appear with my learned friend Ms Wong.

ELIAS CJ:
Thank you Ms Laracy, Ms Wong. Yes Mrs Smith.

MRS SMITH:
Thank you Your Honour. Your Honour, the approved ground, as you know, for this appeal was, was the Court of Appeal correct in finding that the proposed defence evidence to be admissible. The Court of Appeal said no and it is with the greatest of respect that the appellant says that the Court of Appeal was wrong. I suppose my starting point is the Canadian, United Kingdom, Australian and New Zealand law, all find the justification for stigmatising and punishing offenders and its organising fundamental principle that offenders are free to choose whether or not to offend and it is that ability to choose that grounds their moral blamelessness and makes punishment, or just punishment, possible. So the corollary of that principle is that if there is no choice then there has to be a defence and the argument today, Your Honours, is that either section 24 does provide the defence, and that it should be widened, or that section 20 in fact does provide a defence.

So the appellant very respectfully is inviting the Court to review the statutory defence of section 24 and to affirm the existence and the boundaries of the common law defence of necessity and to find that either the statutory defence, or the common law defence, is available to Mr A at his trial. The trial date hasn't been set yet. We're still at the interlocutory stage waiting now for a decision from the Supreme Court. If he's –

WILLIAM YOUNG J:
So what's happened to the other defendants? The importer has pleaded guilty?

MRS SMITH:
Yes.

WILLIAM YOUNG J:
What happened to her?

MRS SMITH:

She went back to South Africa and the trial of the co-accused, Mr Folijami, was held about three weeks ago. The trial took about a day. His statement was exculpatory and the jury found him not guilty within a very short time. I think it took about an hour for them to find him not guilty. The, Ms Ramorapedi, did not come back to New Zealand to give evidence. There was suggestion from the Crown that she could give her evidence by way of video interview but the village where she was living was just too far away to make that a viable alternative so she didn't come to give evidence and I don't think her statement was read either. In fact I believe one of the jurors asked counsel for Mr Folijami, why he'd even been charged, but that, of course, is not Mr A's position.

If I can pass from the narrative of facts which is set out in the argument, if I could go straight to 24, no perhaps I'll start at 23, it's contended on behalf of Mr A that both sections 20 and 24 of the Crimes Act 1961 should be revisited by this Court to decide if Mr A should be permitted to lead evidence that his behaviour was morally involuntarily and that such an approach is really required to ensure that there's not breach with the New Zealand Bill of Rights Act 1990. Section 20 provides, preserves the common law justifications and defences so long as that is not inconsistent with another statute and the Court of Appeal held that section 24, which defines compulsion, is inconsistent with the preservation of a common law defence where the threat is by human agent. There doesn't seem to be so much of a problem with the argument of duress in the circumstances, only where the threat is human, and it's submitted, very respectfully, that this settled approach now requires reconsideration in view of the New Zealand Bill of Rights Act.

At section 25 of the argument, Your Honours, I referred to section 8 of the Bill of Rights which refers to the right not to be deprived of life. Now on the first blush, on the face of it, it speaks for itself. You have the right not to be deprived of life and it seems to say you have the right not to be killed except in accordance with the law. But it is respectfully submitted that section 8 should not be interpreted in such a limited way and the Court is invited to find in that section a much broader interpretation and I'll tell you why. The heading Part 2 of the New Zealand Bill of Rights Act is, "Civil and political rights," and the subheading to 8 and 11 is, "Life and security of the person," and that enables section 8 to be interpreted to include the wider concept of security. Now it's noteworthy that section 7 of the Canadian Charter of Rights and Freedoms –

ELIAS CJ:

But isn't that subheading simply because other parts of that subpart aren't concerned with declaration of life so it's – I'm not quite understanding the submission you're making. You're saying that the right to life includes the right to security of the person?

MRS SMITH:

Yes I am. I'm saying –

ELIAS CJ:

You're going to have to develop that.

MRS SMITH:

Yes. I'm saying that sections 8 to 11 have to be read as –

ELIAS CJ:

We don't seem to have section 11. What section?

MRS SMITH:

Of the Bill of Rights Act?

ELIAS CJ:

Yes, what section 11?

MRS SMITH:

Right to refuse to undergo medical treatment. It's all part of that section –

ELIAS CJ:

Yes.

MRS SMITH:

Part 2, civil and political rights, life and security of the person. That area, before it comes on to democratic and civil rights, it encapsulates the four sections. And it's submitted that the right to life simply can't be read so narrowly as to say that it refers only to the right not to be deprived of life because the subheading "Life and security of the person", statutory subheadings play a very important part in the interpretation of legislation –

WILLIAM YOUNG J:
But why doesn't security of a person simply refer to 9 and 10?

MRS SMITH:
Well it's my – well, the heading to Part 2 encapsulates civil and political rights. The argument is why should it only encapsulate 9 and 10.

GAULT J:
Might it be because that's what the legislature wrote?

MRS SMITH:
Well can I respectfully refer the Court to section 28 of the Bill of Rights Act and to the long title of – if I can just turn you to section 28, are the rights and freedoms not affected, it's a principal and fundamental justice that only voluntary behaviour should attract criminal liability and when you look at section 28 which says, "An existing right or freedom shall not be held to be abrogated or restricted," simply because it's, "not included in this Bill of Rights or is included only in part," when you read that along with the long title of the Act, the Bill of Rights Act, which affirms New Zealand's commitment to the ICCPR, then it's my submission that the right –

ELIAS CJ:
What's the additional right and freedom not included in the Bill of Rights Act that you wish to rely on?

MRS SMITH:
The right not to be punished when your behaviour is morally involuntary.

WILLIAM YOUNG J:
How is that right as at 1990 to be squared with the provisions as to compulsion in the Crimes Act?

MRS SMITH:
You're talking about section 24?

WILLIAM YOUNG J:

I'm talking about section 28, “Any existing right of freedom shall not be held to be abrogated.” So, the argument seems to presuppose that there’s a freestanding principle of law that an action which can be characterised as involuntarily which in the end is always going to be on a continuum is exempt from criminal liability. Now, where does that principle arise from and how does it line up with section 24?

MRS SMITH:

It lines up from the principle of fundamental justice and the heart of the principle of fundamental justice is the perceived injustice of punishing violations of the law in circumstances where the person had no other viable opportunity but to act and do what they did. The act was wrong but the law excuses the act because it was realistically unavoidable.

ELIAS CJ:

I think really Mrs Smith what we’re struggling with is your reference to section 24 of the Bill of Rights Act in the context of the duress provision enacted as at 1990 when the Bill of Rights Act came into force. In other words, is this an additional argument or does it all depend on whether the proper interpretation of section 24 of the Bill of Rights Act excludes any common law defence of duress/necessity, whatever you want to call it.

MRS SMITH:

Your Honour, with respect, I don’t think I've referred to section 24.

ELIAS CJ:

Sorry, is it 28?

WILLIAM YOUNG J:

You’re referring to 24 of the Crimes Act, 28 of the Bill of Rights.

MRS SMITH:

Right, yes.

ELIAS CJ:

Yes, 28 of the Bill of Rights Act. I'm sorry, section 28 of the Bill of Rights Act?

MRS SMITH:

Well –

ELIAS CJ:

I mean it just seems to me that it all does turn on the interpretation of section 24 of the Crimes Act and whether you can convince us that there is an alternative, well, you may still convince us that there is a standalone defence which isn't excluded by the duress defence, but principally it seems to me you have to convince us that section 24 of the Crimes Act can be interpreted in a more expansive sense.

MRS SMITH:

This Court doesn't have the power to strike down legislation like the Canadian Court did.

ELIAS CJ:

Modify.

MRS SMITH:

Ruzic was able through section 25 of the Constitution, *Ruzic* was able to say that their immediacy and presence requirements of the equivalent of section 17 really offended the principles of fundamental justice and just struck it down, because they said that it was inconsistent with the principles of fundamental justice.

McGRATH J:

Under Article 2 of the Charter?

MRS SMITH:

Yes, yes.

McGRATH J:

So what's the equivalent provision in our law on which you're saying section 28 could be put into play?

MRS SMITH:

I would say that the Canadian Charter section 1 guarantees the rights and freedoms set out in its subject only to such reasonable limitations is as prescribed by law and that, in section 7 of the Charter is really similar to our section 8, "Everyone has the right to liberty and security of the person and the right not to be deprived thereof

except in accordance with the principles of fundamental justice." Section 24 is simply too restrictive. The section appears on the face of it, to be designed solely for the gun at the head situation. The test is subjective because the person with the gun being held at his head, it's being done immediately and –

WILLIAM YOUNG J:
Well, there's an option of course, I mean it's a balance and it's always a matter of mitigation.

MRS SMITH:
Mitigation?

WILLIAM YOUNG J:
Yes, there always line drawing in these things. Section 24 for instance says that no matter what the threats are it's not a defence to a charge of arson. So, if your client had been asked to burn something down under the same threats, would you say he had a defence?

MRS SMITH:
No, because of the exceptions in subsection (2) of 24.

WILLIAM YOUNG J:
But why would those exceptions apply to a common law defence if there's a common law defence if it were that's wider than section 24?

MRS SMITH:
Because I think what section 24 has got in subsection (2) is plain wrong. Both *R v Ryan* (2013) 353 DLR (4th) 387 and *R v Ruzic* [2001] 1 RCS 687 are looking at whether or not –

ELIAS CJ:
But we can't accept a submission that it's plain wrong, can we?

MRS SMITH:
No, you probably can't, I'm sorry, that was badly worded.

ELIAS CJ:

I mean the options for you are to persuade us that section 24 should be construed in conformity with what you say is a fundamental principle or to identify a common law defence which is not covered by section 24 and which continues and which was in effect in 1990.

MRS SMITH:

Do I take it Your Honours are not happy about looking at any possible changes or widening of section 24, of widening the immediacy and –

ELIAS CJ:

Can you persuade us to interpret it in the way that you are contending for, because if we can't interpret it under section 4 of the Bill of Rights Act, we have to apply it.

WILLIAM YOUNG J:

We can't just put a red line through immediate and present.

MRS SMITH:

No, but is there a reason why it couldn't be widened? Section 6 of the Bill of Rights Act which is a very powerful section, enables this Court to adopt an interpretation of the Crimes Act –

ELIAS CJ:

So what is the interpretation that you suggest we adopt? If we're just construing it, how do you say we should read section 24?

MRS SMITH:

That immediacy should have a wider meaning than what it does now in presence, should have a wider meaning probably in terms of the *Ryan* tests.

WILLIAM YOUNG J:

Meaning not present?

MRS SMITH:

Yes. Well, no, I don't mean that, but not present from an immediate point of view.

WILLIAM YOUNG J:

And what about immediate?

MRS SMITH:
That could be widened as – that should be widened.

WILLIAM YOUNG J:
To what? Not immediate?

MRS SMITH:
Pardon?

WILLIAM YOUNG J:
Not immediate.

MRS SMITH:
Imminent.

WILLIAM YOUNG J:
What?

MRS SMITH:
To imminent.

GLAZEBROOK J:
Well, it is a submission rather than immediate means that the sense of not having a realistic choice.

MRS SMITH:
Yes.

GLAZEBROOK J:
So it's immediate in the sense that there is nothing that the person can do. Is that the submission?

MRS SMITH:
Yes, it is.

GLAZEBROOK J:

So it's effectively the no realistic choice, so the immediacy and presence are interpreted that way, is that the submission?

MRS SMITH:
Yes, it is.

ELIAS CJ:
Well, except the immediate is in relation to the death or injury or grievous bodily harm. I wonder whether that really works. I mean it still may be a term that is – has to be contextually assessed and there may be room for some relativity in terms of what is immediate death or bodily harm.

MRS SMITH:
As the Court in *R v Abdul-Hussein* [1999] Crim LR 570 (CA) did. The threat wasn't immediate but it was imminent.

GLAZEBROOK J:
So immediate means imminent?

MRS SMITH:
Yes, it could be interpreted to mean that. See the interest – no, I won't pursue that, but it is my submission that it could mean imminent and the presence in this day and age could have a much wider interpretation. I mean with the advent of technology a person can be present in a way that was never anticipated in –

ELIAS CJ:
Well, I think that's the sort of argument we want to hear from you Mrs Smith. That present doesn't mean physically present at the time the offence is committed.

MRS SMITH:
Yes, and that is the submission. It doesn't mean present when the offence was committed but it can have a wider meaning and that's why it was struck down in *Ruzic* because –

GAULT J:
I'd be helped, Mrs Smith, if you could formulate a wording that you say is consistent with the statute and which meets your requirements because your submissions and

your arguments this morning have been rather general. Could you formulate the wording you consider should be applied to section 24? You don't need to try and done it on the run. I'm happy if you take some time and write it down but that's what I would need.

MRS SMITH:
Right, can I reserve my position on that, to do that later, but it would be in terms of the tests, I think, that are set out in –

GAULT J:
Well I've read the cases and I considered it but I'm also conscious of the wording of section 24 and what I need is something concrete as to the wording of section 24 which you would submit should be applied.

MRS SMITH:
Yes, if I could reserve that and perhaps deal with it at a later point but the way round that I think are to incorporate the *Ryan* tests.

WILLIAM YOUNG J:
The problem with that is they are –

ELIAS CJ:
Are not tests.

WILLIAM YOUNG J:
– tests specifically asserting that they can't be reached by a matter of interpretation. They freely concede that the equivalent of section 24 doesn't mean that. So in reality the case is a very strong authority against you, this is *Ruzic* not *Ryan*.

MRS SMITH:
Yes, yes.

WILLIAM YOUNG J:
The words in the statute which are effectively the same can't bear the meaning that you contend for.

MRS SMITH:

In that case I will reserve the right –

WILLIAM YOUNG J:
Are you saying they just didn't try hard enough because they had a plan B but I'm not sure I find that entirely convincing.

MRS SMITH:
Well can I have a look at section 21 reserving the right to go back to section 24.

WILLIAM YOUNG J:
Yes, sure.

ELIAS CJ:
Well why are we going to section – are you going to describe –

MRS SMITH:
The alternative argument.

ELIAS CJ:
Yes, I see.

MRS SMITH:
I think I might possibly be on safer ground with that.

ELIAS CJ:
Well I'm not sure. I would have thought that the interpretation – well, develop it by all means. So again can you encapsulate for us what the justification you say the law provides is. This is outside section 24.

MRS SMITH:
Section 20 has to provide the justification for a defence of duress by threats to human agent. At the moment section 20 seems to be confined in New Zealand cases specifically *Kapi v Ministry of Transport* [1991] 8 CRNZ 49, *R v Neho* [2009] NZCA 299 and *R v Hutchinson* CA 92/03, 8 July 2003 to duress by circumstances and there just doesn't seem to be any principal reason why duress by circumstances and duress by threats can't be the same for the purposes of section 20. If section 20

isn't interpreted in the way that the appellant says that it should be, it means that the appellant will be going to jail because he can't put forward his defence.

WILLIAM YOUNG J:
Why?

MRS SMITH:
Pardon?

WILLIAM YOUNG J:
Say you persuade a Judge that this is true.

MRS SMITH:
This is precisely the reason why I filed the 344A.

WILLIAM YOUNG J:
No, no, but say – no, you haven't persuaded anyone that it's true. Say if he manages to persuade, pleads guilty, manages to persuade a Judge that it's true.

MRS SMITH:
If he pleads guilty?

WILLIAM YOUNG J:
Yes. I mean people do.

MRS SMITH:
Yes I know. A lot of our clients.

WILLIAM YOUNG J:
Yes but I mean it's not, you're making a proposition that I don't think is necessarily true. If he pleads guilty, persuades the Judge that he acted under, you know, the threat of the most appalling consequences for his family in Nigeria, then that doesn't necessarily mean he's going to go to jail.

MRS SMITH:
I think it would. I think it would. I think it's almost certain that he would go to jail. Given the –

WILLIAM YOUNG J:
The actual drug mule didn't go to jail.

MRS SMITH:
Yes she did.

WILLIAM YOUNG J:
Did she?

MRS SMITH:
She went to jail for about two years. She got a heavy discount for –

WILLIAM YOUNG J:
Co-operation.

MRS SMITH:
For co-operation but he's looking at a substantial term of imprisonment and the fact is this, why should he plead guilty if there's actually a defence in New Zealand available to him.

WILLIAM YOUNG J:
Well that's the question, of course, that is the question, is there a defence or is it just a matter of mitigation.

MRS SMITH:
I say in the firmest possible way that it's a defence, under section 20 –

ELIAS CJ:
But you have to explain why.

MRS SMITH:
It's a defence under section 20.

GLAZEBROOK J:
Well it survives from the common law –

MRS SMITH:

Yes it does.

GLAZEBROOK J:

So what do you say – that's the submission that you're making, so you'd have to deal with the inconsistency with section 24 and then you'd have to tell us what you say the defence is under section 20, so what is it at common law because I think from your submissions you're actually suggesting a wider defence, in any event, from the common law defence. So a development of the common law defence.

MRS SMITH:

Yes. Well, section 20 of the Crimes Act, if I can go there, allows for an expansion of defences and the Court in *Hutchinson*, New Zealand Court of Appeal, asked the questions, whether developments in other overseas jurisdictions should be explored but the common law, if I can just preface my comments with this. The common law is by nature the creation of Judges and the Judges are sometimes required to fill the gaps left by the legislature to make the legislation work. But it's contended on behalf of the appellant that the defence of compulsion – sorry, the defence of duress remains available in appropriate circumstances including the threats made by a person. It's – the defence of necessity is simply preserved by section 20 and it was necessary for the appellant to commit this offence otherwise his family were going to be killed in Nigeria. He didn't want to commit the act. His act was morally involuntarily and it's submitted that section 20 applies.

McGRATH J:

Are you able to identify cases in relation to the common law that stated the principle –

MRS SMITH:

In New Zealand?

McGRATH J:

– as at – in New Zealand or in other authorities that we look at, which state the principles you're referring to? It seems to me if you do that and then to identify what changes might be required in the common law to, if any, to get you home.

MRS SMITH:

Yes.

McGRATH J:
Let's just assume that section – you've overcome some of the problems you will have with section 20 towards the end of the provision and let's just look at the common law that you want to invoke. So what's your best case?

MRS SMITH:
All right. Well if I can go back to 1991 where the legislative reform of the Crimes Act was proposed. They looked at section 24 and 20 but the amendments did not actually appear but as far as –

McGRATH J:
That's the Crimes Consultative Committee –

MRS SMITH:
Yes it is.

McGRATH J:
– which was proposing changes and then the Law Commission came –

MRS SMITH:
Yes.

McGRATH J:
I've read all of that, but I'm just really would like to know if there is a case which is a base case articulating the common law which you want to rely on, even if it needs a little bit of alteration.

MRS SMITH:
All right. Yes, I will do that. There are simply no New Zealand cases but as far as the common law is concerned in England, I don't know whether Your Honours have had the opportunity to read *R v A*, the case of the conjoined twins which sets out the history. The law of necessity, the common law of necessity duress really started with *R v Kitson* [1955] 39 Cr App R 66 and in that case, that was a driving case, nobody suggested there that he was entitled to rely on a defence of necessity. What happened there was he was drunk and when he woke up the car was rolling down

the hill so he put on the brake and was found, in fact, as a matter of fact that he was driving, but that was really the start of it. And the next case in England was *R v Willer* (1986) 83 Cr App R 225. He wanted to defend himself. He was driving on the footpath to get away from a gang of about 30 people and –

ELIAS CJ:
Do we have this?

MRS SMITH:
No, I'm just answering –

McGRATH J:
Are there any cases in your list, you're going through the history which is interesting, but are there any cases in your list of authorities which state a common law principle that you would like to rely on?

MRS SMITH:
Yes, well, we're talking about *Ryan*. You know a bundle of authorities, we've cited *Ryan* and Ruzic.

McGRATH J:
Is *Ryan* your best case?

MRS SMITH:
It is. *Ryan* is really the very best case I've got.

McGRATH J:
On the common law as opposed to the provisions of the Canadian Charter?

MRS SMITH:
Yes, yes, but the development of the common law in England is interesting, especially the case of *Abdul-Hussain* where a comment was made that the law of duress is actually a mess. Lord Rose, speaking for the authority of the whole Court said that this was the fourth time in five years that the Courts had asked Parliament to tidy up the law of duress and nothing had happened. But the *Abdul-Hussain* case really set out about 11 principles as to what constituted duress, but the best case that we've got is obviously *Ryan*.

McGRATH J:

If you just identify the patterns in *Ryan* on the common law, which you'd like us to adopt.

MRS SMITH:

If I could refer Your Honours to page 388? Yes, that's at tab 12. Two-thirds of the way down, "Duress which is an amalgam of statutory and common law elements cannot be extended to apply where the accused meets force with force in situations where self-defence is not available, but the point is duress is an amalgam of statutory and common law elements."

McGRATH J:

Thank you.

ELIAS CJ:

Mrs Smith, what's the – can you just state what you say the common law principle that we should be adopting is?

MRS SMITH:

The common law principle that you should be adopting is the principle and it's a fundamental principle that a person should not be punished for behaviour that is morally involuntarily. If he was forced to do it, he shouldn't be punished for it and that is the –

WILLIAM YOUNG J:

I have all sorts of difficulty with this expression morally involuntary.

MRS SMITH:

I know, the academics –

WILLIAM YOUNG J:

It comes out of a Canadian jurisprudence and quite frankly I don't know what it means, morally involuntary.

MRS SMITH:

I'll tell you what it means and then I'll tell you what the academics say about it. Basically it means a person acts in a morally involuntary fashion when faced with perilous circumstances he or she is deprived of a realistic choice whether to break the law and I think that notions of excuse and moral involuntariness provide the theoretical foundation necessary to explain why we have the defences of necessity and duress, but the academics like Your Honour, do not like the term morally involuntarily. Professor Yeo, and these are all in the Crown case books at tab 9, he challenged moral involuntariness as the principle of fundamental injustice and he said that the Supreme Court in *Ruzic* has released an unruly horse. I think he also spoke about cutting the bottom of the toothpaste as well, but the interesting thing is this, none of the academic writers criticised the basic tenants of *Ruzic* and in fact Professor Yeo from Australia said that the Supreme Court in *Ruzic* could've achieved exactly the same result by relying on the principle of fundamental justice based on arbitrariness or unfairness and that seems to be –

WILLIAM YOUNG J:
But it's still a result of –

MRS SMITH:
It is.

WILLIAM YOUNG J:
– effectively a modifying statute?

MRS SMITH:
Yes, yes, it is, but I think it's a much easier and better term to –

WILLIAM YOUNG J:
Why do you think there's opposition to broaden the scope – for the scope of defensive – of compulsion?

MRS SMITH:
In New Zealand –

WILLIAM YOUNG J:
Yes, well, I mean there have been recommendations. What are the reasons why one might not want to do it?

MRS SMITH:

Well I'm not – well, the cases were pre-*Ryan* in New Zealand. The case of *Kapi* for example –

WILLIAM YOUNG J:

I'm not so much talking about the cases, I mean they're simply following the statute, but why aren't the reports – why aren't the reports – why wasn't the crimes consultative committees recommendation picked up? Why have we lagged behind, as you would see it, our Canadian friends?

MRS SMITH:

I think Paciocco got it right when he said in his article, the title of his article is "Nobody wants to be eaten," in England when legislative committees looked at the whole area of duress to see how it should be extended and what should happen, one of the Law Lords noted, in fact I might just find it if I may, one of the Law Lords said, and this is actually in the case of *Re A (Children) Conjoined Twins: Surgical Separation)* [2001] 2 WLR 480 at 1038, Justice Brooke said about the studies by the Law Commission and I think this could well answer your questions, Sir, "We've been shown how the Law Commission tackled this troublesome doctrine in the criminal law between 74 and 1993. A very experienced work party," and here are the words that I think are so significant and answer your question, "Was brave enough to recommend codified proposals," and three years later the Commission retreated so far from the proposition that it actually said, "We recommend that there should be no defence of necessity at all." And that outraged people like academic writers like Glanville Williams and as far as I'm aware Sir, Parliament has never debated these issues in a general sense in spite of the recommendations and the please virtually of the New Zealand Law Commission and it just hasn't been done.

Now *Ruzic* at paragraph 68 referred to the state of the law in other commonwealth countries and he said that the common law reels in England, Australia and I was really disappointed when I read that and saw that New Zealand didn't even feature, appear to accord with the principles inhibit by our Court and Canadian jurisprudence referred to both forms of duress as being essentially the same. Duress by threats is where the accused is threatened by another to commit a crime or be killed or seriously injured. Duress by circumstances which is analogous to our defensive

necessity is available where the accused commits a crime to avert death or serious injury but no one is demanding he do so.

But the fact is, you ask me why the legislature do nothing. I simply don't know the answer to that.

WILLIAM YOUNG J:
Might there not be a view that there are policy considerations the other way?

MRS SMITH:
Well –

WILLIAM YOUNG J:
For instance onus of proof. For instance encouraging a particular type of crime by telling people who import drugs into New Zealand that they'll get away with it simply by saying, "I had to do it because otherwise my brother was going to be killed."

MRS SMITH:
But that's not a – I don't think that's a sufficiently good reason, not when you have *Ryan* setting out tests of close temporal connection, proportionality. There are ways that a safe avenue of escape, they're a way that all those concerns in a principled way can be dealt with. It's simply not enough to sit back and be lazy and say, "Well, there are policy considerations." Of course, the criminal law is all about, it's a real mix. Paciocco says it's not a parlour game. Criminal law covers all those matters. It covers the law. It covers societal considerations, the very considerations that Your Honours just raised. Is it right that a person should be able to say I've committed this crime, brought drugs into New Zealand because my family were going to be killed, but those are the sort of matters that *Abdul-Hussain* looked at. You may recall that case where the –

WILLIAM YOUNG J:
Well Lord Bingham wasn't very keen on the defence.

MRS SMITH:
Pardon?

WILLIAM YOUNG J:

Lord Bingham wasn't very keen on it.

MRS SMITH:

No. No he –

WILLIAM YOUNG J:

For reasons along the lines I've just indicated.

MRS SMITH:

Yes. But with respect to Lord Bingham, I disagree, and I think *Ryan*'s taken the bull by the horns and tidied up *Ruzic*, because there was some doubt in *Ruzic*. You see all these academic writers were really concerned that *Ruzic* had opened the floodgates but *Ryan* really tidied that up. Professor Coughlan is referred to in the Crown's bundle of documents and he argues that morally and voluntarily is not morally blameworthy but in *Ryan* the Supreme Court put to rest the anxiety of Coughlan and I don't know if you had the opportunity to read the reference to Coughlan by the Crown but Ms Hunt kindly forwarded it to the Court.

ELIAS CJ:

Yes, we've had it, thank you.

MRS SMITH:

Chapman's article, sorry.

McGRATH J:

Mrs Smith, can I just ask you, you're putting a lot of weight on *Ryan*. Can I just ask you to look at the end of paragraph 23 which seems to affirm a passage in *Ruzic* –

MRS SMITH:

Is this *Ryan* Sir?

McGRATH J:

Sorry, this is *Ryan*, page 398 of your tab 12.

MRS SMITH:

Yes.

McGRATH J:

Just above paragraph 24 the reference to the judgment of Justice LeBel in *Ruzic*, it seems – where it says, "Morally involuntary conduct is not always inherently blameless."

MRS SMITH:

And he's right. He's right. But it can be excused if certain steps are taken to analyse the conduct. I'm not saying that the mens rea or the actus reus was morally blameworthy, clearly it wasn't in the appellant's case.

McGRATH J:

Involuntary conduct though, I suggest, can arise in a situation in which through having an agonising choice a person takes the weak way out, if you like. It's all very contextual but the real point I want to make is that when it said *Ruzic*, "Morally conduct is not always inherently blameless," the test of whether the conduct is morally involuntary on that basis can't excuse an offence but it might well mitigate an offence, which comes back to the suggestion of Justice Young, that perhaps the right place for looking at these matters is in the sentencing process rather than trying to fashion a test of involuntary conduct which would justify every instance in which a person faced these most difficult choices and made a decision.

MRS SMITH:

It was an agonising choice for the appellant in deciding whether or not to break the law, and he has a spotless record in this country and overseas, or put his family in a position of being killed. So it was agonising. But if it's a fundamental – if it's fundamental that a person should not be punished for behaviour that is morally and involuntarily –

McGRATH J:

I think the problem with that argument is, just on this note that is bringing forward – is stating a principle in both *Ruzic* and LeBel, that involuntary conduct isn't always inherently blameless. But what I'm suggesting to you is that at times a person can still be blameworthy but just not as blameworthy as they would be if they didn't have this choice, which sounds to me like the stuff of mitigation, not of excuse.

MRS SMITH:

But that is not the line that *Ruzic* and *Ryan* took.

McGRATH J:

I'm referring you to passages – a passage in *Ryan* that's citing a passage in *Ruzic*.

MRS SMITH:

But *Ryan* introduced the modified objective test, you know, to deal with that. It's not simply a matter, I don't think, of saying that this can be dealt with at the sentencing process. Why should a person go to jail if he in fact has a defence under the common law, but you see if I don't talk about the modified objec –

WILLIAM YOUNG J:

Well, that's so conclusory.

MRS SMITH:

Pardon?

WILLIAM YOUNG J:

That's so conclusory as to be entirely unhelpful. Of course someone who has got a defence shouldn't go to jail. The issue is should it be a defence or should it be a matter of mitigation?

MRS SMITH:

It should be a defence.

GLAZEBROOK J:

Can you go, because you make those statements about morally involuntary and you make statements about that being a fundamental principle of the common law. Now a fundamental principle of the common law is that you are not to be punished for involuntary events or actions, but in fact these are totally voluntary actions in the sense of the person knows what they're doing, they intend to do what they're doing and they intend that to help the commission of a crime. They may not want that but in terms of what they're actually doing, that's what they're doing, that's the point. Now that's not involuntary in the sense of not having any will or understanding, is it? So, what is it that you say is the fundamental principle of the law that goes further than that?

MRS SMITH:

Well, with respect, I don't think it's as simple as that. The will of the person has been completely overborne by the circumstances –

WILLIAM YOUNG J:

But that's very old fashioned. That rests on a sort of psychological theory that it's not very plausible. The person is making a conscious and rational choice between two alternatives neither of which are particularly pleasant. It's not a matter of the will being overborne in the sense of the person being a mere cipher. They are acting rationally and the problem is that just about every decision in life has involuntary components. We work because we want money. You know, "If we don't work, crikey, no one is going to pay us, you know, it's so unfair." And then it gets more realistic where people are poor and whatever, but I mean it's just a continuum voluntariness isn't it? And for that reason more suited to mitigation than guilt or innocence.

MRS SMITH:

Well, I come back to my point that if there's a defence, then mitigation doesn't come into it.

ELIAS CJ:

But what is the defence? The problem with citing the Canadian cases is that they weren't purporting to fashion a common law defence, they were using their paths to modify the legislation under the Human Rights – under the Charter. Can you point us to a statement of what you say the common law defence should be? It doesn't need to be a statement in a case. It can be a statement in academic writing, but can you encapsulate it for us, instead of simply going back to the principle, you say, which compels there being some defence. What's the scope of it?

MRS SMITH:

Yes...

GLAZEBROOK J:

Do you want to look at *Ruzic* at page 407 perhaps and then you can go through what's said there and say what you say should or shouldn't be included?

MRS SMITH:

Thank you, which page was that, Your Honour?

GLAZEBROOK J:
407.

MRS SMITH:
407, where's that?

GLAZEBROOK J:
Of *Ryan.*

MRS SMITH:
Of *Ryan*, thank you.

GLAZEBROOK J:
And I think there's a summary at 414.

MRS SMITH:
Right, yes, here the Court were dealing with the common law defence of duress post *Ruzic* and they stated the tests or the elements really, they stated what the elements there were. An explicit or implicit threat of death or bodily harm and they said there that the issue of the severity of the threat was better dealt with at the proportionality stage which acts as a threshold for the appropriate degree of bodily harm. The second thing is that the accused must've believed, reasonably believed that the threat would be carried out and then we come to the safe avenue of escape. The non-existence of a safe avenue escape evaluated on a modified objective standard and also required as a close temporal connection between the threat and the harm threatened and then there's proportionality between the harm threatened and the harm inflicted by the accused and that also is to be evaluated on a modified objective standard then there is the exclusion that the accused is not a party to a conspiracy or association whereby he's subject to compulsion but he knew that the threats and coercion to commit an offence were a possible result of the criminal activity, so really –

GLAZEBROOK J:
And is that the test you adopt then?

MRS SMITH:

Those are the elements that I'm adopting.

ELIAS CJ:

Well, if that's so then you have to confront the statutory defence and why it doesn't exclude this common law offence for which you're contending, because it covers on much of the same ground, I know that there are the modifications, but the scope of it is similar.

MRS SMITH:

Because section 20, I'm sorry I didn't mean to interrupt.

ELIAS CJ:

Yes.

MRS SMITH:

Section 20 is interpreted by the New Zealand Court's deals only with duress by circumstances. That is I'm in a car with somebody, I'm a disqualified driver, the driver has a heart attack –

GLAZEBROOK J:

I'm not sure, you say section 24 only deals with that?

MRS SMITH:

No, section – the interpretation of section 20 in New Zealand deals –

GLAZEBROOK J:

I understand, but that is because they say that section 24 deals with compulsion by threats and that it covers the ground.

MRS SMITH:

Exactly.

GLAZEBROOK J:

So what do you say about that?

MRS SMITH:

Exactly, there's a lacuna, there's a gap there.

GLAZEBROOK J:

Well, there isn't a gap, because section 20 deals with duress by circumstances if in fact that exists as a defence and section 24 deals with compulsion by threats. So, where's the gap?

MRS SMITH:

It can't be in the line of cases which say that threat by human agent is codified by section 24 and the appellant's argument is that it can't be, that's wrong.

GLAZEBROOK J:

Well, why isn't it codified? You might say 24 codifies it too narrowly, but that doesn't stop it having been codified, does it?

MRS SMITH:

I don't think it should, I think the interpretation is wrong. I think it's wrong to say that section 24 is codified, the whole of section 20, duress by threats –

GLAZEBROOK J:

Also, what part of the duress by threats doesn't it codify?

MRS SMITH:

Duress by circumstances. It doesn't codify that according –

GLAZEBROOK J:

No, we understand that, but here we're dealing by duress by threats –

MRS SMITH:

By human agent.

GLAZEBROOK J:

So we can park circumstances.

MRS SMITH:

Yes.

GLAZEBROOK J:

So what part of duress by threats does section 24 not cover that's therefore left for section 20?

MRS SMITH:

Section 24 according to New Zealand law codifies duress by threats, by human agent. They say section –

GLAZEBROOK J:

Well I understand that, but you're saying that it doesn't because you're saying section 20 allows some part of that defence to remain or have I misunderstood your argument?

MRS SMITH:

No, you haven't, I'm saying that the New Zealand cases and with respect to Gault J that they're wrong to say that section 24 is codified duress by threats by human agent.

GLAZEBROOK J:

What does it codify then?

MRS SMITH:

Duress by circumstances. The bribing cases for example.

GLAZEBROOK J:

Well, section 24 doesn't say anything about duress by circumstance.

MRS SMITH:

No, it doesn't, it doesn't. That's why it's caught by section 20. Section 20 the common law.

ELIAS CJ:

But we are dealing here with duress by threat.

MRS SMITH:

And I'm saying that that is incorporated into section 20.

ELIAS CJ:

Well what does that leave of section 24? We can totally ignore it?

MRS SMITH:

Section 24, as it reads, is the gun to the head. The gun to the head situation where a person is sitting beside you, there's a gun to your head, "Do as I say or I'll kill you." So, the criminal act is committed –

ELIAS CJ:

So does that mean if you didn't have the immediacy and the presence you would be free of the exclusion of certain crimes?

MRS SMITH:

Yes, yes, or if immediacy and presence were widened, as I believe this Court could do, could widen the interpretation of the meaning, so that it doesn't mean immediate as in present it's being read.

ELIAS CJ:

Well, that's going back into the other argument, which I think you probably do have to and it means that you have to tell us how section 24 should be read.

WILLIAM YOUNG J:

Can I just see – because I'd quite like an answer from you to the questions she just put? One way of looking at section 24 is that it provides for a defence, for a person who commits an offence by a compulsion of threats of death or grievous bodily harm, subject to three conditions, the threats of an immediate character being made by someone who is present and the offence committed is not on the list. Now, you say there's a common law defence that marches parallel with the statutory defence where there isn't a requirement for immediacy of implementation of a threat, no requirement for the person making the threat to be present, but would it permit the defence to be raised in relation to murder?

MRS SMITH:

No.

WILLIAM YOUNG J:

Why not?

MRS SMITH:

Because all the jurisdictions say that it can't be applied to murder. Murderers –

WILLIAM YOUNG J:

What about arson?

MRS SMITH:

Well *Ryan* is looking at that –

WILLIAM YOUNG J:

No, but arson is on the list of scheduled offences.

MRS SMITH:

Well as far as Canada is concerned that may well be unconstitutional to say that the defence –

WILLIAM YOUNG J:

Well, we're not Canada though.

MRS SMITH:

Okay, all right.

WILLIAM YOUNG J:

So do you say that –

MRS SMITH:

I think it's wrong, I think the list of exclusions in subsection (2)...

WILLIAM YOUNG J:

So you say there's a common law defence that marches side by side with a statutory defence but it's not subject to immediacy, not subject to the threat being present and the list of scheduled offences don't apply?

MRS SMITH:

That is right.

WILLIAM YOUNG J:

Because that's quite a big proposition.

MRS SMITH:

Yes, it is, but what is the – but what is the –

McGRATH J:

But you will then invoke section 6, won't you –

MRS SMITH:

Yes.

McGRATH J:

– and say that the enactment can be given that meaning in the Bill of Rights.

ELIAS CJ:

But that's the second point.

WILLIAM YOUNG J:

No, that's a different issue, this is whether there's a common law defence that –

GLAZEBROOK J:

Well it could be still section 6 because you'd say you can interpret that as not meaning what it says.

McGRATH J:

Yes.

ELIAS CJ:

But you still need to interpret a way the apparent treatment on an exclusive basis in section 24, you need to be able to expand those terms.

MRS SMITH:

It's hard to see the rationale why certain, except murder, although in the case of *Re A* that the possibility that the defence may not also include murder is being considered and it may in the future be that murder won't be an exclusion.

ELIAS CJ:

Look, this is a law reform submission. It's very difficult for the Court to act on a submission that what the legislature has enacted and the exclusion of offences it has provided for is wrong.

MRS SMITH:

I know there's nothing you can do about the list of exclusions, I'm not saying and I'm not asking you.

ELIAS CJ:

But those cases are likely to be the worst cases of duress, aren't they? The ones with the loaded gun to the head. So, why should they be more limited than the non-immediate, non-present common law offence that you say continues to exist?

MRS SMITH:

Because the two sections encapsulate entirely different situations. Section 24 –

ELIAS CJ:

Section 20 doesn't encapsulate any defence. It simply permits it, perhaps, except insofar as it's altered or is inconsistent with this act or any other enactment. So, it all takes you back to the scope of section 24, doesn't it? Which is why I'm most interested in hearing whether there is any tenable interpretation of immediate and present that can assist you.

MRS SMITH:

Excuse me.

WILLIAM YOUNG J:

You could perhaps put it in concrete terms by saying how if this case goes to a jury you would claim with the requirements of the immediacy and presence were satisfied.

MRS SMITH:

I'm sorry, I didn't quite get you.

WILLIAM YOUNG J:

Instead of talking in generalities, you might like to approach it in terms of the facts of this case, how could it be said on behalf of the defendant at trial that the immediacy

and presence requirements were satisfied, what would be the submission to the Judge and the jury and ultimately subject to what the Judge said to the jury.

MRS SMITH:
On the present law, I couldn't make any submission.

GLAZEBROOK J:
On what about thinking about it in terms of what you would say if in fact we decide you're right, so how would you formulate?

MRS SMITH:
Oh, I'd formulate it in terms of *Ryan*. The Judge there – I'm sorry, the Judge –

WILLIAM YOUNG J:
But that's not by reference to presence and immediacy. What you're being asked is assume the case goes to trial and the Judge is saying, "Crikey, how am I going to sum up on this? What is your argument, Mrs Smith as to how you satisfy the immediacy requirement? What's your argument as to how you satisfy the presence requirement? How am I meant to sum up to the jury on this?" So, what would you say as to how the Judge could conscientiously with a statute, sum up on the facts leaving an offence to the jury in relation to immediacy and present?

MRS SMITH:
Well at the present state of the law it couldn't go to the jury.

WILLIAM YOUNG J:
Well isn't that end of story then?

MRS SMITH:
I'm sorry, are you saying, I'm sorry.

WILLIAM YOUNG J:
Well, you've got two arguments. You're saying one, we should interpret section 24 so as to allow the defence. Secondly, we should allow common law defence that runs parallel with section 24. Now, we've gone from argument to argument, we're now back at section 24. You're being asked, what's the interpretation you rely on of section 24? And I'm asking you, I thought it might be helpful to put it in concrete

terms, how in this case would you submit to the Judge that he or she should direct the jury as to how the immediacy and presence requirements may have been satisfied? If you can't do it then that is probably the end of story on this argument.

MRS SMITH:
Sir, I'd ask the Judge to interpret it this way, that close temporal connection means immediacy and –

WILLIAM YOUNG J:
Close temporal connection?

MRS SMITH:
Yes, in terms of *Ryan.*

WILLIAM YOUNG J:
But how would that be certified –

ELIAS CJ:
You'd have to say that immediate death it doesn't mean instantaneous. It means inevitable, although that was rejected in the law reform proposals, but it would have to be something of that flavour and from present when the offence is committed you'd have to develop some notion that presence is a real presence rather than a physical presence.

MRS SMITH:
Yes.

ELIAS CJ:
So, I mean it's in that area that I was hoping that you might be able to help us.

MRS SMITH:
Well, I would say to the Judge that immediate doesn't have to mean immediate, it can mean imminent and I'd refer him to the case law like *Abdul-Hussein* et cetera, but you see the problem with the question unless I'm misunderstanding you, is that I couldn't in a principled way, ask the Judge to do that on the present state of the law. Like, if I went to trial with Mr A tomorrow, this is why I filed a 344A, because on the present state of the law I couldn't in a principled way run any –

ELIAS CJ:

Well you might need some interpretation from us.

MRS SMITH:

Yes.

ELIAS CJ:

But you have to tell us what you want from us that we can deliver.

MRS SMITH:

I want immediacy and presence to be widened, so that my client's –

ELIAS CJ:

To what?

MRS SMITH:

I want immediacy to be widened to mean imminent and I want presence to be widened so that the person doesn't have to be –

WILLIAM YOUNG J:

Present.

MRS SMITH:

Physically present, yes, yes.

McGRATH J:

Doesn't have to be in a position to carry out the threat there and then?

MRS SMITH:

No, no, that's right.

McGRATH J:

Which is the essence of that –

MRS SMITH:

Yes.

McGRATH J:

So you've got to come up with a possible meaning of a section that doesn't have that element in it, which has been required by cases like *Teichelman* and others.

MRS SMITH:

Yes, yes, *R v Teichelman* [1981] 2 NZLR 64 and all the other cases state the settled position in New Zealand that defence of duress by threats is captured by section 24, section 24 codifies that. A driving offence or – is duress by circumstances and that is not a problem, although *Hutchinson*, I don't think was even that sure of the defence duress of circumstances existed in New Zealand, but the New Zealand cases do seem to indicate that it does. But duress by threats, by human agent, the law is very clear. It's codified by section 24, therefore you don't have a defence unless the person making the threat, the threatener is present beside you and he's in a position to carry out the threat immediately.

ELIAS CJ:

But you're asking us to change that?

MRS SMITH:

To widen it, yes.

WILLIAM YOUNG J:

But isn't the reason for that, that is that there's an expectation that someone who is subject to a non-immediate threat by someone not present will be able to invoke their system to the police?

MRS SMITH:

Exactly.

WILLIAM YOUNG J:

Now that may not be an assumption that's always going to be right, particularly if the threat emanates from Nigeria, but isn't that the reason why, a rational reason why the defence is so narrowly expressed? So, would we write to, as it were, re-write the section in a way that means that that requirement doesn't apply to New Zealand? Because we couldn't really say there's a different set of requirements whether threats relate to what happens in other jurisdictions as compared to here.

MRS SMITH:

You wouldn't have to go that far, all you've got to do is –

ELIAS CJ:

But you might have to have some concept of something like inevitability, which is what the Law Commission floated.

MRS SMITH:

Yes.

ELIAS CJ:

And I'm not sure that you would need to make a distinction between New Zealand and elsewhere, it would depend on the context. But I wonder whether Mrs Smith, it might help if we took the adjournment early to enable you to reflect on this and give us your best shot in terms of how you say we can interpret section 24, because we have read all your submissions and I think we are tending to go round and round, but on that point I think we would – we'll probably have some further questions but we would really be assisted by some focus.

MRS SMITH:

Thank you Your Honour.

ELIAS CJ:

Would that –

MRS SMITH:

Yes, it would, yes, thank you.

ELIAS CJ:

Is that all right? All right, we'll take a 15 minute adjournment now, thank you.

COURT ADJOURNS: 11.08 AM
COURT RESUMES: 11.34 AM

ELIAS CJ:

Yes Mrs Smith.

MRS SMITH:

Thank you Your Honour. With respect to the last question it's my very respectful submission that this Court, if it wishes to, can offer an interpretation of, in section 24, to say that immediacy means a close temporal connection and that presence means no safe avenue of escape. Now, I wonder if I could expand on those for you.

ELIAS CJ:

Yes.

MRS SMITH:

If I could deal with presence first, meaning no safe avenue of escape, the direction could be in terms of *Ryan* at 409 that the Courts will take into consideration the particular circumstances in which the accused found himself and his ability to perceive a reasonable alternative to committing a crime with an awareness of his background and his essential characteristics and the process involves a pragmatic approach of the position of the accused tempered by the need to avoid negating criminal liability on the basis it is purely subjective and unverifiable excuse. I think that that last part would satisfy the concerns of the Court that anyone could run this excuse and get away with it.

WILLIAM YOUNG J:

How, in practical terms would the Crown be able to rebut the defence asserted by your client?

MRS SMITH:

Through the proportionality tests.

WILLIAM YOUNG J:

No, no, but –

ELIAS CJ:

Factually.

WILLIAM YOUNG J:

Factually.

MRS SMITH:

I'm sorry, how would they be able –

WILLIAM YOUNG J:

Say the Crown don't accept that your client acted under the threats that he has asserted but that the communications with his cousin presumably in Nigeria were perhaps for the purposes of the crime. Now, I'm going to ask Ms Laracy this, has the prosecution actually investigated the account and what are the problems they have and how far have they got with it?

MRS SMITH:

To my knowledge there's been no investigation whatsoever. The defence provided affidavits from two relatives to support part of Mr A's –

WILLIAM YOUNG J:

That's about Mr A having been kidnapped?

MRS SMITH:

Yes, yes, yes, but to my knowledge there's been no investigation whatsoever. Possibly the Crown would take the view that that is a matter, you know, for the jury.

WILLIAM YOUNG J:

But on the face of it, if he gives evidence and the Crown aren't in a position to rebut it, he would have to be acquitted.

MRS SMITH:

Not if the – not if tests – not if the *Ryan* tests were applied. Are you saying without *Ryan*? Just on –

WILLIAM YOUNG J:

No, I'm simply saying if it's a defence – I mean *Ryan* tests are all sort of impressionistic and shades of grey tests.

MRS SMITH:

Do you think so? I think they're sound.

WILLIAM YOUNG J:

Well, is it proportionate, is it involuntary, was there no safe harbour? He could've gone to the police, but anyway –

MRS SMITH:
He couldn't.

WILLIAM YOUNG J:
– what I'm more interested in is on the face of it, if he gives evidence and his wife gives evidence along the lines of the affidavits and there's no rebutting evidence, then on a defence along the lines, you suggest we should adopt, he would have to be acquitted, wouldn't he?

MRS SMITH:
But it would never get that – yes, of course, but it would never get that far because the Judge would not allow me to run the defence. That is precisely why I filed the –

WILLIAM YOUNG J:
No, but assume we allow a defence that effectively takes out the words "immediacy" and "presence" from the statutes –

MRS SMITH:
Oh, I see.

WILLIAM YOUNG J:
He effectively has a home run unless the Crown can rebut his affidavit evidence.

MRS SMITH:
But it's not – well, the Crown can do their best to rebut it, that's their function, but the matter of credibility is solely a matter for the jury.

WILLIAM YOUNG J:
But it's solely, all there has to be is a reasonable possibility that it's true.

MRS SMITH:
The onus of proof is on the Crown.

WILLIAM YOUNG J:

Yes.

MRS SMITH:

The onus of proof is on the Crown and the *Ryan* tests –

WILLIAM YOUNG J:

Just sort of talking to you, I'm just interested in the practicalities of it. He says, "I did this because my cousin in Nigeria told me that he was going to kill all the members of my extended family if I didn't process the drugs when they were off to New Zealand."

MRS SMITH:

Then the Crown would say to him in cross-examination in terms of that sentence that you don't like, safe avenue of escape, they would say to him, "Well, why didn't you go to the police in New Zealand? Why didn't you do this?"

WILLIAM YOUNG J:

But what are the practicalities and maybe you can't because no one has tried it, so you just can't go there, of challenging the core narrative which is at the heart of the defence.

MRS SMITH:

Well the challenge, well nobody has gone there, but the challenge would have to –

WILLIAM YOUNG J:

No, sorry, well if you can help on that, that's fine, but that's what I'm interested in, the practicalities of how such a defence would operate if allowed to be run in front of a jury.

ELIAS CJ:

There'd have to be an evidential threshold raised first.

MRS SMITH:

Yes. That is the air of reality test, isn't it?

WILLIAM YOUNG J:

That would be raised by going on oath and saying it and producing the phone log.

MRS SMITH:

Yes. Yes. In fact the Judge may even say that the defence can't be run that didn't have an air of reality to it.

WILLIAM YOUNG J:

Well wouldn't – yes. It's pretty limited. I mean if the guy goes on oath then it's very hard for the Judge to take that away from the jury.

MRS SMITH:

But if there's a credible narrative then the onus is on the Crown and it's a matter for the jury, who, if the defence was allowed, would apply the *Ryan* test. I think the *Ryan* tests are so sound they cover all the concerns Your Honour has raised.

If I could just get back to no safe avenue of escape meaning presence. "If a reasonable person in the same situation as the accused and with the same personal characteristics," and this is from *Ryan*, at page 410, "and experience would conclude that there was no safe avenue of escape or legal," that might satisfy you more Sir, "or legal alternative to committing the offence. If a reasonable person similarly situated would think that there was a safe avenue of escape, the requirement is not met and the acts of the accused cannot be excused using the defence of duress because they cannot be considered as morally involuntary."

So I think that the term "presence", if this Court wanted to, could be explained to mean no safe avenue of escape and if you don't like the term you could play around with the words and use something different.

ELIAS CJ:

Sorry, just looking at the terms of section 24, "Grievous bodily harm from a person who is present when the offence is committed," it would be from a person from whom you have no safe –

MRS SMITH:

Yes.

ELIAS CJ:

– means of escape.

MRS SMITH:

Yes because it can apply to third parties. And then you come down to what immediacy could mean. Immediacy could be described by this Court to mean a close temporal connection has to be proven between the threat and the harm threatened. That element seems to restrict the availability of the common law defence to situations where there is a sufficient temporal link between the threat and the offence committed and that is at 410 of *Ryan*. In other words –

WILLIAM YOUNG J:

How would you satisfy that here?

MRS SMITH:

The further the threat, the further the threat in time, and the actual activity, that goes, I would say, to proportionality.

WILLIAM YOUNG J:

Sorry, just dealing with the facts of this case, how would you satisfy that by reference to what your client said in his affidavit? Because there's no reference to time, is there?

MRS SMITH:

No. The phone calls came in from the log towards the end of January and this lady was arrested I think the 2nd of –

WILLIAM YOUNG J:

There's no reference to when the threats to be implemented if he didn't co-operate?

MRS SMITH:

No. But the inference can be drawn, I would suggest, from the facts.

WILLIAM YOUNG J:

That they were capable of prompt implementation.

MRS SMITH:

Yes. You see, I don't think it matters whether or not the threat would be carried out. It's the fact that the appellant believed that it could be and would be carried out. So the first purpose of the close temporal connection test is to ensure that there truly

was no safe avenue of escape for the accused and if the threat is too far removed from the appellant's – or any accused's illegal act, it would be very hard to conclude, I suggest, that any reasonable person similarly situated had no option but to commit the offence. So the further it goes back in time the less likely the defence will be accepted by the jury.

WILLIAM YOUNG J:
That adds layers to what's additional components to the defence, because the defence as drafted doesn't require, doesn't contain any no reasonable personal requirement. It just requires threats are made and are believed they'll be carried out.

MRS SMITH:
Well, that's when we come to the modified objective testing and I'll tell you what that means –

GAULT J:
How can we modify that when its section talks about, "And he believes," how can you modify that to an objective test?

MRS SMITH:
Well, can I say what the term, as I understand it, means? The term judges reasonableness after taking into account the particular circumstances in which the accused found himself and his ability.

WILLIAM YOUNG J:
There's no objective element in the defence, as expressed by the statute, do you say we should read one in?

MRS SMITH:
No, it has to be an objective subject of test, I suggest. In that test –

ELIAS CJ:
What, if he reasonably believes?

GLAZEBROOK J:
Well, a common law, you say?

MRS SMITH:

Yes, yes.

WILLIAM YOUNG J:

No, but we're not actually talking about common law now, we're talking about the interpretation of section 24.

MRS SMITH:

Okay.

ELIAS CJ:

So, if he reasonably believes, you say, needs to be read in?

MRS SMITH:

Yes, yes, yes. The important test as far as *Ryan* is concerned and I think for –

ELIAS CJ:

That is a substantial modification probably of the legislation. They're all substantial modifications that you are suggesting.

MRS SMITH:

But are they unprincipled?

ELIAS CJ:

Well, they may not be unprincipled if done by a legislative body.

MRS SMITH:

Yes, yes.

McGRATH J:

It's a question of whether the legislation can be given, the meaning, isn't it?

ELIAS CJ:

Yes.

MRS SMITH:

Your Honour, the history of legislative change in this country and overseas is not good and I would ask that if there's going to be any changes, if there are going to be any changes that it be done by this Court. I'd rather the defence had a quick clean death through this Court then languish in the Government Department's...

McGRATH J:
I understand the aspiration but are we looking at what sections, how far can we go with section 6 of the Bill of Rights Act.

MRS SMITH:
I think in a principled way you can extend the meaning of immediacy and presence in terms of *Ryan.*

McGRATH J:
I understand that submission.

MRS SMITH:
I think it's available to the Courts if you want to and you'll only want to if you believe that this does seem to appear a lacuna in the law where a person is forced through circumstances, threats of another, to commit an act that he wouldn't do, that his will was completely overborne by the circumstances. There does seem to be a gap. Section 24 helps people with a gun to their head where their will was overborne. Section 20 helps people, the disqualified driver, wife with a heart attack, et cetera, that situation, but the appellant, the appellant is falling into a deep hole because –

McGRATH J:
Well, can we sum it up by saying that on this interpretation question in relation to section 24 we should be extending the meanings of immediate and present and we should be introduction a qualification of reasonableness to the belief that's enjoyed?

MRS SMITH:
Yes, Sir.

McGRATH J:
Is that what you're saying?

MRS SMITH:

That is exactly what I'm saying.

McGRATH J:
Why would you want that, may I ask?

MRS SMITH:
Otherwise it becomes an entirely subjective belief.

McGRATH J:
Indeed, yes.

MRS SMITH:
How can you possibly challenge that?

McGRATH J:
But you're conceding that reasonableness has to come in to give the defence something that's objective which is necessary if we're going to widen the other concepts.

MRS SMITH:
Reasonableness is absolutely essential. Paciocco, I don't know if you've had the opportunity to read his article, *No One Wants to be Eaten,* but he said that if duress and necessity were to stay true to the fundamental basis, then subjectivity would be all right, but the law doesn't operate that way and it has to be reasonable and that's what – this is where the proportionality argument is just so important and *Ryan* at 411 deals with it. The moral voluntariness of an act has to depend on whether it's proportional to the threatened harm. I mean as one of the writers cited –

ELIAS CJ:
Well, all right.

MRS SMITH:
Do you not like that Your Honour?

ELIAS CJ:
Not much.

MRS SMITH:
I see.

ELIAS CJ:
But –

MRS SMITH:
I think the author is cited by the Crown. He's the example, you can't blow up somebody's house because they scratch your Porsche. The act –

ELIAS CJ:
It has to be a threat of death or grievous bodily harm, you're not taking issue with that?

MRS SMITH:
No.

ELIAS CJ:
So it'[s a serious matter –

MRS SMITH:
Yes it is.

ELIAS CJ:
– and you must believe that the person would carry out that threat. I don't see, myself, why there's any need to modify the subjective dimension of that belief.

MRS SMITH:
Absolutely, I agree. But it can't be purely subjective otherwise –

ELIAS CJ:
Well there has to be an actual threat.

MRS SMITH:
Yes there does. There does.

ELIAS CJ:

Of the extent that the statute provides for and which the common law provided for.

MRS SMITH:

Yes but the defence can't hinge on the truly subjective belief of the appellant, for example, otherwise the –

ELIAS CJ:

Well –

WILLIAM YOUNG J:

Well that's – I mean this is what the statute says and we don't normally, where a statute requires a state of mind to be proved or disproved, we don't normally put on an objective overlay. Otherwise it would be theft by negligence, murder by accident.

MRS SMITH:

Yes, yes.

WILLIAM YOUNG J:

Robbery by inadvertence. We don't do that.

MRS SMITH:

Yes. All right. The subjectivity then of the belief can be a matter for you –

ELIAS CJ:

I don't see why it's necessary for your argument at all, Mrs Smith. It's just, it seems to me because you're building on *Ryan* and the Canadian approach but they were fashioning, because they could in their constitutional system, a different defence. If we are simply interpreting I would have thought we get there, if you're right, simply on the expansion of what's immediate and the expansion of presence and indeed I understand the Crown to be suggesting some sort of modification of presence, or a more expansive notion of it.

MRS SMITH:

Can I narrow the whole argument then down to focus on that point – on that –

ELIAS CJ:

Well I wonder really whether you haven't, in fact, concluded your argument, Mrs Smith, because it does seem to me you have made all the points. If there's anything additional you want to add that might be helpful, of course, do so, but I think the matters that the Court have been discussing with you are really what it comes down to. Can we interpret section 24 in the way that you suggest.

MRS SMITH:
May I speak to my learned friend?

ELIAS CJ:
Yes of course.

MRS SMITH:
May I reserve the right to comment after on anything the Crown may say?

ELIAS CJ:
Of course.

MRS SMITH:
Thank you.

ELIAS CJ:
Thank you Ms Laracy. I think we would be particularly assisted by your picking up any matters that have been discussed this morning and also perhaps by some concentration on the available meaning of section 24 in particular.

MS LARACY:
Certainly Ma'am. If I could start with that second point where the Court has indicated it has an interest. In my submission the key issue on this appeal is not a policy one but whether the Court can amend or reinterpret the defence and Your Honour's specific question seems to be more directed at how far can the Court go in interpreting the language of section 4 to be consistent with what my learned friend suggests is a better common law position.

ELIAS CJ:
And the Crown position is that presence, for example, in this time of modern communications may not be physical presence as I understand it?

MS LARACY:

The Crown accepts that it does no violence to the language of section 24 to interpret presence as allowing the threatener, or the person who will carry out the threat, as being present, either with the accused when they commit the offence, or with a third party, who might be threatened, and in the – there is case law, including in the *Teichelman* decision, where the language of then and there is used, which would allow someone to be very close.

WILLIAM YOUNG J:

I've got a feeling that there are cases on this, aren't there? The bank manager who facilitates the breaking into the safe because his family are being held hostage. I've got a feeling there's a case in Ireland like that.

MS LARACY:

I'm not familiar with that case. The example that Gerald Orchard gives in his article, which perhaps should be before Your Honours, the material is covered in the other academic materials, but it is the leading New Zealand case on this, he gives the example that if we use the language, say, of constructive presence, that if a rifle, someone holding a rifle was quite some distance away, that that should be able to count as presence. The discussion on this – there is a section on this, particularly in Simester and Brookbanks where they do talk about constructive presence and pick up both on the interpretation from the Court of Appeal's decision in *Teichelman*, which does extend it to capable of carrying it out then and there, and the Gerald Orchard suggestion of – the example of a threat that can actually be executed from a distance. So we have to take into account on that analogy, if the law can go that far, modern technology and there maybe forms of executing violence that can be carried out then and there by the threatener, albeit it at a distance, the example, I presume, would have to be some sort of remote controlled digital device which could be exploded and cause immediate harm to the victim, whoever they are, but the threatener, it's not a very nice word that, but is not necessarily with the victim but is at a safe distance themselves.

McGRATH J:

Are you talking about violence to the person threatened alone or are you also bringing in violence to a third person in this respect?

MS LARACY:

The Crown accepts that the Court of Appeal's suggestion in the *Neho* decision, which is that violence to a third party, or presence with the third party, say the children of the accused in that case, is sufficient to meet the presence requirement. It's not inconsistent with the language of section 24.

GLAZEBROOK J:

And you'd accept, as I understand you'd accept also that presence, perhaps if you strap someone up with a bomb and say all I have to do is press my mobile phone –

MS LARACY:

Yes.

GLAZEBROOK J:

– would probably be a presence in the sense that you're talking about?

MS LARACY:

Yes.

WILLIAM YOUNG J:

But in the sense of being immediately able to carry out –

MS LARACY:

Yes.

GLAZEBROOK J:

Immediately able to carry out the threat.

MS LARACY:

Yes. There are – Simester and Brookbanks give some examples of Australian cases that talk about constructive presence but those are cases where the offender, or the threatener, the person who's going to commit the violence, is not in fact there with the person who carries out the offence, or indeed is not relevantly anywhere, but they exert a mental influence, a constant mental influence –

ELIAS CJ:

They are a presence.

MS LARACY:
They're a mental presence.

ELIAS CJ:
Yes.

MS LARACY:
Now New Zealand law wouldn't appear to accept that is as presence, it's got to be a physical way of carrying out the threat immediately.

ELIAS CJ:
But you say that the person could be with the offender or with the victim?

MS LARACY:
Yes.

ELIAS CJ:
Where do you get that?

MS LARACY:
Neho would accept that. So in *Neho* the – it had to be assumed from the evidence – that was a case in the Court of Appeal a couple of years ago, which is probably the high water mark of how broadly the New Zealand Courts have interpreted presence and – well certainly the presence requirement, and the facts of that case were a woman who claimed that she was being compelled to go into shops and steal items which she would then deliver to the gang members. She was told that the gang members were right there, they were around, they were watching her. There was no evidence anyone else was in the shops at the relevant time, however, and the threat was that they would harm and rape her and that the gang members would harm and rape her children who were understood to be at home in a different area.

The Court of Appeal accepted that presence might, could perhaps in New Zealand law be satisfied if the threateners were there with the children while she was carrying out the offending in the shop and if she turned around and said to or made it clear that she was not going to commit this shoplifting then it would simply be a phone call

to the offender who was at home with the children and they could be heard, that that might satisfy the requirement of presence, so that's where I rely for that on.

ELIAS CJ:

Yes, I mean it isn't necessary to decide, I wouldn't have thought, to decide this for the purpose of this case, but it is possible that presence may be interpreted given the ability people have to cause harm remotely as a presence, but all of this creep in terms of presence is positioned on your argument on the immediacy.

MS LARACY:

Yes.

WILLIAM YOUNG J:

A threat of immediate harm made by someone who is in a position to implement it at present at that time.

MS LARACY:

Yes, and those particular elements achieve what the underlying rationale of this defence is wherever it's found, which is that the law can properly choose to excuse people who act where they have no lawful means of escape. Now, we've tried to capture that proposition in a combination of a subjective belief and some certain objective standards, namely the presence and immediacy standard. Other systems have captured that very same proposition of the law only allowing a narrow release where there's no lawful route out of the situation by having a different standard, not strictly requiring immediacy and presence but instead having an objective standard of reasonableness and quite a number of different elements that have to be satisfied. They're all directed at achieving that same –

ELIAS CJ:

A balance.

MS LARACY:

That's right, a balance and a narrow release and what is clear from both the academics and all of the Courts that have commented on this is that the Courts do have to be very careful to make sure that the defence remains clearly defined and constrained.

ELIAS CJ:

And in terms, having heard the argument this morning of your position of the availability of a common law defence, probably in that wider area of necessity, do you disagree with that proposition that – or do you say that section 24 covers the field in terms at least of compulsion or threats, sorry.

MS LARACY:

Your Honour's second proposition is certainly the Crown's case and that's the position that the Court of Appeal has consistently taken that where the source of the threat is another human being and the demand is that the person commit an offence under threat, under compulsion, then section 24 was intended by Parliament to legislate for that exact situation and if that is the situation then section 24 is the only possible basis for the law to excuse the behaviour. Of course, if you fall outside section 24, it will no doubt be relevant at sentencing and if the substance of the pressure that the person is under is not a threat, then we have the defence of necessity which is itself unclear and to some extent reasonably nascent in New Zealand jurisprudence, but it is there at common law and that can be relied on, so there are a number of alternative routes but for this specific area Parliament did think it was worth covering the ground and that was also the position as our written submissions note, that was taken by the Tasmanian Supreme Court in terms of the parallel argument made there that the common law could run alongside the equivalent of section 24.

And, as Justice Simon France in delivering the Court of Appeal decision in this case noted that the same approach is implicit in the *Ruzic* decision itself, in that if the common law could have been applied, instead there would have been no occasion for Justice LeBel to use that language of striking down the presence and immediacy requirements in section 17. Instead they could have been supplemented by the common law requirements.

Just in terms of Your Honours' previous question about how far the law or the Crown might submits it's acceptable for the law to interpret section 24, in terms of its reasonable and natural meaning, I do suggest *Neho* is the most useful, but there's also a tidy summary in *Ruzic* where the Supreme Court expressed how far it thought that the similar language in section 17 could be interpreted and I'll just find that reference for Your Honours. It's a passage on page 717 of the decision, the second paragraph down. The phrase, "Present when the offence is committed coupled with

the immediacy criterion indicates that the person issuing the threat must be either at the scene of the crime or at whatever other location is necessary to make good on the threat without delay, should the accused resist. Practically speaking, a threat of harm will seldom qualify as immediate of the threat and is not physically present at the scene of the crime."

And as Your Honours are aware, this Supreme Court in *Ruzic* did find that it would illegitimately strain the almost identical language of section 17 to interpret it as the appellants sought. The effect being to interpret present in a way that really encapsulates not present and not immediate in a way that unduly alters the meaning of that word to something along the lines of some time later or tomorrow or in the near future and in my submission if immediate is interpreted as meaning a close temporal connection then that does similar violence to the ordinary and natural meaning of immediate.

The Crown's submission is that this appeal can be resolved on the ordinary and natural meaning of section 24, that it's not necessarily a Bill of Rights interpretation case, that it's simply a case of interpreting the statute in terms of its ordinary and natural meaning. The respondent's submission is that there is no breach of the Bill of Rights and that there is in fact no right in the Bill of Rights that is directly engaged and for that reason it's not necessary to turn to section 6 and try and read the language consistently with the Bill of Rights, there is no right to read it consistently with. That was the constitutional challenge that was permitted in the *Ruzic* case doesn't arise because where a breach of section 7 could be found because of the content of that section, we don't have the equivalent, therefore we don't have a right directly engaged.

I've addressed that proposition in the written submissions and unless the Court is interested in it, I probably won't go over it. It's worth noting that my learned friend does rely on section 8 of the Bill of Rights Act. The Crown has addressed section 8 and says that both in its wording and in its legislative history it is focused exclusively on deprivations of life itself, the killings.

ELIAS CJ:

It is much more widely interpreted though or not much more, it is more widely interpreted in other jurisdictions as providing a basis for a right to health and other matters such as that.

MS LARACY:

Yes, and I assume Your Honour is thinking about section 7, for instance.

ELIAS CJ:

I was thinking really about some of the European case law.

MS LARACY:

Your Honour may well be right. The –

ELIAS CJ:

The right to life is in a number of jurisdiction invoked in support of environmental protections, for example.

WILLIAM YOUNG J:

It also triggers off other things like rights to have an inquest.

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

Conducted into a death and official hands and things like that.

ELIAS CJ:

Yes, yes.

MS LARACY:

The difficulty with comparing it with section 7 of course is that it expressly incorporates the language of security and liberty of the person and security rights have been interpreted in Canada as covering, for instance in this case, the content of criminal defences and a whole range of other interests that affect the quality of life and not just the physical existence.

ELIAS CJ:

I had thought that the right to life had been so interpreted in some jurisdictions, I may be wrong in this –

GLAZEBROOK J:
I know it's been interpreted quite widely.

ELIAS CJ:
Yes.

GLAZEBROOK J:
It certainly has been interpreted for dealing with environmental harm and especially in requiring people to fix sewers and matters of that kind and it doesn't require imminent –

ELIAS CJ:
And bodily integrity too.

GLAZEBROOK J:
Bodily integrity as well. But your submission would be, I'd presume, that the *Ruzic* was specifically concentrating on security of the person.

MS LARACY:
Yes.

GLAZEBROOK J:
Rather than life.

MS LARACY:
Yes.

GLAZEBROOK J:
And that you would say that however widely life is interpreted it doesn't include the right to a criminal defence that's explicitly narrowed by statute. I suppose the only other right might be the right to present a defence and the right to have facilities to present a defence, so that whole natural justice right – but you get into the difficulty then of saying well should it be a defence in the first place and the wording that says, well, it's narrowly limited to the section 24 –

MS LARACY:
That's right.

GLAZEBROOK J:
So it might be a breach of it, but too bad.

MS LARACY:
My submission would be that there's no right to present a defence that Parliament has effectively excluded, which is the common law defence.

GLAZEBROOK J:
Well, there might be, but if Parliament has expressly excluded it, then it can't – and it can't be interpreted in accordance with the Bill of Rights then section 4 would say that that's that. Is that –

MS LARACY:
Yes, yes, I do say that, Your Honour.

McGRATH J:
You developed an argument I think by reference to Richardson J's judgment in *Barlow* in this respect. Is that quite right, I've read it somewhere which you speak of section 8 as being a very specifically focused provision?

MS LARACY:
Yes, that's right, and we do rely on *R v Barlow* (1995) 2 HRNZ 635, 654 (CA) for that and that Parliament and particular, you know, we're fortunate in New Zealand to have the benefit of the white paper which shows exactly what the drafters were being influenced by –

McGRATH J:
Yes.

MS LARACY:
– at the time the Bill of Rights was being prepared and that suggests that what was being aimed at was a very narrow focus in that particular provision on the State not doing anything that would deprive an individual of their life except in accordance with the principles of fundamental justice. That's another issue what they are. That it is to be read strictly in terms of that specific right and not other rights that have been read into that more broadly.

McGRATH J:

Are you able, offhand, to give us a reference to the passage in the white paper?

MS LARACY:

I've got the white paper here, yes.

GLAZEBROOK J:

There is the *Lawson* case as well which there was an attempt to – I think it was *Lawson*, a Housing Corporation case.

McGRATH J:

Just the white paper would be best. The white paper is particularly what I'm interested in.

MS LARACY:

The sections all got moved around so I think it was just section 14.

ELIAS CJ:

There's the Bill of Rights white paper.

MS LARACY:

Bill of Rights white paper, sorry. Can I come back to that, Your Honour? I've got it here –

McGRATH J:

Yes, well if you could at some stage.

MS LARACY:

Yes.

McGRATH J:

I'd certainly be in – because Justice Richardson was also looking at a report of the Department of Justice, but it's all part of this idea, isn't it, that it was a deliberate feature of our Bill of Rights that there would be specific deprivations spelt out.

MS LARACY:

Yes.

McGRATH J:
Rather than adopting the wider concepts.

MS LARACY:
Yes, yes, that each right that was to be guaranteed would be – would be narrowly identified and articulated.

McGRATH J:
And so the idea that there should be a general affirmation of the right to liberty and security of the person that was affected by that, I think is the suggestion that's made in *Barlow.*

MS LARACY:
That's right, and I would adopt the interpretation put forward by the Chief Justice in her discussions with my learned friend that to the extent that the sub-heading of that part of the Act does talk about right to life and security of the person. The security of the person aspect is direct at sections 9 to 11 of the Bill of Rights which are the provisions, for instance, that deal with the right to be free from medical, unwanted medical treatment or medical experimentation.

McGRATH J:
Don't worry about it if you can't –

MS LARACY:
I have found it, Sir. It was section 14 under the Bill as it was then proposed. The language was the same as the current section. So, "Right to life. No one should be deprived of life." Sorry, and the part heading was, at that stage, "Life and liberty of the individual and legal process," but the title to the particular section was, "Right to life. No one shall be deprived of life except on such grounds and where applicable in accordance with such procedures as are established by law and as are consistent with the principles of fundamental justice." The reference there is made to the Canadian Charter section 7 and to the International Covenant Article 6(1) and Article 6(1) is the specific provision covering the right to life as opposed to the other liberty interests and I won't obviously read out the entire commentary but it says in the first paragraph, "Bearing in mind that the Bill is directed at State action, the main

potential application of this article is to statute authorising and regulating such things as abortion, capital punishment, self-defence and the use of deadly force to effect arrest to prevent escapes or control disorder."

There is a paragraph that directly refers to the Canadian Charter, but concentrates its discussion on the meaning of fundamental justice and that's paragraph 10.89. The white paper says, "The Canadian Charter reads everyone has the right... except in accordance with the principles of fundamental justice." The authors of the white paper say, "There's uncertainty whether the phrase fundamental justice refers to procedures or extends to substance, in other words, whether it is simply a synonym for natural justice. The different wording of the New Zealand Article makes it clear that matters of substance as well as procedure are germane." But there's nothing in the commentary of the white paper that could possibly suggest that the broader security and liberty interests that are caught up in section 7, expressly articulated in section 7 should be read into section 8.

Perhaps it's also worth noting that the Crown isn't saying that the defence of duress in this case is ruled out. This is at the pre-trial stage of the matter and it is of course open to the appellant to adduce evidence during the trial if evidence is available to the appellant that satisfies section 24.

WILLIAM YOUNG J:
You can't now though. He's not on oath with, you know, a particular account of events. He can't realistically come up and say, "Oh, I forgot to say my cousin was actually next door to me all the time."

MS LARACY:
There would be a very compelling challenge to his credibility.

WILLIAM YOUNG J:
Yes, so he can't really, I mean one of the things that's slightly, I suppose I won't say troubled me, but it's interested me is that it's unusual for what's really a ruling as to whether there's a defence to come in under a section 344A application, but anyway...

MS LARACY:
Yes, one of the commentators, I can't remember whether it's Professor Yeo or Professor Paciocco suggests that in fact that's the ideal way that – just in terms of

efficiency of Court process for these sorts of defences to be raised because it avoids the risk of the jury having evidence put before them which is ultimately held to be inadmissible for use for the purpose for which it was put there, but I do take Your Honour's point.

WILLIAM YOUNG J:
Well, I mean I didn't really raise an issue, it was just that it's not one of the heads of jurisdiction of section 344A that is a particular defence available.

MS LARACY:
Yes, yes –

WILLIAM YOUNG J:
I don't think you need to worry about it.

MS LARACY:
No, Justice Simon France did make a similar observation. I think it's along the lines of what Your Honour is commenting on. In the Court of Appeal he said, "Really all we can do is we could comment on the evidence before us and say whether that's admissible, but we can't say that at the pre-trial stage that there's no defence. That's not what we're here to do. We can make a comment on the state of the law and say whether it's correct to this point, but it's not our role, we can't say there's no way that this appellant cannot put this defence. We've just got the material before us."

GLAZEBROOK J:
Well, if the evidence isn't relevant to a defence though, it's not admissible.

MS LARACY:
Exactly.

GLAZEBROOK J:
And if the decision is upheld then it's not relevant to a defence and therefore not admissible.

MS LARACY:

Yes, I agree with Your Honour. My point is perhaps theoretical because Young J's response is that you couldn't realistically put forward a better defence after the Supreme Court issues its decision to patch it up.

WILLIAM YOUNG J:
Now I know what the quote with the law of duress is, I will now –

MS LARACY:
Exactly.

WILLIAM YOUNG J:
– come up with a defence that touches all bases.

MS LARACY:
But leaving aside that very sound realistic observation, in theory there is nothing to stop the appellant saying, "In fact I didn't put my best case on the pre-trial, I've got better evidence now and here it is."

WILLIAM YOUNG J:
Can you, it's just a very minor point, I raised it with Mrs Smith, but did the police ever get around to investigating the account of events or not?

MS LARACY:
I'm sorry I don't know the answer to that. My very strong opinion is that it's highly unlikely that they would have. The Crown approached the pre-trial on the basis that the Court should assume for the purposes of that hearing that everything in the appellant's affidavits is true.

WILLIAM YOUNG J:
Yes, of course,

MS LARACY:
And on that basis I think it would've been very unlikely for the police to take on the onerous task of investigating when there was a reasonable chance on the Crown's assessment that the application would fail at the pre-trial stage. The other point is how does the Crown or indeed the defence go about – well, really the difficulties of establishing the no safe avenue aspect. In particular, if we were to apply a common

law test, how do you go about adducing evidence that it can be said reasonably that there was no safe avenue of escape given that that evidence was going to have to relate to activities in Nigeria and perceptions of policing and the state's ability to protect people in Nigeria.

The answer is that it's extremely difficult and if the Crown were put in that position where it was obliged to rebut evidence in order – that was prima facie capable of supporting the defence the way it would have to work would be through a formal mutual assistance request which itself would be very odd in that. It would be the New Zealand Attorney-General asking the Nigerian authorities to comment on the suggestion that their state was essentially corrupted, incapable of protecting their own people would be –

WILLIAM YOUNG J:
Do you know if like accounts of events have been proffered by those involved with importing drugs? Is it common for this sort of explanation to be given in advance in mitigation?

MS LARACY:
It's not unheard of, it's not rare. I don't know if I'd be capable of saying it's common but *Ruzic* itself is similar.

WILLIAM YOUNG J:
Well, it's like almost the same story.

MS LARACY:
Almost the same story. My submission is if we are to focus on where the differences are is that there was more to lay the evidential foundation under *Ruzic* and that may be what influenced the Court.

There's also a case that's referred to in *Ruzic* in a United States case called *United States v Contento-Pachon* 723 F.2d 691 (1984) which is also very similar where a person alleged that he was threatened that his family would be killed, he and his wife would be killed if he didn't bring drugs into the United States and I can take the Court to those references. That United States case is referred to at paragraph 83 of the *Ruzic* decision.

In *Ruzic* there was expert evidence given. Not sure who the expert was or how they qualified because that type of detail unfortunately doesn't have to feature in these cases but expert evidence was given that the rule of law had broken down in Belgrade at the relevant time and that the police could not be trusted and that police and gangs were involved in mafia-style activities and essentially that because of what the world knew about the situation in Belgrade it may not have been too much of a step for the Court to be influenced by that evidence.

There was also in the *Ruzic* case, if Ms Ruzic was to be believed, she gave evidence of quite detailed evidence of dealings with this henchman over quite a long period of time, so she was able to articulate the nature of the threats that she was under and the way in which he was spying on her and that he knew a lot about her life which suggested that he was in fact targeting her and lining her up for something and she had good reason to be afraid based on her actual experience, which she was able to articulate in her evidence of this person threatening her. In my submission that goes substantially beyond the type of claim that we've got in this case, which is that there were threats to kill made by someone conveyed through the cousin and that the reason Mr A was inclined to believe the threats is because an uncle in Nigeria had been kidnapped and the family in that situation had believed the Nigerian police would not be able to assist. But there's no suggestion that the situation with the uncle had any connection whatsoever with the stand-over tactics that he was being placed under.

There's simply not the same level of detail and again in the *Contento-Pachon* case, the defendant's evidence there was somewhat more detailed. He said that he was watched by an associate of the threatener the entire time he was on the plane and the course of smuggling the drugs and that he'd had previous encounters with the henchman for want of a better word or is the henchman the subsidiary, I think it is, the principle.

I'd probably be guided by the Court if there's anything else I could assist with.

ELIAS CJ:

I'd like to raise, because I wouldn't want you to think that I necessarily accept the submission that there isn't a Bill of Rights dimension based on section 9 and your answer to that has been that *Taunoa* required something to shock the conscience or – but that was in the context of punishment and I wonder whether if there is, in fact, a

fundamental principle of criminal justice that is in issue whether section 6 wouldn't swing into action. So, if you want to develop that argument, I'd like you to do that. I'm not sure that it's necessary in the context of this case, but it does seem to me that if Mrs Smith is right, that there's a fundamental principle that there should be some moral culpability which is removed by duress then an interpretation which permits that principle to be given full effect is one that the Court is entitled to look to under section 6 of the Bill of Rights Act, because its exclusion would be disproportionately severe.

MS LARACY:

My submission is that each of the judgments in the *Taunoa v Attorney-General* [2007] NZSC 70; [2008] 1 NZLR 429 case appears to have accepted that when disproportionately severe, the words disproportionately severe are interpreted in section 9, they have to be the same very high test of essentially outrageous conduct, unacceptable social conduct applies.

ELIAS CJ:

Well, I didn't, but that may be a minority position, but in any event, what I'm postulating to you is the suggestion that there's a fundamental principle of criminal responsibility and if that is infringed then one would have thought that that epithet could be applied, that it's outrageous.

MS LARACY:

Yes, yes, there appears to be a consensus in the law that conduct which is not morally blameworthy in that it is morally, it can be described as morally innocent, should not be the subject of the criminal process. There should be no conviction and there should be no punishment if a person is morally blameless. Now we can accept that –

ELIAS CJ:

So punishment would be disproportionately severe in those circumstances?

MS LARACY:

Yes, yes.

ELIAS CJ:

And section 6 should be used?

MS LARACY:
Yes, in this Court if you were to take that approach and say that it was captured by section 9, would then have to decide whether acting deliberately to commit a crime or a particular type of crime because you were forced to do so falls within that limited category of actions which seem to meet the criminal laws requirements but were deemed to be morally blameless.

Perhaps the best example of conduct that we consider to be morally blameless is conduct which falls within that category physical involuntariness and that's because the actus reus of the offence is effectively made absent by the fact that the person did not act consciously. There are a whole range of situations where that happens such as where I push someone and the person I've pushed loses their balance and causes, the example in the commentaries is causes someone else to fall off a cliff. There's no, the person I pushed cannot be held responsible for something over which they had no control. Then, of course, there's the standard automaton type cases and perhaps the most consistent and powerful critique, or criticism, of the *Ruzic* reasoning is that it precedes from an assumption that morally involuntary behaviour is to be equated with physically involuntary behaviour –

WILLIAM YOUNG J:
Well there seems to be an assumption that there is such a thing as morally involuntary behaviour.

MS LARACY:
Yes.

WILLIAM YOUNG J:
As opposed to making a choice.

MS LARACY:
Yes.

WILLIAM YOUNG J:
Albeit it a difficult one.

MS LARACY:

And even with morally blameless behaviour in my submission what the Courts have done, what Parliament has done, and the categories that have been excluded, is essentially made a moral choice there. It's probably an easy one to make and there's a good rationale –

ELIAS CJ:
Yes and the exclusion of certain offences is a legislative judgment about what is proportionate in terms of acting voluntarily but in very difficult circumstances.

MS LARACY:
Yes.

GLAZEBROOK J:
But can also be seen as, if you're looking at it in Bill of Rights terms, certainly the exclusion of murder can be seen as third party rights to life as well and therefore totally justifiable.

MS LARACY:
Yes.

GLAZEBROOK J:
As a limitation on your ability to protect your own life.

MS LARACY:
Yes and self-defence is a good –

GLAZEBROOK J:
Self-defence is a different –

MS LARACY:
– example – is a very good example –

GLAZEBROOK J:
– matter though.

MS LARACY:

But it's a good example of that. There is a, essentially a third party who's – but that third party, who's the victim – the person who's the victim is also the aggressor.

GLAZEBROOK J:
That's right.

MS LARACY:
And they caused the situation.

GLAZEBROOK J:
And in this case it would be a totally separate person totally innocent and with no – if duress is allowed, or compulsion is allowed in a murder situation.

MS LARACY:
Yes and the – one of the difficulties is that while the law accepts that the principle of physical involuntariness is self-evidently true in terms of founding a defence of moral innocence, it's not self-evidently true that you should be considered blameless if you chose an action because it was considered, at the time, to be the better of two actions, the lesser of two evil, word involved, deliberately breaking the law, choosing to break the law.

ELIAS CJ:
Well that's the point made by Justice LeBel, isn't it?

MS LARACY:
Yes. Making the very hard decision. And in terms of the, you know, capturing the full range of interests here, the law obviously has to balance – we have traditionally thought that it was acceptable to balance the interests of the accused, and therefore create this narrow release in certain circumstances from the otherwise criminal implications of their conduct. So if we accept that it's right, or at least it's available to Parliament and the Courts to do that in certain circumstances, that's an interest that can be taken into account. There are obviously the interests of the victims, who in the context of duress are totally innocent, they have no part to play, yet they are the ones who effectively become the sacrifice, the accused decides that it's better to harm these people, or harm society's interest in this regard, than to stand up to the threat. And when you look at that in the context of this case, albeit not this appellant's role, in my submission it's a powerful consideration that he was – you

could accept that he might have been compelled to act in order to save his family from possible harm but equally he was caught up in an enterprise where the principles deliberately put a woman's life at a high degree of risk. That happens every time a courier carrying –

WILLIAM YOUNG J:
Verbally concealed –

MS LARACY:
Concealed drugs internally, travels with them. We've got a case before the High Court in New Zealand which concerned a courier who died –

WILLIAM YOUNG J:
Died from South America.

MS LARACY:
So there is a real risk of harm there to an individual and this accused was part of an enterprise that put her in this position, albeit he may have come into it later and I'm not trying to land him with responsibility for the engagement of the courier in any way, but those interests are not taken into account on the type of analysis that focuses certainly on a pure theory of moral involuntariness which is just to say, well –

ELIAS CJ:
Well no one is really suggesting that there aren't boundaries and –

MS LARACY:
No.

ELIAS CJ:
But...

MS LARACY:
But the difficulty is that the boundaries tend to show the unsuitability of the moral involuntary rationale because they don't sit well with it, whereas people like Professor Yeo and I think all of them really suggest a more honest and accurate approach as to say, "Well, maybe society should just consider such actions to be morally blameless in the circumstances and we simply as a matter of policy need to

come up with a test that allows the Court to determine when the conduct should be excused," but we'll just call it morally blameless.

GLAZEBROOK J:
And you would say presumably that because there isn't an absolute standard about which it's judged and there are balances to be taken, that effectively the section 24 is a balance that's been chosen by the legislature, it's actually in accordance with looking at those different balances and unless it can be shown to be manifestly wrong in some way that that is the balance that's been chosen.

MS LARACY:
Yes.

GLAZEBROOK J:
And it does because it's looking at different interests and different rights. Equally the rights of victims, the rights of this stage.

MS LARACY:
Yes.

GLAZEBROOK J:
Unless there's something really odd about the balance and having something as certain as that is probably as good an argument as any I would suspect.

MS LARACY:
That's right and for some people who are the subject of duress, that subject of test would suit their interest quite properly and much better and will adduce a much fairer result. Certainly one more consistent with the theory of moral involuntariness than if an object of test were to be applied. So, in some circumstances our test is certainly less strict, maybe more consistent with the underlying rationale which seems to have influenced the Canadian Supreme Court's approach and the other point I should perhaps make on this policy issue is that what is apparent from looking around at the other jurisdictions is that there is no clear right model that there are a number of different models and even in countries that have workable common law systems of duress such as England, the Law Commission has suggested that there be an alternative approach. The Law Commission in England, for instance, suggested that there be a subjective test for duress but there be a legal onus as opposed to an

evidential onus on the defendant to establish it to the balance of probabilities. Now, that's got some elements of our test but in other ways it's a lot harsher coming up at that stage with a legal onus that has to be satisfied by the defendant.

So, the point we've made in the submissions is that whether this is looked at is strictly an interpretation exercise, a Bill of Rights interpretation exercise. A policy question if there were a clear right policy outcome and our framework was anathema to that, that might be problematic, but however this is looked at, my submission is the answer remains that it's – we can't interpret section 24 much differently from the way it has been interpreted and even if it's not considered the ideal formula, it's a perfectly acceptable formula in terms of the underlying policy rationale and when compared with the type of arrangements that exist in the comparable jurisdictions and fundamentally that this is such a complex area in terms of the value laden decisions that have to be made that it should be left to the Law Commission and Parliament to work out when the change comes but also it would be an enormous job for a Court.

ELIAS CJ:
Thank you Ms Laracy. Yes, Mrs Smith.

MRS SMITH:
My learned, just a few points if I may, my learned friend said that if you fall outside section 24 that would be relevant to sentencing, but my point is that if the appellant has a defence it would be wrong to deny him of that. Section 9 of the Bill of Rights, Butler & Butler and this is at paragraph 35 of the Crown's submissions suggests that the section might in theory provide a basis for arguing that the restriction of the availability of a criminal defence breaches the Bill of Rights Act. Section 9 provides that everyone has the right not to be subject to including disproportionately severe treatment or punishment and the authors Butler & Butler claim that it does not strain the language of section 9 of the Act to hold that punishment of acts committed involuntarily and that includes the term morally involuntary acts is in fact disproportionately severe and Butler & Butler note that overseas jurisdictions do not appear to rely on equivalent provisions to strike down laws that appear to restrict in a nobly fashion, on the availability of criminal defences, but they note that that is because other jurisdictions contain different provisions that are more suitable for that line of argument, but in Butler & Butler's view, a very good argument can be made that section 9 of the Act provides a principle basis on which to review such laws.

Reference was made to the case of *Taunoa*. The section and it was noted at paragraph 70 of the decision that the heading to section 9 of the Bill of Rights Act includes a person has the right not to be subjected to disproportionately severe treatment or punishment and the point I'd like to make is that the wording of section 9 of the New Zealand Act follows the modern expression to be found in Article 7 of the ICCPR from what – sorry, section 9 of the ICCPR on which our section 9 is derived, no one shall be subject to torture or cruel or inhuman or degrading treatment or punishment and yet another expression of the same prohibition is to be found in Article 3 of the European Convention on human rights which provides no one shall be subjected to torture or to inhuman or degrading treatment or punishment and basically the differences in expression don't really detract from the underlying principle which is common to all these statements. It is the right to be treated as human and if a person is deprived of a defence which may be available, then that is a breach and it's the appellant's submission that that involves a right not to be punished for acts done outside his will.

Now, the Crown referred to the defence of necessity in duress by circumstances as excluding duress by threats. If I could refer you very quickly to what Lord Robert Walker say in the case of *Re A* this is at page 1064, "Duress of circumstances can therefore be seen as a third or residual category of necessity along with self-defence and duress by threats. I don't think it matters whether these defences are regarded as justifications or excuses, whatever label is used, the moral merits of the defence will vary with the circumstances. The important issue is whether duress of circumstances can ever be a defence to a charge of murder." Now that case was in 2002. *Ryan* has expressly excluded, and properly so, self-defence coming in within an argument for duress but Lord Justice Robert Walker's point was that the labels don't matter, duress of circumstances, duress by threats, are one and the same and Paciocco says there's really no principled basis for separating them and in his article he goes through, I think the second to last page, showing what the differences are between duress and necessity and then showing that there was no principled basis at all for those distinctions.

ELIAS CJ:

Well I think at least one text says that necessity is the wider principle and duress by threats is a subset of within the wider principle.

MRS SMITH:

Yes, yes. The Crown referred to *Ruzic* at page 717 which was the – I'm sorry it was the American – sorry. It's 717, the Crown referred to the plain meaning of section 7 is quite restricted in scope and the reference was there in that section to the section being suitable for the gun at the head but at 719, paragraph 55, the Court developed that and said, "Thus by the strictness of its conditions, section 17 breaches section 7 of the Charter because it allows individuals who acted involuntarily to be declared criminally liable." And I just bring that to your attention to complete what the Crown cited to you.

Now the academics to which the Crown referred, none of them, not one of them like the terminology and Professor Paciocco is the same. Professor Coughlan says that, he argues that morally involuntarily would be better described as morally blameworthy. Professor Yeo from Australia was worried about the unruly horse. The only thing I'd say about that, when you read his article it was a carefully constructed article but it was pre-*Ryan* and if I can put it in his terms, the unruly horse has now been safely corralled. He was concerned too about self-defence being caught in. I think he was the academic who was worried about that. I think they all were, thinking that self-defence could be brought in within *Ruzic*. So *Ryan* made it perfectly plain that there are quite severe tests and self-defence certainly doesn't apply.

Professor Berge, contrary to Professor Coughlan, prefers the language of moral blame to moral involuntariness and Professor Paciocco, I've dealt with that. Professor Paciocco prefers the term "normative involuntariness" but that is also a difficult term to come to grips with but he said that that would be, given the normative limits imposed on the duress defence, that may be a more accurate way of describing the underlying theory, rather than moral involuntariness.

I don't – I can see your concerns. Moral involuntariness doesn't capture the reality and that's what the academics all say. Perhaps you may consider that normal involuntariness does – that simply means that the law will excuse conduct where it is justifiable to do so according to normative limits. But frankly the law is an absolute mess and Paciocco says that the defences are not unflinchingly faithful to their stated theoretical foundations should come as no surprise. He said that criminal lawyers have to cope with theoretical messes because the entire criminal law is based on a compromised commitment to criminal law theory and it was for that reason that I filed

– well I hadn't read Paciocco at that stage – I hadn't even heard of the term "air of reality" but I knew that a Judge is under a duty to exclude evidence that's not relevant so that's the reason why I decided, and I think one of Your Honours wondered why it came under the heading at 344A. The defence can avail themselves of that section as well because it tests whether evidence is admissible and after reading *Kapi* when I first realised that section 24 wouldn't apply and section 20 I thought would apply, I thought there'll be no problem here, then I read *Kapi* and found that there was a problem and when I saw – when I noted the underlying theme of –

ELIAS CJ:
What was the submission Mrs Smith? I'm sorry, I'm getting a bit lost with it.

MRS SMITH:
I'm sorry, I was just dealing with the –

ELIAS CJ:
What's this directed at?

MRS SMITH:
All right, I was dealing with the academics, but I've –

ELIAS CJ:
I mean I don't think that anyone would think that the terminology is determinative. It's just whatever labels people want to – it's the substance that matters.

MRS SMITH:
It is, it is.

ELIAS CJ:
Yes.

MRS SMITH:
I just wanted to explain why I filed a 344A because there seems to be a little bit of concern as to why I would've done that and it was simply because I wasn't sure whether the evidence would be admissible and you can't run it at a trial and then have the Judge properly say, "Well, this isn't admissible." So –

ELIAS CJ:

Yes. I think everyone understands why the 344A route was the appropriate route.

MRS SMITH:

One of Your Honours raised the concern that a person may say, "Well, now I know what the law of duress is, I'm going to tailor my evidence accordingly." That could apply to any single criminal charge that a person faces. Before they see their lawyer, they could tailor –

WILLIAM YOUNG J:

I don't think you need to worry about this. It was a reference to a submission Ms Laracy made.

MRS SMITH:

I see. Well, the final thing that I wanted to say was the Crown referred to the case at paragraph 24 of *Ruzic* of *Contento-Pachon*. The Court of Appeal actually and I don't think my learned friend told you this, but at paragraph 84, we see –

ELIAS CJ:

Where do we find it?

WILLIAM YOUNG J:

This is in *Ruzic.*

MRS SMITH:

In *Ruzic.*

WILLIAM YOUNG J:

The US Court of Appeals allow the appeal.

MRS SMITH:

Yes, they allowed the appeal, so I just put that in for balance and at paragraph 84 they found that the alleged threat was not immediate, the defence of duress – the trial Judge found that since the alleged threat was not immediate the defence of duress could not be submitted to the jury and of course that was reversed when the Court of Appeal said that a more flexible criterion was required and that could involve a test of impending. That is all I wish to say in respect of the Crown's arguments,

Your Honours and the last thing I'd like to say I suppose is thank you for hearing the appeal.

ELIAS CJ:

Thank you Mrs Smith, well, thank you counsel, we'll reserve our decision in this matter, thank you.

COURT ADJOURNS: 12.58 PM