IN THE SUPREME COURT OF NEW ZEALAND

SC 38/2013
[2013] NZSC 88

BETWEEN	IFEANYI JUDE AKULUE Appellant
AND	THE QUEEN Respondent

Hearing:	14 August 2013
Court:	Elias CJ, McGrath, William Young, Glazebrook and Gault JJ
Counsel:	L O Smith and B J Hunt for Appellant M F Laracy and M L Wong for Respondent
Judgment:	19 September 2013

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS

(Given by William Young J)

The appeal

[1] The appellant – a Nigerian who has been living in New Zealand for many years – faces charges of importing and conspiring to supply methamphetamine. The drugs were brought into New Zealand by a courier who was intercepted at Auckland Airport. She was placed in a hotel and remained under police supervision. The appellant and another person contacted her there and were subsequently both arrested. The appellant admits that he knew that the courier had imported drugs and that he approached her in order to obtain the drugs which were then to be passed on to another person.

[2] The appellant maintains that he was coerced into the offending by a cousin living in Nigeria and known as Zuby. He says that Zuby threatened to kidnap and kill members of his family in Nigeria unless he assisted with the importation of the drugs. This account of events – including the full name and telephone number of Zuby – is set out in an affidavit which the appellant has sworn. In this affidavit the appellant also said that in 2009, his uncle had been kidnapped in Nigeria, and held to ransom, which resulted in some $20,000 being paid to secure his freedom. His narrative is supported by other affidavits. In one, his wife refers to phone calls from Zuby on the night of the appellant's arrest. The others confirm the kidnapping of the uncle and payment of the ransom.

[3] The appellant sought an order under s 344A of the Crimes Act 1961[1] as to the admissibility of the affidavit evidence. This was on the basis that its admissibility turned on whether the narrative disclosed a defence.[2] It was common ground in the District Court that the statutory defence of compulsion under s 24 of the Crimes Act was not available.[3] However, the Judge ruled the evidence could be led in support of a common law defence of necessity.[4] The Solicitor-General then appealed and the Court of Appeal held that the evidence would not support a defence of necessity.[5] The Court expressed no concluded view on the availability of s 24 but recorded that the case had been run on the basis that the appellant was not able to rely on that section.[6]

[4] Although it was thus common ground in the Court of Appeal as well as in the District Court that the statutory defence under s 24 was not available, the appellant, in this Court, maintains that he can invoke it. Accordingly, there are two questions in issue:

(a) Does the appellant's account of events give rise to a defence under s 24? And, if not:

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1 This section has been repealed on 1 July 2013 by s 6 of the Crimes Amendment Act (No 4) 2011. The corresponding provision is s 101 in the Criminal Procedure Act 2011.

2 We heard no argument as to whether this was an appropriate procedure and thus express no opinion on the point.

3 *Akulue v R* DC Auckland CRI-2011-004-1967, 12 October 2012 at [7].

4 At [15].

5 *R v Akulue* [2013] NZCA 84.

6 At [35].

(b) Can the appellant rely on a common law defence of necessity?

For the reasons which follow, we answer both questions in the negative. The appeal must therefore be dismissed.

The relevant sections of the Crimes Act 1961

[5] Section 24 is relevantly in these terms:

> **24 Compulsion**
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> (1) Subject to the provisions of this section, a person who commits an offence under compulsion by threats of immediate death or grievous bodily harm from a person who is present when the offence is committed is protected from criminal responsibility if he believes that the threats will be carried out and if he is not a party to any association or conspiracy whereby he is subject to compulsion.
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> (2) Nothing in subsection (1) shall apply where the offence committed is an offence specified in any of the following provisions of this Act, namely:
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> (a) Section 73 (treason) or section 78 (communicating secrets):
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> (b) Section 79 (sabotage):
>
> (c) Section 92 (piracy):
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> (d) Section 93 (piratical acts):
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> (e) Sections 167 and 168 (murder):
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> (f) Section 173 (attempt to murder):
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> (g) Section 188 (wounding with intent):
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> (h) Subsection (1) of section 189 (injuring with intent to cause grievous bodily harm):
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> (i) Section 208 (abduction):
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> (j) Section 209 (kidnapping):
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> (k) section 234 (robbery):
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> …
>
> (l) section 235 (aggravated robbery):
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> (m) section 267 (arson).
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> …

[6] From the point of view of the appellant, the problems with the s 24 defence are:

(a) The threats which he says Zuby made were not "of immediate death or grievous bodily harm"; and

(b) Zuby was not "present when the offence [was] committed".

[7] Also relevant is s 20 which is in these terms:

> **20 General rule as to justifications**
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> (1) All rules and principles of the common law which render any circumstances a justification or excuse for any act or omission, or a defence to any charge, shall remain in force and apply in respect of a charge of any offence, whether under this Act or under any other enactment, except so far as they are altered by or are inconsistent with this Act or any other enactment.
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> …

The appellant argues that if he cannot rely on the statutory defence of compulsion there is nonetheless a common law defence of necessity which is preserved by s 20 and runs alongside the s 24 defence but without all, or some, of its limitations.

The judgments in the courts below

[8] In the District Court, Judge Dawson recorded that it was accepted that the statutory defence of compulsion was unavailable because the threats were not of immediate death or grievous bodily harm from a person present when the offence was committed.[7] However, he concluded that the Court of Appeal judgment in *R v Hutchinson*[8] supports the view that the common law defence of necessity was preserved pursuant to s 20 of the Crimes Act.[9] He also held that such defence was potentially available to the appellant.[10] We note in passing that the judgment of the Court of Appeal in *Hutchinson* (which did not involve duress by threats) discussed earlier New Zealand authority to the effect that any defence based on duress by

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7 *Akulue v R*, above n 3, at [7].
8 *R v Hutchinson* [2004] NZAR 303 (CA).
9 *Akulue v R*, above n 3, at [8] and [15].
10 At [13].

threats from another person can only be advanced under s 24.[11] While the Court in *Hutchinson* left open the possibility that threats which do not meet the s 24 criteria might give rise to a common law defence of necessity,[12] it is certainly not authority for the proposition that such a defence is available.

[9] On appeal from Judge Dawson's decision, the Court of Appeal held that a defence based on duress sourced in the threats of another person is available only under s 24.[13] In doing so, it followed and applied earlier judgments of that Court, including *Kapi v Ministry of Transport*[14] and *R v Neho*.[15] The Court also discussed the Canadian case, *R v Ruzic*,[16] to which we will revert shortly, and which the Court of Appeal saw as supporting a narrow approach to s 24.[17]

[10] The Court of Appeal also referred to various proposals which have been made to provide for a statutory defence of necessity which would encompass and change the existing s 24 defence. The Court of Appeal then went on to say:

> [32] It is notable that there has been no legislative movement in response to these various proposals. Further, it is clear that the proper scope of these defences is a matter of considerable debate. For example, if immediacy and presence are to be jettisoned, there are numerous ways one can seek to capture the concepts of no reasonable alternative, or no safe avenue of escape. Issues also exist concerning whether the assessment of the reality of the threat should be subjective, objective, or a mixed assessment. … Further, decisions would be required about what offences are excluded, a process which inherently seems to be legislative in nature.

The defence of compulsion – an overview

[11] The shape of the defence of compulsion has always been affected by policy considerations. There should be proportionality between the harm which is threatened and the harm caused by the commission of the offence. Those who are put under pressure to offend should show firmness of character and seek the assistance of the authorities or do whatever else is practicable. So a high level of

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11 *R v Hutchinson*, above n 8, at [32]–[38] and [48].
12 At [49].
13 *R v Akulue*, above n 5, at [25], [29] and [34].
14 *Kapi v Ministry of Transport* (1991) 8 CRNZ 49 (CA).
15 *R v Neho* [2009] NZCA 299, [2013] NZAR 464.
16 *R v Ruzic* 2001 SCC 24, [2001] 1 SCR 687.
17 *R v Akulue*, above n 5, at [27].

coerciveness and the absence of any reasonable alternative to compliance are part of the rationale of the defence. Any formulation of the defence must thus address:

(a) proportionality; and

(b) the level of coerciveness (including absence of practical alternative to compliance).

[12] The exclusion of some offences from the scope of the defence is a mechanism, albeit perhaps a little crude, for ensuring that the harm done by the defendant is not disproportionate to the threatened harm. What offences should be excluded is quintessentially a policy question. According to Hale's *Pleas of the Crown*,[18] murder, treason and robbery were excluded offences. But despite this, judges left compulsion defences to juries in the treason trials which followed the 1745 Jacobite uprising.[19] More recent common law developments as to excluded offences were reviewed by the House of Lords in *R v Gotts* in which attempted murder was added to the list.[20] But there remain far more offences listed in s 24(2) than are excluded at common law.

[13] The operation of s 24 depends on the criteria of immediacy (of the harm that is threatened) and presence (of the person making the threats). Satisfaction of these criteria will be highly indicative of coercive circumstances leaving no practical alternative but compliance. The section may, however, be seen as under-inclusive because threats which do not meet the immediacy and presence criteria may nonetheless be very coercive in the sense of leaving no reasonable alternative but compliance. Another approach would be to treat the rationale as the rule, so that the defence is available if there was a high level of coercion and the defendant had no practical alternative to compliance. The more the rationale becomes the rule, the greater the likelihood that the rule will be "just right" in terms of inclusiveness. But, on the other hand, the more generally expressed the rule, the more its application in particular cases is left to very evaluative and subjective assessments by juries (or other finders of fact) and thus the greater the risk of arbitrary outcomes.

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18 Matthew Hale *Pleas of the Crown* (1 Hale PC, 1800) at 50.

19 See for instance *R v MacGrowther* (1746) 18 State Trials 391.

20 *R v Gotts* [1992] 2 AC 412 (HL) in the speeches of Lords Jauncey and Lowry.

[14] There are few old cases on compulsion.[21] Initially, the view was that only threats of death would suffice.[22] But the common law position developed to the point that threats of grievous bodily harm also suffice. The relevant history was explained by the House of Lords in *R v Hasan*.[23] In this respect the common law and s 24 are to the same effect. But whereas initially, it was only threats which induced a "present fear of death" that could be relied on[24] – an approach closely akin to the statutory requirements of immediacy and presence – the common law has moved on. Immediacy and presence are no longer necessary components of the common law defence.[25] Instead the common law defence depends on the defendant not having had a reasonably practicable way of avoiding compliance with the threat. While in part less restrictive than the statutory test (because immediacy and presence are not required), the common law test is objective rather than subjective and in this respect is more restrictive than s 24.

[15] Other features of the defence of compulsion which warrant mention are reviewed in the speech of Lord Bingham in *Hasan*:

(a) The victim of a crime committed under compulsion will usually be morally innocent.[26]

(b) Allowing a defence of compulsion may enable criminals "to set up a countervailing system of sanctions" which has the effect of conferring immunity for crimes committed by their associates.[27]

(c) Where a defence of compulsion is in play, it is for the Crown to disprove it, something which is likely to be difficult, especially when,

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21 James Fitzjames Stephen in *A History of the Criminal Law of England* (Macmillan and Co, London, 1883) vol 2 at 106 and following, indicated that, the only cases he was aware of were *MacGrowther*, above n 19; and *R v Crutchley* (1831) 5 C & P 133, 172 ER 909. Another case, not referred to by Stephen, is *R v Tyler* (1838) 8 C & P 616, 173 ER 643.

22 See *MacGrowther*, above n 19.

23 *R v Hasan* [2005] UKHL 22, [2005] 2 AC 467 at [21] (also reported as *R v Z* [2005] UKHL 22, [2005] 2 AC 467).

24 See *MacGrowther*, above n 19.

25 See *R v Hasan*, above n 23, at [25]–[28]

26 At [19].

27 At [22], citing Lord Simon, in *Director of Public Prosecutions for Northern Ireland v Lynch* [1975] AC 653 (HL) at 688 and 696.

as will often be the case, the prosecution is not on notice of the defence or its details before trial.[28]

(d) Coercion falling short of compulsion may be relied on by way of mitigation of sentence.[29]

These considerations prompted the following remarks from Lord Bingham:

> 21 Having regard to these features of duress, I find it unsurprising that the law in this and other jurisdictions should have been developed so as to confine the defence of duress within narrowly defined limits.
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> …
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> 22 … I must acknowledge that the features of duress to which I have referred … incline me, where policy choices are to be made, towards tightening rather than relaxing the conditions to be met before duress may be successfully relied on. …

The legislative history of s 24

[16] Section 24 of the Crimes Act is taken from s 23 of the Draft Code prepared by the Stephens Commission.[30] It was relevantly in these terms:

> SECTION 23
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> COMPULSION
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> Compulsion by threats of immediate death or grievous bodily harm from a person actually present at the commission of the offence shall be an excuse for the commission of any offence other than high treason as herein-after defined in section 75 sub-sections (*a*) (*b*) (*c*) (*d*) and (*e*),[31] murder, piracy, offences deemed to be piracy, attempting to murder, assisting in rape, forcible abduction, robbery, causing grievous bodily harm, and arson: Provided that the person under compulsion believes that such threat will be executed: Provided also, that he was not a party to any association or conspiracy the being party to which rendered him subject to such compulsion.
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> …

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28 At [20].

29 At [22].

30 Criminal Code Bill Commission *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences* (George Edward Eyre and William Spottiswoode, London, 1879) [Draft Code].

31 Subsections (a)–(e) of s 75 of the Draft Code encompassed offences involving the murder of, or violence towards, the sovereign, the sovereign's consort or the heir apparent. So compulsion was seen as available in respect of other forms of treason, including levying war against the sovereign, the species of treason involved in *MacGrowther*, above n 19.

In the accompanying report, the Commissioners discussed the history of the defence of compulsion noting that it had been held to be available except where the crime was of a "heinous character".[32] They recorded that they had framed s 23 of the Draft Code:[33]

> … to express what we think is the existing law, and what at all events we suggest ought to be the law.

The statement that s 23 had been drafted so as "to express what we think is the existing law" can hardly have been intended to encompass the list of excluded offences but otherwise the defence, as formulated, was broadly in accord with the common law defence of compulsion as then understood.

The approach of the Supreme Court of Canada in *R v Ruzic*

[17] Because the judgment of the Supreme Court of Canada in *R v Ruzic* was central to the argument advanced on behalf of the appellant, the case warrants some explanation and comment.[34]

[18] The appellant, Marijana Ruzic, had imported two kilograms of heroin into Canada. She said that she did so because of threats made by a third party to harm her mother. The threats were made in Serbia where she and her mother lived. Section 17 of the Canadian Criminal Code[35] incorporates immediacy and presence requirements which are practically identical to those provided for in s 24 of the Crimes Act. Ms Ruzic's difficulty under s 17 was therefore that there was no threat of immediate harm from a person present when the offence was committed. This meant that she could not rely on the s 17 defence.[36]

[19] The Supreme Court concluded that s 17, as drafted, was inconsistent with the Canadian Charter of Rights and Freedoms and, in particular, s 7 which provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

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32 Draft Code, above n 30, at 43.
33 At 43.
34 *R v Ruzic*, above n 16.
35 Criminal Code RSC 1985 c C-46, s 17.
36 A point made clear in *R v Ruzic*, above n 16, at [50]–[54].

The Court held that it is a principle of fundamental justice that conduct which is morally involuntary should not attract criminal liability.[37] The immediacy and presence requirements for the defence of compulsion were seen as overly restrictive and thus in breach of s 7 of the Charter and the Court,[38] in effect, replaced them[39] with requirements that:

(a) there be "a close temporal connection between the threat and the harm threatened";[40] and

(b) there be no safe avenue of escape.[41]

Conformity with the latter requirement was to be assessed on the basis of how the situation would appear to a reasonable person in the special circumstances in which the accused found herself.[42]

[20] The approach taken by the Supreme Court in that case is not directly applicable in New Zealand given that it is not open to this Court to strike down statutory provisions. As well, there are differences between the New Zealand Bill of Rights Act 1990 and the Canadian Charter. The provision of the New Zealand Bill of Rights Act which most closely corresponds to s 7 of the Charter is s 8 which is more limited in its terms than its Canadian counterpart:

> No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice.

As well, we do not accept that recognition of moral involuntariness is a principle of fundamental justice. The approach in *Ruzic* has, in this respect, been subject to some

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37 At [47].

38 At [55] and [87]–[90].

39 See *R v Ryan* 2013 SCC 3, (2013) 353 DLR (4th) 387 at [43]. A possible problem is that in some respects the duress test adopted in *Ruzic* is more demanding than the statutory test. It is thus possible to postulate a defendant who could have satisfied the struck down components of the statutory test but not their replacements. More generally, the jurisprudential effect of the judgment is not entirely clear, as explained by David Paciocco "No-one Wants to Be Eaten: The Logic and Experience of the Law of Necessity and Duress" (2010) 56 Crim LQ 240 at 274 and following.

40 *R v Ruzic*, above n 16, at [65] and [96].

41 At [61] and [96].

42 At [61].

academic criticism in Canada.[43] Involuntariness involves questions of degree and is not easily susceptible to a binary analysis under which actions are either voluntary (and punishable) or involuntary (and not punishable). While any humane system of criminal law must make allowance for involuntariness, we see no reason why this cannot fairly be achieved by the adoption of rules, the application of which turn on objective criteria (such as, for instance, immediacy and presence).

[21] If the language of s 17 of the Canadian Criminal Code had been sufficiently broad to accommodate Ms Ruzic's defence, there would have been no occasion for the Supreme Court to strike down the immediacy and presence criteria in s 17. It follows, as the Court of Appeal said,[44] that *Ruzic* supports the view that the language of s 24 cannot be read in a way that would accommodate the circumstances as described by the appellant (which are practically identical to those relied on by Ms Ruzic). Beyond that, we see the case as being of no assistance in the present context.

The questions in the case

Does the appellant's account of events give rise to a defence under s 24?

[22] Section 24 has been applied by New Zealand courts very much in accordance with its terms.[45] Those terms do not explicitly require that the threat be of harm to the defendant. But they must have an immediate character and they must derive from a person who is present at the time of the offence. Whatever flexibility may be inherent in the section,[46] it does not encompass the explanation of events offered by the appellant. Such elasticity as may be inherent in the presence requirement is

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43 See Stanley Yeo "Challenging Moral Involuntariness As a Principle of Fundamental Justice" (2002) 28 Queens LJ 335 at 343–346; Benjamin L Berger "Emotions and Veil of Voluntarism: The Loss of Judgment in Canadian Criminal Defences" (2006) 51 McGill LJ 99 at 108–114; and Stephen G Couglan "Duress, Necessity, Self-Defence and Provocation: Implications of Radical Change?" (2013) 7 Can Crim LR 147 at 196 and 204–208.

44 *R v Akulue*, above n 5, at [27].

45 Illustrative cases include *R v Joyce* [1968] NZLR 1070 (CA); *R v Teichelman* [1981] 1 NZLR 64 (CA); *R v Raroa* [1987] 2 NZLR 486 (CA); and *R v Neho*, above n 15. New Zealand courts have never adopted the principal / secondary party distinction, which was drawn in Canada in *R v Parquette* [1977] 2 SCR 189, under which the limitations of the statutory defence were applicable only to principal offenders. A broadly similar distinction was drawn in *Director of Public Prosecutions for Northern Ireland v Lynch*, above n 27, but this case was subsequently overruled, see *R v Howe* [1987] AC 417 (HL).

46 See, for instance, *R v Neho*, above n 15, at [17] and [18].

insufficient to encompass Zuby being in Nigeria and the appellant being in Auckland when the offending occurred. And Zuby's threats were not of harm which was to be inflicted immediately on the appellant's family in Nigeria. So to interpret s 24 as permitting a defence here would, as was observed in *Ruzic*, "amount to construing presence as absence and immediate as sometime later".[47]

[23] The requirements under s 24, for threats to be made by a person who is present and for the harm threatened to be immediate, reflect a legislative purpose that if there was sufficient time to seek assistance from the authorities, a defence of compulsion is not available. The section was not drafted with a view to allowing a defence of compulsion based on the belief, reasonable or otherwise, of the defendant that assistance from the authorities would not be forthcoming if requested.

[24] As is apparent, we see no inconsistency between s 24 as drafted and the New Zealand Bill of Rights Act. It follows that s 6 of the New Zealand Bill of Rights Act does not assist the appellant. Section 24 must therefore be applied in accordance with its terms.

Can the appellant rely on a common law defence of necessity?

[25] It will be recalled that s 20 does not preserve common law defences "so far as they are altered by or are inconsistent with this Act or any other enactment". The approach of the New Zealand courts to date is that this excludes a defence of necessity based on threats of harm sourced in other persons.[48] This is a reasonably obvious interpretation of s 20. To the extent that s 24 expresses the elements of the defence of compulsion in respects which differ from the current common law, it might be thought to have "altered" the defence. And to the extent of the resulting differences, it might be thought that the common law is "inconsistent" with s 24. On either basis, it follows that the common law defence of compulsion is not preserved by s 20.

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47 See *R v Ruzic*, above n 16, at [49].

48 See cases cited at [9] above.

[26] As the Court of Appeal noted, various proposals to amend the law of compulsion have been floated over recent years,[49] but there has been no legislative response. Mrs Smith for the appellant suggested that this absence of response warrants judicial intervention. We, however, see intervention along the lines that she proposes to be inconsistent with the proper limits of our role. It would be an obvious usurpation of legislative function for the courts to allow, under the guise of a common law defence of necessity, a defence based on compulsion by threats in respect of the offences listed in s 24(2). This being so, it might be thought to be equally an usurpation of legislative function to allow such a defence to be advanced in circumstances where other requirements of s 24, in particular, immediacy and presence, have not been satisfied.

[27] There is also the consideration that the legislative history of ss 20 and 24 of the Crimes Act is directly against the appellant's argument. It will be recalled that s 24 of the Crimes Act has its origins in s 23 of the Draft Criminal Code. Likewise s 20 of the Crimes Act can be traced back to the same Code, in this case to s 19:

> SECTION 19
>
> COMMON LAW PRINCIPLES
>
> All rules and principles of the common law which render any circumstances a justification or excuse for any act or a defence to any charge, shall remain in force and be applicable to any defence to a charge under this Act, except in so far as they are thereby altered or are inconsistent therewith.
>
> …

The Commissioners had earlier proposed to provide specifically and separately for a defence of necessity but, in the end, did not do so. They observed that:[50]

> … compulsion is only one instance of a justification on the ground that the act, otherwise criminal, was necessary to preserve life.

They explained the decision not to provide separately for this defence in this way:[51]

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49 See, for instance, Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants* (NZLC R73, 2001) at ch 8.

50 Draft Code, above n 30, at 43.

51 At 44.

> Casuists have for centuries amused themselves … by speculating as to the moral duty of two persons in the water struggling for the possession of a plank capable of supporting only one. If ever such a case were to come before a court of justice (which is improbable) it may be found that the particular circumstances render it easy of solution. We are certainly not prepared to suggest that necessity should in every case be a justification. We are equally unprepared to suggest that necessity in no case be a defence; we judge it better to leave such questions to be dealt with when, if ever, they arise in practice by applying the principles of law to the circumstances of the particular case.

[28] With that background in mind, the comments of the Commissioners in respect of s 19 of the Draft Code are of interest:[52]

> We have already expressed our opinion that it is on the whole expedient that no crimes not specified in the Draft Code should be punished, though in consequence some guilty persons may thus escape punishment. But we do not think it desirable that, if a particular combination of circumstances arises of so unusual a character that the law has never been decided with reference to it, there should be any risk of a Code being so framed as to deprive an accused person of a defence to which the common law entitles him …While, therefore, digesting and declaring the law as applicable to the ordinary cases, we think that the common law so far as it affords a defence should be preserved in all cases not expressly provided for. This we have endeavoured to do by Section 19 of the Draft Code.

[29] These passages from the report make it clear that the Commissioners saw the defence of compulsion at common law as a subset of the defence of necessity and sought to codify exclusively the circumstances in which compulsion by threats of harm from another person provides a defence, leaving only other circumstances of necessity to the common law.

[30] Against this background it would be inconsistent with the purpose underpinning the codification of our criminal law to treat s 24 as codifying the defence of compulsion only in respect of threats of a kind recognised by the section, leaving a common law defence in respect of threats which do not meet the statutory criteria.

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[52] At 10.

Disposition

[31] For these reasons the appeal should be dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent