[2003–04 Gib LR 49]

FUZETA v. ATTORNEY-GENERAL

SUPREME COURT (Pizzarello, Ag. C.J.): April 29th, 2003

Road Traffic—driving without due care and attention—duress of circumstances—defence applicable to careless driving if accused acts, from objective standpoint, reasonably and proportionately to avoid reasonably believed threat of death or serious injury to himself or another

The appellant was charged in the Magistrates' Court with driving without due care and attention, contrary to the Traffic Ordinance, s.30(1).

The appellant was driving his car with his wife as a passenger, at the time being 80 and 77 years of age respectively. She was not in good health, having had a kidney removed and suffering from continuing renal problems. Whilst the car was stopped in traffic at a pelican crossing, she felt ill and needed to go to the toilet urgently. The appellant therefore performed a U-turn at the crossing to go to the nearest toilet. Once his wife had been to the toilet, the couple went shopping. There were conflicting accounts from the appellant and the police officer who charged him, as to the precise details of the manoeuvre, and the court preferred the appellant's account. The appellant raised a defence of duress of circumstances, on the ground that the wife needing the toilet was, because of her ill-health, reasonably believed by the appellant to be an emergency. He was nonetheless convicted, as the court held that the circumstances did not amount to duress (but without giving reasons why this was so), and given a conditional discharge.

On appeal, the appellant submitted that (a) the preferred evidence pointed to careful and competent driving; (b) the court erred in law by failing to consider the test for duress of circumstances properly—it failed to consider the objective test for the reasonable belief held by the appellant of the situation being an emergency, and also had not considered the particular circumstances, *i.e.* the fact that his wife had been taken ill and needed to go to the toilet as an emergency; (c) the lack of reasoning for the court's decision that the issue did not amount to duress showed that it had not considered the matter properly; and (d) the defence of duress of circumstances was available in relation to the charge of careless driving.

The Crown, in reply, submitted that (a) the appellant was driving carelessly because the U-turn could have been safely executed a few metres further on; (b) the defence of duress of circumstances was not available to the appellant because, immediately after the incident, the

appellant and his wife went shopping, indicating that there was no real emergency and certainly no threat of death or serious injury; and (c) the lower court did in fact consider this point.

Held, allowing the appeal:

(1) The defence of duress of circumstances was available on a charge of driving without due care and attention. For it to be available (a) the accused's act must have been necessary to avoid inevitable and irreparable harm; (b) no more should have been done than was reasonably necessary for the purpose to be achieved; and (c) the harm inflicted must not have been disproportionate to the harm avoided. The defence was only available if, from an objective standpoint, the accused could have been said to have acted reasonably and proportionately, on the facts reasonably believed by him, in order to avoid a threat of death or serious injury to himself or another (para. 18).

(2) In the present case, the lower court had considered the defence of duress of circumstances, but it had not considered the circumstances properly, and the lack of reasons for its decision showed this. It should have tested the reasonableness of the appellant's actions by examining all the relevant circumstances and considered whether or not his belief that it was an emergency, objectively viewed, was reasonable and that his action in response was also reasonable and proportional. All the relevant facts which could have enabled the court to perform such a task were not considered properly and the court's conclusion on the defence was therefore inadequate (paras. 19–20).

Cases cited:

(1) *D.P.P.* v. *Harris*, [1995] 1 Cr. App. R. 170; [1995] Crim. L.R. 73; [1995] RTR 100; [1994] J.P. 896, considered.
(2) *D.P.P.* v. *Hicks*, [2002] EWHC 1638, considered.
(3) *D.P.P.* v. *Rogers*, [1998] Crim. L.R. 202, considered.
(4) *R.* v. *Backshall*, [1998] 1 W.L.R. 1506; [1999] 1 Cr. App. R. 35; [1999] Crim. L.R. 662; [1998] RTR 423, followed.
(5) *R.* v. *Bristol Crown Court, ex p. Jones* (1986), 83 Cr. App. R. 109; *sub nom. Jones* v. *Bristol Crown Court*, [1986] J.P. 93, considered.
(6) *R.* v. *Cairns*, [1999] 2 Cr. App. R. 137; [2000] RTR 15, considered.

S.R. Bossino for the appellant;
Mrs. S. Peralta, Crown Counsel, for the respondent.

1 **PIZZARELLO, Ag. C.J.:** The appellant appeals against his conviction in the Magistrates' Court on an information laid by Sgt. A. Viagas of the Royal Gibraltar Police on February 15th, 2002 for driving a vehicle without due care and attention on November 8th, 2001, contrary to s.30(1) of the Traffic Ordinance. The summons bore the return date September 23rd, 2002, and the trial took place on December 5th, 2003.

The sentence was a conditional discharge for 12 months.

2 The appeal is on the ground that the court did not apply the correct test in law and that the sentence was wrong in principle.

3 The evidence was that the appellant was stopped at the pelican crossing opposite the airport as the red light was against him. He had been driving along Winston Churchill Avenue in a northerly direction on the west side of the east lane of the carriage way. When the lights turned green the appellant drove his vehicle sharp left and drove on the pelican crossing over to the west side of the avenue and into the airport car park, all in one go. There was no one on the pelican crossing when the appellant executed this manoeuvre.

4 This manoeuvre was seen by P.C. Anson, who says that a bus driving in a southerly direction had to stop and that the appellant shook his fist at the bus driver. This happened at about 10 a.m. and he spoke to the appellant, who he says told him that he (the appellant) had thought he was turning at four corners. The officer says the manoeuvre as such was adequately performed. The officer says he was by himself and spoke to the appellant as soon as the appellant came out of the car park accompanied by his wife and gave him the warning formula in English. In answer to the learned magistrate's question he said he would not have stopped the appellant had it not been a pelican crossing.

5 The evidence of Mr. Fuzeta was that he was 80 years of age at the time. He was accompanied by his wife, aged 77, who is not in good health and has renal problems. She has had a kidney removed and has dialysis treatment in Spain three times a week. On that day and at the time of the occurrence (he says at 8 or 9 a.m.) his wife was feeling ill and he was required to take her to the toilet as an emergency and urgently. The airport toilet was the nearest, so he put on his indicator, looked and turned left. There was no traffic south-bound that he saw. There was a queue of cars right across the pelican crossing and lots of cars behind his. Once he parked his car at the airport car park, he took his wife to the airport toilet, she holding on to him. He was not stopped by the police officer at that stage. He had not shaken his fist at the bus driver because there was no bus there. The only bus was stopped further down. He says that he was spoken to by P.C. Anson at about 12.30 p.m., after he and his wife had returned from Spain, where they had gone after visiting the toilet. He says he was spoken to by two officers, by P.C. Anson and another officer. This other officer explained he had not been present but had been told of the occurrence by someone else. P.C. Anson spoke to him in English and told him he was booked because he had taken the wrong turn.

6 Mr. Bossino put to the bench:

(a) The evidence of the police officer left much to be desired, in that he

did not produce his pocket-book, which might have substantiated the time that he spoke to the appellant and would show by way of contemporaneous note where the bus, if any, was situated.

(b) The appellant executed the manoeuvre in a careful and competent manner. There was no person on the crossing, no one was inconvenienced. That he drove on the crossing is unusual but it is not *per se* an offence and he did not fall below the standard of a careful, competent, reasonable and prudent driver.

(c) The manoeuvre was not executed on a whim; he was faced with an urgent situation.

7 What Mr. Bossino says of the conviction is that it does not follow on from the reasons given by the Magistrate. The Magistrate ruled that "having heard your evidence and of the constable, preferred your evidence." Thus the Magistrate immediately puts in doubt the accuracy of the constable and, in so far as there is a conflict between the evidence of Mr. Fuzeta and the constable as to the time of the incident, as to the time that the constable spoke to Mr. Fuzeta, as to the presence of the bus and as to the shaking of the fist, it is clear that the Magistrate accepted the appellant's version. The Magistrate then says "on your own evidence, you admit you did a U-turn on the pelican crossing" and that shows that that was all there was against the appellant as far as the court was concerned and that shows too that the Magistrate did not consider all the circumstances. This is shown even more clearly, Mr. Bossino submits, when the bench continues: "To our mind U-turn falls below prudent and competent driver" and that, says Mr. Bossino, is false on the evidence that the court said it preferred.

8 Mr. Bossino submits that on the facts the evidence points to careful and competent driving in respect of which the prosecution had not discharged its burden of proof; at the very least a reasonable doubt arises and the court should have given the appellant the benefit of the doubt and should have acquitted him. Furthermore, the court did not consider the particular circumstances that the appellant found himself in when his wife was taken ill—a fact which no one questioned and which from the court's decision it must have accepted. Indeed, submits Mr. Bossino, when the Magistrate expressly says "circumstances concern to your wife does not amount to duress issue," that is plainly wrong in law when no reason or explanation is given by the court. The court, submits Mr. Bossino, also fell into an error of law by wrongly distinguishing the stark objective test and the circumstances concerning his wife which it states do not amount to duress; it is an error of law because the reasons put forward by the driver form a part of the consideration the court must bear in mind when it considers its decision, the more so when necessity is claimed as a defence. It is all one test and not to be broken into two limbs.

9 Referring to the actual circumstances of the case, Mr. Bossino submits no motorist is called upon to achieve a standard of perfection when he is suddenly confronted with some kind of emergency, see 2 *Stone's Justices' Manual* at 3008, para. 7–9 (2002) and *R.* v. *Bristol Crown Court, ex p. Jones* (5). I understood Mr. Bossino to concede that performing a U-turn at and on a pelican crossing is *prima facie* evidence of careless driving, but that the circumstances must be taken into consideration and where, as here, the defence of necessity was put forward the court must consider it. It is for the prosecution to disprove it and this was not done. The court, he submits, took a narrow objective view, *i.e.* "to our mind, U-turn falls below prudent and competent driver—circumstances concern to your wife does not amount to duress issue."

10 He refers to *R.* v. *Backshall* (4) to show that the court did not consider this aspect. In that case, Mr. Backshall was prosecuted for dangerous driving. He was acquitted of dangerous driving but convicted of the statutory alternative of careless driving. The facts were these ([1998] 1 W.L.R. at 1508):

> "On 26th February the defendant was driving his Ford Mondeo when another vehicle, a Mazda, driven by Ian Howell, attempted to overtake him. The prosecution case was that the defendant drove his vehicle from side to side and applied his brakes several times before Howell overtook him. The defence was that the defendant had noticed Howell, whom he did not know, driving in an erratic manner approximately half a mile behind him. Howell's car came up behind his. The defendant applied his brakes three or four times; he wanted to slow down and stop to allow Howell to go past. He said he had not stopped the car from overtaking. He thought that Howell might ram him off the road, he was angry, frightened and confused. He slowed his vehicle down so that Howell could pass him on the right-hand side; he wanted to get out of Howell's way.
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> Both vehicles stopped. A fight ensued during which it seems Howell was the aggressor and, more seriously, the defendant were [*sic*] injured. The defendant's shirt was torn. Howell went to his car and returned with a hammer and a set of jump leads. He smashed the windscreen and front side windows of the defendant's car while the defendant sat in the driver's seat and as the defendant drove away Howell threatened him with a large screwdriver. That clearly was a disgraceful incident, on any view of the matter, and it was the subject of a charge of criminal damage against Howell.
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> There then followed the second driving incident. The defendant drove away at speed pursued by Howell. They turned left at a roundabout, across the path of other traffic. The defendant reversed from a side street into a major road and then stopped facing the

wrong direction in traffic. With regard to that incident, he said that he drove off intending to go to the nearest police station, and the fact that Howell was in pursuit of him affected his driving. He drove as well as he could and did not endanger others. He was trying to reach safety. Howell overtook him on the wrong side on a major road. This forced the defendant to turn right into a minor road. Howell did a U-turn in order to pursue him. Another vehicle came towards the defendant, in the minor road, which forced him to reverse back into the major road. His car mounted the pavement, facing north on the southbound carriageway. Howell's car was at the end of the road, nose to nose with the defendant. In summary, there were two incidents of what was alleged as dangerous driving separated by the fight, which appears to have been started by Howell and which was an appalling example of road rage."

At the appeal, Evans, L.J. referred to the uncertainty that existed as to whether, as a matter of law, the defence can rely upon what is called "necessity" as a defence on a charge of careless driving and said (*ibid.*, at 1509):

"'Necessity' is defined in *Archbold*, p.1433, para. 17–127, and again at p.1435, para. 12–132, by reference to the decision of this Court in *Reg.* v. *Pommell*, [1995] 2 Cr.App.R. 607. It is surprising, at first sight, that this could be thought to be a defence that might arise in the context of a mundane example of deplorable road behaviour, as this was. But circumstances can arise where a driver may act as he does because he is in fear of his life, or finds himself in other circumstances where the requirements of such a defence may be made out. For those reasons, the defence of necessity is recognised as a defence to the charge of dangerous driving. The authority is shown in *Archbold*, p.2391, para. 32–23, with a reference back to p.1433, para. 17–127 *et seq.*"

11 Mr. Bossino submits in the present appeal the substantial question is whether the defence of necessity may arise in relation to the charge of careless driving and *R.* v. *Backshall* (4) is authority for that. Again he draws attention to the judgment of Evans, L.J., which referred to *D.P.P.* v. *Harris* (1), where McCowan, L.J. had said: "Curtis, J. thought it would be anomalous for the defence [of duress of circumstance] to be available on a charge of the more serious offence, but not on the lesser alternative offence", and ruled ([1998] 1 W.L.R. at 1512) "we would be prepared to hold the view expressed by Curtis, J. was in fact correct." So that authority, says Mr. Bossino, decides that in England there is a defence of necessity of circumstance on a charge of careless driving. The judgment of the court was expressed in the following manner (*ibid.*, at 1513):

"The important factor is that the jury or the fact finding tribunal should be clear that it is possible in an appropriate case to take

account of the reasons for the driving, when those reasons do or may amount to grounds which give rise to the defence of necessity or duress of circumstances. We express the matter in that way, because it is quite clear that unless the circumstances are such as to give rise to that defence, then the present problem does not arise. We would hold that it is better to take the view that necessity is available as a defence, in an appropriate case, so that the position will be plain to the jury or to the fact finding tribunal."

12 Mr. Bossino submits that the bench failed to consider this point. The present appeal concerns facts in a rare case where exceptional circumstances existed which are not likely to be encountered very often, but they did arise and should have been considered, *e.g.* the ages of Mr. and Mrs. Fuzeta and that Mrs. Fuzeta is short of one kidney and is a serious dialysis patient, with sudden pain and the need for toilet relief. The three requirements for the application of the doctrine of necessity are stated in 1 *Stone's Justices' Manual* at 39, para. 1–307 (2002):

"(i) [T]hat the act was necessary to avoid inevitable and irreparable evil; (ii) that no more should be done than was reasonably necessary for the purpose to be achieved; and (iii) that the evil inflicted was not disproportionate to the evil avoided.

In order to establish a defence of necessity, the causative feature of the defendant's committing the offence must be extraneous to the defendant himself so that the defence of necessity does not extend to where the subjective thought processes and emotions of the accused operated as duress."

These exist in the present appeal. I understood Mr. Bossino to submit that necessity or duress of circumstances can arise from wrongful threats or violence to another, or other objective dangers threatening the accused or others, and in the circumstances of the present appeal the appellant committed the offence in circumstances in which his belief that his wife was suddenly severely ill and needed attention was objectively reasonable. The evil to be avoided has to be serious, the threshold for that being a matter for the court to have assessed in the circumstances and in his submission the evil in this case was serious enough. But the court did not consider this point at all.

13 For the Crown, Mrs. Peralta reminds the court that on the facts of this case the U-turn executed by the appellant on the pelican crossing constituted a departure from the standard expected from the reasonable, prudent and competent driver for the following reasons:

(a) The U-turn could have been safely executed in several other areas a few metres further on—a fact the court with its local knowledge would have known.

(b) The appellant's reply to P.C. Anson to the effect that he thought it was a turning at a cross-roads.

(c) He was not aware that he was on a pelican crossing.

(d) This is indicative of lack of concentration of the appellant as the driver.

14 The only available defence was that of duress of circumstances and she points to 1 *Stone's Justices' Manual* at 39, para. 1–307 (2002). That defence, she submits, is put in doubt by the fact that Mr. and Mrs. Fuzeta immediately thereafter went across to Spain on foot and came back after doing their shopping. That indicates there was really no emergency. Mrs. Peralta refers to *D.P.P.* v. *Rogers* (3) ([1998] Crim. L.R. at 203):

> "A person does an act under duress of circumstances if—
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> (a) he does it because he knows or believes that it is immediately necessary to avoid death or serious injury to himself or another, and
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> (b) the danger that he knows or believes to exist is such that in all the circumstances (including any of his personal characteristics that affect its gravity) he cannot reasonably be expected to act otherwise."

15 She also refers to the case of *R.* v. *Cairns* (6), where the following principles were approved ([1999] 2 Cr. App. R. at 141):

> "The principles may be summarised thus. First, English law does, in extreme circumstances, recognise a defence of necessity. Most commonly this defence arises as duress, that is pressure upon the accused's will from the wrongful threats or violence of another. Equally, however, it can arise from other objective dangers threatening the accused or others. Arising thus it is conveniently called 'duress of circumstances'.
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> Secondly, the defence is available only, if, from an objective standpoint, the accused can be said to be acting reasonably and proportionately in order to avoid a threat of death or serious injury.
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> Thirdly, assuming the defence to be open to the accused on his account of the facts, the issue should be left to the jury, who should be directed to determine these two questions: first, was the accused, or may he have been, impelled to act as he did because as a result of what he reasonably believed to be the situation he had good cause to fear that otherwise death or serious physical injury would result? Second, if so, may a sober person of reasonable firmness, sharing the characteristics of the accused, have responded to that situation by acting as the accused acted? If the answer to both those questions

> was yes, then the jury would acquit: the defence of necessity would have been established."

The test, Mrs. Peralta submits, is an objective test. Did the appellant act reasonably in order to avoid death or serious injury and would a reasonable person have acted as he did?

16 On the facts of the present appeal, the defence is not made out. There was no threat of death or serious injury. Mrs. Fuzeta required at most quick access to a toilet. If it had been a serious emergency, the appellant would have left the car there and then to look after his wife. Case law shows that the defence is made out only in cases where the driver is in the position of believing himself to be in extreme danger. In *R.* v. *Cairns* (6) the victim climbed on the bonnet of the accused's car, fell off in front of the accused's car and the accused drove over him. The accused felt threatened by the victim's behaviour and that of a group of persons who chased him. In *D.P.P.* v. *Rogers* (3) the defendant was charged with drink driving. He had left home after a dispute because he feared his neighbour would attack him. The defence failed. In the case of *R.* v. *Backshall* (4), the defendant had been attacked in a violent attack of road rage. In *D.P.P.* v. *Hicks* (2), on a charge of driving over the limit, the defence was that his daughter was taken ill and he intended to drive to a chemist for some Calpol and it was held that the facts got nowhere near any threshold of necessity. In the present appeal, there was no threat of death or serious injury to either Mr. Fuzeta or his wife. There was no evidence of serious injury and he did not act as if there was an emergency. And the fact is that the court did consider the point. The clerk's note is "Circumstances concern to your wife does not amount to duress issue."

17 In reply, Mr. Bossino submitted that at the trial, P.C. Anson's evidence was challenged in full and therefore the finding of the court that it preferred the evidence of the appellant means that the respondent may not rely on Anson's evidence at all. There is a lot of conjecture on the part of the respondent; what should he have done, where should he have turned to go round into the airport car park? He submitted that what Mr. Fuzeta did was a reasonable thing in the circumstances as they were and these were that he was surrounded by cars in front and behind him. He could not turn right because there was a queue of cars to his right. He could not go forward, but he could turn left. And it is true that the cases referred to by the respondent dealt with fear of serious injury or death, but it is plainly good law that (a) the injury need not be to oneself; and (b) if a defence of duress of circumstances is raised, it must be considered. Here, the emergency was to his wife, an emergency which arose as they were driving and it was a true emergency in that his wife was a seriously ill woman. The fact that she recovered soon after and they were able to continue to go into Spain does not take away from the fact that the emergency had arisen and had to be dealt with.

18 I think I have set out counsel's submissions in a manner which does not misinterpret what they have put to me. It goes without saying that I accept the law as laid out by Evans, L.J. in the *Backshall* (4) case. Duress of circumstances is a defence on a charge of driving without due care and attention (*i.e.* careless driving). I see nothing in *Backshall* which compels me to water down the need to require that these be circumstances which suddenly give rise to a fear of serious injury arising. But of course it is for the tribunal of fact (in the present appeal the bench is judge of fact and law), once the defence is raised, to consider whether the facts stated by the defendant to have caused him to fear the evil are accurate Then it should consider whether those facts bore on the defendant's mind, *i.e.* that he believed them to be so, then that such belief could reasonably be held and lastly in the present appeal whether the evil was so serious that serious physical injury would result.

19 The point in the present appeal is, did the court consider the issue properly? The clerk reports it as saying "circumstances concern to your wife does not amount to duress issue." That shows the court did consider the matter of duress. But how and in what manner? I am of the opinion that Mr. Bossino's critique that the court used two limbs independently is not made out. The court can approach its decision by taking individual strands and putting them together so long as on the whole it does so. But to accept that it considered the point does not necessarily mean that it did so properly. If the words mean "we objectively feel that the factors in this case put forward as a defence of duress are not made out," I think the court would be wrong because it would be using its own objective test. The proper approach is: "Do the facts in this case reasonably believed by the defendant reasonably justify him in his action to avoid serious injury to his wife?" It is the appellant's reasonable belief objectively viewed on the facts which is in issue.

20 The court was at a disadvantage as there was no evidence put forward by the defence of the exact medical nature of the emergency. There was no medical evidence of her physical condition and the effect of the loss of a kidney and of dialysis treatment. All this was stated by the appellant when he gave his evidence and to that extent the evidence is unsatisfactory. As a result the court could not have tested the reasonableness of Mr. Fuzeta's belief of the emergency. However, it seems fairly clear that the court did find the appellant was a credible and honest witness. I will assume for the purpose of this appeal that it did so and that the appellant was fearful in anticipating that Mrs. Fuzeta was heading for a possible serious injury. For the court to say that "circumstances concern to your wife does not amount to duress issue" misses, in my opinion, the precise point because it *does* affect the duress issue. If the court had recorded that the circumstances do not amount to duress (and therefore

the appellant could not have objectively have held that belief) that would have been a finding of fact with which it would be impossible to quarrel and the court's decision would have been plain and in my view unappealable. But I am left in a doubt as to whether the court applied its mind to the proper question.

21 I therefore consider that the verdict should be set aside on the grounds that in all the circumstances it is unsafe and I allow the appeal.

Appeal allowed.