Coercion and the criminal code

by Beth Wild & Rex Wild (1)

The Criminal Code of the Northern Territory contains a most interesting provision which has, to the writers' knowledge, been rarely used in litigation.

Section 41 provides:

(1) *When a person who has unlawfully killed another under circumstances that, but for this subsection, would have constituted murder, did the act or made the omission that caused death because of coercion of such a nature that it would have caused an ordinary person similarly circumstanced to have acted in the same or a similar way, he is excused from criminal responsibility for murder and is guilty of manslaughter only;*

(2) *The excuse referred to in subsection (1) does not extend to a person who has rendered himself liable to have such coercion applied to him by having entered into an association or conspiracy that has as any of its objects the doing of a wrongful act.*

Coercion is defined in s.1 to mean:

... physical or mental pressure forcing the person said to be coerced to do what he would not otherwise do.

Section 41 immediately follows the section providing the *excuse* for an act done because of duress. Both these sections are contained in Division 4 (*Excuse*) of Part II of the **Code** which deals with *Criminal Responsibility*. Coercion, as will be noticed, has the effect of reducing what would otherwise be murder to manslaughter. It therefore has a similar effect to what are termed the *partial defences* of provocation (s.34(2)) and diminished responsibility (s.37).

Although the section has been little, if at all, used in the Territory we have a strong pointer to the work that it was expected to do. The Criminal Code of the Northern Territory was drafted by leading Queensland criminal lawyer Des Sturgess. In his explanatory letter to the Attorney-General, dated 12 August 1983, he explained the drafting of what became sections 40 and 41 in the following terms:

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The provision dealing with duress and coercion make significant changes to existing law. The defence of duress has been carefully contained for it was seen as a defence that can be easily fabricated, indeed, prepared before the commission of an offence. However, coercion, which may reduce murder to manslaughter and thus give to the court a discretion in relation to penalty, has been defined so that it will have a wide application particularly in the circumstances of the Territory where, not infrequently, there occur cases of homicide committed by Aborigines who see themselves as compelled by tribal law to avenge a death by killing a real, or imagined, wrongdoer - so-called pay-back killings. Additionally, it is intended that coercion may reduce murder to manslaughter where a person deliberately and upon reflection kills another, but in circumstances where he has been brought to that act by pressure accumulated from a long series of provocations.

It will be immediately seen that the partial defence of coercion could have a significant role to play in cases either involving Aboriginal pay-back or domestic violence. These uses of the coercion defence will be examined further in the course of this short paper.

It is significant that the excuse of coercion may reduce murder to manslaughter, whilst the excuse of duress may never do so; (unlike the common law situation, as far as the latter is concerned).

Coercion constituted a common law presumption that if a woman committed an offence jointly with her husband, or in his presence, he had coerced her into doing it and she should therefore be acquitted unless the prosecution rebutted the presumption. This rather old-fashioned and quaint notion has now largely disappeared from the common law jurisdictions by statutory abrogation. Its re-introduction in the criminal law of the Northern Territory is, of course, in a completely different guise. The spousal coercion envisaged by Sturgess may, so it seems, have been the very cause of that spouse's demise, in circumstances where a *long series of provocations* (either physical or mental) had forced the hand of the surviving spouse; not quite what the original concept of coercion concerned. It is interesting, of course, that the draftsman's intentions in this regard have probably been overtaken by curial interpretations of *long-term* provocative behavior (culminating in a *final straw* situation).

It was, moreover, on this latter basis that the Crown had originally accepted a plea at the first *Secretary* trial. It may be recalled that the trial judge in that matter had indicated that he would not leave self-defence to the jury in what was a so-called *battered-wife* situation. The Crown then accepted a plea to manslaughter, on the basis that the provocative conducted of the deceased over a long period of time partially excused the wife's conduct. (s.34 of the Code).

There was at the first trial, and in the subsequent Court of Criminal Appeal hearing, no consideration of the effect of section 41 (2).

The relevance of a possible defence pursuant to s.41 in similar cases should not be overlooked. Of course, in the **Secretary** case itself, the primary issue was whether self-defence was open. At the second trial the defendant succeeded in having this put before the jury and was acquitted outright.

Coercive Payback

A further question arises; what use ha

been made of s.41 in cases where the defendant has raised *payback* as the *justification* (that word not here used as in the self-defence provisions of the Code - ss.27 & 28)? That is, an attempt has been made to argue compliance with Aboriginal customary law as a defence? It would appear that again the section has been overlooked and courts have relied on inadequate provisions such as duress and provocation to address the situation where homicide occurs as a result of a compelling customary law.

It was suggested by the trial judge in ***R v Warren Coombes and Tucker*** (3) that the defence of duress was unavailable due to the effect of Mason CJ's comments in ***Walker v NSW*** (4). The trial judge referred to the passage: *Australian criminal law does not accommodate an alternative body of law operating alongside it.* The South Australian Court of Criminal Appeal rejected this argument and held that while in this case the evidence to support the defence was not available, nevertheless *the trial judge was wrong in saying that the decision in* ***Walker*** *precludes acceptance of the defence.* The judges accepted the argument that if the evidence demonstrated that the applicants believed that they would be severely beaten or killed if they did not punish the victim, then they had acted under duress for the purpose of the general criminal law. Section 40 of the ***NT Criminal Code*** would not support such a defence because of sub-section (2)'s limitation of the duress defence to comparatively minor assaults.

The defence of duress will only cover a limited number of scenarios where death has occurred as a result of the application of customary law. It is not available for example where the accused carries out the act because she/he believes in the legitimacy of the law. Section 41 will more aptly apply as it allows the court to comprehensively consider the context in which the killing is committed – taking into account the mind of the accused further than simply posing whether or not threats of physical harm had overborne his/her will. Operating only as a partial excuse, it prevents the situation where an Aboriginal person may be completely exonerated for carrying out payback killings which are sanctioned by Aboriginal law. (An extreme example of this may be illustrated by a man who kills his wife when imposing traditionally accepted *discipline* for *marital misconduct* (5).

A detailed examination of the complex issues which arise when Aboriginal law collides with the accepted Australian law was conducted in 1986 by the Australian Law Reform Commission. The use of coercion (as provided for in s.41) as a defence, although not apparently raised in Territory Courts, would seem to achieve the recommendation of the ALRC's report (No 31, 1986). Paragraph 453 states:

It should be provided that, where the accused is found to have done an act that caused the death of the victim in the well-founded belief that the customary laws of an Aboriginal community to which the accused belong required that he do the act, the accused should be liable to be convicted for manslaughter rather than murder.

Rex Wild, Director of Public Prosecutions.

We would be interested to hear the views of other readers of ***Balance*** in respect of these, to us, interesting concepts.

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(2) R v Secretary (1996) 5 NTLR 96.
(3) Unreported decision of County Criminal Appeal of South Australia, SCCRM 95/529 judgment no. 5543, 19 February 1996.
(4) (1994) 69 ALJR 11.
(5) McRae H, Nettheim G & Beacroft L. Aboriginal Legal Issues. 1991 Law Book Company. NSW p.269.

Cross-vesting - no worries?

There is no doubt that the decision in Re Wakim striking down the Cross-vesting scheme in relation to corporations law (but of more general import) also prevents the NT from conferring jurisdiction on a federal court. But does it matter? The Solicitor General Tom Pauling QC is trying to find out if there is a real (rather than theoretical) problem to fix.

Would any practitioner having difficulty because of the Re Wakim decision inform Jenni Daniel-Yee on: 8999 5391.

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cross-examine will be a matter for the Court. That decision will depend upon what the Court considers is necessary for the purpose of doing justice.

It should be noted that there is no prohibition at common law or under the *Evidence Act* on the calling of evidence from subsequent witnesses that contradicts in part testimony given by an earlier witness for the party. This will occur in many cases where witnesses have different recollections of the order of events or the precise nature of what occurred. To do so is not to discredit the earlier witness in the relevant sense, *R v M.* (1980) 2 NSWLR 195 at 210.

The Advocacy articles are written by the Hon. Justice Trevor Riley of the Supreme Court of the Northern Territory.