Case No: 9707785/S1-9708062/Y5-9708063/Y5-9708064/Y5-9708068/Y5-9708070/Y5

Neutral Citation Number: [1998] EWCA Crim 3528
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London WC2

Date: Thursday 17th December 1998

B E F O R E :
THE VICE PRESIDENT
(LORD JUSTICE ROSE)

MR JUSTICE ROUGIER
and
MR JUSTICE JOHNSON
- - - - - - - - - - - -
R E G I N A

- v -

MUSTAFA SHAKIR ABDUL-HUSSAIN
SAHEB SHERIF ABOUD
HASAH SAHEB ABDUL HASAN
MAGED MEHDY NAJI
MOHAMMED CHAMEKH MUHSSIN
ADNAN HOSHAN
SABAH NOURI NAGI
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MR M MANSFIELD QC appeared on behalf of the Appellant ABDUL-HUSSAIN
MR M MASSIH appeared on behalf of the Appellant ABOUD
MR M MASSIH appeared on behalf of the Appellant ABDUL HASAN
MR A RIZA QC appeared on behalf of the Appellant NAJI
MR L KERSHEN QC appeared on behalf of the Appellant MUHSSIN
MR A NEWMAN QC appeared on behalf of the Appellant HOSHAN
MISS F BOLTON appeared on behalf of the Appellant NAGI
MR N HILLIARD appeared on behalf of the Crown
- - - - - - - - - - - -
JUDGMENT

Thursday 17th December 1998

THE VICE PRESIDENT: At the Central Criminal Court, on 31st October 1997, these appellants, apart from Sabah Nagi, were convicted by the jury after a retirement of two days and by a majority verdict of 10 to 2 of hijacking, contrary to section 1(1) of the Aviation Security Act 1982. Subsequently, they were sentenced, in the case of Hoshan, to 9 years' imprisonment, in the cases of Aboud and Muhssin, to 7 years' imprisonment, and, in the cases of Hasan, Abdul-Hussain and Naji, to 5 years' imprisonment. The jury failed to reach a verdict in relation to Sabah Nagi, who was charged with conspiracy with the others to hijack. Subsequently, on 20th January 1998, at a retrial, he was convicted by the jury before His Honour Judge Capstick and sentenced to 30 months' imprisonment, a sentence which he has now served. All the appellants appeal against conviction by leave of the Single Judge and all, save Sabah Nagi, renew their applications for leave to appeal against sentence following refusal by the Single Judge.

The appellants were all Shiite Muslims from Southern Iraq. Save for Hoshan, all had offended against the laws or regulations of the Saddam Hussein regime, from which they were fugitives. In the summer of 1996, they were living in Sudan and feared return to Iraq at the hands of the Sudanese authorities. Hoshan had a valid permit to reside in the United Kingdom and would have become entitled to a right of permanent settlement. He was free to travel to Middle Eastern countries and elsewhere. He helped Iraqis obtain false papers and in the bribing of officials. He appeared to have access to funds for that latter purpose.

In April 1996, he was in Jordan to assist a family called Macki, the eldest daughter of which he had arranged to marry. In Iraq, the father and two brothers in that family had been executed in horrifying circumstances, and all the women of the family had been imprisoned and tortured. They went with him, that is Hoshan, to the Sudan, in the belief that it would be easier to escape from that country. Hoshan believed that, because of his involvement in helping others, he was at risk of detection and deportation to Iraq, where he would probably be executed. Abdul-Hussain was under sentence of death, passed in Iraq in 1991, in his absence, following a confession extracted by torture. In 1996, that sentence of death had been reiterated. Aboud, Hasan and Maged Nagi had taken part in the Interfada, that is the unsuccessful uprising in Southern Iraq after the Gulf war. Aboud and Hasan had escaped from jail in Iraq. They had previously been hiding in Jordan. Muhssin had avoided service in the Iraqi army in the Gulf war and had been sentenced, in his absence, to 10 years and a very large fine for taking and selling a lorry. He believed that, if he were

caught, he would be hanged at the Iraqi border.

Abdul-Hussain was related to the family of Macki. Maged Naji met Hoshan in Jordan. They feared detection by Iraqi agents. Sabah Naji had been deported from Iraq in 1995 and was on a black list there and believed that, if he returned, he would face death.

The group made several attempts to leave Sudan using false passports. These were on each occasion rejected at Khartoum Airport but returned to them. Without success, they tried to obtain visas for other European countries. Some three weeks before the hijack to which, in a moment, we shall come, Sudanese security personnel had visited their apartment and taken away their passports. Hoshan had managed to get the documents back, but he was warned by the Sudanese that he would need to take steps to resolve the position of the group in Sudan. Hoshan also feared that the consequence of United Nation sanctions was that Khartoum airport might be closed.

On 8th August 1996, several members of the group watched a film about a hijack, which prompted an idea in their minds to hijack an aeroplane. Hoshan (who was the accepted leader) formulated the plans. Hasan had arrived in Khartoum in June 1995 and been sheltered by friends. He was making artificial flowers to earn money. He met Aboud a month before the hijack. Aboud had tried, unsuccessfully, to get across the border to Libya. The two of them met Hoshan and agreed to join his scheme. Muhssin had been in the Sudan longer than anyone. He had succeeded in going to the Yemen, but had found himself unable otherwise to leave the Sudan. He had been approached to work as a spy for the security police, but he declined to do so and had been arrested as an overstayer. In July 1996, he was ordered to leave Sudan within a month. He agreed to join the scheme.

Everyone, by the end of August 1996, was an overstayer in Sudan. Hoshan alone did not have forged documents. All feared deportation to Iraq, or being handed over to the Iraqi embassy. All feared that, if either of those things happened, the next step would be torture and probable death.

At about 4 pm on 27th August 1996, at Khartoum Airport, the appellants boarded a Sudanese airbus bound for Amman in Jordan. They were equipped with plastic knives and plastic mustard bottles filled with salt. The plastic bottles, once on board, were wrapped in black tape and modified with plasticine to make them look like hand grenades.

Once the flight was in Egyptian airspace, Muhssin seized hold of an airhostess and threatened her with a plastic knife. He was overpowered by security officials. They, at that moment, thought he was acting on his own, but, at that

stage, Maged Naji produced one of the imitation grenades and threatened to blow up the plane. Thereupon, Muhssin was released. The captain surrendered control of his aircraft to the appellants, and, thereafter, Muhssin remained on the flight deck with him holding a knife to his back.

Wholly independently of the activities of the appellants, there had gone on board a butcher who took with him his professional knives. They were placed elsewhere in the plane. Hoshan took possession of those knives and distributed them among the appellants. Several of the passengers who were believed to be security officials were tied up. One passenger who resisted was stabbed in the arm, and the judge concluded that Aboud was responsible for that injury.

Sabah Nagi declined to participate in the hijack. In particular, he refused to use his tie to tie up the airhostess. In consequence, he was himself tied up and gagged.

The intention was to divert the plane to London, but it had insufficient fuel and permission was given to land at Larnaca in Cyprus. There, the appellants declined to release the women and children. The atmosphere on board was very tense. Hoshan pretended to instruct the others to blow up the plane if there was any movement. Once it had been refuelled and permitted to take off, however, the atmosphere became conspicuously more calm. Eventually, it landed at Stanstead Airport, in the early hours of 28th August, 12 hours after leaving Khartoum.

After negotiations for a period of some eight hours, the passengers and crew were released and the appellants surrendered.

In interview, Hoshan made full admissions of the plan to hijack the plane. He described how he had been living in England, trying to get his fiancee and her family out of, initially, Jordan and then the Sudan. He gave details about meeting the others, fleeing from the Iraqi authorities and the hijack plans. He described his role during the flight, though he denied responsibility for the stabbing. His account was largely supported by the other passengers and crew.

Muhssin denied taking part at first, but then he described how the plans were made and what had happened on board. He had the advantage of having been in the Iraqi air force, so he knew about aeroplanes and flight procedure, and that is why he had stayed with the captain.

Abdul-Hussain said he met the others only 10 days before, but he was a cousin of Hoshan. He had seen the film of the hijack and he had taken the tape on board to manufacture the imitation grenades. He said that he had carried a knife but did not have a grenade. He helped to tie up passengers. Aboud admitted he had taken part in the hijacking and had

carried a knife. Hasan did not answer any questions. Maged Naji at first declined to answer, but then he said he had been party to the planning but was against the hijack, on the basis that they would be betrayed. He denied swearing an allegiance to the plan and said he had simply intended to travel to Amman as an ordinary passenger. When Muhssin was overpowered, he lost his temper, jumped up and shouted. But he did not have a grenade and he denied having threatened to blow up the plane. Afterwards, he said, he fell asleep, although he did sit by a door with a grenade at Hoshan's request. He said he had been facing execution in Iraq since in 1991.

Sabah Naji said that he had fled from Iraq in 1994, first to Jordan, and then to the Sudan. So far as the purchase of his air ticket was concerned, which was a central aspect of the case against him, he denied that Hoshan had bought it for him. He said it had been bought by a Sudanese woman.

He said he was hoping to find work in Jordan. He was not a hijacker, but he knew three of them. At his retrial, Hasan gave evidence against Sabah Naji and said, indeed, that it was Sabah Naji who invited him, Hasan, to join the hijacking plan. There was evidence that Hoshan had bought all the tickets and Sabah Naji's tickets was numerically in the midst of the tickets which Hoshan had bought.

All the appellants, on arrival in this country, sought political asylum.

It was accepted that, save in the case of Sabah Naji, all the appellants had hijacked the airliner. But it was said that the reason they had done so was as a last resort to escape death, either of themselves or of their families, at the hands of the Iraqi authorities. It is unnecessary for present purposes to rehearse the evidence which each of them gave before the jury. In substance, it accorded with the answers which they had given in interviews.

At the close of all the evidence, the trial judge, having heard submissions by counsel for the Crown and on behalf of all the appellants, ruled that the defence of necessity or duress of circumstances would not be left to the jury. It is to be noted that the submissions to the judge differed in an important respect from the submissions made to this Court. Until Mr Newman raised the point at a very late stage, no distinction was drawn by counsel on either side between imminence and immediacy. On the contrary, counsel for the Crown referred to imminence and immediacy as being effectively the same. Mr Newman's submission in terms referred to the "concept of continuing immediacy" and focused on the word immediacy, rather than imminent. Perhaps unsurprisingly, therefore, the judge treated imminent and immediate as synonymous. The possibility that spontaneity introduced a third concept does not seem to have been addressed by

anyone.

The relevant part of the judge's ruling starts in these terms, at page 13A of the transcript:

> "On this aspect of the matter a considerable body of, if I may say so, convincing evidence has been called on behalf of the defendants to demonstrate the cruel, unjust and tyrannical nature of the Saddam Hussein regime in Iraq. Evidence has been called of summary executions, either without any or no more than a semblance of a trial of arbitrary imprisonment in conditions of extreme hardship coupled more often than not with torture of the most revolting and horrifying kind for no greater offence than that of opposition to the current regime in power.
>
> The evidence of the defendants themselves in this regard is supported not only by independent expert evidence but also by the country briefs of the Immigration and National Directorate of the Home Office which have been placed before the jury by agreement between counsel on all sides.
>
> As a result of that opposition five of the six defendants, for whom this ruling applies, and those accompanying them, founds themselves in the Sudan in the summer of 1996 as fugitives from the regime in Iraq and in fear of being returned there should the Sudanese authorities have reason either to deport them themselves or to turn them over to the representatives of the Iraqi Government in the Iraqi embassy for the same purpose."

The judge referred to the circumstances of the individual defendants, and went on at page 19A:

> "On about 8th August various members of the group, including Adnan, saw a foreign film on television about hijacking. This gave him the idea that this might present a solution to their problem and two days later another of his contacts, a security officer known as Mohammed Salah, also suggested the same idea and further suggested that he might be able to help them get on the aircraft and to provide them with a gun. From then on Hoshan, who accepts that he was at all times the leader of the group, began to formulate the scheme to hijack a Sudanese Airways aircraft."

At page 20F, the judge continued:

> "In general terms all these six defendants and their companions were overstayers in the Sudan and in the case of all but Hoshan on forged documents. They feared that at any time they might be arrested by the Sudanese authorities and that instead of being merely fined for overstaying and giving a limited period to leave the country that they would either be deported direct to Iraq or handed over to the Iraqi embassy with the same result. If that occurred they all feared that they and their families would receive savage punishment including, in all probability, execution.
>
> Nevertheless, in my judgment there was at no time any sufficient connection between the danger feared by the defendants and their families on the one hand and the criminal act of hijacking the aircraft on the other of such a close and immediate nature as is established by the authorities as being required to lay the basis for the defence of necessity. There was no immediate threat of death or serious personal harm or, indeed, even of arrest in the meaning of that word which, in my judgment, the authorities I have cited require."

Then, in a passage at page 23B, on which criticism in this Court has been particularly focused, he said this:

> "The established limits of the defence of necessity involve, in my judgment, a connection between the threat and criminal act so close and immediate as will give rise to what is virtually a spontaneous reaction to the

physical risk arising. I cite Cole and the example given which I have cited in Loughnan.

I am quite clear that the situation in which these defendants found themselves falls short of that very strict requirement. The connection relied upon on behalf of the defendants requires, as it seems to me, a series of contingent and consequential steps. First detection. Secondly, a decision by the Sudanese authorities to arrest, allowing always for the possibility of bribery. Third, having been arrested a decision to deport as opposed merely to giving one month's notice to leave the country. Fourthly, the actual act of deportation itself, remembering that on at least two occasions two of the defendants, when under an order of deportation in Jordan back to Iraq, had contrived by corruption to change the destination from Iraq to the Sudan. Fifthly, having arrived in Iraq, execution there."

In relation to Maged Naji, he concluded additionally, at page 27B, as follows:

"...it is unarguable but that he had voluntarily boarded the plane in the knowledge that a hijack was to be attempted and which bore a substantial risk of failing, thus deliberately exposing himself to the very pressures that he now seeks to rely upon. If the voluntariness of his boarding the aircraft is challenged, as he himself sought to challenge it in evidence, then the focus switches back to the position he was in before he boarded.

In that respect, as I have already held, no distinction is to be drawn between the position he describes as being in and that of his co-defendants, and I have already ruled that that position at that stage was not capable of giving rise to a defence of necessity.

Accordingly, whichever way one views his position, therefore, Maged Naji also is not in a position to avail himself of that defence."

The judge added the further comment at page 28D:

"It has never been clear to me how any of these defendants could justify continuing with their hijack - which is, of course, a continuing offence so long as they retain control of the aircraft - once they had landed for refuelling in Cyprus."

It is, however, clear from a subsequent exchange between the judge and counsel that the judge did not base his ruling on this point, for it was not one on which the prosecution then chose to rely.

Mr Allen Newman QC, on behalf of Hoshan, in submissions adopted by counsel on behalf of all the other appellants, submitted to this Court that the judge misdirected himself as to the law and was wrong to withdraw the defence of duress from the jury's consideration. Although there must be a nexus between the threat of death or serious injury and the criminal act, this nexus arises, he submitted on the authorities, from imminent peril not immediate threat or "a virtually spontaneous reaction". Imminent means impending threateningly, hanging over one's head, ready to overtake one, coming on shortly. Immediate means without intermediary, proximate, nearest, next. Spontaneous, means voluntarily, without thought or premeditation, without external stimulus.

The correct test, he submitted, is set out in

R v Martin (1989) 88 Cr App R 343 at 345. Simon Brown J, giving the judgment of the Court, said this:

> "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.'
>
> 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.
>
> 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? Secondly, 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 acquit: the defence of necessity would have been established."

R v Hudson and Taylor (1971) 56 Cr App R 1, Mr Newman submitted, is clear authority that, although there must be a threat operating on the actor's mind, a threat of future injury may suffice to support the defence of duress.

In Hudson and Taylor, at page 4, appear the following passages:

> "It is clearly established that duress provides a defence in all offences including perjury (except possibly treason or murder as a principal) if the will of the accused has been overborne by threats of death or serious personal injury so that the commission of the alleged offence was no longer the voluntary act of the accused."

A little later:

> "It is essential to the defence of duress that the threat shall be effective at the moment when the crime is committed. The threat must be a 'present' threat in the sense that it is effective to neutralise the will of the accused at that time."

Then:

> "Similarly a threat of future violence may be so remote as to be insufficient to overpower the will at the moment when the offence was committed, or the accused may have elected to commit the offence in order to rid himself of a threat hanging over him and not because he was driven to act by immediate and unavoidable pressure. In none of these cases is the defence of duress available because a person cannot justify the commission of a crime merely to secure his own peace of mind.
>
> When, however, there is no opportunity for delaying tactics, and the person threatened must make up his mind

> whether he is to commit the criminal act or not, the existence at that moment of threats sufficient to destroy his will ought to provide him with a defence even though the threatened injury may not follow instantly, but after an interval."

Hudson and Taylor, submitted Mr Newman, was approved by the House of Lords in DPP v Lynch [1975] AC 417. Lord Morris of Borth-y-Gest at 674H to 675F, Lord Wilberforce at 682B, and Lord Edmund-Davies at 706A and 708D, all referred to Hudson without adverse comment, and Lord Simon of Glaisdale at 686B assumed that it was correct in holding that threat of future injury may suffice.

In R v Cole (unreported, Court of Appeal Criminal Division, 14th February 1994) on which the trial judge relied, Simon Brown LJ, giving the judgment of the Court, having referred to the Australian authority of R v Loughnan [1981] VR 443, in which the majority judgment draws no distinction between 'imminence' and 'immediacy', and all three judges refer to "imminent peril" as an essential element of the defence of necessity, said this at page 10:

> "Whichever formulation one applies, in our judgment it is perfectly plain that the present appellant cannot hope to bring himself within it. Considerations of proportionality aside, there was lacking here the situation of imminent peril which on any view is a necessary precondition to the defence properly arising. True, at one point of his interview with regard to the second robbery the appellant said: '..... I had no choice really.....I couldn't go home that night again.....I had to have the money around that night by six o'clock.' Even that, however, the very high water mark of the appellant's case on urgency, in our judgment falls short of the degree of directness and immediacy required of the link between the suggested peril and the criminal offence charged. Certain it is, as the trial judge pointed out, that the connection between threat and criminal act is by no means as close and immediate here as it was in Willer, Conway and Martin, the offence in each of those cases being virtually a spontaneous reaction to physical risk arising."

At page 12, Simon Brown LJ said this:

> "...until all aspects of this defence have been put on to a statutory footing, including as presently envisaged shifting the burden of proof with regard to it from the Crown to the accused, we believe that duress should be rigidly confined to its established present limits."

Mr Newman submitted that the passage in the judgment in Cole, at page 10, was obiter and, in so far as it is inconsistent with Hudson and Taylor, it was wrong and should not be followed by this Court, which should follow Hudson and Taylor. Mr Newman accepted that imminence of peril is initially a question of law for the judge; but the evidence in the present case, he submitted, was such that, whether the judge misdirected himself or not, the jury should have been permitted to determine "whether threats were so real and were at the relevant time so operative, and their

effect so incapable of avoidance, that, having regard to all the circumstances, the conduct can be excused", per Lord Morris of Borth-y-Gest in Lynch at 675F. The analysis of principle in the speeches of the majority in Lynch, although not the actual decision as to the availability of the defence of duress to a person charged as an aider and abettor to murder, was approved by the House of Lords in Howe [1987] AC 417.

It is necessary, briefly, to refer to some of the submissions on behalf of the other appellants.

Mr Mansfield QC, for Abdul-Hussain, stressed that, as this appellant was the subject of two death sentences in Iraq, had his wife and children with him, had only recently reached Sudan in the course of flight, and was known by the Sudanese authorities to have a forged passport, his case, as the trial judge accepted, was the strongest on nexus, and should have been left to the jury, submitted Mr Mansfield, whatever the precise legal test. Mr Mansfield criticised the trial judge's reference, at page 23D of his ruling, to the "very strict requirement" in the light of the highest authority, that duress is "an extremely vague and elusive concept", see per Lord Simon of Glaisdale at 686A in Lynch, approved in Howe at 453G.

Mr Mansfield also criticised the five contingent steps identified by the trial judge, at page 23 of his ruling, as disconnecting the hijacking from the threats. Abdul-Hussain had already been detected in the Sudan as having forged documents. The judge's reference to decisions to arrest and deport, the act of deportation from the Sudan, and execution in Iraq suggests that duress would not become available until the firing squad were raising their rifles. This demonstrates, submitted Mr Mansfield, that "a virtually spontaneous reaction" cannot be the proper test, and the "instinctive reaction", to which the judge referred in summing up the matter to the jury, is even less appropriate.

Mr Kershen QC, for Muhssin, submitted that the immediacy referred in R v Dawson (1978) VR 536 and Loughnan, and by Simon Brown LJ in Cole, refers to the immediacy of the threat of coercion, that is, there must be a present threat operating on the mind of the victim, although implementation of the threat may be delayed, as in Hudson and Taylor. A present threat, not to be carried out immediately, may give rise to duress if it is impossible or fruitless to invoke legal protection. Because the imminence of peril depends on a variety of factors, including the number, strength and status of those threatening, the hostility of the present environment and the prospects of escape to a friendly environment, it is the jury not the judge who should assess these. There will always be, submitted Mr Kershen, contingencies between threat and offence. In Martin, indeed, where the defendant drove while disqualified in response to his wife's threat to commit

suicide, such contingent steps included the availability of a son who was qualified to drive.

Mr Riza QC, on behalf of Maged Naji, submitted that the judge was wrong to categorise him as a volunteer, within the observations of Lord Lowry in

R v Fitzpatrick [1977] NILR 20 at 30G and 31D, requiring moral innocence before duress can be invoked. Knowledge when he boarded the plane that a hijacking would be attempted which would probably fail did not give rise to a criminal act and was an insufficient basis on which to say that Naji had deliberately exposed himself to the risk of threat. In any event, voluntariness should have been left to the jury to decide. He referred to R v Shepherd (1988) 86 Cr App R 47, at page 51, where reference is made to R v Sharp 85 Cr App R 212, in support of the proposition that a question of voluntary exposure is properly for the jury.

For the Crown, Mr Hilliard emphasised the lack of precision in relation to the principles of duress, to which the House of Lords have drawn attention in Howe and Lynch. He also referred to the calls made three times in recent years by differently constituted divisions of this Court for legislation to define the defence: in Cole, R v Hurst [1995] 1 Cr App R 82 and

R v Baker and Wilkins [1997] Crim LR 497. He accepted that imminence and immediacy do not have the same meaning, and that imminent peril is an element in both forms of duress. But, he submitted, the move away from immediacy in Hudson and Taylor, which was a case of duress by threats, should not be extended to duress of circumstances. Cole was a duress of circumstances case, in that money had to be repaid within 2 hours after the robbery, and the observations of the Court, at page 10, can therefore not be regarded as obiter. He submitted that, in this passage, the Court was drawing a distinction between imminent peril applicable to both forms of duress, and immediacy and spontaneity, which limits duress of circumstances. He relies on a passage in Loughnan at page 448:

"...if there is an interval of time between the threat and its expected execution it will be very rarely if ever that a defence of necessity can succeed."

He too relied on Graham as approved in Howe and reflected in Martin, as being the correct, largely objective, test. He submitted, boldly, that, as a matter of law aircraft hijacking, at least where the majority of passengers are innocent, is in the same category as murder and cannot ever be a proportionate response to any threat, however grave.

More than 70 authorities were placed before the Court. Of these, fewer than one-third were cited, and only a

handful were of helpful significance. In the light of the submissions made to us, we derive the following propositions from the relevant authorities:

1. Unless and until Parliament provides otherwise, the defence of duress, whether by threats or from circumstances, is generally available in relation to all substantive crimes, except murder, attempted murder and some forms of treason (R v Pommell [1995] 2 Cr App R 607 at 615C). Accordingly, if raised by appropriate evidence, it is available in relation to hijacking aircraft; although, in such cases, the terror induced in innocent passengers will generally raise issues of proportionality for determination, initially as a matter of law by the judge and, in appropriate cases, by the jury.

2. The courts have developed the defence on a case-by-case basis, notably during the last 30 years. Its scope remains imprecise (Howe, 453G-454C; Hurst [1995] 1 Cr App R 82 at 93D.

3. Imminent peril of death or serious injury to the defendant, or those to whom he has responsibility, is an essential element of both types of duress (see Southwark LBC v Williams (1971) 1 Ch 734, per Lord Justice Edmund-Davies at 746A; Loughnan, by the majority at 448 and the dissentient at 460; and Cole at page 10).

4. The peril must operate on the mind of the defendant at the time when he commits the otherwise criminal act, so as to overbear his will, and this is essentially a question for the jury (Hudson and Taylor at 4; and Lynch at 675F. It is to be noted that in Hudson and Taylor Lord Parker CJ presided over the Court, whose reserved judgment was given by Widgery LJ (as he then was).)

5. But the execution of the threat need not be immediately in prospect (Hudson and Taylor at 425). If in Cole the Court had had the advantage of argument, as to the distinction between imminence, immediacy and spontaneity which has been addressed to us, it seems unlikely that the second half of the paragraph at page 10 of the judgment which we have cited would have been so expressed. If, and in so far as anything said in Cole is

inconsistent with Hudson and Taylor, we prefer and are, in any event, bound by Hudson an Taylor, as, indeed, was the Court in Cole.

6. The period of time which elapses between the inception of the peril and the defendant's act, and between that act and execution of the threat, are relevant but not determinative factors for a judge and jury in deciding whether duress operates (Hudson and Taylor; Pommell at 616A).

7. All the circumstances of the peril, including the number, identity and status of those creating it, and the opportunities (if any) which exist to avoid it are relevant, initially for the judge, and, in appropriate cases, for the jury, when assessing whether the defendant's mind was affected as in 4 above. As Lord Morris of Borth-y-Gest said in Lynch at 675F in the passage previously cited, the issue in Hudson and Taylor was "whether the threats were so real and were at the relevant time so operative and their effect so incapable of avoidance that, having regard to all the circumstances, the conduct of the girls could be excused."

8. As to 6 and 7, if Anne Frank had stolen a car to escape from Amsterdam and been charged with theft, the tenets of English law would not, in our judgment, have denied her a defence of duress of circumstances, on the ground that she should have waited for the Gestapo's knock on the door.

9. We see no reason of principle or authority for distinguishing the two forms of duress in relation to the elements of the defence which we have identified. In particular, we do not read the Court's judgment in Cole as seeking to draw any such distinction.

10. The judgment of the Court, presided over by Lord Lane CJ and delivered by Simon Brown LJ, in Martin, at 345 to 346 (already cited) affords, as it seems to us, the clearest and most authoritative guide to the relevant principles and appropriate direction in relation to both forms of duress. Subject to questions of continuance (which did not arise and as to which, see Pommell at 615D), it clearly reflects Lord Lane's judgment in R v

Graham (1981) 74 Cr App R 235 at 241, which was approved by the House of Lords in Howe in 458G. It applies a predominantly, but not entirely, objective test, and this Court has recently rejected an attempt to introduce a purely subjective element divorced from extraneous influence (see Roger and Rose, 9th July 1997).

11. Clauses 25 and 26 of the Law Commission's draft Criminal Law Bill do not represent the present law. Accordingly, reference to those provisions is potentially misleading (see the forceful note by Professor Sir John Smith QC [1998] Crim LR 204, with which we agree).

Applying these principles to the present case, we are satisfied that the learned judge was lead into error as to the applicable law. We have considerable sympathy with him. No submissions were addressed to him as to the distinction between imminence, immediacy and spontaneity, and he sought to follow the judgment of this Court in Cole, where, likewise, no such submissions had been advanced.

In our judgment, although the judge was right to look for a close nexus between the threat and the criminal act, he interpreted the law too strictly in seeking a virtually spontaneous reaction. He should have asked himself, in accordance with Martin, whether there was evidence of such fear operating on the minds of the defendants at the time of the hijacking as to impel them to act as they did and whether, if so, there was evidence that the danger they feared objectively existed and that hijacking was a reasonable and proportionate response to it. Had he done so, it seems to us it that he must have concluded that there was evidence for the jury to consider.

We stress that the prosecution did not seek to rely on a want of proportionality or to contend that duress was not capable of applying after the plane had landed at Larnaca.

It follows that, in our judgment, in the light of how he was invited to approach the matter, the judge should have left the defence of duress for the jury to consider. Although the position of some of the defendants differed - in particular, Hoshan held documents which permitted him to travel freely and Maged Naji's case raised an additional argument in relation to voluntariness - we see no reason, for present purposes, to draw a distinction between the defendants. In relation to all of them, the jury should have been permitted to consider duress.

We express no view as to proportionality or the continued availability of duress after Larnaca because, as we have said, these matters were not relied on before the judge and because, more significantly, there is no sufficient material

before us as to the evidence on these matters. In any event, having concluded, for the reasons given, that the judge was wrong to withdraw the defence from the jury, the convictions of the appellants at the first trial must be regarded as unsafe. Their appeals are therefore allowed and their convictions quashed.

For the fourth time in 5 years this Court emphasises the urgent need for legislation to define duress with precision.

There remains the appellant, Sabah Naji, who was charged not with hijacking, but with conspiracy to hijack and in relation to whom, it will be recalled, the jury disagreed.

In relation to his conviction on retrial, Mrs Bolton advances two principal grounds for contending that his conviction was unsafe. First, it is said that prosecuting counsel improperly introduced in cross-examination of the defendant inadmissible hearsay evidence that at his first trial the other defendants had implicated him in hijacking. At the retrial, Naji's counsel could not, as they had at the original trial, cross-examine other defendants apart from Hasan, who gave evidence on the prosecution at the retrial. The inadmissible evidence went to the heart of the case and the judge should have acceded to the defence application to discharge the jury. Secondly, the judge's warnings to the jury as to the potential unreliability of Hasan were inadequate.

As to the first ground, it is necessary to explain how the cross-examination to which objection is taken came about.

This is readily apparent from the transcript. In response to a question about what he had told the police as to whether he was first gagged or tied, he said at 2F:

> "I told the police that but the interpreter put it in a different way and you heard before one of the hijackers, 'I told you when I went to Sabah and gagged him I saw him with his hands tied up to the back', and this is the biggest proof about what I am saying."

That was clearly a reference to evidence given at the first trial. Counsel went on at 3C:

"Q. When you gave evidence to another jury last year, you were asked questions by Mr Massih, do you remember?

> He asked you this: 'Of all the people on board the plane, passengers and crew, you were the only one whose mouth was gagged, were you not?' Answer from you: 'Yes.'"

Answer, at page 4A:

> "First I heard from you, you read evidence and you explained to the jury. And the other thing I did not remember at that particular moment that the hijacker he said about this subject tie and gag."

At page 7D, this question:

"Did Adnan say to you, 'Don't untie him, he is a traitor, he is one of us'?

A. No. Mohammed came to me and one of the hijackers who said at the previous trial, 'When the passenger start to leave I untie Sabah. When Mohammed saw Sabah untied so he came, he tie him up again so he doesn't go down with these passengers.' This is the wordings of one of the hijackers... This is evidence which you have, proof you have.

Q. Do you want to tell the jury what else the other hijackers said about you in the previous trial?

A. If you like you can say it.

Q. You have no objection to that?

A. If you would like you can put it forward and I can answer you.

Q. They all said you were one of the conspirators not just Mr Hasan, and they are all lying, are they not, according to you?

A. Yes."

It is apparent from that transcript that no objection to these questions was taken by the highly experienced leading counsel representing Nagi, and it also has to be borne in mind that matters were proceeding slowly because question and answer were being interpreted. Furthermore, we are told and accept, that prosecution counsel deliberately proceeded particularly slowly and looked at defence counsel to see if there was any sign of objection.

Subsequently, Nagi's counsel applied for the jury to be discharged. The judge refused. No submission is made to us that, in so exercising his discretion, the judge in any way misdirected himself. It is clear from the summing-up that he did not refer to the cross-examination to which objection was taken when discharge of the jury was sought. This, it seems to us, was an appropriate exercise of discretion. To have referred to it would have been to draw attention to it.

Furthermore, he specifically directed the jury that this aspect of the case was dependent on the evidence of Hasan. There is the further, final, point on this aspect that the questions to which objection is taken were not supportive of evidence against the defendant, they were directed to his credit, so that the jury would not be mislead in relation to what had transpired at the earlier trial. In the light of these matters, this ground is without substance.

As to the second ground, what direction the judge gives in relation to an accomplice or a potentially unreliable witness is within his discretion (see R v Makanjoula [1995] 2 Cr App R 469). In the present case, Mr Hilliard took us to no less than eight passages in the summing-up where, in one form of words or another, the judge drew attention to

matters which might render Hasan's evidence unreliable. These included a letter, the terms of which were before the jury in which Hasan admitted in evidence he had lied. The second ground therefore fails.

Mrs Bolton also sought to contend that Nagi's conviction should be quashed, if the appeals of those convicted at the first trial were successful. There are several difficulties with this. First, Nagi was not convicted at the first trial. Secondly, the offence charged against him was different from that which lay against the other defendants, namely conspiracy. Thirdly, at his retrial, he did not seek to run the defence of duress and no evidence was led to support it.

Although we have heard no submissions on the point, we entertain some doubt as to whether duress is capable of affording a defence to conspiracy, the essence of which is agreement not activity. But, in any event, as the defence was not raised at the retrial, it cannot afford any ground for regarding Nagi's conviction on retrial as unsafe.

It is true that the conspiracy laid against him was with the other appellants whose convictions we have quashed, but they were charged with and convicted of the substantive offence of hijacking, not conspiracy.

There is no reason, in our judgment, to regard Sabah Nagi's conviction as unsafe. His appeal is therefore dismissed.

We will hear submissions as to the question of a retrial.

(Submissions re: Retrial and question for the House of Lords which is:

were the Court of Appeal (Criminal Division) right to rule that any of the appellants had available to them, at trial, the defence of duress of circumstances, if the appellant in question, at the time of committing the offence, feared imminent but not immediate death or serious bodily harm?

THE VICE PRESIDENT: Taking all the circumstances of this case into account, including, in particular, that three of the defendants are due to be released from serving their sentence on 1st May next, and the history, which it is common ground reveals suffering of a high degree on the part of these defendants, in Iraq, we shall not, in the interests of justice, in this case, order a retrial, in relation to any of the appellants.

So far as the question for certification is concerned, we are not averse to it, but we would like to see it in writing, and, it may be possible to deal with the matter on paper.

MR HILLIARD: My Lord, would it be possible if both that aspect and if we too seek to persuade the Court to grant leave, exceptionally, I wonder whether those submissions might be in writing.

THE VICE PRESIDENT: Yes, but we do not hold out any hope we shall give you leave. But you can certainly make submissions in writing.

MR HILLIARD: I was just considering section 37 of the Criminal Appeal Act, the defendant on appeal by the Court. It seems to me, given that your Lordships have said there should not be a retrial, I cannot have any application; I hope that is correct.

THE VICE PRESIDENT: I think it is. Mr Newman, you wanted to correct something.

MR NEWMAN: It is not a marginal factual error, but one on which my Lord lay great emphasis in two passages in the judgment. In all the best to correct them I ask my Lord to look at the submissions of the transcript, page 100, the submission before the judge, page 100.

MR JUSTICE ROUGIER: Volume II, page 100.

MR NEWMAN: At the top of the page, dealing with Dudley, the last parts of the submission concerning Dudley and Stevens at letter D, I then turn yet again to the case of Cole and make precisely the distinction between immense and immediacy, and take the learned judge to the shorter Oxford dictionary. Over the page, the whole of the rest of that next page, is dealing in some detail, I mention it to your Lordship if you thought it might be appropriate, you might in some way or another.

THE VICE PRESIDENT: Your submission at that stage was rather different from what it was at an earlier stage.

MR NEWMAN: I fully appreciate what my Lord was focusing on. My submission at an earlier stage, as it developed, as is often the case....

THE VICE PRESIDENT: But very late. Mr Newman, in fairness to you, some amendment will be made to the transcript.

MR NEWMAN: The last matter is this. I hesitate, my Lord. At the moment, I have appeared, as your Lordship knows, legally aided throughout. In fact my junior has been assisting throughout, on a pro bono basis. He has assisted me in what your Lordship undoubtedly can appreciate is a sparing preparation of any of the submissions in this case. Quite apart from the authority, referred to in the 70 cases photocopied, the background, there are very considerable numbers of articles and other such matters.

THE VICE PRESIDENT: Seventy-five plus, we were spared.

MR NEWMAN: I hope the essence was adduced in the course of submissions, but your Lordships were spared having to bother to read them.

THE VICE PRESIDENT: I do not know, Mr Newman, you tell me, was this matter of the extent of legal aid not considered at an earlier stage? I know that one aspect of it was, that you should, as you have done, lead on the major point.

MR NEWMAN: I asked the Registrar, and she indicated she effectively did not wish to go behind the grant of legal aid and Mr Justice Laws, who granted leave and who had originally did not renew my application....

THE VICE PRESIDENT: Laws J ordered legal aid for leading counsel.

MR JUSTICE JOHNSON: I notice your junior was taking an active part. He was not sitting there as an observer, there was a bit of note passing and gown pulling.

MR NEWMAN: The really active part was before the gown pulling started.

THE VICE PRESIDENT: It was probably good experience for both of you.

MR NEWMAN: I am not going to persist.

THE VICE PRESIDENT: Mr Newman, not without a degree of hesitation, we grant your application.

MR NEWMAN: I thank you on behalf of my absent junior.

MR RIZA: May I repeat that application in relation to my own junior.

THE VICE PRESIDENT: No, Mr Riza. I have considered that matter myself.

MR RIZA: I thought it an advantage that it had been. I obviously misconstrued that.

THE VICE PRESIDENT: Your position and that of your junior is very different from Mr Newman's junior.