1966

*Nov. 4

Dec. 19

HER MAJESTY THE QUEEN .....APPELLANT;

AND

HERBERT CARKER .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Unlawful and wilful damage to public property—Defence of having acted under threat—Whether trial judge erred in ruling evidence of compulsion inadmissible—Whether accused in danger as a result of threats—Criminal Code, 1953-54 (Can.), c. 51, ss. 7, 17, 371, 372.

The respondent was convicted of having unlawfully and wilfully damaged public property. At trial, he admitted having damaged the plumbing fixtures in the cell where he was incarcerated but, through his counsel, he sought to introduce evidence to show that he had committed this offence under the compulsion of threats and was therefore entitled to be excused by virtue of s. 17 of the *Criminal Code* and that he was also entitled to avail himself of the *Common Law* defence of "duress" by virtue of s. 7 of the Code. The nature of this evidence, as outlined by counsel for the accused, was that the offence had been committed during a disturbance in the course of which a substantial body of prisoners, shouting in unison from their separate cells, threatened the respondent, who was not joining in the disturbance, that if he did not

*PRESENT: Taschereau C.J. and Fauteux, Abbott, Martland and Ritchie JJ.

break the plumbing fixtures in his cell he would be kicked in the head, his arms would be broken and he would get a knife in the back at the first opportunity. The trial judge ruled that the proposed evidence did not indicate a defence or excuse available at law and ruled the evidence inadmissible. The Court of Appeal held that the evidence should have been presented to the jury, quashed the conviction and ordered a new trial. The Crown appealed to this Court.

Held: The appeal should be allowed, and the conviction restored.

The trial judge was right in deciding that the proposed evidence did not afford an excuse within the meaning of s. 17 of the *Criminal Code*. The question of whether immediate threats of future death or grievous bodily harm constitute an excuse for committing a crime within the meaning of s. 17 of the Code and the question of whether a person can be present within the meaning of that section when he is locked in a separate cell from the place where the offence is committed are both questions which depend upon the construction to be placed on section 17 and they are therefore questions of law and not questions of fact for the jury. Accepting the outline made by defence counsel as being an accurate account of the evidence which was available, there was nothing in it to support the defence that the act was not done wilfully within the meaning of ss. 371(1) and 372(1) of the Code, and there was accordingly no ground to justify the trial judge in permitting the proposed evidence.

Droit criminel—Dommage à un bien public causé illégalement et volontairement—Défense de contrainte exercée par des menaces—Le juge au procès a-t-il erré en décidant que la preuve de contrainte était inadmissible—L'accusé était-il en danger comme résultat des menaces—Code Criminel, 1953-54 (Can.), c. 51, arts. 7, 17, 371, 372.

L'intimé a été trouvé coupable d'avoir causé illégalement et volontairement du dommage à un bien public. Lors du procès, il a admis avoir endommagé la tuyauterie dans la cellule de la prison où il était détenu mais, par l'entremise de son avocat, il a tenté d'introduire une preuve démontrant qu'il avait commis cette offense sous l'effet de la contrainte exercée par des menaces et qu'il avait droit en conséquence d'être excusé en vertu de l'art. 17 du *Code Criminel* et qu'il avait aussi le droit de se prévaloir de la défense de droit commun de «coercition» en vertu de l'art. 7 du Code. La nature de cette preuve, telle qu'exposée par son avocat, était à l'effet que l'offense avait été commise à l'occasion d'un tumulte durant lequel une partie considérable des prisonniers, criant tous ensemble à tue-tête de leurs cellules respectives, avaient menacé l'intimé, qui ne s'était pas joint au tumulte, que s'il ne brisait pas la tuyauterie de sa cellule on le frapperait à la tête, on lui briserait les bras et on le poignarderait dans le dos à la première occasion. Le juge au procès décida que la preuve que l'on voulait offrir ne démontrait pas une défense ou une excuse disponible en droit et rejeta la preuve comme n'étant pas admissible. La Cour d'appel jugea que la preuve aurait dû être présentée au jury, cassa le verdict de culpabilité et ordonna un nouveau procès. La Couronne en appela devant cette Cour.

Arrêt: L'appel doit être maintenu et le verdict de culpabilité rétabli.

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Le juge au procès a eu raison de décider que la preuve que l'on voulait offrir n'était pas une excuse selon le sens de l'art. 17 du *Code Criminel*. La question de savoir si des menaces immédiates de mort future ou de lésions corporelles graves constituent une excuse pour commettre un crime dans le sens de l'art. 17 du Code et la question de savoir si une personne peut être présente dans le sens de cet article lorsqu'elle est enfermée sous clef dans une cellule séparée de l'endroit où l'offense est commise, sont deux questions qui dépendent de l'interprétation de l'art. 17 et qui sont en conséquence des questions de droit et non pas des questions de fait pour le jury. Si l'on accepte l'exposé fait par l'avocat de l'accusé comme étant un récit fidèle de la preuve qui était disponible, il n'y a rien dans cet exposé pour supporter la défense que l'offense n'avait pas été commise volontairement dans le sens des arts. 371(1) et 372(1) du Code, et en conséquence il n'y avait aucune raison justifiant le juge au procès de permettre la présentation de cette preuve.

APPEL de la Couronne d'un jugement de la Cour d'appel de la Colombie-Britannique[1], ordonnant un nouveau procès. Appel maintenu.

APPEAL by the Crown from a judgment of the Court of Appeal for British Columbia[1], ordering a new trial. Appeal allowed.

W. G. Burke-Robertson, Q.C., for the appellant.

Frank G. P. Lewis, for the respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal by the Attorney General of British Columbia from a judgment of the Court of Appeal[1] of that Province, from which Mr. Justice MacLean dissented, and by which it was ordered that the respondent's conviction for unlawfully and wilfully damaging public property and thereby committing mischief, should be set aside and that a new trial should be had.

At the trial the respondent admitted having damaged the plumbing fixtures in the cell where he was incarcerated at Oakalla Prison Farm in British Columbia but, through his counsel, he sought to introduce evidence to show that he had committed this offence under the compulsion of threats and was therefore entitled to be excused for committing it by virtue of the provisions of s. 17 of the *Criminal Code*

[1] (1966), 48 C.R. 313, 4 C.C.C. 212.

and that he was also entitled to avail himself of the common law defence of "duress" having regard to the provisions of s. 7 of the *Criminal Code*.

Under the latter section it is provided that:

> Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act . . . *except in so far as they are altered by or are inconsistent with this Act or any other Act of the Parliament of Canada.*

The italics are my own.

I agree with the learned trial judge and with MacLean J.A. that in respect of proceedings for an offence under the *Criminal Code* the common law rules and principles respecting "duress" as an excuse or defence have been codified and exhaustively defined in s. 17 which reads as follows:

> 17. 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 excused for committing the offence if he believes that the threats will be carried out and if he is not a party to a conspiracy or association whereby he is subject to compulsion, but this section does not apply where the offence that is committed is treason, murder, piracy, attempted murder, assisting in rape, forcible abduction, robbery, causing bodily harm or arson.

At the outset of the proceedings at the trial in the present case and in the absence of the jury, Mr. Greenfield, who acted on behalf of the accused, informed the Court that he intended to call evidence of compulsion and duress and he elected to outline the nature of this evidence which was that the offence had been committed during a disturbance, apparently organized by way of protest, to damage property at the Prison Farm in the course of which a substantial body of prisoners, shouting in unison from their separate cells, threatened the respondent, who was not joining in the disturbance, that if he did not break the plumbing fixtures in his cell he would be kicked in the head, his arm would be broken and he would get a knife in the back at the first opportunity.

The question which the learned trial judge was required to determine on Mr. Greenfield's application was whether the proposed evidence which had been outlined to him indicated a defence or excuse available at law; he decided

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that it did not and the majority of the Court of Appeal having taken a different view, the Attorney General now appeals to this Court.

There can be little doubt that the evidence outlined by Mr. Greenfield, which was subsequently confirmed by the evidence given by the ringleaders of the disturbance in mitigation of sentence, disclosed that the respondent committed the offence under the compulsion of threats of death and grievous bodily harm, but although these threats were "immediate" in the sense that they were continuous until the time that the offence was committed, they were not threats of "immediate death" or "immediate grievous bodily harm" and none of the persons who delivered them was present in the cell with the respondent when the offence was committed. I am accordingly of opinion that the learned trial judge was right in deciding that the proposed evidence did not afford an excuse within the meaning of s. 17 of the *Criminal Code*.

In the course of his most thoughtful judgment in the Court of Appeal, Mr. Justice Norris had occasion to say:

> The question of whether or not a person threatening was present goes to the question of the grounds for the fear which the appellant might have. In my opinion a person could be present making a threat although separated by the bars of the cell. These are all matters which should have gone to the jury, as was the question of whether or not the threat of death or grievous bodily harm was an immediate one—a question of degree. They might well consider that the threat was immediate as being continuous, as it was in this case, that it would be all the more frightening because of the uncertainty as to when it actually might happen, and therefore force him to act as he did.

With the greatest respect it appears to me that the question of whether immediate threats of future death or grievous bodily harm constitute an excuse for committing a crime within the meaning of s. 17 and the question of whether a person can be "present" within the meaning of that section when he is locked in a separate cell from the place where the offence is committed are both questions which depend upon the construction to be placed on the section and they are therefore questions of law and not questions of fact for the jury. *See Vail v. The Queen*[1] and *The Queen v. Sikyea*[2].

[1] [1960] S.C.R. 913 at 920, 33 W.W.R. 325, 129 C.C.C. 145.

[2] [1964] S.C.R. 642 at 645, 49 W.W.R. 306, 44 C.R. 266, 2 C.C.C. 129, 50 D.L.R. (2d) 80.

In support of the suggestion that the threat in the present case was "immediate and continuous" Mr. Justice Norris relied on the case of *Subramaniam v. Public Prosecutor*[1], in which the Privy Council decided that the trial judge was wrong in excluding evidence of threats to which the appellant was subjected by Chinese terrorists in Malaya. In that case it was found that the threats were a continuous menace up to the moment when the appellant was captured because the terrorists might have come back at any time and carried them into effect. Section 94 of the Penal Code of the Federated Malay States, which the appellant sought to invoke in that case provided:

> 94. Except murder and offences included in Chapter VI punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence; . . .

The distinctions between the *Subramaniam* case and the present one lie in the fact that Subramaniam might well have had reasonable cause for apprehension that instant death would result from his disobeying the terrorists who might have come back at any moment, whereas it is virtually inconceivable that "immediate death" or "grievous bodily harm" could have come to Carker from those who were uttering the threats against him as they were locked up in separate cells, and it is also to be noted that the provisions of s. 17 of the *Criminal Code* are by no means the same as those of s. 94 of the Penal Code of the Federated Malay States; amongst other distinctions the latter section contains no provision that the person who utters the threats must be present when the offence is committed in order to afford an excuse for committing it.

Both Mr. Justice Norris and Mr. Justice Branca in delivering their separate reasons for judgment in the Court of Appeal, expressed the view that the evidence which was tendered should have been admitted on the issue of whether the respondent acted wilfully in damaging the prison plumbing or whether he was so affected by the threats uttered against him as to be incapable of adopting any other course than the one which he did.

[1] [1956] 1 W.L.R. 965.

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The relevant provisions of the *Criminal Code* read as follows:

372(1) Every one commits mischief who wilfully

(*a*) destroys or damages property, . . .

(3) Every one who commits mischief in relation to public property is guilty of an indictable offence and is liable to imprisonment for fourteen years.

On this phase of the matter, Mr. Justice Norris had this to say:

In making the ruling which he did the learned trial judge deprived the appellant of what could be a substantial defence to the charge or an excuse under s. 17 without hearing the evidence. The jury could not decide whether the act was in fact wilful. This was not a matter on which the judge might rule. The length to which the evidence might go to disprove the essentials of the charge or to prove the requirements of s. 17 could never in the absence of the evidence of witnesses be apparent either to the learned judge or to the jury.

With the greatest respect, this portion of Mr. Justice Norris' reasons for judgment appears to overlook the fact that "the length to which the evidence might go . . ." was fully outlined to the learned judge by counsel for the respondent when he was making the application.

In this regard it is important to bear in mind the fact that "wilful" as it is used in Part IX of the *Criminal Code* is defined in s. 371(1) which reads, in part, as follows:

371(1) Every one who causes the occurrence of an event by doing an act or by omitting to do an act that it is his duty to do, knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not, shall be deemed, for the purposes of this Part, wilfully to have caused the occurrence of the event.

The evidence outlined to the learned trial judge discloses that the criminal act was committed to preserve the respondent from future harm coming to him, but there is no suggestion in the evidence tendered for the defence that the accused did not know that what he was doing would "probably cause" damage. Accepting the outline made by defence counsel as being an accurate account of the evidence which was available, there was in my view nothing in it to support the defence that the act was not done "wilfully" within the meaning of s. 371(1) and 372(1) of the *Criminal Code* and there was accordingly no ground to justify the learned trial judge in permitting the proposed evidence to be called in support of such a defence.

In view of all the above, I would allow this appeal, set aside the judgment of the Court of Appeal and restore the conviction.

Appeal allowed and conviction restored.

Solicitor for the appellant: G. L. Murray, Vancouver.

Solicitor for the respondent: D. E. Greenfield, Vancouver.