
CANADA / JUDGMENT

R. v. Delos Santos

2013 BCSC 2216

COURT

Supreme Court of British Columbia

DECIDED

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2013 BCSC 2216 R. v. Delos Santos

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Delos Santos,

2013 BCSC 2216

Date: 20131202

Docket: 26229

Registry: Vancouver

Regina

v.

Baby Marie Antoinette Delos Santos

Corrected Judgment: The text of the judgment was corrected at paragraph 50

where changes were made on January 10, 2014.

Before: The Honourable Madam Justice Fitzpatrick

Ruling re duress defence

Counsel for the Crown:

Sharon Steele

Adrienne Switzer

Counsel for the Accused:

Dan M. Sudeyko

Place and Date of Trial:

Vancouver, B.C.

November 25-29, 2013,

and continuing

Place and Date of Ruling:

Vancouver, B.C.

December 2, 2013

Introduction

- [1] The accused Baby Marie Antoinette Delos Santos is charged with trafficking in Oxycodone, also known as Oxycontin, pursuant to s. 5(1) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19.
- [2] While a pharmacy assistant at The Real Canadian Superstore in North Vancouver ("Superstore"), Ms. Delos Santos filled six fraudulent prescriptions for large amounts of strong dosage Oxycontin pills over the period of time between December 23, 2011 and January 17, 2012. She filled these prescriptions knowing they were probably stolen and probably fraudulent. She expressly bypassed the pharmacy's security procedures by making it appear as if a pharmacist had verified the prescriptions, as required by Superstore.
- [3] The offence of trafficking has essentially been admitted by Ms. Delos Santos. The evidence at trial includes Admissions, Ms. Delos Santos' testimony and her voluntary statement to the police.
- [4] The only real issue arising in this trial is Ms. Delos Santos' defence that she was acting under duress given her contention that she was forced to provide the drugs to people she believed to be gang members. The Crown contends that there is no "air of reality" to this defence and that the defence should not be left with the jury.

The Law

- [5] The defence of duress is grounded in the notion that an accused should not be found guilty if it is found that he or she acted in a morally involuntary manner. In *R. v. Ruzic*, 2001 SCC 24, [2001] 1 S.C.R. 687, the Court examined the underpinnings of the defence in the context of a constitutional challenge to the requirements set out in s. 17 of the Criminal Code, R.S.C. 1985, c. C-46.
- [6] The Court in *Ruzic* established the shifting onus of proof in respect of this defence:

100 The accused must certainly raise the defence and introduce some evidence about it. Once this is done, the burden of proof shifts to the Crown under the general rule of criminal evidence. It must be shown, beyond a reasonable doubt, that the accused did not act under duress.

[7] It is clear from the authorities that often the court will be largely faced with the evidence of the accused in terms of the real or perceived threats that are said to have caused the accused to commit the crime. The difficulty in assessing such evidence and the need to test the reasonableness of such evidence was highlighted by the Court in *Ruzic*:

59 The assessment of a defence of duress at common law may carry with it a number of practical risks and problems relating to evidence. At times, as in the case at bar, proof of the defence may rest on little more than the accused's own evidence. Verification of a spurious claim of duress may prove difficult. Hence, courts should be alive to the need to apply reasonable, but strict standards for the application of the defence. In the end, much will depend on the evaluation of the evidence and on the soundness of the instructions given to jurors during a jury trial.

[8] Recently, the Supreme Court of Canada clarified the defence of duress both under s. 17 of the Criminal Code (post *Ruzic*) and under the common law: *R. v. Ryan*, 2013 SCC 3. In *Ryan*, the Court summarized the elements common to both the statutory and common law defence:

[81] The defence of duress, in its statutory and common law forms, is largely the same. The two forms share the following common elements:

- There must be an explicit or implicit threat of present or future death or bodily harm. This threat can be directed at the accused or a third party.
- The accused must reasonably believe that the threat will be carried out.
- There is no safe avenue of escape. This element is evaluated on a modified objective standard.
- A close temporal connection between the threat and the harm threatened.
- Proportionality between the harm threatened and the harm inflicted by the accused. The harm caused by the accused must be equal to or no greater than the harm threatened. This is also evaluated on a modified objective standard.
- The accused is not a party to a conspiracy or association whereby the accused is subject to compulsion and actually knew that threats and coercion to commit an offence were a possible result of this criminal activity, conspiracy or association.

[9] The Crown contends in this trial that the defence of duress should not be put before the jury because there is no "air of reality" to it. No issue arises in respect of the element regarding proportionality. Nor is it alleged that Ms. Delos Santos voluntarily became a party to any criminal conspiracy or association and that the threats arose in the context: see *R. v. Basit*, (18 January 2013), Vancouver 25892 (B.C.S.C.) at paras. 45-51. The Crown argues in particular

that there is no "air of reality" in respect of the first three elements of duress: namely, was there a threat, did Ms. Delos Santos reasonably believe that the threat would be carried out and was there no safe avenue of escape?

- [10] The "air of reality" test was discussed at length in *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3. At its core, the test requires that the defence be left with the jury if there is some/any evidence, if believed, upon which a properly instructed jury acting reasonably might acquit: paras. 62, 83.
- [11] Very recently, the Supreme Court revisited the "air of reality" test and its application in *R. v. Pappas*, 2013 SCC 56. Although the case involved the defence of provocation, the Court's summary of the relevant principles are equally applicable to the defence of duress:
- [21] As discussed in the companion case *R. v. Cairney*, 2013 SCC 55, before leaving the defence to the jury, the trial judge must find that there is an air of reality on both the objective and subjective elements of the defence. The question is whether a properly instructed jury acting reasonably could be left in a state of reasonable doubt as to whether the accused is guilty of murder, on the basis of the defence of provocation. There must be an evidential foundation for both the objective and subjective elements of the defence, which s. 232(3) of the Criminal Code states are questions of fact.
- [22] The air of reality test requires courts to tread a fine line: it requires more than "some" or "any" evidence of the elements of a defence, yet it does not go so far as to allow a weighing of the substantive merits of a defence (*R. v. Mayuran*, 2012 SCC 31, [2012] 2 S.C.R. 162, at para. 21). A trial judge applying the air of reality test cannot consider issues of credibility and reliability, weigh evidence substantively, make findings of fact, or draw determinate factual inferences: *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3, at para. 87; *R. v. Fontaine*, 2004 SCC 27, [2004] 1 S.C.R. 702, at para. 12. However, where appropriate, the trial judge can engage in a "limited weighing" of the evidence, similar to that conducted by a preliminary inquiry judge when deciding whether to commit an accused to trial: see *R. v. Arcuri*, 2001 SCC 54, [2001] 2 S.C.R. 828, cited by McLachlin C.J. and Bastarache J. in *Cinous*, at para. 91.
- [23] The ability of the trial judge to engage in "limited weighing" depends on the type of evidence on the record. "If there is direct evidence as to every element of the defence, whether or not it is adduced by the accused, the trial judge must put the defence to the jury": *Cinous*, at para. 88. The trial judge may not engage in any weighing of direct evidence, since this would require a consideration of the inherent reliability of the evidence.
- [24] "Direct evidence is evidence which, if believed, resolves a matter in issue": *Cinous*, at para. 88, citing D. Watt, *Watt's Manual of Criminal Evidence* (2001), at §8.0. However, "the mere assertion by the accused of the elements of a defence does not constitute direct evidence, and will not be sufficient to put the defence before a jury": *Cinous*, at para. 88. An air of reality "cannot spring from what amounts to little more than a bare, unsupported assertion by the accused", which is otherwise inconsistent with the totality of the accused's own evidence: *R. v. Park*, [1995] 2 S.C.R. 836, at para. 35, per L'Heureux-Dubé J.. For example, in

R. v. Gauthier, 2013 SCC 32, this Court, per Wagner J., suggested that a single statement made by an accused that is otherwise inconsistent with the accused's "principal narrative" is insufficient to give an air of reality to a defence: paras. 60-61.

- [25] Where the evidence instead requires the drawing of inferences in order to establish the elements of a defence, the trial judge may engage in a limited weighing to determine whether the elements of the defence can reasonably be inferred from the evidence. "The judge does not draw determinate factual inferences, but rather comes to a conclusion about the field of factual inferences that could reasonably be drawn from the evidence": Cinous, at para. 91. In conducting this limited weighing, the trial judge must examine the totality of the evidence: Cinous, at para. 53; Park, at para. 13, per L'Heureux-Dubé J.
- [26] As discussed in Cairney, in cases where there is a real doubt as to whether the air of reality test is met, the defence of provocation should be left to the jury. However, this principle does not exempt the trial judge from engaging in a limited weighing of the evidence, where appropriate. The fact remains that the trial judge exercises a gatekeeper role in keeping from the jury defences that have no evidential foundation. Defences supported only by bald assertions that cannot reasonably be borne out by the evidence, viewed in its totality, should be kept from the jury.
- [27] The question is whether a properly instructed jury acting reasonably could be left in a state of reasonable doubt as to the presence of each of the elements of the defence of provocation. There must be an evidential foundation for both the objective and subjective elements of the defence.
- [12] The Court's reference in Pappas to the court needing to "tread a fine line" is apt. On the one hand, the jury should not be burdened or confused with defences which have no basis in the evidence; on the other, the court must not cross the line and usurp the role of the jury in weighing the evidence, assessing credibility and finding facts. Where that "fine line" is in a particular case may not be particularly clear. This is quite evident from Fish J.'s spirited dissent in Pappas where he disagreed with the majority's view that there was no "air of reality" to the accused's defence of provocation.

Discussion

- [13] In general, Ms. Delos Santos testified that she filled the fraudulent prescriptions for a man named Jesse Castillo who was exerting pressure on her.
- [14] Ms. Delos Santos testified that her first contact with Castillo was a couple of months before November 2011 when she was contacted by him on her cell phone out of the blue. At that point in time, she didn't know who he was or what he wanted. He only mentioned that a "friend" had given him her phone number although he did not name that friend or give her his own name.

- [15] Ms. Delos Santos found it "disturbing" that this person knew her nickname and her phone number. It became apparent during later exchanges that Castillo knew that Ms. Delos Santos worked in a pharmacy. During their early conversations, Castillo was said to use terms like "we", "us" and "my friends". Ms. Delos Santos inferred from this that he was in a gang. Castillo mentioned at some point that "they" wanted her to do them a "favour" although at first no details were revealed about what that favour was. Ms. Delos Santos suspected that the favour involved drugs.
- [16] Beginning in November 2011, Ms. Delos Santos received further communications from Castillo and from at least November 26 onward, she and Castillo engaged in extensive communications by cell phone calls and texts. Ms. Delos Santos testified that when she tried to ignore the texts, she would get an angry text back to the effect of "why aren't you picking up your phone" or "call me". As such, she says that she was "scared" and felt compelled to respond. At some point, the "favour" was confirmed and Castillo asked if she could supply the drugs. No threat was made at this time. Ms. Delos Santos refused to provide the drugs after the "favour" was revealed or alternatively told Castillo that "it couldn't be done".
- [17] During a long phone conversation on December 10, 2011, Castillo revealed to Ms. Delos Santos that he was in the United Nations gang. Ms. Delos Santos "Googled" the UN gang and discovered information about drug involvement and violent acts committed by the gang. Ms. Delos Santos was also generally aware from news reports that gangs committed violence and sometimes killed innocent people. In her words, gangs were "scary".
- [18] Ms. Delos Santos says that she was told by Castillo that "they" wanted her to get the drugs for them and that she better do it "or else". Ms. Delos Santos took "or else" to mean that either she or her family would be harmed. Castillo never explicitly threatened to hurt or kill Ms. Delos Santos or her family. She describes the communications as "lots of demands", "pressure" or "bugging" her.
- [19] From December 10 to 22, 2011, Ms. Delos Santos and Castillo continued to be in constant contact by cell phone calls and texts. Ms. Delos Santos perceived the repetitive contact and requests as a threat. Again, Ms. Delos Santos told him that she would not get the drugs or that "it could not be done". Castillo was not deterred and Ms. Delos Santos states that he continued to pressure her although again, he did not expressly threaten her or her family.
- [20] On December 22, 2011, an unknown male approached Ms. Delos Santos at Superstore and gave her a piece of paper in the parking lot. This man said "we want you to do this" and walked back to his vehicle, a white van. Ms. Delos Santos said she was shocked and did not know what to do. The paper turned out to be a fraudulent prescription for Oxycontin. This was the first physical contact between Ms. Delos Santos and the people who wanted her to obtain the drugs. She said she was "really scared".
- [21] Ms. Delos Santos worked all day on December 22, 2011 after receiving the prescription that morning. Ms. Delos Santos states that at 5:26 pm she received the only communication from Castillo that day, being a text which she says indicated that she "better do this for us". Ms.

Delos Santos says that when she returned home that evening, she saw the same male who had given her the prescription. This man was beside a white van on the street outside of her home. He did not speak to her or make any gestures to her. Ms. Delos Santos interpreted this to be the gang trying to scare her and a threat to her child and family in the event that she refused to get the drugs for them. Again, she says that she was quite frightened.

- [22] The next day, on December 23, 2011, Castillo contacted Ms. Delos Santos to tell her that his friend would be at the pharmacy that day to pick up the drugs. That day, she filled the fraudulent prescription. The same male picked up the drugs from the pharmacy.
- [23] Despite Ms. Delos Santos' hope that Castillo would then "go away", he did not. From December 23rd and following, the fairly constant texting and occasional phone calls continued between Castillo and Ms. Delos Santos. She indicates that the communications from him became more "abrupt" and "direct".
- [24] Five further prescriptions were filled by her on December 29 and 30, 2011 and January 6, 16 and 17, 2012. All of these further prescriptions were completed by Castillo or another male dropping off the prescription at the pharmacy and one of the two picking up the drugs after they were filled by Ms. Delos Santos. All of the pick-ups were captured on video and show Ms. Delos Santos handing over the drugs after a cash payment was taken from the man and put in the till.
- [25] Throughout this time, Ms. Delos Santos says that she felt she had no choice but to comply due to concerns about what "they" (i.e. Castillo and his "friends") would do to her or her family if she did not. Ms. Delos Santos says that throughout this period of time, no one ever made any explicit reference or threats against her, her husband, her child or her other family members. She says however that the pressure from Castillo through the phone calls and texts continued to be demanding that she complied. She remained frightened and scared for her life and that of her family.
- [26] On January 19, 2012, these fraudulent prescriptions came to the attention of the pharmacist at Superstore and the store's security and the RCMP were called in. Ms. Delos Santos was arrested. Her purse contained a filled prescription and two further prescriptions for Oxycontin which she intended to fill that day and the next.
- [27] When meeting with the security personnel at Superstore, Ms. Delos Santos originally denied any knowledge of the prescriptions but she quickly confessed to filling them at the request of a person who she said had "gang ties". She told them that she filled them "in fear for her life".
- [28] Ms. Delos Santos' later statement to the police that day contains statements about her assisting these people, about them being involved in gangs and that she was "scared" for her and her family. She also said that she was concerned about the gang's reaction if they were to face consequences and if they thought the consequences arose from her "ratting them out".

- [29] Towards the end of her statement, Ms. Delos Santos and the constable looked at her cell phone and saw a text from two people, one being Castillo, to the effect of "yo, what's going on?" and another from an unknown caller to the effect of "I'm here". She also says there was a missed call from Castillo. Finally, there were texts from a phone which is registered to Castillo's girlfriend, Elizabeth Centenera.
- [30] Almost immediately after her release from jail, Ms. Delos Santos contacted her husband but did not tell him about her circumstances. She then immediately contacted Castillo by phone; she received another call from him later that evening. Her explanation is that she was trying to respond to the texts and calls and assure Castillo that her manager had found out and had taken the prescriptions. She did not tell him about the police. She says she was trying to appease him so that he would not get mad at her.
- [31] Ms. Delos Santos denies that she received any benefit or monetary benefit by assisting Castillo or the other people involved. At one point, they offered her \$1,000 but she did not take it since she did not want to let them "get their hands wrapped around [her]" or be "like a part of them".
- (a) The Threats
- [32] To fulfill this requirement, there must have been an explicit or implicit, present or future, threat of death or bodily harm, directed at the accused or a third person: Ryan at para. 63. The threat must be of such a degree of violence that a person of reasonable firmness with the characteristics and in the situation of the accused could not have been expected to resist: Ryan at para. 52.
- [33] The Crown argues that a reasonable person in Ms. Delos Santos' position would not have perceived the comments and actions of Castillo to be a "threat of death or bodily harm". Ms. Delos Santos' evidence makes clear that Castillo did not expressly threaten physical violence to her or her family. Rather, he couched his verbal demands that she obtain the drugs with the phrase "or else".
- [34] In *R. v. Mena* (1987), 34 C.C.C. (3d) 304 (Ont. C.A.), the court stated:
- [55] Mere fear does not constitute duress in the absence of a threat, either express or implied. Where an implied threat is relied upon to constitute duress either under s. 17 or under the common law, the threshold question is whether the acts, conduct or words of the person alleged to have made the threat could reasonably be construed as a threat of the required kind. On this threshold question, an objective standard must necessarily be met. If the judge at the conclusion of the evidence is of the opinion that no reasonable jury could find that the words or conduct constituted a threat of the kind required, the judge will withdraw the defence of duress from the jury.

[Emphasis added.]

- [35] Although there was never any mention of physical violence, nor any actual violence, Castillo's words must be construed within the totality of the evidence.
- [36] These words were spoken not just by an unknown individual, but someone who expressly communicated to Ms. Delos Santos that he was involved in a gang. The persistent communication from Castillo by phone and text is also a circumstance that supports Ms. Delos Santos' contention that he continued to demand that she comply in supplying the Oxycontin. The Crown argues that the repeated texts and phone calls from Castillo would not be perceived by a reasonable person to be a threat of death or bodily harm in that it was simply "peer pressure" or "pestering" or "bugging".
- [37] I accept that the Crown's argument has merit to a point. However, the circumstances on December 22, 2011 provide a stark backdrop to Ms. Delos Santos' ultimate decision to fill the first prescription the next day. To that point in time, she had resisted the demands or "bugging" but matters escalated dramatically on that day by the first physical contact with these people when the prescription was handed to her. Even so, she did not fill it that day. Further escalation occurred later that evening when she returned home. By that time, she was aware that they knew where she, her husband, child and in-laws lived.
- [38] The Crown argues that the mere presence of one of the males at her house does not elevate these events to a threat of death or bodily harm because there are any number of reasons why the male might have been at her house. The Crown contends that Ms. Delos Santos simply imagined a threat to her family. That may be the case, but whether that attendance occurred, whether Ms. Delos Santos is believed in terms of what she saw and how she perceived it are all findings of fact to be considered by the jury. If she is believed, that event must be considered within the overall circumstances, including the persistent communication from Castillo to that point in time and the mention of "or else".
- [39] Again, I must consider the totality of the evidence and assume the evidence relied upon by the accused is true: Cinous at para. 53; R. v. English, 2010 BCCA 564 at para. 29.
- [40] I agree with counsel for Ms. Delos Santos that the totality of the evidence on this point goes well beyond "mere assertions" or "bare unsupported assertions": Cinous at para. 88; Pappas at para. 24.
- [41] Ms. Delos Santos' evidence at trial was supported by the phone records which confirmed the extensive communications to and from her and Castillo. The video of the drug pickups also confirm her evidence about the involvement of two men. Ms. Delos Santos' statements to the security personnel and then the police confirm, to some extent, her contention that she acted under threats from Castillo.
- [42] The involvement of Castillo was confirmed directly in two ways: firstly, on January 19, 2012, two texts on Ms. Delos Santos' phone revealed a number registered to a person believed to be Centenera, Castillo's girlfriend; secondly, the fingerprint of Castillo was on one of the prescriptions found in Ms. Delos Santos' purse on January 19, 2012. Further, on the morning

of her arrest, video surveillance of the Superstore parking lot showed a white van and later that day, one of the males was observed in Superstore wandering around. This male left in a white van registered in Centenera's name.

- [43] While the Crown argues that these circumstances simply prove the involvement of the two males in the trafficking, they also stand as support for Ms. Delos Santos' overall narrative of the circumstances.
- [44] The defence relies on *R. v. McRae*, [2005] O.J. No. 3200 (C.A.) where the court found some basis in the evidence for an implicit threat where no express physical or verbal threat had been made. In *McRae*, the accused assisted his cousin in disposing of the bodies of people his cousin had murdered. The court found that the conduct, words and overall circumstances were capable of implicitly amounting to a threat by that cousin that the accused would be murdered too if he did not assist him: para. 51.
- [45] In my view, the evidence of Ms. Delos Santos, if believed, concerning the words and actions of Castillo and the actions of the male who attended at her residence could reasonably be construed as an implicit or implied threat against her and her family. Accordingly, there is an "air of reality" to that aspect of the defence. Whether or not the jury accepts as a fact that these events occurred and that they constituted a threat is not the concern of the court at this time and on this application: *Cinous* at para. 54.
- (b) Reasonable Belief of Threats Being Carried Out
- [46] The second element of the defence of duress is that the accused must reasonably believe that the threat will be carried out. The element is analyzed on a modified objective basis, that is, according to the test of the reasonable person similarly situated: *Ryan* at para. 64.
- [47] Ms. Delos Santos was extensively cross examined on the true nature of her relationship with Castillo. The Crown suggested that she enjoyed her "texting" relationship with him and that she was excited to participate in the enterprise. Further, the Crown argues that there was nothing in the actions of Ms. Delos Santos to suggest that she actually believed that Castillo would follow through on his threats.
- [48] It remains the case, however, that the jury will be required to find facts necessary to determine the issue as to whether Ms. Delos Santos subjectively had this belief. Ms. Delos Santos explains that she engaged in this extensive communication with Castillo because she was afraid of repercussions if she did not respond. She denies that her communications with Castillo went beyond her unwilling but necessary responses for that reason. For the purposes of this application, I must assume these facts to be true. I am not to engage in any consideration of the credibility of Ms. Delos Santos: *Pappas* at para. 22, citing *Cinous* at para. 87.
- [49] The second part of this element is the requirement that the belief be reasonable. However, the reasonableness must be considered from a person similarly situated to Ms. Delos Santos.

[50] Ms. Delos Santos is Filipino and immigrated to Canada with her family at age nine. She completed high school and then took schooling to qualify as a pharmacy assistant. Her first job as a pharmacy assistant or technician was at the Superstore pharmacy where she completed a practicum and then obtained full time employment. She also had some part-time employment as a clerk at the Department of Justice. At the time of the offences, Ms. Delos Santos was 25 years old, married and had a 3 ½ year old daughter. She and her husband and child lived with her in-laws in Vancouver. She had never been in trouble with the police and the only knowledge she had of gangs was what she learned from the media.

[51] The defence argues and I agree that Ms. Delos Santos' demeanour on the stand was that of a meek and timid young woman. The defence also argues that in the circumstances of the escalation of the contact and the continuing and increasing demands on her to supply the drugs, Ms. Delos Santos reasonably believed that Castillo would follow through on the "or else".

[52] In my view, there is some evidence that, if believed, would support the contention that Ms. Delos Santos reasonably held the belief that the threats would be carried out.

(c) Safe Avenue of Escape

[53] The final element of the defence of duress relevant to this ruling relates to the issue of whether Ms. Delos Santo had a "safe avenue of escape". The Crown states, quite correctly in my view, that this is their strongest argument.

[54] The defence does not apply to persons who could have "legally and safely extricated themselves from the situation of duress": Ryan at para. 47.

[55] The court in Ryan confirmed that on this element of the defence, the test is on a modified objective basis, namely that of a reasonable person similarly situated:

[65] This element of the common law defence was specifically addressed in Ruzic, at para. 61. Once again, the test, evaluated on a modified objective basis, is that of a reasonable person similarly situated:

The courts will take into consideration the particular circumstances where the accused found himself and his ability to perceive a reasonable alternative to committing a crime, with an awareness of his background and essential characteristics. The process involves a pragmatic assessment of the position of the accused, tempered by the need to avoid negating criminal liability on the basis of a purely subjective and unverifiable excuse.

In other words, a reasonable person in the same situation as the accused and with the same personal characteristics and experience would conclude that there was no safe avenue of escape or legal alternative to committing the offence. If a reasonable person similarly situated would think that there was a safe avenue of escape, the requirement is not met and the acts of the accused cannot be excused using the defence of duress because they cannot be considered as morally involuntary.

- [56] Closely connected to this element of the defence is the requirement that there be a close temporal connection between the threat and the harm threatened (the fourth element per Ryan). If the connection is too tenuous (i.e. too removed in time), then one might conclude that the accused had other legal options: see Ruzic at paras. 65, 96; Ryan at paras. 48-49, 66-69. As the Court stated in Ryan:
- [68] The first purpose of the close temporal connection element is to ensure that there truly was no safe avenue of escape for the accused. If the threat is too far removed from the accused's illegal acts, it will be difficult to conclude that a reasonable person similarly situated had no option but to commit the offence. The temporal link between the threat and the harm threatened is necessary to demonstrate the degree of pressure placed on the accused.
- [57] Finally, there clearly are policy reasons to expect that a person will take such legal options as are available to him or her rather than simply weakly and quickly succumbing to the demands or threats which require illegal options. In Ruzic, the Court stated this bluntly:

62 The common law of duress, as restated by this Court in Hibbert recognizes that an accused in a situation of duress does not only enjoy rights, but also has obligations towards others and society. As a fellow human being, the accused remains subject to a basic duty to adjust his or her conduct to the importance and nature of the threat. The law includes a requirement of proportionality between the threat and the criminal act to be executed, measured on the objective-subjective standard of the reasonable person similarly situated. The accused should be expected to demonstrate some fortitude and to put up a normal resistance to the threat. The threat must be to the personal integrity of the person. In addition, it must deprive the accused of any safe avenue of escape in the eyes of a reasonable person, similarly situated.

[Emphasis added].

- [58] As with the second element discussed above, I will proceed on the basis that Ms. Delos Santos is to be believed in that she thought that she had no alternative, so as to satisfy the subjective aspect of this element of the test.
- [59] The more difficult issue is whether Ms. Delos Santos has presented some evidence upon which a jury might find that this belief was objectively reasonable, given her circumstances.
- [60] The Crown argues that Ms. Delos Santos had many options other than breaking the law and that she had multiple opportunities to "escape" in that she could have: blocked Castillo's number, changed her phone number; told her husband, friends, parents, in laws or siblings; changed/quit her job or at least changed her job at Superstore; changed her residence, at least temporarily; or finally, called the police.
- [61] Asked why she did not just ignore the texts, Ms. Delos Santos replied that she got "angry" texts back and she was frightened. She testified that she did not change her cell phone number initially because it was in her husband's name. She also believed that changing it would not make a difference because they would find her again.

- [62] Ms. Delos Santos did not disclose to anyone that she was receiving what she perceived as threats to supply the Oxycontin. She did not tell her husband because she felt he might try to become involved and thereby increase the danger she felt they faced. Parenthetically, at the time of the trial, Ms. Delos Santos had still not told her husband about her circumstances beyond that she was fired from Superstore arising from a "fraud" there.
- [63] Ms. Delos Santos states in her evidence that there was no issue of "escape" until December 22, 2011 when she was actually physically handed the prescription in the Superstore parking lot. Until then, she had been actively resisting the demands of Castillo to supply the drugs. To that point in time, she had been hoping that her refusal to supply the drugs or that her explanation that "it could not be done" would be sufficient to discourage these people such that they would leave her alone. There is some logic to this explanation.
- [64] However, the events of December 22, 2012 put in sharp focus the options that were before her at that time. The clearest option was to go to the police, possibly in conjunction with notifying her employer of the circumstances.
- [65] The option of seeking police protection is not an absolute one. In *Ruzic*, the Court stated that "the law does not require an accused to seek the official protection of police in all cases": para. 98. See also *R. v. Poon and Wong*, 2006 BCSC 1158 at para. 5.
- [66] Ms. Delos Santos explained that she did consider going to the police from time to time. However, she decided against it because she was not sure that the police could protect her and her family. She was scared that "if I rat them out, they would go after me. They knew my number. I don't know what else they knew about me".
- [67] The Crown relies on a number of authorities where the court found no "air of reality" for a duress defence where there were opportunities to go to the police.
- [68] In *R. v. Tucker*, 2011 BCSC 554, the accused was caught outside the walls of prison, trying to throw drugs over the wall into an inmate recreation area. He testified that a few days before his release from prison, a known gang leader requested that he obtain the drugs and throw them over the wall. There were no threats, but the accused said that the prison inmate code had an expectation of obedience or else he would suffer dire consequences. On that basis, he complied. The court stated:
- [7] He had safe avenues of escape by simply leaving the city or contacting the police. There was no evidence that the police could not protect him.
- [69] In *Poon*, the court considered circumstances somewhat similar to those found in this case. The accused participated in a kidnapping scheme. The defence of duress was based on the contention that the accused's good friend from high school, Raymond Wong, had gang connections and that he could call on his gangster buddies to carry through on his threats to harm the accused, their families and friends unless they cooperated in his kidnapping scheme. The court found that there was no air of reality to the defence of duress since:

- [14] Viewed objectively, the accused had many safe avenues of escape available to them. In addition to seeking police protection, there were many reasonable legal alternatives available to Bosco Poon and Jeff Wong over the eight days that Jackie Lee was held while Bosco Poon and Jeff Wong for the most part were free to come and go about their daily activities.
- [70] The facts in *R. v. Keller*, 1998 ABCA 357 also bear some resemblance to this case. Keller was charged with trafficking in LSD. He claimed that he was compelled to do so under a threat of death or serious bodily harm made by a man he knew as "Shawn". He had apparently inadvertently destroyed 2,000 hits of LSD owned by Shawn and Shawn subsequently demanded payment (which Keller did not have) or that he work off the debt by complying with his instructions. Shawn threatened that there would be "nasty consequences" and it would be "over" for Keller if he didn't cooperate.
- [71] Over the next four months, Keller complied and acted as a drug courier for Shawn around Calgary. Keller did not tell anyone about this since he was "embarrassed". He said that he did not go to the police because he was afraid of retribution from Shawn and his friends and, similar to Ms. Delos Santos, he did not feel that the police could protect him.
- [72] The Court in *Keller* noted that the conduct for which Keller was arrested occurred some four months after the threat. Beyond the initial threat, no further words of such nature were spoken to him. Keller did think he was being watched by Shawn's friends. In these circumstances, the lack of a close temporal connection was a critical aspect of the court finding that there was a safe avenue of escape, particularly by contacting the police. Therefore, the court found no "air of reality" to the defence of duress:
- [33] The most obvious alternative to yielding to the threat was to contact the police in Calgary. He had ample opportunity to do so. He could have made a phone call from anywhere and at anytime with his cellular telephone. After he received the message that the package had arrived, he could have "escaped" to the police and his threatener would not have known about it until several days later when ongoing instructions were to be given with respect to the disposition of the drugs. The appellant himself admitted that there were several similar opportunities over the four-month period. He could have escaped to the police in Vancouver during his vacation there. The appellant's evidence that he feared the police could not protect him rings hollow in the face of his comment to the arresting officers that he was glad he was arrested. Presumably he was then anxious to have the protection he previously rejected as inadequate.
- [73] There must be some basis in the evidence upon which objective reasonableness of the belief must be found.

- [74] In this respect, the matter of whether or not the police can protect someone is a troubling issue. In Keller, the court stated that there was nothing in the evidence, beyond Keller's bald assertion, to suggest that the police would be unable to protect him: para. 34. This raised obvious concerns from a policy perspective if perpetrators can simply suggest that the police were not, in their mind, a viable option. The Court stated:
- [34] If common law duress can achieve an air of reality on the basis of nothing more than the assertion of a subjective honest belief that there was no option but to succumb to the threat, then in these circumstances, the appellant could continue trafficking drugs indefinitely with the assurance that if he were caught he would have a viable defence.
- [75] In Ruzik, the accused was caught importing heroin into Canada. She claimed that she did so under duress, based on physical violence against her in Belgrade, Yugoslavia and also threats that her mother, whom she lived with, would be harmed. In that case, the accused did not seek police protection because she believed the Belgrade police were corrupt and would not assist her. Expert evidence supported the contention that people in Belgrade generally believed that the police could not be trusted and that they did not feel safe: para. 3. The Court stated that these "special circumstances" could be considered in terms of the objective part of the test.
- [76] I would venture to suggest, however, that the rule of law was demonstrably better in Canada in 2011 than it was in Yugoslavia in 1994.
- [77] So, one might ask, on what reasonably objective basis did Ms. Delos Santos form this view that the police would not be able to assist? The evidence suggests that the key to this issue may lie in the requirement that the objective aspect of the test be considered based on Ms. Delos Santos' personal circumstances.
- [78] I must proceed on the basis of her evidence being true, in that she did not enter this situation willingly or voluntarily. At the time, she was a young woman with a husband, a family and a job, simply going about her business each day. She was not a criminal, whose criminality provided the circumstances for the threat: Tucker; Keller, para. 4. Nor did she voluntarily join in the criminality that led to the threats: Poon, para. 15. Further, the accused in Keller was described as:
- [32] not abnormally vulnerable to threats of physical violence. He had not reason to think that the police could not give him protection if he reported the situation.
- [79] The circumstances in Keller may also be distinguished on the basis that the court found that the accused had "failed to take any steps to discover the full range of legal alternatives open to him": para. 35. Further, the court found that Keller had "no subjective frailty or personal circumstance that suggested he was unable to discover his options": para. 35. This factor was particularly relevant again given the lack of closeness in time between the threat and Keller's later actions leading to his arrest some four months later. Keller also stood to benefit from his illegal acts by repaying the debt said to be owing to Shawn.

- [80] In this case, Ms. Delos Santos states that the full reality of her situation crystallized on December 22, when the prescription was handed to her, when Castillo later communicated to her that someone would be there the next day to pick it up and most importantly, when the unknown male made his presence clear at her residence later that day. She had, prior to that time, considered calling the police. She had also considered going to her employer as an obvious alternative, but she quite rightly considered that would also have inevitably led to the police. She contends that she felt she had no choice at that time but to choose between getting Castillo the drugs or her family's safety.
- [81] Viewed objectively, there is some basis in the evidence that Ms. Delos Santos was suddenly backed into a corner and made the choice that she felt she had to make by getting the drugs the next day, December 23. The reasonableness of her choice, however, diminishes in respect of the five further prescriptions for the simple reason that she would have been fully aware of the magnitude of her situation and would have had further time to consider her options, including going to the police.
- [82] The full range of other options was put to Ms. Delos Santos in cross examination. She confirmed that she had told no one in her family about her situation. She acknowledged that she could have temporarily moved to her parents' home in Surrey. She acknowledged that she could have called Crime Stoppers, although she was scared that Castillo and the gang would find out.
- [83] If she told her supervisor, Ms. Delos Santos considered that would lead to the involvement of the police and Castillo finding out that she had "ratted them out". She did not consider that the police could protect her and her family, particularly in light of news reports she had read about innocent people being killed by gangs. She did not look into the witness protection program although, similar to the facts in *Basit*, there was no evidence that this program was available to Ms. Delos Santos and her family: para. 34.
- [84] In *Basit*, the court rejected the notion that:
- [37] the Crown can create a check list of notional safe avenues of escape and that the accused must have tendered some evidence or explanation in relation to each of them.
- [85] The fundamental question in relation to whether there is a "safe avenue of escape" remains as stated in *Ruzic* (as adopted in *Ryan* at paras. 47, 65):

61 This particular excuse focuses on the search for a safe avenue of escape (see *Hibbert*, *supra*, at paras. 55 and 62), but rejects a purely subjective standard, in the assessment of the threats. The courts have to use an objective-subjective standard when appreciating the gravity of the threats and the existence of an avenue of escape. The test requires that the situation be examined from the point of view of a reasonable person, but similarly situated. The courts will take into consideration the particular circumstances where the accused found himself and his ability to perceive a reasonable alternative to committing a crime, with an awareness of his background and essential characteristics. The process involves a pragmatic assessment of the position of the

accused, tempered by the need to avoid negating criminal liability on the basis of a purely subjective and unverifiable excuse. .

[Emphasis added]

- [86] In Cinous, the court accepted the accused's explanation about why he did not feel that calling the police was a viable option: paras. 105, 122.
- [87] The evidence of Ms. Delos Santos demonstrates to me that she is not particularly a person with "fortitude" or even sophistication in life: Ruzic, para. 62. I do not mean that critically but simply as an observation of her demeanor and assuming that her demeanour at the time of these offences was the same as at trial. The manner in which she gave evidence could suggest to the finder of fact that she has a compliant personality and that she shies away from confrontation. The fact that she has yet to tell her husband about her illegal activities and the jeopardy that she faces in these proceedings could support that conclusion.
- [88] Ms. Delos Santos did resist the demands of Castillo for some time but eventually succumbed to her perception of the threat and her truly viable options. Her explanation for filling not only the first but also the later five prescriptions is that Castillo continued to press and in fact escalated his verbal and text demands for her to continue to obtain the drugs. She says that she continued to consider that she and her family were being threatened by these people who had expressly advised her were gang members. She said she was confused and frightened.
- [89] It could be argued that her "ability to perceive a reasonable alternative to committing a crime" was largely driven by her particular circumstances and in those circumstances, her confusion and fright contributed to her not identifying any real legal alternative.
- [90] It is difficult in considering this issue to reconcile what Ms. Delos Santos thought was going to happen in the future. She acknowledged in her evidence that she thought that at some point she would be caught and that she wanted to be caught. Why then did she not "accelerate" that process by going to her employer voluntarily to advise them what was going on? Would she not have been able to put Castillo off in the same way that she did after her arrest? During her statement to the police, she indicated that she was glad to have the matter ended.
- [91] Nevertheless, in my view, these are matters for the jury to consider as questions of fact. The court stated in Basit that questions of whether the accused had other "safe avenues of escape" or whether the accused reasonably identified those options or whether the accused should have pursued those options are questions of fact for the jury:
- [40] The foregoing assessment is for the jury. The determination of whether Mr. Basit had a safe avenue of escape available to him is a question of fact for the jury: R. v. Mena (1987), 34 C.C.C. (3d) 304 at 319, 57 C.R. (3d) 172 (Ont. C.A.); Keller at para. 29. It requires an assessment of the severity of the risk Mr. Basit says he was subject to, of his characteristics and background, of his ability to perceive reasonable options and of the temporal

constraints that faced him. The weighing of these matters and the question of whether the further options the Crown points to are options which Mr. Basit should have pursued are, similarly, questions for the jury. The defence is only to be withheld from the jury if there is no evidence upon which a jury, acting reasonably, could acquit the accused.

- [92] Having undertaken a limited weighing of the evidence (again assuming that the evidence of Ms. Delos Santos is true and considering the most favourable evidence in support), I have concluded that there is some evidentiary basis upon which this element of the defence of duress may be put to the jury. Acting reasonably, the jury may consider that Ms. Delos Santos subjectively believed that she had no choice but to commit the crime and that this belief was objectively reasonable in her particular circumstances.
- [93] In my view, there is no clear path to concluding that Ms. Delos Santos should have pursued what has been suggested by the Crown to be viable legal options in lieu of committing this crime. To my mind, the actions (or rather inactions) of Ms. Delos Santos raise some serious issues about how we expect our fellow otherwise law abiding citizens to react to such pressures, particularly given the police resources that we have in our communities. This same concern was expressed in Ruzik at para. 62 and Keller at para. 34.
- [94] While the authorities clearly state that going to the police is not a viable option in all situations, it is also evident that credible evidence will be required to support that contention. It remains a possibility that the jury may choose to accept the evidence of Ms. Delos Santos in this case and find that her belief in a lack of options was reasonable in her circumstances. In that event, or in the event that her position is rejected, the decision of her fellow citizens will express the views of our community, as the jury system is intended to.
- [95] On a final note, while I have some concerns about this aspect of the defence, I am reminded that it is not my role to weigh the substantive evidence on such an application. That is for the jury. Despite my concerns, I have "real doubt" that the "air of reality" test is met on this point. In that event, the Court's statement in Pappas leads me to conclude that the matter should be left to the jury: para. 26.

Conclusion

- [96] The Crown's application to remove the defence of duress from consideration by the jury is dismissed.

"Fitzpatrick J."

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