DURESS UNDER THE INDIAN PENAL CODE: INSIGHTS FROM MALAYSIA AND SINGAPORE

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I Introduction

THE DEFENCE of duress, which is provided for under section 94 of the Indian Penal Code (IPC), has remained unaltered since its inception 150 years ago. Although progressive for its time, the provision has become outmoded in some respects, compared to more recent formulations of the defence in the common law world.[1] Furthermore, certain parts of the provision are ambiguous and require elucidation. A study of Indian case law and commentaries on section 94 show that little progress has been made to clarify or develop the defence. Insofar as the courts are concerned, this may simply be due to dearth of cases where the defence has been pleaded, denying judges the opportunity to expound the law. With regard to commentaries, some of them have cited at length English common law pronouncements on the defence,[2] while others have done exactly the opposite and stated that the English law is different from section 94.[3] Both views are correct to an extent. In favour of the former view, section 94 has traditionally been understood as having its origin in English common law at the time of its drafting, with the following comment in *M'Growther's* case often referred to:[4]

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1. For a recent article discussing several of these formulations, see Stanley Yeo, "Commonwealth and international perspectives on self-defence, duress and necessity" 19 *Current Issues in Criminal Justice* 345 (2008).

2. For example, see, Justice Y.V. Chandrachud, V.R. Manohar and Avtar Singh (eds.), *Ratanlal and Dhirajlal's The Indian Penal Code* 397-400 (31st ed., 2006); Justice C.K. Thakker and M.C. Thakkar (eds.), *Ratanlal and Dhirajlal's Law of Crimes*, 359-361 (26th ed., 2007) where various English commentaries are cited at length without qualification.

3. M.C. Desai and Gyanendra Kumar and R.B. Sethi (eds.), *Gour's Penal Law of India* 750-751 (10th ed., Reprint, 1996); P.M. Bakshi (ed.) *Raghavan's Law of Crimes* 211 (5th ed., 1999).

4. (1746) 18 St Tr 301 at 393-394. In answer to a charge of high treason, the accused pleaded that he had joined the Duke of Perth in arms against the King because the Duke's men had threatened to burn his house and destroy his cattle if he refused to do so.

> The only force that doth excuse is a force upon the person, and present fear of death; and this force and fear must continue all the time the party remains with the rebels. It is encumbent on every man who makes the force his defence, to show an actual force, and that he quitted the service as soon as he could.

The features shared by section 94 and this comment are that the threat must be of death which was present at the time when the accused committed the crime charged, and provided he was not at fault in placing himself in the situation by which he became subject to the threat, such as by failing to escape from his threatener. As against aligning section 94 with the English common law is the fact that there are some significant differences between the two laws. For example, English law recognises threats of grievous bodily harm[5] which could be directed at someone other than the accused,[6] whereas section 94 is restricted to death threats towards the accused alone. Additionally, *M'Growther's* case is authority for permitting the defence to be pleaded in answer to a charge of waging war against the state, whereas this offence is expressly excluded from the scope of section 94.

All this suggests that great care must be taken should one be disposed to rely on English common law to clarify or develop the defence of duress under section 94. It is submitted that, until such time as Parliament decides to revise section 94,[7] the best approach is to adhere as closely as possible to the wording of that provision and seek to find the law within those words. English law may be drawn upon only where it is absolutely necessary and provided that law fitted within the spirit and intendment of the IPC drafters.

The operation of this approach is well illustrated by a study of Malaysian and Singapore case authorities on section 94. It may not be well known that the British colonial administrators transplanted the IPC into the then Federated Malay states and Straits Settlements (of which Singapore was a part) in the 19th century.[8] Consequently, section 94 of the Malaysian and Singapore Penal Codes[9] is virtually identical to the provision in the IPC. As such, the Indian courts should regard the

5. *R* v. *Z* [2005] 2 AC 467; *R* v. *Radford* [2004] EWCA Crim 2878.

6. *R* v. *Z, ibid*; *R* v. *Shayler* [2001] EWCA Crim 1977.

7. The Law Commission of India, *42nd Report on Indian Penal Code* (Government of India, 1971) recommended some revisions to s. 94, but these have not been implemented.

8. See Chan Wing Cheong and Andrew Phang, "The Development of Criminal Law and Criminal Justice" in *Essays in Singapore Legal History* 245 (2005).

9. Act 574 (Revised 1997); and Cap. 224, 1985 Rev. Ed., respectively.

pronouncements by the courts of these two nations as carrying greater weight and attracting stronger interest than English cases. These Malaysian and Singapore cases have engaged with section 94 in much greater detail and depth than their Indian counterparts have managed to do.

Following from the above, the present paper does not cover every aspect of the defence of duress under section 94. Only those features of the defence which have been the subject of judicial comment are discussed (plus a recent legislative amendment made by the Singapore legislature). These are (1) the time period for effecting the threat; (2) the subject of the threat; (3) a reasonable apprehension that the threat will be carried out; (4) the physical presence of the threatener; (5) a duty to take a reasonable opportunity to escape; (6) a duty not to associate with criminals; (7) the exclusion of murder from the operation of the defence; and (8) the relevant time when the defence operates.

At this juncture, it would be helpful to reproduce section 94 of Indian Penal Code in full:

> Except for murder, and offences against the State 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:
>
> Provided that the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint.
>
> *Explanation 1*[10]
>
> A person who, of his own accord, or by reason of a threat of being beaten, joins a gang of dacoits, knowing their character, is not entitled to the benefit of this exception on the ground of his having been compelled by his associates to do anything that is an offence by law.
>
> *Explanation 2*
>
> A person seized by gang of dacoits, and forced, by threat of instant death to do a thing which is an offence by law; for example, a smith compelled to take his tools and to force the door of a

10. This and the next "explanation" are, more accurately, illustrations.

house for the dacoits to enter and plunder it, is entitled to the benefit of this exception.

II Time period for effecting threat

Section 94 expressly requires accused persons pleading the defence to have reasonably apprehended "instant" death to themselves if they refused to comply with the threatener's order to commit the crime charged. The *Oxford English Dictionary*[11] defines "instant" as "following immediately; an infinitely short space of time; a moment". This word is to be contrasted with "imminent" which permits a longer time interval for the threatener to carry out the threat from when the accused refused to comply with the threatener's wishes. That the IPC drafters meant to draw this distinction is evident in their use of the term "imminent" in section 81, the provision on the closely related defence of necessity.[12] In keeping with this, Indian case law has rightly insisted on a strict interpretation of "instant" for the defence of duress under section 94.[13]

By contrast, there is a growing body of Malaysian and Singapore cases which have substituted "imminent" for "instant" under section 94.[14] The source of this development can be traced to the Malaysian Court of Criminal Appeal case of *Tan Seng Aun* v. *Public Prosecutor* where, after upholding the trial judge's direction that "only fear of immediate death would be a sufficient excuse", the court went on to say that "[i]t is clear from section 94 itself and from decided cases e.g. *M'Growther's* case 168 ER 8 and *R v. Stratton* 99 ER 156, that duress to be pleaded successfully must be imminent, extreme and persistent".[15]

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11. *OED Online*, 2009.

12. The relevant part of s. 81 appears in the explanation accompanying the main provision and reads: "It is a question of fact in such a case whether the harm to be prevented or avoided was of such a nature and so imminent as to justify or excuse the risk of doing the act with the knowledge that it was likely to cause harm."

13. For example, see *State of Rajasthan* v. *Vijay Ram*, 1978 Cr LR (Raj) 296; *In re Doraiswami Reddiar,* AIR 1951 Mad 894; *Emperor* v. *Maganlal*, (1889) 14 Bom 115.

14. For example, see *Public Prosecutor* v. *Ng Pen Tine* [2009] SGHC 230; *Chu Tak Fai* v. *Public Prosecutor* [1998] 4 MLJ 246; *Derrick Gregory* v. *Public Prosecutor* [1988] 2 MLJ 369; *Mohamed Yusof bin Haji Ahmad* v. *Public Prosecutor* [1983] 2 MLJ 167; *Teo Hee Heng* v. *Public Prosecutor* [2000] 2 SLR(R) 351; *Shaiful Edham bin Adam* v. *Public Prosecutor* [1999] 1 SLR(R) 442; *Wong Yoke Wah* v. *Public Prosecutor* [1995] 3 SLR(R) 776; *Fung Yuk Shing* v. *Public Prosecutor* [1993] 2 SLR(R) 771.

15. [1949] MLJ 87 at 88. The citation given for *Stratton* is concerned with a procedural issue arising from that case. The correct citation where the judgment deals with the threat element is (1779) 21 St Tr 1045.

With respect, the sources of authority relied on by the appellate court in *Tan Seng Aun* for watering down the "instant" nature of the threat are highly dubious. Regarding the court's reliance on section 94 itself, it has already been noted that the provision unequivocally uses the word "instant" and not some more flexible term such as "imminent". As for the two cases cited, apart from querying why reliance should be placed on English common law, those cases do not actually support the test of imminence.[16] Certainly, there are statements in *M'Growther's* case which require the threat to be "extreme and persistent" but no mention is made there of the threat having to be imminent. As for *Stratton*, while that case describes the threat as giving rise to "imminent, extreme, necessity",[17] it was concerned with the defence of necessity, not duress. This ruling in *Stratton* accords with the IPC provision on necessity which, as noted earlier, describes the threat as "imminent". Thus, contrary to the court's view in *Tan Seng Aun*, the case of *Stratton* did not hold that the defence of duress under section 94 permits the threat to be only imminent as opposed to having to be instantaneously carried out should the accused refuse to comply with the threatener's orders.

Saying that the word "instant" appearing in section 94 should be strictly interpreted on account of its lexical meaning is one thing; contending that the defence should be so restricted is another. What purpose is served by insisting on instant harm? The likely answer is that it is to ensure that the accused's choice was materially undermined by the threat before permitting him or her to be exculpated. But this lack of free choice could well occur even if the accused reasonably apprehended that the threatener would carry out the threat after an interval. There could well be situations where, although the threat was not of instant harm, there was no way of escape or other avoiding action available to the accused. Take for example a kidnap victim who is faced with a future threat of death and who knows full well that there is no means of escape or prospects of rescue by the police.

In this regard, certain observations made by the Supreme Court of Canada in *R* v. *Ruzic* are instructive.[18] The court there replaced the term "immediate" with "imminent" appearing in the provision on duress in the Canadian Criminal Code[19] on the ground that insisting that the threat had

16. Certainly, there are other English cases which do support it: for example, see *R* v. *Hudson* [1971] 2 QB 202; *R* v. *Abdul Hussain* [1999] Crim LR 570. However, and somewhat ironically, the latest English cases favour the requirement of "immediacy": for example, see *R* v. *Z, supra* note 5.

17. (1779) 21 St Tr 1045 at 1224 *per* Lord Mansfield.

18. (2001) 153 CCC (3d) 1. For a detailed study of this decision, see Stanley Yeo, "Defining Duress" 46 *Criminal Law Quarterly*, 212.

19. RSC 1985, c. C-46, s. 17.

to be immediate breached fundamental principles of justice as laid down in the Canadian Charter of Rights and Freedoms.[20] The court went on to elaborate on how trial courts should deal with the matter of imminence. As well as referring to the word "imminent" which should be interpreted and applied in a flexible manner, the court stated that there must be "a close connection in time, between the threat and its execution in such a manner that the accused loses the ability to act freely".[21]

Regrettably, Indian, Malaysian and Singapore courts do not have the same constitutional power afforded to the Supreme Court of Canada to strike down legislation as was done in *Ruzic*. For justice to be done, the choice is either for Indian courts to adopt the stance taken by their Malaysian and Singapore counterparts and ignore the lexical meaning of "instant" under section 94, or for Parliament to replace that word with "imminent". The clear preference is for the latter course, in order to avoid sullying the IPC.

III Subject of the threat

Section 94 expressly requires the threat to have been directed at the accused alone. It is submitted that this restriction is unduly severe and runs against the current trend in many jurisdictions of extending the defence to cases where some person other than the accused was the subject of the threat. This position is attractive for recognising that there may be circumstances involving threats of bodily harm (especially when it is of death) to other people besides the accused, which can move ordinary people to commit crime to prevent the harm occurring.

In agreement, the Law Commission of India reviewing the IPC proposed extending section 94 to cases involving threats to "any near relative of [the accused] who was present when the threats were made", with the term "near relative" covering "parents, spouse, son or daughter".[22] The commission's recommendation is arguably too restrictive. It is difficult to appreciate why the person who was in danger of being harmed had to be present when the threats were made. Applying the commission's proposal would deny the defence to an accused threatened with the death of his or her spouse who was being held captive in some other place. Furthermore, the definition of "near relative" is so narrow that it fails to include the

20. See *R* v. *Ruzic* (2001) 153 CCC (3d) 1 (SCC), paras. 22-23 *per* LeBel J., referring to s. 7 of the Charter which provides that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

21. *Id*., para 65.

22. *Supra* note 7, para. 4.45.

accused's own siblings, grandparents and other family members whom he or she may have some special attachment for. It is also questionable why the relationship between the accused and the person threatened should be familial.

Recently, the Singapore Parliament amended section 94 to permit the defence to apply where the threat was directed at the accused "or any other person".[23] This allows the defence to be invoked even where the threat had been directed at a complete stranger. Other jurisdictions have adopted a middle ground. For example, English common law recognises that, besides the accused, the threat could be directed at a member of his or her immediate family or someone for whose safety the accused reasonably regarded himself or herself as responsible.[24] Another example is the proposal by the Victorian Law Reform Commission that the threat could be directed at the accused or "someone closely connected with him".[25] This formula has much to commend it for being sufficiently flexible to enable a court to decide the issue based on the particular facts of the case before it.

IV Reasonable apprehension of threat being carried out

The words "reasonably cause the apprehension that instant death … will otherwise be the consequence" appearing in section 94 clearly inject an element of objectivity into an assessment of the accused's belief as to the threat confronting him or her. It is not simply that the accused himself or herself believed (in which case the test would be purely subjective) but what the accused reasonably believed. This requires the court to consider what the accused's belief as to the nature of the threat was, and to then decide whether such a belief was reasonably held.

There appear to be no Indian cases on the point. The issue came before the Malaysian Supreme Court in the case of *Derrick Gregory* v. *Public Prosecutor.*[26] The accused had pleaded the defence under section 94 in answer to a charge of drug-trafficking. He claimed to have suffered from a personality disorder which made him extremely timid with the result that he perceived the threat directed at him to be more serious than it might have been to an ordinary person. The court rejected this contention. Based on this decision, when considering the "reasonableness" of the

23. Penal Code (Amendment) Act 2007 (No. 51 of 2007).

24. *Supra* note 6.

25. Report No.9 of 1980, *Duress, Necessity and Coercion* para 4.19 (Government Printer, 1980).

26. [1988] 2 MLJ 369.

accused's belief, only those personal characteristics of the accused which might be found in a mentally healthy and sober person will be taken into account. Thus, characteristics such as the accused's age, sex or physical vulnerability will be recognised, but not the fact that he or she was intoxicated or suffered from some intellectual or mental disorder. Incidentally, this is also the position under English common law which likewise specifies a test of reasonable belief as to the nature of the threat. Thus in *R* v. *Bowen*,[27] the court of appeal rejected the accused's plea that his low intellectual quotient (I.Q.) had affected his ability to understand the threat.[28]

V Physical presence of the threatener

The Indian Penal Code Commissioners[29] originally proposed that the threatener had to be physically proximate to the accused at the time of the crime, and some criminal codes such as those of Canada,[30] New Zealand[31] and Tasmania[32] have this requirement. However, there is nothing in the wording of section 94 which insists on this. Certainly, the requirement of a threat of instant death may suggest that the threatener has to be close by to carry out that threat. However, one can imagine circumstances when the threatened harm may be carried out instantly if the accused refused to comply, without the threatener being physically present. For example, the threatener could use a high calibre rifle or strap a bomb on the accused's body which could be detonated by remote control. Furthermore, a close examination of section 94 reveals that it does not say that only the person who ordered the accused to commit the crime can carry out the threat. As such, the defence could operate where the threatener had arranged for someone else to kill the accused.

Unfortunately, the Malaysian Court of Appeal in the case of *Chu Tak Fai* v. *Public Prosecutor*[33] read into section 94 the need for the threatener's physical presence when the crime occurred. The accused had relied on

27. [1996] 2 Cr App R 157.

28. But see *R* v. *Martin (David Paul)* [2000] 2 Cr App R 42 where the Court of Appeal recognised the accused's psychiatric disorder. This decision is unlikely to stand in the light of the House of Lords case of *R* v. *Z, supra* note 5 which had emphasized the objective nature of the defence: see David Ormerod (ed.), *Smith and Hogan's Criminal Law* 331 (12th ed., 2008).

29. C.H. Cameron and D. Eliott, *The Indian Penal Code as Originally Drafted in 1837 and the First and Second Reports Thereon* (1888), para. 169.

30. See *supra* note 19.

31. Crimes Act 1961 (N.Z.), s. 24.

32. Criminal Code Act 1924 (Tas.), s. 20(1).

33. [1998] 4 MLJ 246.

section 94 in answer to a charge of drug-trafficking. Among the grounds which the court relied on to reject the accused's plea was the fact that the person who made the death threat was in Bangkok when the accused was arrested with the drugs at the Thai-Malaysian border. In support of its ruling, the court referred to the Privy Council decision in *Subramanian* v. *Public Prosecutor*,[34] on appeal from Malaya. The facts of that case were that the appellant had been convicted of unlawful possession of ammunition contrary to Malayan Emergency Regulations. He was found by security forces lying wounded in a deserted terrorist camp. He relied on section 94, claiming that he had been held against his will and in fear of instant death by the terrorists. The trial judge had rejected the defence on the ground that the terrorists were no longer present when the accused was found. On one reading, the Privy Council appears to have accepted the trial judge's view that the threatener's physical presence was required by section 94 when, in giving the appellant the benefit of the defence, it commented that "[t]he terrorists or some of them may have come back at any moment".[35] However, the better reading of the Privy Council's comment is that it was solely concerned with the "instant" nature of the threat.[36]

The Singapore courts have not followed *Chu Tak Fai*. A recent example is the Singapore High Court decision in *Public Prosecutor* v. *Ng Pen Tine & Another*.[37] The facts of this case are described in detail here because they will serve to illustrate several propositions discussed in this paper. The accused was a Malaysian national who was alleged to have trafficked in heroin by handing bundles of the drug hidden in his car to the co-accused. In his statement to the police, the accused said that he was indebted to one Ah Xiong for getting him out of trouble with another gangster. The accused contended that he knew Ah Xiong to be a powerful and influential Malaysian gangster, and believed that Ah Xiong would carry out his threat of killing the accused and his family members if he refused to drive his car from Malaysia into Singapore to meet the co-accused. This threat was uttered in the house of one Ah Zhong in the Malaysian State of Johor on October 3, the day before the alleged crime. The accused also claimed that he had made previous unsuccessful attempts to stay away from Ah Xiong by escaping to the Malaysian State of Pahang.

34. (1956) 22 MLJ 220.

35. *Id*. at 223.

36. See further Stanley Yeo, Neil Morgan and Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* paras. 22.15 – 22.16 (2007).

37. [2009] SGHC 230. For another case example, see *Teo Hee Heng* v. *Public Prosecutor* [2000] 2 SLR(R) 351.

On October 4, pursuant to the orders of Ah Xiong, the accused drove his car from Ah Zhong's house into Singapore to meet the co-accused. The accused said that although Ah Xiong was not physically present during his drive into Singapore, three of his men had followed the accused closely in motor vehicles. Soon after the accused and co-accused had met and then gone their separate ways, law enforcement officers arrested them. At his trial, the accused pleaded the defence of duress which was accepted by the court, with the result that he was acquitted of the drug-trafficking charge.

With respect to the issue of the threatener's physical presence, the court in *Ng Pen Tine* permitted section 94 to succeed despite Ah Xiong being in Malaysia when the accused was arrested with the drugs in Singapore. The court noted that "Ah Xiong's threat of death, far from being removed from the … accused's mind, continued to operate on him".[38] This observation correctly highlights the concern of section 94 which is the impact of the threat on the accused's mental state. Although in practice, the threatener's presence will often be necessary to convince the trier of fact that the accused did indeed commit the crime under duress, such presence is not a strict legal condition. Section 94 is concerned with the psychological effect on the accused which will continue so long as he or she reasonably believes that the threatener is able to carry out the threat whether from near or far.

VI Duty to escape

Does section 94 require an accused person to escape from his or her threatener if a reasonable opportunity arises? This question is sometimes phrased in terms of whether the accused had a safe avenue of escape or, more broadly, had no reasonable alternative course of action but to comply with the threatener's wishes. On its face, the wording of the provision seems to be silent on this issue, and there do not appear to be any reported Indian cases which have dealt with it. Indian commentaries are also sparse in their discussion. The editors of *Ratanlal and Dhirajalal's Indian Penal Code* had to resort to citing the English case of *R* v. *Hudson*[39] which allowed the accused to successfully plead the common law defence of duress in answer to a charge of giving false evidence because she "had no alternative under the circumstances".[40] There is also the comment in *Gour's Penal Law of India* that:[41]

38. *Ibid.*, para. 158.
39. [1971] 2 All ER 244.
40. *Supra* note 2 at 400.
41. *Supra* note 3 at 752.

> In order, however, to entitle a person to avail himself of the general exemption here provided for [i.e. section 94], he must bring his case strictly within its compass. He must … show that he was given no alternative but to do or die.

Unfortunately, the editors do not identify the part of section 94 which imposes this requirement.

The Malaysian and Singapore courts have also read into section 94 this duty on the part of the accused to escape should a reasonable opportunity arise. The Malaysian Court of Appeal in *Chu Tak Fai* did this by relying, not on section 94 but on English common law authorities, including *R* v. *Hudson*.[42] On the other hand, the Singapore courts have found the source for this requirement in the proviso to section 94 where it is stated that the accused "did not of his own accord … place himself in the situation by which he became subject to such constraint". Although those words have been conventionally read as being concerned with the duty not to associate with criminals,[43] the duty to escape could just as readily come within its ambit.

In the Singapore High Court case of *Teo Hee Heng* v. *Public Prosecutor*,[44] the accused, who was charged with extortion, contended that he had been forced to do so by one Leow who had threatened him with death if he refused to comply. Leow was not with the accused at the time of the offence. The court rejected the defence under section 94 on the ground that:[45]

> … [E]ven if Leow had made any threats on the petitioner's life, it was partly the petitioner's own doing for having placed himself in such a position since he could easily have extricated himself out of the situation by seeking help from the police instead of continuing to act on Leow's instigation.

Although the court did not expressly refer to the section 94 proviso, its choice of words is so closely similar to the wording of the proviso as to point unmistakably to it.

The proviso to section 94 does not describe the test to be applied to determine whether or not there was a reasonable opportunity to escape. The Singapore High Court in *Ng Pen Tine* filled this gap by ruling that "it

42. [1998] 4 MLJ 246. The court also referred to a passage from the House of Lords' case of *Director of Public Prosecutions for Northern Ireland* v. *Lynch* [1975] AC 653 at 668; and another from the English Court of Appeal case of *R* v. *Sharp* [1987] 1 QB 853 at 857.

43. See discussion *infra* part VII.

44. [2000] 2 SLR(R) 351.

45. *Ibid.*, para. 11.

was the … accused's reasonable belief which mattered".[46] It will be recalled that the accused claimed to have been followed by some of Ah Xiong's men during his drive from Malaysia to a designated spot in Singapore. In the course of the trial, the court accepted the prosecution's contention that the accused could have sought help when he stopped at a petrol station to refuel, or at either of the border checkpoints. However, it held that these possible opportunities were not in reality available from the accused's point of view since he knew that Ah Xiong was a very powerful and influential gangster in Malaysia who had violent men at his disposal. It was, therefore, reasonable for the accused to believe that alerting the public authorities would have been ineffective in removing Ah Xiong's threat on his life and those of his family members,[47] and could well have compounded matters.

The court in *Ng Pen Tine* did not state the source for its test of "reasonable belief". Nevertheless, it is submitted that the court was correct to have adopted this test. This is because the main provision of section 94 refers to threats which "reasonably cause the apprehension" that instant death to the accused will be the consequence of his or her refusal to comply with the threatener's orders. Hence, a partially subjective/objective test is applied to the nature of the threat being of instant death. A strong argument could be made that since the issue of a reasonable opportunity to escape, like the nature of the threat, involves a state of things or affairs, the test should be the same for both. Thus, what was said in part IV of this paper concerning the personal characteristics affecting the "reasonableness" of the accused's belief, equally applies here.

The case of *Ng Pen Tine* considered another aspect of the requirement of a reasonable opportunity. It concerns persons claiming, as the accused in *Ng Pen Tine* and *Chu Tak Fai* did, that their threateners belonged to a vicious drug syndicate that had large resources at its disposal to carry out the threat. The court in *Ng Pen Tine* acknowledged this factual possibility by saying that "[a]s a general rule, there could be situations where no amount of police protection would be effective to counter the threats levied at the accused … [and] that the present case was one such instance".[48] This ruling is laudable for injecting a sense of reality with respect to the limitations of police protection, especially where violent criminal organizations are involved.

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46. *Ibid.*, para. 160.

47. As noted earlier, since a 2007 amendment, the Singapore provision permits the threat to be directed "at any person".

48. [2009] SGHC 230 at 160.

Nevertheless, it must be acknowledged that, were this ruling to be adopted by Indian courts, it would undermine public confidence in the efficacy of the police. The courts have a choice of two options, the first being to deny members of the community, on grounds of public policy, the right to evaluate the efficiency of the police force.[49] The second is the one taken by the court in *Ng Pen Tine* of permitting the efficacy of police protection to be considered when assessing the reasonableness of an accused's belief concerning a reasonable opportunity to escape.[50] An attractive compromise between these two options could be that it is for our courts to presume that members of the society would reasonably believe that police protection is effective and to seek it out, and to make a finding that such protection was ineffective only when the circumstances were exceptional, such as transpired in *Ng Pen Tine*.[51]

VII Duty not to associate with criminals

As noted earlier, the proviso to section 94 requires that the accused "did not of his own accord … place himself in the situation by which he became the subject" of threats. The first explanation of section 94 describes a person who had voluntarily joined a gang of robbers knowing of their character. The few available Indian cases have dealt with straightforward cases of an accused joining a criminal group knowing of their propensity for violence.[52] The editors of *Gour's Penal Law of India* give the illustration of D who joins an assembly of people which, unknown to him, is a criminal gang personating a lawful marriage procession or government officers on duty.[53] Should the gang subsequently reveal their true identity and compel D to commit a crime, they opine that he must still resist, unless the threat is one of instant death. It is submitted that

49. This option was recommended by the English Law Commission in its Report No 177, *A Criminal Code for England and Wales* (HMSO, 1989), cl. 42(4) of its draft Criminal Code.

50. This option was preferred by the English Law Commission in its later report, No. 218, *Legislating the Criminal Code: Offences against the Person and General Principles* (HMSO, 1993), cl. 25(2)(b) of its draft Criminal Law Bill.

51. For another example of a case adopting this approach, see the High Court of Australia decision in *Taipa* v. *The Queen* [2009] HCA 53 *available at*: http://www.austlii.edu.au/au/cases/cth/HCA/2009/53.html (accessed 5th February 2010).

52. For example, see *Sanlaydo* v. *Emperor*, AIR 1933 Ran 204 where the accused had voluntarily and knowingly joined a band of persons who intended to commit a robbery. See also *Gour*, *supra* note 3 at 754 where the illustration is given of members of an anarchist meeting who have been given timely notice that one of them will murder a certain personage, failing which he will be killed.

53. *Supra* note 3 at 754.

this opinion is incorrect[54] insofar as it does not adequately account for the fact that D was ignorant of the assembly's criminal character when he first joined it. In these circumstances, D cannot strictly be said to have "on his own accord … knowing of [the gang's] character" placed himself in the situation whereby he became subject to the threats.

It is unclear whether the proviso excludes cases where the accused had voluntarily *associated* with a criminal group (as opposed to joining it) knowing of their character and thereby exposed himself or herself to the risk of compulsion to commit a crime on the group's behalf. This issue arose on the facts in the Singapore case of *Ng Pen Tine* where the prosecution contended that duress failed because the accused had, contrary to the proviso to section 94, voluntarily placed himself in the situation where he became the subject of the threat by Ah Xiong. The court rejected this contention by highlighting the fact that the accused had been compelled by his surrounding circumstances to continue to be in associate with Ah Xiong. In particular, he had made previous unsuccessful attempts to stay away from Ah Xiong by escaping to another Malaysian State.[55] As such, it could not be said that he had freely chosen to place himself in the situation where he became subject to Ah Xiong's threat. This specific finding of fact aside, *Ng Pen Tine* stands for the proposition that the proviso to section 94 excludes not only people who voluntarily join a criminal group but those who voluntarily associate with members of the group as a result of which they are subsequently forced to participate in the group's criminal activities.

For the sake of completeness, another controversial issue involving the *proviso* to section 94 which was not discussed in *Ng Pen Tine* needs to beconsidered. On one reading, the *proviso* stipulates that an accused will be denied the defence in respect of *any* crime which he or she was ordered to commit, and not only ones which the accused knew or ought to have known he or she might be ordered to commit. This position is supported by the part of the first explanation to section 94 which says that the proviso operates to disentitle accused persons from relying on the defence on the ground of their having been compelled by their associates "to do anything that is an offence by law". This is also the position under English common law.[56] On this reading, it would have been immaterial that the accused in *Ng Pen Tine* believed he was being ordered by Ah Xiong to deliver "ice" (i.e. methamphetamine) to the co-accused in Singapore, or any other illegal substance for that matter.

54. The part of the opinion concerning the threat of instant death is not disputed.
55. [2009] SGHC 230, para. 161.
56. *R* v. *Harmer* [2002] Crim LR 401; *R.* v *Z* [2005] 2 AC 467.

On another reading, the *proviso* is wide enough to permit the courts to restrict its operation to persons who knew or ought to have reasonably foreseen that, by joining or associating with the criminal group in question, they risked being compelled to commit the type of crime alleged. This is the position under the Australian Commonwealth Criminal Code.[57] It is submitted that this stance is to be preferred for not denying the defence to people who may be compelled to commit a crime which fell completely outside their scope of contemplation. As one commentator has convincingly stated, "it is one thing to be aware that you are likely to be beaten up if you do not pay your debts, it is another that you may be aware that you may be required under threat of violence to commit other, though unspecified crimes, if you do not".[58]

VIII Murder excluded

Section 94 expressly excludes murder from its scope of operation. Indian courts have strictly construed the provision as excluding only persons charged with murder *per se*. Consequently, section 94 has been permitted to be pleaded in answer to a charge of abetment to murder[59] and of being a member of an unlawful assembly which common object was to commit murder.[60] There do not appear to be any cases involving conspiracy to murder or attempted murder, but the strict judicial construction given to the term "murder" in section 94 should likewise enable the defence to operate in respect of these other offences. Malaysian and Singapore courts have taken the same approach.[61]

In contrast, English common law excludes murder,[62] abetment to murder[63] and attempted murder[64] from the scope of the defence of duress. The basis for the English courts' exclusion of abetment to murder is the artificiality of the distinction drawn between abettors and killers since there could be cases where the former might be more culpable than the latter and yet escape criminal liability. Examples when this might occur are cases involving contract killings or where a clever and scheming person goaded a weak minded individual into committing a killing which he or

57. Criminal Code 1995 (Cth.), s. 10.2(3).
58. J.C. Smith, commenting on *Heath* [2000] Crim LR 109 at 111.
59. *Umadasi Dasi* v. *Emperor*, AIR 1924 Cal 1031.
60. *Bachchan Lal* v. *State of Uttar Pradesh,* AIR 1957 All 184.
61. For example, see *Chao Chong & Others* v. *Public Prosecutor* [1960] MLJ 238; *Wan Kamil bin Md Shafian & Others* [2002] SGCA 15.
62. *R.* v. *Howe* [1987] AC 417.
63. *Ibid*.
64. *R* v. *Gotts* (1991) 2 AC 412.

she would not otherwise have done. As for excluding attempted murder, the English courts have done so on the basis that the *mens rea* for that offence is an intention to kill whereas, for murder, it is sufficient to prove a less culpable mental state. Accordingly, it would be illogical to permit the defence to acquit a person charged with attempted murder but not with murder. These appear to be persuasive reasons for excluding abetment to murder and attempted murder from the operation of duress.

However, insofar as section 94 is concerned, it will not suffice to simply refer to the English common law as some Indian commentaries have done,[65] without engaging with the Indian, Malaysian and Singapore case authorities which have taken a different approach. Although not expressly stated by these authorities, a possible explanation for their strict construction of the word "murder" in section 94 is because the courts were attracted to the arguments for recognising duress defence to murder.[66] Consequently, these courts have sought to contain the exclusion in section 94 as much as possible. In any event, whether section 94 should be available as a defence to murder is a matter which deserves serious consideration by the legislature. This is now the law in some jurisdictions[67] and has been proposed by the law reform commissions of others, including England.[68]

IX Revelant time when the defence operates

Section 94 states that "[n]othing 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 of instant death …". On this basis, Indian courts have held that the defence would fail if the accused continues to perform the physical elements of the offence charged after the threat has ceased to exist.[69] The simple explanation for this is that the accused would then no longer have been compelled by the threat to commit the offence.

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65. For example, see *Ratanlal and Dhirajlal's Indian Penal Code*, *supra* note 2 at 397, 399.

66. For a detailed discussion of these arguments, see Law Commission No. 218, *supra* note 50, paras. 30.9 – 30.16.

67. For example, Western Australia and the Commonwealth of Australia.

68. See the English Law Commission No. 304, *Murder, Manslaughter and Infanticide* (TSO, 2006). See also the Victorian Law Reform Commission, *Defences to Homicide, Final Report* (VLRC, 2004).

69. For example, see *In re, Doraiswami Reddiar*, AIR 1951 Mad 894; *Mirza Zahid Beg* v. *Emperor*, AIR 1938 All 91.

However, there is a real danger of this requirement wreaking injustice if it were to be very strictly applied. This occurred in the Malaysian case of *Mohamed Yusof bin Haji Ahmad* v. *Public Prosecutor*.[70] In answer to a charge of drug-trafficking, the accused claimed that a Thai man had met him in Thailand and threatened to shoot him dead if he refused to carry two bags containing cannabis, a prohibited drug, across the Thai/Malaysian border to the Malaysian railway station just across the border. The accused said that his threatener had followed him on foot, keeping a distance of about 20 feet from him, throughout his walk along the railway lines to the platform of the said station. The accused had left the bags on the platform and gone to purchase a train ticket when he was arrested by the police. The court observed, as one of the grounds for rejecting the defence of duress, that the accused "had already completed his mission except for handing over the drugs to the Thai".[71] In these circumstances, the court held that "there is nothing to suggest that when the [accused] placed the bags on the platform and went to purchase the ticket, such duress was present or continued to be present".[72] With respect, while it might have been true that the threat no longer existed when the accused was arrested, by confining the operation of the defence of duress to this specific point in time, the court failed to take into account the period leading up to it, during which the threat would have been continuing and present.

If *Mohamed Yusof* indeed expresses the legal position that the law enforcement agents could deliberately wait until the offence was completed before arresting the accused. This would enable the prosecution to successfully contend that it did not matter that the accused had been compelled by a threat until just before his or her arrest. The reason for this is that, when the accused was arrested, the threat would have ceased since the accused would have discharged the threatener's orders by completing the offence.

It is submitted that courts should allow a wider time frame than the time of arrest for the operation of duress. They should inquire whether the threat was present and operating on the accused's mind *just prior to* his or her arrest. This proposal not only does justice to the accused; it satisfies the requirement of section 94 that the threat must be present at the time of the offence. This is because the accused would have been committing the offence during this earlier point in time, and not only when he or she was arrested. In this respect, the approach taken by the court in *Ng Pen Tine* was correct in not denying the accused the defence

70. [1983] 2 MLJ 167.
71. *Id*. at 170.
72. *Ibid*.

of duress on the ground that Ah Xiong's threats had ceased when the accused delivered the bags of heroin to the co-accused.

X Conclusion

This survey of Malaysian and Singapore judicial and legislative initiatives with respect to the defence of duress under section 94 of the IPC has produced several useful insights. Among them are two which will require legislative amendment for them to become part of Indian law. The first is for the defence to extend to cases where the threat was imminent, as opposed to instant. It is submitted that this alteration to section 94 has been judicially effected in Malaysia and Singapore by relying on dubious English case authorities. While justice has been served by this judicial initiative, it goes against the express wording of section 94 and consequently ignores the clear legislative intent. The second initiative is to follow the lead of the Singapore Parliament to amend section 94 so as to permit the defence to apply to cases where the threat was directed, not at the accused alone, but at any person. Should this be considered too generous towards the accused, some restriction could be placed on the categories of persons threatened, such as people who were closely connected with the accused, or whose safety an accused reasonably regarded a responsibility for.

Apart from these two initiatives, the judicial pronouncements by Malaysian and Singapore courts on various other features of section 94 could be adopted by Indian courts. This is because those pronouncements were aimed at filling gap found in section 94 or clearing some ambiguity in the provision. When doing so, the Malaysian and Singapore courts have generally been careful to find the answers from the IPC provision itself and not from the English common law. These pronouncements and attendant proposals made in this article may be summarized as follows:

- When assessing the reasonableness of an accused's belief that (1) instant death will be the consequence if he or she refuses to comply with the threatener's orders; and (2) there was no reasonable opportunity to escape from the threatener, account will be taken of any of the accused's personal characteristics which could also be found in a ordinary sober person of sound mental health.
- An accused should seek the protection of the police if a reasonable opportunity avails itself, unless the circumstances were so exceptional that it would be unreasonable to expect him or her to do so.

- There is no legal requirement for the threatener to have been physically proximate to the accused when he or she committed the alleged offence.
- The defence under section 94 will be denied to a person who voluntarily associates with criminals, knowing of their character, and knowing or reasonably foreseeing the risk that such association could result in him or her being threatened into committing a crime of the same type as that which the accused actually committed.
- Indian courts should reconsider their interpretation of section 94 that only murder *per se* is excluded from the scope of the defence. There are persuasive reasons, given by English courts, to also exclude the allied offences of abetment to murder and attempted murder. That said, Parliament should seriously consider making section 94 a defence to murder, as has been recently done or proposed in several jurisdictions.
- It should also permit the defence to succeed so long as the threat existed just prior to the accused's arrest. Otherwise, law enforcement agents could time the arrest so that it occurred after the accused had completed the offence, and consequently claim that the threat had ceased to exist at that time.