

In source four (Special Study Materials) Lord Jauncey, in *R v Gotts* [1992], states: "I can see ... no justification in logic, morality or law in affording to an attempted murderer the defence which is withheld from a murderer."

Discuss, in light of the relevant case law, whether you agree with this statement.

Introduction

In this essay I will be analysing Lord Jauncey's judgement in regards to the court's final decision in *R v Gotts* (1992). This quote highlights Lord Jauncey's opposition to allow any defendant in using the defence of duress whether the mens rea was fulfilled or not. In other words, if a defendant is unable to use duress whilst charged with murder, a defendant charged with attempted murder should not be granted the defence either. I wholeheartedly agree with his statement, as surely a charge of attempted murder is worse than that of murder. Attempting to kill someone requires a higher and more specific level of intent than killing someone accidentally. Although the Homicide Act (1957) offers 3 partial defences to murder, it is not always the case that they are used successfully. This essay will focus on Lord Jauncey's quote, giving the counter-arguments of other judges as well as explaining the concept of *stare decisis* (stand by what has already been established) which the courts must take into consideration.

Murder

Murder is a common-law offence which has not been defined by any Act of Parliament, but has been defined through the judgements of previous murder cases. The widely accepted definition of murder given by Lord Coke in the seventeenth-century is "*the unlawful killing of a reasonable person in being and under the King's (or Queen's) Peace with malice aforethought, express or implied*"¹. This means that an individual lacking any ailment, who performs the actus reus of killing another individual, with the mens rea of intent, will be found guilty of murder. The jury must find that death or serious injury was a virtual certainty as a result of the defendant's actions and that the defendant was well aware of this (Woollin 1998).

Attempted Murder

An attempt to commit murder is where the defendant tries to commit the crime, but for some reason fails to complete it. The perfect example of this is through the case of White (1910) where the defendant poured cyanide into his mother's drink intending to kill her. Before she drank it, she died of a heart attack due to fright or some external cause. Bray J (who delivered the

¹ Criminal Law A2 – J. Martin Page 67

judgement of the court) stated that: “*We are of opinion... that the completion or attempted completion of one of a series of acts intended by a man to result in killing is an attempt to murder even though this completed act would not, unless followed by other acts, result in killing.*”² This judgement will be important when I discuss the case of R v Gotts later on in this essay, and subsequently why Lord Jauncey’s statement is right.

The law and duress – is the defence available to murder?

Duress can be briefly defined as the defendant being forced to commit a crime because he has been threatened with either death or serious injury. An example can be seen in this analogy: Simon intends to plant a bomb in a school. Simon has no way of getting there, so holds Zack at gunpoint and says “drive me to the school or I’ll shoot you in the heart”. Zack fears for his life, so drives him to the school. Simon then says “if you don’t wait for me, I’ll hunt your family down and kill each and every one of them”. Zack feels he has no choice but to do as Simon says, being a secondary participant to murder by aiding and abetting Simon.

Duress is never a defence to murder. This judgement was established in the case of Dudley and Stephens (1884) where the defendant and others were shipwrecked on a boat. After several days of no food or water, they decided to kill and eat the cabin boy who was the weakest of the four. They were rescued four days later and sentenced to death. Were it not for Queen Victoria herself to intervene and spare their lives through “Royal Prerogative” they would have still been sentenced to death. This case was however one of murder, not attempted murder. So Lord Jauncey’s statement of a murderer being denied the defence of duress should be considered similar for attempted murder. Surely attempting to kill someone, but due to fortunate circumstances (on the victim’s part) failing to do so is as terrible a crime as fully committing it?

Summary of R v Gotts

The case of R v Gotts involved a 16 year old who had seriously injured his mother with a knife. He pleaded not guilty to the charge he had received of attempted murder, and sought to prove that he was only acting under duress because his father had threatened to shoot him unless he killed her. The trial judge rules that the evidence was prohibited since duress was not a defence to a charge of attempted murder. Gotts pleaded guilty and was put on probation for three years. His appeal against the conviction, on the grounds that the

² Criminal Law Cases and Materials 7th Edition – Smith & Hogan Page 408

rulings given were wrong, had been dismissed by the Court of Appeal so he appealed to the House of Lords.

In *Gotts*, before Lord Jauncey had given his judgement, Lord Keith stated that the defence of duress was withheld only in the cases of murder and treason. He found it “*difficult to accept that a person acting under duress had a truly evil intent*”. Lord Keith also highlighted that he thought it unsatisfactory that the defence of duress was only available to those charged with wounding to cause GBH (grievous bodily harm) but not on a charge of attempted murder. His opinion is quite unsatisfactory in itself, as he is advocating the need to allow a potential murderer in harming his fellow human being. Being pressured into committing murder or attempting to commit it, could dramatically widen the loophole of claiming that duress was the only reason why a certain crime was completed. Hit men could claim that they were ‘forced’ into attempting to kill someone, even if they weren’t. Teenagers would shift the blame of their violent actions, as it’s the easiest thing to do. The problem with gang members in London could initiate a contest of blaming rival gang members they dislike, even if they’re completely innocent. “*The British Crime Survey suggests the number of violent incidents involving knives in 2005/2006 was at 169,000*”³ This statistic could dramatically increase in number if potential perpetrators knew that the defence of duress was available to crimes of attempted murder.

Is choosing the lesser of two evils permission to use the defence?

In reference to **Source 4**, Lord Jauncey states that “*...duress... as a defence to a murder charge is that the law regards the sanctity of human life and the protection thereof as a paramount importance. Does that reason apply to attempted murder as well as to murder?*” In other commonwealth countries, duress is not available as a defence to attempted murder, such as Queensland, Tasmania, Western Australia, New Zealand and Canada. Surely their precedent in attempted murder crimes should persuade and influence our courts in their judgements?

The case of R v Howe (1987) involved two appellants, Howe and Bannister, who took part in the torture and abuse of a man who was then strangled to death by one of the other participants. These events were repeated for a second time where a man was also killed through torture, abuse then strangulation. The difference here was that Howe and Bannister were in fact the principal offenders. They claimed that they had been acting under duress,

³ <http://www.telegraph.co.uk/news/uknews/1546085/The-vagaries-of-UK-knife-crime-statistics.html>

as they were ordered by someone named Murray who through acts of violence had gained control of each of them. The trial judge ruled that duress was available for the first killing where they were only secondary offenders, but not for the second killing where they were the principal offenders. The Court of Appeal ruled that this was correct, but the House of Lords re-instated the fact that duress was not an available defence for either murder. In reference to **Source 2**, Lord Hailsham stated that “...a reasonable man might reflect that one innocent human life is at least as valuable as his own or that of his loved one. In such a case a man cannot claim that he is choosing the lesser of two evils.” If murder was not permitted the defence of duress, allowing an attempted murderer the defence would create an inconsistency within the law. As previously mentioned, murder is the unlawful killing of a human being with ‘malice aforethought’. An attempted murder has the same definition, but the actus reus has not been completed. If a reasonable man with the same characteristics as the defendant chose to kill another to save himself due to duress, his actions do not deserve the term of being the ‘lesser of two evils’. There could have been a number of ways to prevent the crime, as in *Howe*, the defendants could have easily notified the police that they were being threatened to commit illegal acts. The police are not going to act in a similar way as the police officer in *Dytham (1979)* did, where he failed to perform his duty whilst a man was being violently attacked.

Is there much difference in murder and attempted murder?

There is no difference between the two, as failing to kill when intending to kill, is the same as intending to kill and killing. Lord Jauncey stated in *R v Gotts* that “A man shooting to kill but missing a vital organ by a hair’s breadth can justify his actions no more than a man who hits a vital organ”⁴ This is entirely true, thus making his initial statement (quote in question) acceptable. There are countless analogies that highlight the reasons more for why duress should not be available to an attempt, than why duress should be. In reference to **Source 1**, the judgement of Lord Lane, Lord Chief Justice in *R v Graham (1982)* created a subjective and objective test that the jury must consider when deciding whether the defence of duress should succeed:

- 1) Was the defendant compelled to act as he did because he reasonably believed he had good cause to fear serious injury or death? And
- 2) If so, would a sober person of reasonable firmness, sharing the characteristics of the accused have responded in the same way?

⁴ Criminal Law Cases and Materials 7th Edition – Smith & Hogan Page 321

In the case of R v Gotts, the intimate facts of the case are crucial in deciding whether there's a potential in using the defence. If the defendant was held at gunpoint whilst being threatened to stab his mother had occurred, then the first objective test would apply. The defendant would fear death or serious injury at the time of the offence, compelling him to act. Would a reasonable man have done the same thing? Most probably, but a truly reasonable man would act heroically rather than the way of a villain. A problem with the definition of the reasonable man, is that there is no concise and authentic definition. How can millions of human beings living on this very earth, each entailing different characteristics and unique personalities, define what they believe to be reasonable? The Oxford dictionary defines reasonable as “**1** fair and sensible. **2** as much as is appropriate or fair; moderate. **3** fairly good; average”⁵ What is fair and sensible? What is appropriate or fair? What is fairly good; average? It would be much simpler and easier to re-enforce the notion that duress is not available to murder, onto attempted murder, as they both interlink and coincide with each other. Before a murder is classified as one, the defendant would have attempted to murder an individual. Murder is simply the follow on of an attempt to murder.

Should duress only be available due to result rather than intent?

Lord Lowry's judgement in R v Gotts was quite critical of Lord Jauncey's statement, as he has said that “*if common law has had a policy towards duress... it seems to have been to go by result and not primarily by intent*”⁶. In other words, when looking back at common-law cases, it has based itself upon the result of the accused's actions rather than what his intentions were. This might be so, but when maintaining the concept of stare decisis and ensuring the correct application of justice is used, following the case of Howe is vital in upholding the courts values. In reference to **Source 3**, Lord Griffiths stated that “*the law should not be extended to the killer*” and he declared that “*the law to duress is not available as a defence to a charge of murder, or to attempted murder.*”

Lord Lowry finally stated that “*...your Lordships are constrained by common-law rule from holding that the defence of duress does not apply to attempted murder.*”⁷ Thus not only confirming the law in regards to duress, but making Lord Jauncey's statement correct in both the sense of morality and law.

Conclusion

⁵ http://www.askoxford.com/concise_oed/orexxasonable?view=uk

⁶ Criminal Law Cases and Materials 7th Edition – Smith & Hogan Page 321

⁷ Criminal Law Cases and Materials 7th Edition – Smith & Hogan Page 321

In conclusion, I completely agree with Lord Jauncey's statement as a murderer should be treated the same as someone attempting to murder. The concept of stare decisis is vital in maintaining a just and consistent society, and an individual attempting to murder someone due to duress should try to be a hero rather than the villain. Obviously there are a number of mitigating circumstances that could deserve the defence of duress in being used, but allowing the defence to everyone who seriously harmed or killed an innocent person due to the threat rather than act of violence, would result in corruption and a mass amount of false excuses. Maintaining the judge's decision in *Howe* is necessary due to it being binding precedent.

Bibliography

Criminal Law A2 – J. Martin Page 67

Criminal Law Cases and Materials 7th Edition – Smith & Hogan Page 408

Criminal Law Cases and Materials 7th Edition – Smith & Hogan Page 321

Criminal Law 4th Edition – Storey and Lidbury

Criminal Law Special Study Material (Sources)

http://www.askoxford.com/concise_oed/orexxasonable?view=uk

<http://www.telegraph.co.uk/news/uknews/1546085/The-vagaries-of-UK-knife-crime-statistics.html>

Cases

R v Gotts (1992)

R v Howe (1987)

R v Graham (1982)

Woollin (1998)

White (1910)

Dudley and Stephens (1884)

Dytham (1979)

Homicide Act (1957)