

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.

Plan

Lord Jauncey argues that the level of intention for attempted murder can actually be higher than murder, and so it is ridiculous to afford the defence of duress to an attempted murderer when a murderer who does not intend to kill cannot use the defence.

Argument is sound-look at judgements of other judges in case. But there are counterarguments...

R v Howe and R v Gotts are key cases (look up quotes from cases books)

Discuss the law on murder/attempted murder

Introduction

This essay will be arguing that the statements made by Lord Jauncey in R v Gotts (1992), in that the defence of duress should not be afforded to an attempted murderer when it is withheld from a murderer, are unsound and not agreeable. It will do this by looking at these two crimes in-depth, as well as the defence of duress, through relevant case law and legal judgements. This essay will be focusing its attentions mainly on duress of/by threats, but will touch upon necessity and duress of circumstances where necessary.

Murder and Attempted Murder

The crime of murder is not defined by statute but by common law; thus, it has been defined by judges over hundreds of years in various cases. The accepted definition is that of Lord Coke in the 17th century, which is: *'the unlawful killing of a reasonable creature in being and under the Queen's Peace with malice aforethought, express or implied'*. When this definition is broken down, it gives us the actus reus and mens rea of murder. So, the actus reus would be that the defendant must have *killed a reasonable creature in being, under the Queen's Peace*. Also, that killing must have been *unlawful*. The defendant must commit the crime by way of an act, or if there is a duty of care, by an omission. A reasonable creature in being is essentially a human being, so this law cannot apply to animals or foetus' inside the womb. 'Under the Queen's Peace' simply means that the killing must not have been committed by a soldier in the course of war-this is not murder. The killing of a person would also not be unlawful if it was done in self-defence or in the prevention of crime.

The mens rea for murder is shown in the final part of Lord Coke's definition-*'malice aforethought, express or implied'*. The courts have held that express malice aforethought is an intention to kill, while implied malice aforethought is an intention to cause grievous bodily harm.¹

¹ *Vickers (1957)*-Defendant punched and kicked an old lady, which resulted in her death. Courts held that intention to cause GBH is sufficient for murder.

The law on attempts is governed by the Criminal Attempts Act 1981, which states: “*If, with intent to commit an offence to which this section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence*”. The key words here are ‘more than merely preparatory’, and many court decisions have attempted to define what this means. The case of *Gullefer (1987)* held that ‘more than merely preparatory’ means that the defendant must have gone beyond purely preparatory acts and be ‘embarked on the crime proper’. *Geddes (1996)*, where the defendant was found in the a school boys’ lavatory with a knife, some rope and masking tape, created two questions which the Court of Appeal believed should be asked: ‘had the accused moved from planning or preparation to execution or implementation?; and had the accused done an act showing that he was actually trying to commit the full offence or had he got only as far as getting ready, or putting himself in position, or equipping himself, to do so?’. Thus, any act of equipping or preparation is not an attempted crime; the defendant must be somehow into the actual offence.

In regards to attempted murder, the important point is the required mens rea. The usual mens rea for murder, as already mentioned, is express or implied malice aforethought. For attempted murder, however, there must be *express* malice aforethought, or an intent to kill. This can be seen in the case of *Pagett (1910)*, where the defendant poisoned his mother’s drink in an attempt to kill her. She died before she could have drink the tea, however. The defendant had an intention to kill her, and had gone beyond ‘mere preparation’, and so was guilty of attempted murder (it is important to note, however, that at the time the ‘more than merely preparatory rule was not in effect). If the defendant had merely bought the poison, but not applied it to the tea, then it is safe to say that this would not be beyond ‘mere preparation.’

In regards to Lord Jauncey’s statements, the differences between murder and attempted murder are a key component of his argument. He is essentially saying, in *R v Gotts*, that for murder there must be an intent to kill or cause serious harm, but for attempted murder there can only be an intent to kill. Thus, attempted murder actually requires a higher level of intention than murder (where there is implied malice aforethought), and thus it could be argued is just as serious (or more serious) an offence. Take the *Shooting example*. Someone who shoots a person in the foot, intending only to warn them or injure them, but that person then dies later through lack of treatment, is a murderer. This is the case even though there was no intention to kill. If that same person, however, aimed and shot at the head, intending to kill, but missed, they would be an attempted murderer. It is clear from this example that, often, attempted murder can actually be just as serious as a murder, the only difference being in the outcome of death.

Duress

The defence of duress, sometimes called in legal circles as ‘concession to human frailty’, is the idea that threats of death or serious harm force the defendant to commit a crime. It is best defined by *AG v Whelan* as ‘Threats of immediate and serious personal violence so great as to overbear the ordinary powers of human resistance’. An example to illustrate this would be where a bank manager is threatened with death by an armed gunman, who states that he must open the safe or he will die. This defence is available for all crimes except, as will be discussed, murder and attempted

murder (and forms of treason). There are, however, several limitations to the defence of duress. The threats themselves must be of death or serious injury, as seen in the case of *Valderrama-vega (1985)*. However, the jury is entitled to look at the cumulative effect of any relevant threats, such as in that case where threats to disclose homosexuality were received along with death threats. The threat should also be against the defendant, although it is logical to assume that threats to family members and friends would also suffice. In *Martin and Conway* (both duress of circumstances cases), the ‘threats’ were to a family member and a passenger in a car, respectively. There must be ‘no safe avenue of escape’. This means that the defendant must have nowhere else to go or no way out of the situation. So, if an opportunity arises for the defendant to escape or call the police etc, and the defendant fails to take that opportunity, then the defence may not be afforded to him. Furthermore, the threat must be an imminent one, as decided in *Abdul-Hussain (1999)*. In this case, two Shiite Muslims were fleeing religious persecution in Iraq to the UK by hijacking a plane. The Court of Appeal held that the threat does not have to be an immediate one, but an ‘imminent’ one (i.e. it is hanging over them or playing on their mind). The threat must also be to commit a specific offence. This was seen in *Cole (1994)* where the defendant was threatened with serious violence if he did not pay back some money. He decided to rob two building societies, so the defence of duress was not available to him because he had not been told to commit those robberies, only to get some money. The case of *Graham (1982)* laid out a two-stage test for the jury to consider when looking at duress. This test was created by Lord Lane, as shown in Source 1 of the Special Study Materials. The first test is a largely subjective test, being: ‘was the defendant compelled to act as he did because he reasonably believed he had good cause to fear serious injury or death?’. This is subjective in that it is through the eyes of the defendant, but it contains objective elements through the use of the word ‘reasonably’, which is something for the jury themselves to decide. The second test is objective, being ‘would a sober person of reasonable firmness, sharing the characteristics of the accused have responded in the same way?’. Those characteristics were held to be age, pregnancy, serious mental or physical disability, and gender.²

Duress and murder

The principles regarding the defence of duress and the crime of murder stem from the case of *R v Dudley and Stephens (1884)*. In this case, the two defendants were shipwrecked at sea and felt that it was necessary to eat the cabin boy in order to decide. They tried to use a defence of necessity in court, but it was denied. The judges in that case decided that ‘necessity is no defence to murder’. Duress is, in effect, a form of necessity, as evidenced by Lord Woolf’s comments in *R v Conway*, that ‘Whether “duress of circumstances” is called “duress” or “necessity” does not matter’. This clearly shows that duress and necessity are interchangeable and intrinsically linked ideas.

The case of *R v Howe (1987)* laid down the binding precedent that duress is not a defence to murder. In this case, the defendant had taken part in the torture of one man, who was then killed by another, and on a second occasion actually tortured and killed a man. He argued that he had only participated because of death threats to him. The House of Lords, however, ruled that duress is not a defence to murder, whether as a principal or secondary offender. This overruled their previous decision in *DPP v*

² Bowen (1996)

Lynch, where it was held that duress could be available to a secondary participant to murder. Lord Hailsham justified this approach by stating that ‘it is [n]either good morals, good policy, or good law to suggest...that the ordinary man of reasonable fortitude is not to be supposed to be capable of heroism if he is asked to take an innocent life rather than sacrifice his own’. This approach seems sound, but it fails to take into account certain circumstances where sometimes the threats may not be against the defendant but against a loved one or even a large group of people. For example, where a person must choose between taking one life or saving a hundred thousand lives from a terrorist attack, it is relatively clear which the lesser of two evils is. Such a person would be praised as a hero (and is unlikely to be prosecuted) but if here were prosecuted, then English courts would not grant him a defence of duress/necessity under the rulings of *Howe* and *Dudley and Stephens*. This seems illogical and extremely unfair, as well as contradictory to Lord Hailsham’s statements that a person should be capable of heroism. Someone who saves thousands of lives at the expense of one life is a hero, and so should not be prosecuted. This shows a fundamental flaw with the defence of duress; that is, it is far too narrow. It simply states that duress can *never* be a defence to murder, without considering individual circumstances. This can also be seen in Lord Hailsham’s statements in *R v Howe*, where he says that a person who takes an innocent life to protect his or a member of his family’s ‘cannot claim that he is choosing the lesser of two evils’. If, as already mentioned, it was thousands of lives that the defendant saved, it would be interesting to see how Lord Hailsham would have reacted to such a case, as it is much more unclear whether one is the lesser of two evils.

Lord Griffiths expressed the view that duress should not exist as a defence but as a mitigating factor.³ This would mean that duress could be relevant to all crimes, but it would not be a total factor. The advantage of this is that it would lead to leniency on those who were under duress for charges of murder, and would take into consideration individual circumstances. This is a view shared by Lord Jauncey in *R v Gotts*. I do agree with this approach, but unfortunately, as Lord Jauncey states, it is too late for the House of Lords to change the law in such a way, going against years of binding precedent.

Duress and attempted murder

In *R v Howe*, several obiter dicta statements by the judges state that duress should not be a defence to murder. For example, Lord Griffiths in *R v Howe* states that ‘I would depart from the decision of this House in *DPP v Lynch* and declare the law to be that duress is not available as a defence to a charge of murder, or to attempted murder’. This statement is not binding, but in the later case of *R v Gotts*, the judges decided to follow it and declare duress as not being a defence to attempted murder either. It is from this case that Lord Jauncey’s comments regarding attempted murder and duress stem from.

He made several arguments reinforcing his view that duress is not a defence to murder or attempted murder. The first of these is that it is the duty of the courts and the law to uphold the ‘sanctity of human life and the protection thereof to paramount importance’. At first sight this seems to be a sound argument, but if we were to follow it through to its logical conclusion then self-defence or abortion would not be allowed. After all, it is legal for a person to kill if they use reasonable force to prevent crime or

³ *R v Howe*

defend themselves. Also, it is legal for a doctor to terminate an unborn baby in a medical procedure. Similarly, it is legal for a doctor to turn off a life-support machine which is keeping a brain-dead person alive. If the sanctity of human life were of paramount importance, then these things would all be illegal (also, the law would make acts of war illegal also). Clearly then, there are several circumstances where murder/killing is legally permitted, and so Lord Jauncey's statements here are slightly flawed. Since killing can be permitted in these circumstances, then there does not appear to be reason why it could not be permitted in certain scenarios involving duress.

Lord Jauncey's other argument is in regards to the intention involved in murder and attempted murder. As already stated, the mens rea for murder is an intention to kill or cause serious harm, but for attempted murder it is only an intention to kill. Lord Jauncey's reasoning is that it seems illogical for someone who intends to injure but mistakenly kills to not rely on duress, but someone who intends to kill but fails to rely on it. This is an agreeable judgement, but the key difference between these two crimes is that one actually results in a death. Regardless of the intention, a murderer actually kills, whilst an attempted murderer only intends to kill, and fails to do so.

To fully understand what this means for the crime of attempted murder, it is vital to consider some examples of where duress would occur. The idea of an *assassin*, who has been threatened with death and forced to kill someone, comes to mind. This person does not want to commit the crime, but feels he has no choice. All of the elements of duress are there, and the defendant enters the victim's house with a gun. He points the gun at the victim, but is quickly arrested before he can pull the trigger. It is almost certain that this would be held to be 'more than merely preparatory', and so a charge of attempted murder is highly likely. However, duress should be available to him, preferably as a mitigating factor. Although he had an intention to kill, he did not actually kill the person and was under incredible pressure and duress to commit that offence. The fact that he did not commit that crime is extremely important, because it shows that no person has died and thus it seems unfair for the defendant to receive a lengthy sentence. Ideally, the defendant would be convicted but could rely on duress as a mitigating factor to receive a conditional or absolute discharge.

However, a defence of duress should not be withheld from such a person. Under Lord Jauncey's views, however, it would be.

The case of *R v Gotts* itself also shows how unfair withholding duress can be. The defendant was a 16 year old boy, forced through threats by his father to stab his mother. D did so but did not kill her, and his conviction for attempted murder was upheld. If we take this but make some assumptions on the facts, then it could be argued that the boy felt he had no choice but to acquiesce to his father's demands, but he did so in a manner which he knew would not kill his mother. He deliberately failed to kill her because he could not bring himself to; he was an emotional wreck from the threats and abuse from his father, and had nowhere else to turn. It is highly unfair for the courts to not allow any form of duress or necessity to be granted to the defendant, either as a defence or through mitigation.

Conclusion

Overall, I do not agree with Lord Jauncey's statements. This is because the courts should not be so narrow-minded as to rule out duress as a defence to all charges of murder, regardless of circumstances. Lord Jauncey's arguments regarding attempted murder are fundamentally flawed in that they are contradictory and fail to take into

consideration examples where a defence of duress should, according to the morals of society, be allowed. Although the intention of attempted murder is an intent to kill, which is often higher than that of a murderer, the key point is that what sets murder apart as that most heinous of crimes is the ending of a human life. Lord Jauncey himself stated that the protection of human life is paramount, and thus attempted murder should not be seen as just as serious an offence as murder. It is my own view that duress should no longer be a defence but a factor to be taken into account during mitigation. This, combined with more discretion in regards to the sentencing of murderers, would allow for greater justice and fairness in the law.