*412 Regina Respondent v Gotts Appellant

No Substantial Judicial Treatment

Court
House of Lords

Judgment Date
20 February 1992

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[1992] 2 W.L.R. 284
[1992] 2 A.C. 412

ICLR

House of Lords

Lord Keith of Kinkel , Lord Templeman , Lord Jauncey of Tullichettle , Lord Lowry and Lord Browne-Wilkinson

1991 Dec. 3, 4; 1992 Feb. 20

Crime—Duress—Attempted murder—Whether duress available as defence

The appellant was charged with attempted murder. He pleaded not guilty and sought to raise a defence of duress. The trial judge ruled that duress was not available as a defence to the charge. The appellant thereupon changed his plea to guilty. The Court of Appeal (Criminal Division) dismissed his appeal against conviction.

On his appeal: -

Held, dismissing the appeal (Lord Keith of Kinkel and Lord Lowry dissenting), that in the absence of any common law rule, statutory provision or judicial authority compelling a decision either way, the question whether the defence of duress extended to the offence of attempted murder was at large, and, accordingly, it was a matter of policy how it should be answered; that the defence was not available to a charge of murder because the law regarded the sanctity of human life and its protection as of paramount importance; and that there was no justification in logic, morality or law in affording the defence to a charge of attempted murder when it was not available to a murderer (post, pp. 419F, 422F, 424H-425A, F-426A, D-G, 442A-B).

Dicta of Lord Griffiths in *Reg. v. Howe [1987] A.C. 417* , 444, 445, H.L.(E.) applied.

Decision of the Court of Appeal (Criminal Division) [1991] 1 Q.B. 660; [1991] 2 W.L.R. 878; [1991] 2 All E.R. 1 affirmed.

The following cases are referred to in their Lordships' opinions:

Abbott v. The Queen [1977] A.C. 755; [1976] 3 W.L.R. 462; [1976] 3 All E.R. 140, P.C.
Myers v. Director of Public Prosecutions [1965] A.C. 1001; [1964] 3 W.L.R. 145; [1964] 2 All E.R. 881, H.L.(E.)
Reg. v. Brown and Morley (1968) S.A.S.R. 467
Reg. v. Fagan (unreported), *20 September 1974, MacDermott J., Belfast City Commission*

Reg. v. Howe [1986] Q.B. 626; [1986] 2 W.L.R. 294; [1986] 1 All E.R. 833 , C.A.; *[1987] A.C. 417; [1987] 2 W.L.R. 568; [1987] 1 All E.R. 771, H.L.(E.)*
Reg. v. Hudson [1971] 2 Q.B. 202; [1971] 2 W.L.R. 1047; [1971] 2 All E.R. 244, C.A.
Reg. v. Hurley and Murray [1967] V.R. 526
Reg. v. Lynch [1975] N.I. 35 , C.C.A.; sub nom. Director of Public Prosecutions for Northern Ireland v. Lynch *[1975] A.C. 653; [1975] 2 W.L.R. 641; [1975] 1 All E.R. 913, H.L.(N.I.)* ***413**
Reg. v. R . [1992] 1 A.C. 599; [1991] 3 W.L.R. 767; [1991] 4 All E.R. 481, H.L.(E.)
Rex v. Stephenson [1947] N.I. 110, C.C.A.
Thomson v. H.M. Advocate , 1983 S.C.C.R. 368

The following additional cases were cited in argument:

Armand v. State of Indiana (1985) 474 N.E. 2d 1002 (Ind.)
Kee v. State of Indiana (1982) 438 N.E. 2d 993 (Ind.)
Practice Statement (Judicial Precedent) [1966] 1 W.L.R. 1234; [1966] 3 All E.R. 77, H.L.(E.)
Reg. v. Dudley and Stephens (1884) 14 Q.B.D. 273
Rex v. Higgins (1801) 2 East 5
Rex v. Scofield (1784) Cald. 397
Rex v. Steane [1947] K.B. 997; [1947] 1 All E.R. 813, C.C.A.
S. v. Goliath , 1972 (3) S.A. 1

APPEAL from the Court of Appeal (Criminal Division).

This was an appeal by the appellant, Benjamin Zebedee Isaiah **Gotts**, by leave of the House of Lords from the decision of the Court of Appeal (Criminal Division) (Lord Lane C.J., Owen and Pill JJ.) *[1991] 1 Q.B. 660* on 23 January 1991 dismissing his appeal against his conviction on 23 October 1989 at Chelmsford Crown Court (Judge Rant Q.C. and a jury) of attempted murder.

The Court of Appeal granted the appellant a certificate under section 33(2) of the Criminal Appeal Act 1968 that a point of law of general public importance was involved in its decision, namely 'is the defence of duress available to a person charged with attempted murder?' but refused him leave to appeal. On 13 May 1991 the Appeal Committee of the House of Lords (Lord Keith of Kinkel, Lord Griffiths and Lord Oliver of Aylmerton) *[1991] 1 W.L.R. 448* allowed a petition by him for leave.

The facts are set out in the opinion of Lord Jauncey of Tullichettle.

David Farrer Q.C. and *Charles Miskin* for the appellant. The common law of England always denied the defence of duress (or the cognate defence of martial coercion) to a charge of murder: see *Reg. v. Howe [1987] A.C. 417* . The common law never denied this defence (nor that of coercion) to any offence short of murder (and various forms of treason). This admission of the defence extended to attempted murder. If this defence is to be withdrawn from attempted murder (and by parity of reasoning from other kindred offences), that is a matter of social policy that should be dealt with by legislation rather than judicial decision: see *Reg. v. Howe* .

Logic admits no easy answer to the question of where the line should be drawn regarding the availability of the defence. If it should be drawn below rather than above attempted murder, so equally the defence will as a matter of consistency have to be withdrawn from a whole category of crimes where for 100 years its availability has never been questioned. The distinction drawn by Lord Lane C.J. *[1991] 1 Q.B. 660* , 668B is unsustainable. There is a perfectly sound reason of policy for drawing ***414** the line as it has been drawn: that murder has always been recognised as a crime apart.

By the Criminal Attempts Act 1981 , Parliament replaced an infinite variety of statutory and common law criminal attempts by a single statutory offence, which may be committed in a whole range of different ways with different procedures and punishments. A defence of general application such as duress cannot as a matter of juridical principle be excluded from one sort of offence and admitted for another in the absence of any statutory provision.

The commentators from Hale (*Pleas of the Crown* (1736)) onwards have, for different reasons, denied the defence of duress to a murderer. It has been the plainly received law for several centuries, although there is no reported case law and only one unreported case: *Reg. v. Fagan* , 20 September 1974, where the defence was allowed on a charge of attempted murder following a concession by the Crown. With perhaps one exception, no commentator has suggested that this defence should be excluded from attempted murder or any kindred offence. The Criminal Law Commissioners in the 19th century acted, and the Parliamentary

draftsmen in the 20th have acted, on the apparent assumption that the defence was available for attempted murder or anything else short of murder. [Reference was made to *Holdsworth, History of English Law,* 3rd ed. (1923), vols. III, pp. 372-375, and V, pp. 196-205; Hudson, 'A Treatise on the Court of Star Chamber,' *Collectanea Juridica* (1792), vol. II, p. 1, pp. 86-89, 104-109; *Hale's Pleas of the Crown,* vol. 1, p. 44, para. III, p. 45, sub-para. 3, and p. 51; Blackstone's Commentaries on the Laws of England, 2nd ed. (1766), vol. I, pp. 29-30, 31-33; Hawkin's Pleas of the Crown, 7th ed. (1795) and *East's Pleas of the Crown* (1803).]

It is inconceivable that Hale, with his experience as Chief Justice of the common law courts in the mid-17th century, omitted attempted murder from his list of excepted crimes because he did not perceive it as an offence. By the late 18th century (see *East's Pleas of the Crown,* vol. I, pp. 89, 411; *Rex v. Scofield* (1784) Cald. 397, 402-403 and *Rex v. Higgins (1801) 2 East 5*) the law had been refined, but it does not seem that Blackstone and Hale were unfamiliar with attempted murder. There is a quite different explanation for the exclusion: all misdemeanours, including attempted murder, attracted this defence: see *East,* vol. I, p. 411; *Stephen, History of the Criminal Law of England* (1883), vol. II, pp. 221-225 and *Rex v. Steane [1947] K.B. 997* . The status of attempted murder as a misdemeanour was made clear by the enactment of the Offences against the Person Act 1861, sections 11 to 15 . It remained a specific statutory offence until all these sections were repealed by the Criminal Law Act 1967 . It then resumed its status as a common law offence until 1981, when it again became a statutory offence. [Reference was also made to the Hard Labour Act 1822 (3 Geo. 4, c. 114) ; the Criminal Law Commissioners' First Report (Parl. Rep. (1834) XXVI 105); Glanville Williams, Criminal Law, The General Part, 2nd ed. (1961), p. 8; Stephen's 1879 draft criminal code (Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences (C. 2345)); *Reg. v. Dudley and Stephens (1884) 14 Q.B.D. 273* ; section 47 of the Criminal Justice Act 1925; the Criminal Justice (Northern Ireland) Act 1945, sections 37 and 38 and *Reg. v. Hudson [1971] 2 Q.B. 202* , 206E.]

As to *Reg. v. Lynch [1975] N.I. 35* ; (sub nom. *Director of Public Prosecutions for Northern Ireland v. Lynch) [1975] A.C. 653* ; *Abbott v. The Queen [1977] A.C. 755* and *Reg. v. Howe [1987] A.C. 417* , all the observations were obiter and were made in appeals where there was no direct argument on the present issue. In *Lynch* , duress was allowed as a defence to murder where the accused was a secondary party. In *Abbott* , it was excluded by the Privy Council in the case of the actual killer. In *Howe [1987] A.C. 471* , the House of Lords invoked Practice Statement (Judicial Precedent) *[1966] 1 W.L.R. 1234* to depart from *Lynch* : duress was excluded for all parties to murder.

In 1977 the Law Commission, in its Criminal Law Report on Defences of General Application (1977) (Law Com. No. 83), proposed that duress be a defence to all offences; it is neutral on the present issue. [Reference was made to the Criminal Attempts Act 1981, ss. 1(1)(4) and 6(1) , and A Criminal Code for England and Wales (1989) (Law Com. No. 177).]

Even though murder requires, in one limb, proof of a lesser intent, there are defences available to a person charged with murder that are not available to a man charged with attempt: provocation and diminished responsibility. Should attempted murder join murder in the excluded category by reason of the requisite intent, then so also, by a parity of reasoning, should conspiracy to murder, incitement to murder, offences contrary to section 18 of the Act of 1861 and attempts at such offences. Possibly other offences such as arson or possession of a firearm with intent to endanger life should also join the list. It would be difficult to draw the line, and such a wholesale withdrawal of the defence for crimes of violence would be quite unjustified and certainly a matter for Parliamentary action rather than judicial initiative. The addition of attempted murder to the excluded list thus renders the law uncertain in this area. Contrary to what Lord Lane C.J. said *[1991] 1 Q.B. 660* , 668, conspiracy and incitement are not necessarily less proximate. If the Crown is right, one would charge attempt rather than conspiracy. The mandatory sentence for murder reflects the special distinction that the law makes with regard to that offence. This distinction may be grounded in the same expediency that Stephen in his *History of the Criminal Law of England,* vol. II, at p. 107, found as the justification for Hale's list of crimes (*Pleas of the Crown*) excluded from those for which duress was a defence. That expediency is, however, sufficiently warranted by the respect paid to human life.

The Commonwealth authorities do not reveal any single pattern of values. At any rate, if the House of Lords were to draw the line below murder, England would not be alone.

Miskin following. In South Australia there is a defence of duress and it is a defence to murder. In Victoria it is a defence but it is not clear whether there are exceptions. In New South Wales also it is a defence; the matter is not codified; whether there are exceptions is unclear. In France (see articles 64, 328 and 329 of the Code Pénal) it is a defence. ***416** As to South Africa, see *S. v. Goliath, 1972 (3) S.A. 1* . In Scotland, the leading case is *Thomson v. H.M. Advocate, 1983 S.C.C.R. 368* , 371-372, 378. Whether the defence applies to murder is an open question.

Anthony Arlidge Q.C. and *Simon Spence* for the Crown. The courts in deciding the proper extent of the defence of duress are making public policy. They consider (a) whether the law is in step with what the public would regard as just and fair; and (b) whether the absence of the defence might have any deterrent value that would protect the innocent. They might have held that the defence was never available or that it was always available. It is now clear that it is available for some offences but not others. It has been left to English juries as a defence in cases of criminal damage, arson, theft, handling, perjury, contempt of court and drug offences; and the courts have assumed that it would apply to buggery and conspiracy to defraud: cf. *Smith & Hogan, Criminal Law,* 6th ed. (1988), p. 231. It is not available to those charged with murder as principals in the first or second degree: *Reg. v. Howe [1987] A.C. 417* . Between these two extremes some demarcation line must be drawn that is as consonant with principle as possible.

The public policy justifying the availability of the defence is that the law should have due regard for the frailty of human nature and that a man whose will is truly overborne by serious threats to himself or others close to him is not deserving of punishment. Any other result would be 'unfair.' The best justification for excluding it as a defence is that no one should be able to justify himself against a charge of doing injury to another by showing the threat of an imminent danger of an equal or less injury to himself: cf. Glanville Williams, Criminal Law, The General Part, para. 247, p. 760. So far as deterrence is concerned, the absence of such a defence might affect some principal offenders: cf. Stephen, History of the Criminal Law of England, vol. II, p. 107. Its availability is more likely to encourage professional terrorists to use outsiders as instruments of terror.

The most logical dividing-line would be that the defence should not be available where the act required to be carried out involves the likelihood of serious bodily injury to the victim. This is logical because (i) any act that is likely to result in serious bodily harm may also lead to death; it may be fortuitous whether death in fact results; and (ii) the threat that is regarded as sufficient to constitute duress is of death or serious bodily injury: cf. *Smith & Hogan, Criminal Law,* p. 234.

While there are general statements in the books that duress is available in all cases other than murder and treason, in practice in the English jurisdiction there do not appear to be any reported examples where it has been held to be available as a defence to a charge under section 18 of the Act of 1861 or to any other offence where serious bodily harm to the victim was likely. Hale (*Pleas of the Crown,* vol. 1, p. 51) envisaged that the defence might not be available on a robbery charge. On the appellant's argument, there is nothing to prevent it going as far down as grievous bodily harm. Section 23 of the draft criminal code of 1879 (Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences (C. 2345)) excepted murder, piracy, attempted murder, assisting in rape, forcible abduction, robbery ***417** causing grievous bodily harm and arson: see *Director of Public Prosecutions for Northern Ireland v. Lynch [1975] A.C. 653* , 707. Various foreign jurisdictions exclude duress from a range of offences including causing grievous bodily harm.

Whatever offences are excepted from the defence of duress, attempts to commit them should also be excepted. The acceptance of attempt as a separate crime occurred relatively late in English legal history, and the defence of duress is a rare one, though, perhaps, it is becoming less rare in recent times. The absence of direct authority on the availability of the defence in cases of attempted murder goes no way to establish that it is available. The law of attempt requires the accused's acts to be more than preparatory: he must be 'on the job.' Attempted murder is in a different category from other inchoate offences because of its proximity to the full offence. To be guilty of conspiracy to murder or incitement to murder, no act of violence need be present. These offences are still 'merely preparatory' and therefore fall short of an attempt. It may well be fortuitous that the accused does not commit the full offence: he may fail simply through his own ineptitude or because of the intervention of another. Where duress is allowed as a defence, it is allowed in order to produce a just result. Justice involves that persons in like circumstances be treated equally.

If duress is not a defence to murder but is a defence to attempted murder the position is illogical because (i) if sanctity of human life is the criterion that governs the extent of the defence of duress, it requires that those who attempt to kill be subject to the same rules as those who kill; those who attempt but fail might just as well have succeeded. (ii) Whether an attempt succeeds or not may be fortuitous; it may fail because of the ineptitude of the defendant or of the intervention of a third party; mere chance should not be a policy ground for distinguishing between those who succeed and those who fail. (iii) A man who has the intent to cause grievous bodily harm but kills has no defence of duress, whilst a man who intends to kill but fails has such a defence; the man with the lesser intent is worse off than the man with the greater intent. (iv) A man who plays a minor part in a murder, e.g., driving the principal offenders to the scene of the crime, will not have the defence of duress, whilst a principal offender who actually attempts to kill but fails will have such a defence; the minor actor is worse off than the major actor.

The Act of 1981 merely defines attempt. It does not talk about the defences at all. The definition of the offence attempted can only be obtained by referring to the substantive law: cf. *Kee v. State of Indiana* (1982) 438 N.E. 2d 993 (Ind.) and *Armand v.*

State of Indiana (1985) 474 N.E. 2d 1002 (Ind.). The House of Lords having felt able to hold that as a matter of policy duress is not available to persons charged with murder in the first or second degree, it must equally be open to the House to decide the status of the defence in cases of attempted murder. In *Reg. v. Howe [1987] A.C. 417* , although Lord Griffiths, at p. 445, and Lord Hailsham of St. Marylebone L.C., at p. 432, appear to have differed as to the common law as it then stood, both were clearly of the **418* view that duress should not be a defence to a charge of attempted murder.

The Star Chamber was not a common law court. An offence tried before it would have been a Star Chamber offence, not a common law offence.

It might have been logical, while the distinction between felonies and misdemeanours existed, for all misdemeanours to be dealt with in the same way. The House of Lords should be slow to reintroduce any distinction that Parliament has abolished. The historical way in which misdemeanours developed resulted in an illogicality, hence the abolition of the distinction in 1967. The distinction should not be made.

A person accused of murder can plead provocation or diminished responsibility, whereas a person accused of attempted murder cannot. Many offences, however, have defences peculiar to them, so that in itself is not a reason for extending the defence of duress to attempted murder. Any anomaly could be cured by Parliament extending those defences to attempted murder. [Reference was made to *Practice Statement (Judicial Precedent) [1966] 1 W.L.R. 1234* and *Reg. v. Brown and Morley (1968) S.A.S.R. 467* .]

Farrer Q.C. replied.

Their Lordships took time for consideration.

20 February **1992**. LORD KEITH OF KINKEL.

My Lords, I have read the speech to be delivered by my noble and learned friend, Lord Lowry, and I agree with it.

The important points appear to me to be these.

1. At the time when the appellant attempted to murder his mother there nowhere existed any clear statement of law to the effect that the defence of duress was unavailable to one charged with attempted murder. There is much to be said in favour of the view that the generally accepted wisdom then was that the defence was only withheld in cases of murder and treason.

2. Murder is a crime in a category of its own. The fact that it involves the actual destruction of life makes its nature special. That special nature is recognised by the mandatory life sentence which follows on proof of guilt, irrespective of the degree of moral blameworthiness which may be involved, and warrants a distinction, so far as the defence of duress is concerned, between it and other offences against the person, including attempted murder.

3. The principal argument against allowing the defence of duress to a charge of attempted murder appears to be what is said to be the illogicality of denying the defence to one who has killed while intending only to wound with intent to inflict grievous bodily harm, while admitting it in the case of one who has intended to kill but chanced to fail to do so. Considering that the intent is more evil in the latter case than in the former, so it is claimed, the person who has intended to kill but failed should not be treated more leniently. But I find it difficult to accept that a person acting under duress has a truly evil intent. He does not actually desire the death of the victim. In the case of a man who is **419* compelled by threats against his wife and children to drive a vehicle loaded with explosives into a checkpoint, the object being to kill those manning it, but that object having fortunately failed, the driver is likely to be as relieved at the outcome as anyone else. It would be hard to condemn him as having had an evil intent. The logical solution may be to withhold the defence in the case of all crimes, leaving the circumstances of the duress to be taken into account in mitigation. But that solution is not open to the court in the present state of the law. It could only be brought about by Parliament.

4. In many cases it may be a nice question whether the accused is guilty of attempted murder or only of wounding with intent to inflict grievous bodily harm. It is unsatisfactory that the defence of duress should be available in the latter case but not in the former.

5. Although it is open to your Lordships' House to develop the common law to meet changing economic circumstances and habits of thought (as your Lordships have recently done in *Reg. v. R. [1992] 1 A.C. 599*), I am unable to perceive any change of that character such as to warrant it now being definitively laid down that duress is no defence to a charge of attempted murder. The complexities and anomalies involved in the whole matter of the defence of duress seem to me to be such that the issue is much better left to Parliament to deal with in the light of wide considerations of policy.

I would allow the appeal.

LORD TEMPLEMAN.

My Lords, there is a fundamental divergence of opinion, expressed on the one hand by the speeches of Lord Keith of Kinkel and Lord Lowry and on the other hand by the speech of Lord Jauncey of Tullichettle. In the present case this is no bad thing because I agree with Lord Keith that Parliament ought to decide the issue as a matter of principle. The different opinions expressed in this House, discussions in academic circles and possible consideration by the Law Commission should assist Parliament to reach a decision. In the mean-time we must do our best. I agree with the speech of Lord Jauncey and do not consider that I can improve on it. I would dismiss the appeal for the reasons he gives.

LORD JAUNCEY OF TULLICHETTLE.

My Lords, this appeal raises the important question of whether duress is available as a defence to a charge of attempted murder. At the outset of the trial a submission was advanced on behalf of the appellant who was charged, inter alia, with attempted murder to the effect that the defence of duress was open to him. The trial judge rejected the submission whereupon the appellant pleaded guilty to the charge and was sentenced to a period of probation. It is unnecessary to go into the details of the offence but it is clear that in sentencing the appellant the judge took into account the facts which would have been relied upon had duress been available as a defence. The Court of Appeal dismissed the appeal, granted a certificate under section 33(2) of the Criminal Appeal Act 1968 and refused leave to appeal to your Lordships' House. Your Lordships subsequently gave leave *[1991] 1 W.L.R. 448* .

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It is agreed that there is no English authority which deals directly with the availability of the defence of duress to a charge of attempted murder, but Mr. Farrer, for the appellant, submitted that this is because it has long been recognised that the defence of duress is available in respect of all crimes except murder and treason, and was unavailable for a short time for robbery. *Hale's Pleas of the Crown* (1736), vol. 1, p. 51, deals with duress in the context of these last-mentioned crimes committed in time of peace in the following passage:

> 'If a man be menaced with death, unless he will commit an act of treason, murder, or robbery, the fear of death doth not excuse him, if he commit the fact; for the law hath provided a sufficient remedy against such fears by applying himself to the courts and officers of justice for a writ or precept de securitate pacis. Again, if a man be desperately assaulted, and in peril of death, and cannot otherwise escape, unless to satisfy his assailant's fury he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact; for he ought rather to die himself, than kill an innocent . . .'

In 1766 Blackstone in his *Commentaries on the Laws of England,* 2nd ed., vol. IV, pp. 29-30, said:

> 'Another species of compulsion or necessity is what our law calls duress per minas; or threats and menaces, which induce a fear of death or other bodily harm, and which take away for that reason the guilt of many crimes and misdemeanours; at least before the human tribunal. . . . This however seems only, or at least principally, to hold as to positive crimes, so created by the laws of society; and which therefore society may excuse; but not as to natural offences so declared by the law of God, wherein human magistrates are only the executioners of divine punishment. and therefore though a man be violently assaulted, and hath no other possible means of escaping death, but by killing an innocent person; this fear and force shall not acquit him of murder; for he ought rather to die himself, than escape by the murder of an innocent.'

Mr. Farrer submitted that given the development during the 17th century in the Star Chamber of the law relating to attempts to commit crimes it is inconceivable that Hale and Blackstone were unaware of this and that the omission to refer to attempted murder in the context of duress demonstrated that this crime was not in the same position as murder. I think that this is taking too much from the 18th century writings. They appear to me not to be setting out exhaustive lists of crimes where duress is not a defence but rather to be giving examples of crimes where it is. Furthermore at the time of the writings an attempt to commit any crime was merely a misdemeanour so that attempted murder would have been a far less serious offence than many others such as robbery to which Hale refers. It was not until the passing of the Offences against the Person Act 1861 (24 & 25 Vict. c. 100) that attempted murder was, by section 15 thereof, made a statutory felony. It is reasonable to infer that before that date cases involving injury to ***421** the victim which would nowadays be charged as attempted murder would have been charged as some form of assault constituting a felony. In any event the defence of duress or compulsion appears to have been very rarely relied upon. Sir James Fitzjames Stephen in his History of the Criminal Law of England (1883), vol. II, wrote, at p. 105, that as far as he knew there were only three forms of compulsion of which the law would take cognisance, namely (1) compulsion of a husband over a wife, (**2**) compulsion by threats of injury to person or property and (3) com- pulsion by necessity. He considered that hardly any branch of the law of England was more meagre or less satisfactory than the law on compulsion and that the law on marital compulsion was both vague and bad as far as it went. He stated it as follows:

> 'If a married woman commits a theft or receives stolen goods, knowing them to be stolen, in the presence of her husband, she is presumed to have acted under his coercion, and such coercion excuses her act; but this presumption may be rebutted if the cirumstances of the case show that in point of fact she was not coerced. It is uncertain how far this principle applies to felonies in general. It does not apply to high treason or murder. It probably does not apply to robbery. It applies to uttering counterfeit coin. It seems to apply to misdemeanours generally.'

In relation to compulsion by threats of injury he stated, at p. 106:

> 'In the course of nearly 30 years' experience at the bar and on the bench, during which I have paid special attention to the administration of the criminal law, I never knew or heard of the defence of compulsion being made except in the case of married women, and I have not been able to find more than two reported cases which bear upon it. One of them is the case of a man compelled by threats of death to join the rebel army in 1745. The other, the case of persons compelled (I suppose by threats of personal violence) to take a formal part in breaking threshing machines by a mob of rioters so employed.'

Sir James Stephen referred, at p. 107, to the passage from *Hale* to which I have already referred and while doubting the reasoning considered that the principle laid down could be justified on the ground of expediency. He went on to say:

> 'Criminal law is itself a system of compulsion on the widest scale. It is a collection of threats of injury to life, liberty, and property if people do commit crimes. Are such threats to be withdrawn as soon as they are encountered by opposing threats? The law says to a man intending to commit murder, If you do it I will hang you. Is the law to withdraw its threat if some one else says, If you do not do it I will shoot you? Surely it is at the moment when temptation to crime is strongest that the law should speak most clearly and emphatically to the contrary.'

In *Outlines of Criminal Law,* 13th ed. (1929) Professor Kenny, after referring to the rarity of the defence of duress, stated, at p. 74:

> 'Consequently the law respecting it remains to this day both meagre and vague. It is, however, clear that threats of the immediate ***422** infliction of death, or even of grievous bodily harm, will excuse *some* crimes that have been committed under the influence of such threats. It is impossible to say with precision what crimes the defence will be allowed to avail. It certainly will not excuse murder.'

I find Professor Kenny's comments particularly significant because they appear to recognise that in 1929 there was no clearly defined limitation on the particular crimes to which a defence of duress was not available even although they were made after the enactment of section 47 of the Criminal Justice Act 1925 to which I am about to refer.

That section is in the following terms:

> 'Any presumption of law that an offence committed by a wife in the presence of her husband is committed under the coercion of the husband is hereby abolished, but on a charge against a wife for any offence other than treason or murder it shall be a good defence to prove that the offence was committed in the presence of, and under the coercion of, the husband.'

Mr. Farrer drew attention to the similarity of the defences of compulsion by a husband over a wife and of compulsion by threats of injury and argued that the reference in section 47 to treason and murder demonstrated that the draftsman and Parliament considered that as the common law then stood these were the only crimes to which the defence of duress whether by husband over wife or by threats of injury was not available. I have already referred to Professor Kenny's observations written as they were after the passage of the Act of 1925. I would add to this the very few occasions upon which the defence appears to have been relied upon and remark that even if the draftsman had applied his mind to the question of attempted murder, which must be in some doubt, he can have had before him no authority to vouch the proposition that duress per minas is available as a defence to all crimes other than treason or murder.

My Lords, there is nothing in the writings to which I have referred which leads me to conclude that at common law duress is or is not a defence to attempted murder. In arriving at this conclusion or lack of it I am fortified by the fact that Lord Lane C.J. *[1991] 1 Q.B. 660* , 667 came to a similar view where he said:

> 'In these circumstances we are not constrained by a common law rule or by authority from considering whether the defence of duress does or does not extend to the offence of attempted murder.'

I do not consider that section 47 of the Act of 1925 forces me to a conclusion one way or the other. In these circumstances I turn to consider three recent cases in this House and in the Privy Council to see whether any further guidance on the matter can be obtained therefrom. In *Reg. v. Lynch [1975] N.I. 35* , the Court of Appeal in Northern Ireland decided that the defence of duress was not open to a person charged with murder as a principal in the second degree, i.e. as an aider and abettor. During the course of a detailed analysis of the doctrine of ****423*** duress my noble and learned friend Lord Lowry, then sitting as Lord Chief Justice of Northern Ireland, said, at p. 45:

> 'The conventional view is that duress is not available as a defence on a charge of murder. This doctrine has sometimes been attributed to the principle that, whatever one may say about other offences, a man must be prepared to sacrifice his own life rather than take the life of another, but morally and logically this approach is open to two criticisms: in regard to the pressure exerted and in regard to the criminal act to be committed. Duress may include a threat to the family of the person threatened, and this introduces a new and different moral factor; secondly, murder may be committed by a person who intends not to kill but merely to inflict serious bodily harm, and yet, according to the conventional view, if his act causes death, the crime is murder and the defence of duress is not available to him. A more practical explanation of the conventional view is that the sanctity of human life caused the defence of duress to be removed in the case of murder, even if it were available in the case of other crimes, some of which might in certain circumstances be regarded as even more reprehensible. This outlook is consistent with a system of law which has prescribed a fixed penalty for murder, both before and after the abolition of capital punishment for murder, regardless of the degree of guilt and even the presence or absence of an actual intention to kill, and which at the same time has not fixed the penalty for attempted murder (and, incidentally, has left available the defence of duress), although the actual intention to kill is an essential element of the latter crime.'

With due respect to my noble and learned friend, I do not think that the words in parenthesis are justified. As I have already remarked, I consider that the matter is still at large. On appeal (*Director of Public Prosecutions for Northern Ireland v. Lynch [1975]* ***A.C.*** *653*), it was held by a majority of this House that the defence of duress was available to a person charged with murder as a principal in the second degree. In a dissenting judgment Lord Simon of Glaisdale referred, at p. 687A, to the need for the law to draw a line somewhere and went on to pose the question: 'But if an arbitrary line is thus drawn, is not one between murder and traditionally lesser crimes equally justifiable?' It is, in my view, taking too much out of these observations to treat them as recognising the availability of the defence of duress to a charge of attempted murder.

In *Abbott* **v**. *The Queen [1977]* ***A.C***. *755* , the Privy Council by a majority held that on a charge of murder the defence of duress was not available to a principal in the first degree who took part in the actual killing. Mr. Farrer relied on a passage from the dissenting judgment of Lord Wilberforce, at p. 772:

> ' *Director of Public Prosecutions for Northern Ireland* **v**. *Lynch* having been decided as it was, the most striking feature of the present appeal is the lack of any indication, in the judgment of the majority, *why* a flat declaration that in no circumstances whatsoever may the actual killer be absolved by a plea of duress makes for ****424*** sounder law and better ethics. In truth, the contrary is the case. For example D attempts to kill P but, though injuring him, fails. When charged with attempted murder he may plead duress (*Reg.* **v**. *Fagan* (unreported), 20 September 1974, and several times referred to in *Lynch*). Later P dies and D is charged with his murder; if the majority of their Lordships are right, he now has no such plea available.'

The observations as to attempted murder were obiter and I do not consider that *Reg.* **v**. *Fagan* , a Northern Irish case, which proceeded upon a concession by the Crown that the defence was available to a charge of attempted murder, can be treated as authoritative.

The last and most important of the three cases is *Reg.* **v**. *Howe [1987]* ***A.C***. *417* in which it was held that the defence of duress was available neither to the person who had actually killed the victim nor, overruling *Director of Public Prosecutions of Northern Ireland* **v**. *Lynch* , to those who had been involved in the murder as principals in the second degree. This case '[restored] the law to the condition in which it was almost universally thought to be prior to *Lynch* :' *per* Lord Hailsham of Marylebone L.C., at p. 430. Accordingly, duress is no defence to murder in whatever capacity the accused is charged with that crime.

My Lords, I share the view of Lord Griffiths that

> 'it would have been better had [the development of the defence of duress] not taken place and that duress had been regarded as a factor to be taken into account in mitigation as Stephen suggested in his History of the Criminal Law of England, vol. II, p. 108:' *Reg.* **v**. *Howe [1987]* ***A.C***. *417* , 439

- a view which was expressed in not dissimilar terms by Lord Hunter in the Scottish case of *Thomson* **v**. *H.M. Advocate, 1983 S.C.C.R. 368* , 372: 'I doubt whether - at any rate in the case of very serious crimes - it is sound legal policy ever to admit coercion as a full defence leading, if established, to acquittal.' At the time of the earlier writings on duress as a defence, offences against the person were much more likely to have involved only one or two victims. Weapons and substances capable of inflicting mass injury were not readily available to terrorists and other criminals as they are in the reputedly more civilised times in which we now live. While it is not now possible for this House to restrict the availability of defence of duress in those cases where it has been recognised to exist, I feel constrained to express the personal view that given the climate of violence and terrorism which ordinary law-abiding citizens have now to face Parliament might do well to consider whether that defence should continue to be available in the case of all very serious crimes. I am aware that in expressing this personal view I am at odds with the recommendations of the Law Commission Report, Criminal Law Report on Defences of General Application (1977) (Law Com. No. 83), but I am also aware that during some 14 years since its publication Parliament has, perhaps advisedly, taken no action thereanent.

However, in this appeal there is no question of your Lordships being asked to deny the defence in circumstances where it has previously been held to be available. I have already expressed the opinion that earlier ****425*** writings leave the matter at large. I do not consider that the obiter dictum of Lord Wilberforce in *Abbott* **v**. *The Queen [1977]* ***A.C***. *755* , to which I have already referred, supported as it is only by *Reg.* **v**. *Fagan* , 20 September 1974, which proceeded upon a concession, can be regarded as authoritative and there are no other observations in any of the three recent cases to a similar effect. There are, however, two obiter dicta in *Reg.* **v**. *Howe [1987]* ***A.C***. *417* to which I must refer. Lord Hailsham, dealing with a defence argument as to the illogicality of allowing the defence of duress to a charge of attempted murder but not to one of murder, said, at p. 432:

> 'More persuasive, perhaps, is the point based on the availability of the defence of duress on a charge of attempted murder, where the actual intent to kill is an essential prerequisite. It may be that we must meet this casus omissus in your Lordships' House when we come to it. It may require reconsideration of the availability of the defence in that case too.'

I understand Lord Hailsham there to be accepting that the question was still open for decision by this House and that his use of the word 'reconsideration' was not intended to connote a change in established law. Lord Griffiths dealt with the matter more positively, at p. 445:

> 'As I can find no fair and certain basis upon which to differentiate between participants to a murder and as I am firmly convinced that the law should not be extended to the killer, I would depart from the decision of this House in *Director of Public Prosecution for Northern Ireland v. Lynch [1975] A.C. 653* and declare the law to be that duress is not available as a defence to a charge of murder, or to attempted murder, I add attempted murder because it is to be remembered that the prosecution have to prove an even more evil intent to convict of attempted murder than in actual murder. Attempted murder requires proof of an intent to kill, whereas in murder it is sufficient to prove an intent to cause really serious injury. It cannot be right to allow the defence to one who may be more intent upon taking a life than the murderer.'

As the question is still open for decision by your Lordships it becomes a matter of policy how it should be answered. It is interesting to note that there is no uniformity of practice in other common law countries. The industry of Mr. Miskin who appeared with Mr. Farrer disclosed that in Queensland, Tasmania, Western Australia, New Zealand and Canada duress is not available as a defence to attempted murder but that it is available in almost all of the states of the United States of America. The reason why duress has for so long been stated not to be available as a defence to a murder charge is that the law regards the sanctity of human life and the protection thereof as of paramount importance. Does that reason apply to attempted murder as well as to murder? As Lord Griffiths pointed out in the passage to which I have just referred, an intent to kill must be proved in the case of attempted murder but not necessarily in the case of murder. Is there logic in affording the defence to one who intends to kill but fails and ***426** denying it to one who mistakenly kills intending only to injure? If I may give two examples:

(1a) A stabs B in the chest intending to kill him and leaves him for dead. By good luck B is found whilst still alive and rushed to hospital where surgical skill saves his life.

(1b) C stabs D intending only to injure him and inflicts a near identical wound. Unfortunately D is not found until it is too late to save his life.

I see no justification of logic or morality for affording a defence of duress to A who intended to kill when it is denied to C who did not so intend.

(2a) E plants in a passenger aircraft a bomb timed to go off in mid-flight. Owing to bungling it explodes while the aircraft is still on the ground with the result that some 200 passengers suffer physical and mental injuries of which many are permanently disabling, but no one is killed.

(2b) F plants a bomb in a light aircraft intending to injure the pilot before it takes off but in fact it goes off in mid-air killing the pilot who is the sole occupant of the airplane.

It would in my view be both offensive to common sense and decency that E if he established duress should be acquitted and walk free without a stain on his character notwithstanding the appalling results which he has achieved, whereas F who never intended to kill should, if convicted in the absence of the defence, be sentenced to life imprisonment as a murderer.

It is of course true that withholding the defence in any circumstances will create some anomalies but I would agree with Lord Griffiths (*Reg. v. Howe [1987] A.C. 417* , 444a) that nothing should be done to undermine in any way the highest duty of the law to protect the freedom and lives of those that live under it. I can therefore see no justification in logic, morality or law in affording to an attempted murderer the defence which is withheld from a murderer. The intent required of an attempted murderer is more evil than that required of a murderer and the line which divides the two offences is seldom, if ever, of the deliberate making of the criminal. A man shooting to kill but missing a vital organ by a hair's breadth can justify his action no more than can the man who hits that organ. It is pure chance that the attempted murderer is not a murderer and I entirely agree with what Lord Lane C.J. *[1991] 1 Q.B. 660* , 667 said: that the fact that the attempt failed to kill should not make any difference.

For the foregoing reasons I have no doubt that the Court of Appeal reached the correct conclusion and that the appeal should be dismissed.

LORD LOWRY.

My Lords, the sole point in this appeal is whether the defence of duress is available to a person charged with attempted murder.

On 20 October 1989, before Judge Rant Q.C. at Chelmsford Crown Court, the appellant, then aged 17, was charged on two counts of an indictment which alleged that he on 14 December 1988 (1) attempted to murder Pamela **Gotts** contrary to **427* section 1(1) of the Criminal AttemptsAct 1981 and (**2**) wounded Pamela **Gotts** with intent to do her grievous bodily harm contrary to section 18 of the Offences against the Person Act 1861 . He pleaded not guilty to both counts and was put in charge of the jury.

Before the Crown case was opened the appellant's counsel invited the trial judge to consider the question whether the appellant might adduce by way of defence to the charge of attempted murder evidence to show that at the time when he tried to kill Pamela **Gotts**, who was his mother, he was acting under duress. After legal argument in the absence of the jury, the judge ruled on 23 October that such evidence was not admissible, since duress was not as a matter of law available as a defence to a charge of attempted murder, whereupon the appellant was at his own request rearraigned and, in the presence of the jury, pleaded guilty to the charge of attempted murder. The jury convicted him on his confession and count **2** was then ordered to lie upon the file.

The facts which would have been relied on as constituting duress, namely, that the appellant's father threatened to shoot him unless he killed his mother, were put forward in mitigation and the appellant was made the subject of a probation order for three years.

The appellant's appeal against conviction, on the ground that duress was a defence to a charge of attempted murder, was on 23 January 1991 dismissed by the Court of Appeal (Lord Lane C.J., Owen and Pill JJ.) *[1991] 1 Q.B. 660* , which certified the following question, 'Is the defence of duress available to a person charged with attempted murder?' but refused leave to appeal. The appellant now appeals with the leave of this House *[1991] 1 W.L.R. 448* given on 13 May 1991.

The trial judge, giving his ruling, said:

> 'The present state of the law is plain enough in regard to the substantive offence of murder itself. There is a general common law rule that the defence of duress runs in all cases except murder as to the principals in the first or second degree and possibly treason. Why has murder been singled out to be such an exception? Drawing from the decisions to which my attention has been drawn, it seems to me that the foundation of the present situation is settled on the special place that the deliberate taking of human life has always occupied in our law.'

After considering what was said by Lord Hailsham of St. Marylebone L.C. and Lord Griffiths in *Reg. **v**. Howe [1987] **A.C**. 417* and noting Mr. Farrer's submission that murder was a special crime, he said:

> 'In my judgment it is precisely because murder is so special that it is impossible to decouple an attempt to commit this offence from the substantive crime itself. The real point here, if I might say so, is that in order to prove an attempt the Crown must establish an intention to kill, a mens rea higher than that required for the actual offence itself. That puts attempted murder in the highest possible category of crime so far as intention is concerned and it would, in my view, be morally and logically offensive to try to distinguish between a principal in the second or first degree as to the actual offence itself, and one who attempts to commit murder.'

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In the Court of Appeal Lord Lane C.J. referred, at pp. 662-663, to *Director of Public Prosecutions for Northern Ireland **v**. Lynch [1975] **A.C**. 653* and *Abbott **v**. The Queen [1977] **A.C**. 755* and to the position with regard to murder which has been established, indeed restored, by *Reg. **v**. Howe* . He recalled Mr. Farrer's argument, which was that throughout the history of the common law the defence of duress had been available in respect of all crimes with the exception of murder and some forms of treason, and quoted the well known passages in *Hale's Pleas of the Crown,* vol. 1, p. 51, and *Blackstone's Commentaries on the Laws of England,* vol. IV, p. 30, to which my noble and learned friend, Lord Jauncey of Tullichettle, has referred. The reason for withholding from the person threatened a defence of duress is stated to be that 'he ought rather to die himself, than kill an innocent' (Hale) or, as Blackstone phrased it, 'rather to die himself, than escape by the murder of an innocent.' In each

case the explanation is based on a moral principle which would also apply to attempted murder, even though the death of the intended victim had not been achieved.

Your Lordships will recall how Lord Lane C.J., at pp. 663-664, completed his preliminary review in which he referred to the First Report of the Criminal Law Commissioners 1833 (Parl. Rep. (1834) XXVI 105) (which exempted only murder and treason from the defence of duress), the Report in 1879 (C. 2345) of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences, of which Sir James Fitzjames Stephen was a member, and *Stephen, History of the Criminal Law of England* and then commented on the common law position, and later the statutory position, with regard to the closely related subject of coercion of a wife by her husband, on which the appellant relied, and still relies, as an illustration by close analogy that, despite the logical and moral problem, the common law (and now Parliament as well) draws a line between murder and attempted murder, so far as the defences of duress and coercion are concerned.

My Lords, I draw attention to what Lord Lane C.J. said, at p. 664:

> 'If it be correct that the common law recognised that there was, so to speak, a line to be drawn under murder whether by a principal in the first or second degree, so that apart from treason that was the only crime to which duress would not be an available defence, then it seems to us that we would be bound to accept that as the law, whether we think that is a desirable conclusion or not. In these circumstances the fact that there is no binding decision on the point does not serve to weaken a rule of the common law which has stood the test of time: see *Foakes v. Beer (1884) 9 App.Cas. 605* .'

In my respectful view, that statement accurately defines the problem in this case.

There being no direct authority on duress as a defence to a charge of attempted murder, Lord Lane C.J. then cited a trio of observations, which were obiter, from the majority judgment in the Court of Appeal in *Director of Public Prosecutions for Northern Ireland v. Lynch [1975] N.I. 35* , 45 and from the speeches of Lord Hailsham of St. Marylebone L.C. and Lord Griffiths in *Reg. v. Howe [1987] A.C. 417* , and 445, ***429** which my noble and learned friend, Lord Jauncey, has already mentioned and to which I shall presently return. These obiter dicta may be supplemented in favour of the Crown by a reference to the dissenting judgment of Bray C.J. (who held that duress was a defence to a charge of second degree murder) in *Reg. v. Brown and Morley (1968) S.A.S.R. 467* , 499:

> 'I can only repeat that in my view the trend of the later cases, general reasoning, and the express authority of the Privy Council in *Sephakela's Case, The Times, 14 July 1954* , prevent the acceptance of the simple proposition that no type of duress can ever afford a defence to any type of complicity in murder. I repeat also that as at present advised I do not think duress could constitute a defence to one who actually kills or attempts to kill the victim.'

On the other hand, in *Reg. v. Hudson [1971] 2 Q.B. 202* , where duress was held capable of providing a defence to a charge of perjury, Lord Parker C.J., delivering judgment, said, at p. 206:

> 'We have been referred to a large number of authorities and to the views of writers of textbooks. Despite the concern expressed in Stephen, History of the Criminal Law of England, vol. II, p. 107, that it would be 'a much greater misfortune for society at large if criminals could confer [immunity] upon their agents by threatening them with death or violence if they refuse to execute their commands' it is clearly established that duress provides a defence in all offences including perjury (except possibly treason or murder as a principal).'

I draw attention to the words 'in all offences.'

The logic of what my noble and learned friend, Lord Griffiths, said in *Reg. v. Howe [1987] A.C. 417* , 445 cannot be refuted, but at this point I must digress to take note of some observations made both by him and by the other members of the appellate committee. Lord Hailsham of St. Marylebone L.C. said, at pp. 429-430:

> 'I consider that the right course in the instant appeal is to restore the law to the condition in which it was almost universally thought to be prior to *Lynch* . It may well be that that law was to a certain extent unclear and to some extent gave rise to anomaly. But these anomalies I believe to be due to a number of factors extraneous to the present appeal and to the intrinsic nature of duress. The first is the mandatory nature of the sentence in murder. The second resides in the fact that murder being a 'result' crime, only being complete if the victim dies within the traditional period of a year and a day and

> that, in consequence, a different crime may be charged according to whether or not the victim actually succumbs during the prescribed period. The third lies in the fact (fully discussed amongst many other authorities in *Reg. v. Hyam [1975] A.C. 55*) that, as matters stand, the mens rea in murder consists not simply in an intention to kill, but may include an intent to commit grievous bodily harm. It has always been possible for Parliament to clear up this branch of the law (or indeed to define more closely the ***430*** nature and extent of the availability of duress as a defence). But Parliament has conspicuously, and perhaps deliberately, declined to do so. In the meantime, I must say that the attempt made in *Lynch* to clear up this situation by judicial legislation has proved to be an excessive and perhaps improvident use of the undoubted power of the courts to create new law by creating precedents in individual cases. This brings me back to the question of principle. I begin by affirming that, while there can never be a direct correspondence between law and morality, an attempt to divorce the two entirely is and has always proved to be, doomed to failure, and, in the present case, the overriding objects of the criminal law must be to protect innocent lives and to set a standard of conduct which ordinary men and women are expected to observe if they are to avoid criminal responsibility.'

I invite attention to his mention of anomalies and the cause of their existence and also to his description of murder as a 'result' crime. Then there is the passage, at p. 432, which is reproduced in the Court of Appeal's judgment *[1991] 1 Q.B. 660* , 665:

> 'it is pointed out that at least in theory, a defendant accused of this crime under section 18 of the Offences against the Person Act 1861, but acquitted on the grounds of duress, will still be liable to a charge of murder if the victim dies within the traditional period of one year and a day. I am not, perhaps, persuaded of this last point as much as I should. It is not simply an anomaly based on the defence of duress. It is a product of the peculiar mens rea allowed on a charge of murder which is not confined to an intent to kill. More persuasive, perhaps, is the point based on the availability of the defence of duress on a charge of attempted murder, where the actual intent to kill is an essential prerequisite. It may be that we must meet this casus omissus in your Lordships' House when we come to it. It may require reconsideration of the availability of the defence in that case too.'

It does appear to me that the author of the concluding words of this passage, read in their context, is taking the defence of duress to be *available* on a charge of attempted murder, despite the contrast which he draws between the possible absence of an intent to kill in murder and its essential presence in attempted murder. The reference to a 'casus omissus' conveys to my mind the impression that attempted murder has not become established by the common law as one of the exceptions to the general availability of the defence of duress, and that impression is strengthened by the use of the word 'reconsideration.' Of course, the use of that word also implies the possibility of concluding that the defence is *not* available in a case of attempted murder.

Lord Bridge of Harwich said *[1987] A.C. 417* , 436:

> 'My Lords, the defence of duress, as a general defence available at common law which is sufficient to negative the criminal liability of a defendant against whom every ingredient of an offence has otherwise been proved, is *difficult to rationalise or explain by reference to any* ***431*** *coherent principle of jurisprudence.* The theory that the party acting under duress is so far deprived of volition as to lack the necessary criminal intent has been clearly shown to be fallacious: *Director of Public Prosecutions for Northern Ireland v. Lynch [1975] A.C. 653* , 709-711, *per* Lord Edmund-Davies. No alternative theory seems to provide a wholly satisfactory foundation on which the defence can rest. The law, therefore, might have developed more logically had it adopted the view of Stephen, expressed in his *History of the Criminal Law of England,* vol. II, p. 108, that duress should be a matter, not of defence, but of mitigation. If this course had been followed, it might sensibly have led to the further development that, in the case of murder, duress, like provocation, would have sufficed to reduce the offence from murder to manslaughter. But that is not the law and, though it is open to Parliament to decide that it ought to be, that course is not open to us. We have to accept the law as we find it and, given the lack of any clear underlying principle to which we can refer, we must not, I think, be wholly surprised if the solution to the problem posed by the first certified question arising in these appeals fails to remove all the anomalies which some may discern in this field of the law.'

I draw attention to the words which I have emphasised above. and my noble and learned friend also said, at pp. 437-438:

> 'Not only is it for Parliament to decide whether the proposed reform of the law is socially appropriate, but it is also by legislation alone, as opposed to judicial development, that the scope of the defence of duress can be defined with the degree of precision which, if it is to be available in murder at all, must surely be of critical importance.'

I concede that one must beware of relying on an observation out of context.

Lord Brandon of Oakbrook also referred to illogicality and the need for legislation rather than judicial decision. His speech was quite short, at p. 438:

> 'My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Mackay of Clashfern. I agree with it, and for the reasons which he gives I would dismiss the appeal. I cannot pretend, however, that I regard the outcome as satisfactory. It is not logical, and I do not think it can be just, that duress should afford a complete defence to charges of all crimes less grave than murder, but not even a partial defence to a charge of that crime. I say nothing as to treason, for that is not here in issue. I am persuaded, nevertheless, to agree with my noble and learned friend by three considerations. First, it seems to me that, so far as the defence of duress is concerned, no valid distinction can be drawn between the commission of murder by one who is a principal in the first degree and one who is a principal in the second degree. Secondly, I am satisfied that the common law of England has developed over several centuries in such a way as to **432* produce the illogical, and as I think unjust, situation to which I have referred. Thirdly, I am convinced that, if there is to be any alteration in the law on such an important and controversial subject, that alteration should be made by legislation and not by judicial decision.'

The words I have emphasised are scarcely consistent with the view that attempted murder is an exception to the general rule about duress.

In view of its importance I shall quote a slightly longer extract from the speech of Lord Griffiths, at p. 445, than that which is reproduced in the Court of Appeal's judgment:

> 'As I can find no fair and certain basis upon which to differentiate between participants to a murder and as I am firmly convinced that the law should not be extended to the killer, I would depart from the decision of this House in *Director of Public Prosecutions for Northern Ireland v. Lynch [1975] A.C. 653* and declare the law to be that duress is not available as a defence to a charge of murder, or to attempted murder. I add attempted murder because it is to be remembered that the prosecution have to prove an even more evil intent to convict of attempted murder than in actual murder. Attempted murder requires proof of an intent to kill, whereas in murder it is sufficient to prove an intent to cause really serious injury. It cannot be right to allow the defence to one who may be more intent upon taking a life than the murderer. This leaves, of course, the anomaly that duress is available for the offence of wounding with intent but not to murder if the victim dies subsequently. But this flows from the special regard that the law has for human life, it may not be logical but it is real and has to be accepted.'

I note again the reference to anomaly and to the 'special regard that the law has for human life.'

Lord Mackay of Clashfern, having referred to the situation created by the decision in *Director of Public Prosecutions for Northern Ireland v. Lynch* , continued, at p. 457:

> 'In my opinion, it would not be right to allow this state of affairs to continue. I recognise that this decision leaves certain apparent anomalies in the law but I regard these as consequences of the fact that murder is a result related crime with a mandatory penalty. Consequently no distinction is made in penalty between the various levels of culpability. Differentiation in treatment once sentence has been pronounced depends upon action by the Crown advised by the executive government although that may be affected by a recommendation which the court is empowered to make. Where a person has taken a minor part in a wounding with intent and is dealt with on that basis he may receive a very short sentence. If sufficiently soon after that conviction the victim dies, on the same facts with the addition of the victim's death caused by the wounding he may be sentenced to life imprisonment. This is simply one illustration of the fact that *very different results may follow from a* **433* set of facts together with the death of a victim from what would follow the same facts if the victim lived.' (Emphasis supplied.)

While this passage gives no indication of the author's view of the question which is now before your Lordships, it acknowledges the existence of anomalies and notes features consequent on murder being a result-related crime.

To these observations I would just add one extract from the judgment of Lord Lane C.J. in the Court of Appeal in *Reg. v. Howe [1986] Q.B. 626* , 637-638:

> 'The judges discover the law either from words of the relevant statutes or, so far as common law offences are concerned, from earlier decisions of other courts which are binding upon them or have persuasive authority. They may often be assisted by eminent writers of commentaries, or by academic writers, in so far as they have distilled the essence of judicial decisions. Judges should, however, be careful to disregard those parts of their writings which suggest what the law ought to be but is not. Just as the trial judge must decide what the present law is, so must this court decide whether the trial judge came to the right conclusion. It is no more our task than his to decide what the law ought to be, although we may express our views obiter for what they are worth, if we feel the situation so demands.'

To come back to the present appeal, Lord Lane C.J. completed his historical survey with some important comments and quotations as follows *[1991] 1 Q.B. 660* , 666:

> 'The rules of the common law as enunciated by the early commentators were expressed at a time when the concept of attempt as a separate form of crime had not yet emerged.
>
> 'Stephen in his *History of the Criminal Law of England,* vol. II, said, at p. 222: 'The following is the history of the manner in which the law relating to attempts to commit crimes arrrived at the present state. The first general rule upon the subject with which I am acquainted was that in cases of attempts to murder the will was to be taken for the deed when it was accompanied by overt acts clearly indicating the intention of the party. Coke, in his exposition of the Statute of Treasons (25 Edw. 3, st. 5, c. 2) [Treason Act 1351], refers to this principle, regarding apparently the provision as to compassing and imagining the king's death as an illustration of it, and he refers to instances which occurred some time before the statute in which offenders who had clearly shown their intention to kill were punished as for murder, although their object was not carried out.' The footnote to that page provides two interesting examples. Stephen continues, at p. 223: 'This rule, however, appears to have been considered too severe and to have fallen into disuse, no general principle at all taking its place. The wide discretion which was then, and is now, allowed to the courts in regard of punishment would obviate many difficulties which the want of such a principle would raise.' As pointed out in *Russell on* ****434*** *Crime,* 12th ed. (1964), vol. 1, p. 175, it was not until the late 18th or early 19th century, so it seems, that the idea of attempt at common law and by statute assumed, broadly speaking, the shape in which we now see it. The Hard Labour Act 1822 (3 Geo. 4, c. 114) made any attempt to commit a felony an offence punishable by imprisonment with hard labour. Section 15 of the Offences against the Person Act 1861 (24 & 25 Vict. c. 100) made attempts to commit murder punishable by a maximum of penal servitude for life. This being so, it cannot be said that the views of the early commentators establish or demonstrate a rule of the common law that the defence of duress will excuse attempted murder. Had attempted murder been perceived as a distinct and separate offence, it too would have been likely to have been the subject of a similar exclusion from the defence of duress.
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> 'Professor Kenny in his *Outlines of Criminal Law,* 13th ed. (1929), stated, at p. 74: 'Duress per minas is a very rare defence; so rare that Sir James Stephen, in his long forensic experience never saw a case in which it was raised. Consequently the law respecting it remains to this day both meagre and vague. It is, however, clear that threats of the immediate infliction of death, or even of grievous bodily harm, will excuse *some* crimes that have been committed under the influence of such threats. It is impossible to say with precision what crimes the defence will be allowed to avail. It certainly will not excuse murder.' Professor Kenny then goes on to consider treason and also the conduct required to excuse a crime on the ground of duress. In these circumstances we are not constrained by a common law rule or by authority from considering whether the defence of duress does or does not extend to the offence of attempted murder. Equally, it is not surprising that some courts and Parliamentary draftsmen have assumed that the common law drew a distinction between the attempt and the full offence which historically speaking may not have been justified.'

The basic proposition for the appellant is that at common law duress has always been a defence for those charged with every crime except murder, most forms of treason and possibly (for a short time) robbery and that to add attempted murder to the exceptions would not be justified. The trial judge, whose words I have cited earlier, may seem to have adopted the first part of this proposition but not the second. The answer by the Crown I suggest, has to be that attempted murder *is* at common law an exception to the general rule and was an exception at the time when the appellant tried to kill his mother.

The first mention of attempted murder as an exception is in the draft criminal code of 1879 (Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences (C. 2345)) and the Crown must concede that this code, with its numerous exceptions to the duress defence, represents an aspiration of its authors and not a restatement of the law as it was understood to be. The statutory codes in Commonwealth countries which mention attempted murder and sometimes other serious offences as exceptions may no doubt be largely ***435** derived from the code of 1879. They do not purport to *reflect* the common law, any more than do the codes found in the U.S.A. I think it is worth mentioning that all the codes seem to be drawn up on the basis that duress is available as a defence to every charge which is not expressly excepted.

The early writers acknowledge duress as a defence and mention murder and treason as exceptions. These are the most heinous crimes, the one against humanity, the other against the state, and the fixed penalty was death. Certain crimes connected with setting fire to docks and Her Majesty's ships were also capital offences under the Dockyards, etc. Protection Act 1772 (12 Geo. 3, c. 24) until its repeal in 1971 (by the Criminal Damage Act 1971, ss. 11(2)(8), 12(6), Sch., Pt. III), which is later in time than the abolition of the death penalty for murder. No doubt those crimes could in some cases have been treated as treason, but no argument advanced has sought to reveal a connection between such offences and the solution of the question posed to your Lordships.

The early writers do not mention attempted murder and therefore one's first impression is that that crime is not an exception from the duress defence. But it has been said that attempts to commit a crime were of no great account in our jurisprudence until the late 18th and early 19th centuries, with the predictable consequence that even the serious offence of attempted murder was not discussed by such authorities as Hale and Blackstone. Indeed, like other attempts, attempted murder was only a misdemeanour at common law. It is, in my view, doubtful whether this explanation of the neglect of Hale and Blackstone to mention attempted murder lends any support to the ulterior proposition that that crime is an exception (like murder and treason) to the general rule. But, as my noble and learned friend, Lord Jauncey, has noted, Mr. Farrer submitted that the very foundation of the Crown's argument was unsound when one took into account the development in the Star Chamber of the law in relation to attempts and the adoption of that law by the common law courts. He also submitted the cogent observation that it was inconceivable that Hale, with his experience as Chief Justice, did not perceive attempted murder as an offence. And, referring to East's Pleas of the Crown (1803), vol. I, p. 89, he invited your Lordships' attention to 9 Anne c. 16 , whereby:

> 'if any person shall unlawfully attempt to kill, or shall unlawfully assault, strike, or wound any privy counsellor in the execution of his office, in council, or in any committee of council, he shall on conviction be declared a felon, and suffer death without benefit of clergy.'

By 1833, when the Criminal Law Commissioners presented their First Report (Parl. Rep. (1834) XXVI 105), exempting only murder and treason from the duress defence, the Hard Labour Act 1822 (3 Geo. 4, c. 114), as Lord Lane C.J. *[1991] 1 Q.B. 660* , 666 pointed out, had given statutory recognition to attempts.

I have no difficulty in accepting the inference or surmise of my noble and learned friend Lord Jauncey that an act amounting to attempted murder, before that offence became a statutory felony in 1861 punishable ***436** by penal servitude for life, may often, depending on the facts of the case, have been charged as wounding with intent or causing grievous bodily harm. But the true conclusion from this may be that before 1861 the misdemeanour of attempted murder did not rank at all in the same category as the heinous offences of murder and treason, so that there was no question of withdrawing from its perpetrator the benefit of the defence of duress. Your Lordships will also have noted that that defence has never been said to be unavailable at common law in cases of serious assault.

The foundation of the Crown's argument is that, accepting the sanctity of human life as the basis for denying the defence of duress in murder, both logic and morality demand that that defence must be withheld from one who tried (albeit unsuccessfully), and therefore *intended,* to kill, when one considers that in murder the defence is withheld not only from the deliberate killer but also from the killer who intended only to inflict very serious injury and from all principals in the second degree, whatever their mens rea. But the logic and, to some extent, also the morality of this proposition are open to attack, as follows.

1. Treason, too, is an excluded offence and it does not invariably involve killing or attempting or conspiring to kill. It is the ultimate crime against the state (a man-made, as distinct from a divinely ordained, offence).

2. The principle that a person ought to die himself rather than kill an innocent is attractive but does not touch the case in which the killer did not intend to cause death, nor does it touch a principal in the second degree either, if he merely intended the victim to suffer serious personal injury.

3. There is much authority to show that duress can be relevant which involves a threat not to the killer, but to others, in particular his wife and children, which fundamentally alters the moral problem: see *Reg. v. Brown and Morley (1968) S.A.S.R. 467* , 498, *per* Bray C.J.; *Reg. v. Hurley and Murray [1967] V.R. 526* ; *Abbott v. The Queen [1977] A.C. 755* , 767a and 769f, *per* Lord Salmon; *Reg. v. Howe [1987] A.C. 417* , 433, *per* Lord Hailsham of St. Marylebone L.C., and at p. 453, *per* Lord Mackay of Clashfern, and also various statutory codes and the Law Commission's draft Bill on A Criminal Code for England and Wales (vol. 1, App. A) (1989) (Law Com. No. 177), the combined effect of which is to show that threats to harm others can be a basis for the defence of duress.

My Lords, I suggest that the only thing which can reconcile the anomalies that have been a prolific source of comment is the stark fact of death. Murder is a result related crime, as Lord Hailsham of St. Marylebone L.C. and Lord Mackay of Clashfern both observed in *Reg. v. Howe* , at pp. 430 and 457. Thus, to exclude treason and murder relates the doctrine of duress to serious results (admittedly an unsuccessful *attempt* to subvert the government can itself be treason), namely, danger to the state or a crime committed with guilty intent and resulting in, but not necessarily aimed at, loss of life, and does not specially relate that doctrine to a scale of moral turpitude. It is founded on practical **437* considerations and not on a moral value judgment: the recourse to moral values was found in Hale's explanation (*Pleas of the Crown,* vol. 1, p. 51), which related only to murder (and certainly not to robbery) and which, even in relation to murder, did not serve to justify the law's attitude, since it did not cover the guilty causation of death while intending merely to injure.

Blackstone's explanation that crimes created by the laws of society are in relation to duress distinguished from natural offences, so declared by the law of God (*Commentaries on the Laws of England,* vol. IV, p. 30), equally fails to satisfy, since treason is typically a crime created by the laws of society for its own protection and because the explanation does not contemplate a mere intent to injure.

I sympathise with the proposition that attempted murder should be recognised as an exempted crime. But from the point of view of deterrence this idea holds no special attraction. If one makes the somewhat artificial assumption (without which the principle of deterrence has no meaning) that a potential offender will know when the defence of duress is not available, one then has to realise that, whatever the law may be about *attempted* murder, one who sets out to kill under threat will be guilty of murder if he succeeds. Therefore the deterrent is in theory operative already. The moral position, too, is clouded, because *Director of Public Prosecutions for Northern Ireland v. Lynch [1975] A.C. 653* , in this respect alone affirming the majority opinion of the Court of Criminal Appeal in Northern Ireland, affirmed that the offender, even when acting under duress, intends to commit the crime (of murder, not attempted murder). But his guilty intent is of a special kind: 'coactus voluit,' as the Latin phrase has it. Thus the denial of the duress defence, based on moral principles, is not straightforward. It may not be just a case of the law saying: 'Although you did not succeed, you intended to kill. Therefore you cannot rely on duress.' The law might equally well say: 'As with other offenders who allege duress, your guilty intent was caused by threats. Therefore, since the intended victim did not die, you, like other offenders, can rely on those threats as a defence. If the victim had died in circumstances amounting to murder or if treason had been the crime, it would of course have been different.' This emphasises the point that murder is a result-related crime.

The choice is between the two views propounded by Lord Lane C.J. *[1991] 1 Q.B. 660* , 664f-g and 667b: (1) *if* the common law recognised that murder and treason were the only excepted crimes, then we are bound to accept that as the law, whether it seems a desirable conclusion or not; the fact that there is no binding decision on the point does not weaken a rule of the common law which has stood the test of time; or (**2**) we are not constrained by a common law rule or by authority from considering whether the defence of duress does or does not extend to the offence of attempted murder.

I consider that the view to be preferred is that which is contained in the first of these propositions and that to adopt the second would result in an unjustified judicial change in the law. It is only with diffidence that I would express an opinion on the criminal law which conflicts with **438* that of such highly respected authorities as the present Lord Chief Justice and my noble and learned friend, Lord Griffiths, but on this occasion I feel obliged to do so. I proceed to give my reasons for this conclusion.

Both judges and textwriters have pointed out that the law on the subject is vague and uncertain. In *Reg. v. Brown and Morley (1968) S.A.S.R. 467* , 479 the court mentioned 'the defence of duress, as to which there is little direct authority and much theoretical discussion.' And, speaking of compulsion, whether by a husband over a wife, by threats of injury or by necessity, Stephen said in his History of the Criminal Law of England, vol. II, at p. 105:

> 'Of the three forms of compulsion above mentioned, I may observe generally that hardly any branch of the law of England is more meagre or less satisfactory than the law on this subject.'

Your Lordships have seen that Professor Kenny expressed himself to the same effect in his *Outlines of Criminal Law,* 13th ed. There have, moreover, been few cases in which the doctrine of duress has been directly in issue either with regard to the offences in relation to which it may provide a defence or as to the kind of threatening conduct which may constitute duress. There has, for all that, been considerable discussion and debate. In such an atmosphere it is easy for the discussion to focus on what the law ought to be rather than on what it is, and that is an unsatisfactory basis for the exercise of criminal jurisdiction. But, in my opinion, this vagueness ought not to encourage innovation which makes a departure from the received wisdom even if that wisdom is imperfect. This is particularly true if the innovation is retrospective in effect, to the prejudice of an accused person.

Hale's philosophical explanation of withholding the duress defence (Pleas of the Crown, vol. 1, p. 51) is not a good starting-point for putting attempted murder in the category of murder and treason or for saying that it is in that category already. The intention of the offender is evil, but when the attempt has failed the sentence is variable, although someone who kills through compassion or who kills intending only to injure receives a fixed sentence (until recently a capital sentence). That a man who did not mean to kill can be found guilty of murder and will receive a mandatory life sentence is arguably a blot on our legal system but that is the law and this fact sets murder apart. Such a result is consistent with the traditional view that one who causes death when committing a felony (I exclude manslaughter) is guilty of murder. In *Rex v. Stephenson [1947] N.I. 110* the accused was charged with the murder of a woman on whom he performed an abortion but, on the verdict of the jury, was convicted of manslaughter. The principle on which Stephenson was charged, although outmoded, is further proof that murder is a result related crime.

Stephen (*History of the Criminal Law of England,* vol. II, p. 108) - and many have agreed with him - thought that duress should not be a defence to *any* crime, but this view does not justify taking the most obvious candidate for exclusion from that defence any more than all the other offences below murder and treason which are listed in the code of ****439*** 1879 and in relation to which your Lordships can safely say that the duress defence is available. Whatever one may say about the earlier days, attempted murder was a fully established and serious crime in 1861 and has been ever since.

To withhold in respect of *every* crime the defence of duress, leaving it to the court (or, in relation to fixed penalty crimes, the executive) to take mitigating circumstances into account, seems logical. But to withhold that defence only from a selected list of serious crimes (some of which incur variable penalties) is questionable from a sentencing point of view, as indeed the sentence in the present case shows. The defence is withheld on the ground that the crime is so odious that it must not be palliated; and yet, if circumstances are allowed to mitigate the punishment, the principle on which the defence of duress is withheld has been defeated.

The fact that the sentence for attempted murder is at large is, with respect to those who think otherwise, no justification for withholding the defence of duress. Quite the reverse, because it is the theoretical inexcusability of murder and treason which causes those crimes (the fixed penalty for which can be mitigated only by the executive) to be deprived of the duress defence.

Except for the dictum of Lord Griffiths, the comments made in *Reg. v. Howe [1987] A.C. 417* do not appear to help the Crown.

Section 47 of the Criminal Justice Act 1925 is by no means decisive and I acknowledge the validity of my noble and learned friend Lord Jauncey's comments. For one thing, the common law background is no clearer than that appertaining to duress and the case law is negligible. But the draftsman seems to have acted upon the received wisdom, conforming to what I suggest everyone must have thought was the law and thereby coinciding with the received view on duress. One cannot, of course, deny that attempted murder was a well recognised felony in 1925. So, whatever the rationale, the law appears to have been consistent, making no concession to human frailty or to a wife's submissiveness in regard to murder or treason, but conceding the defence of duress and the possibility of marital coercion in respect of *all other* offences.

Having referred in the Court of Appeal's judgment *[1991] 1 Q.B. 660* to the wise observations of Lord Griffiths in *Reg. v. Howe [1987] A.C. 417* on the undesirability of making available the defence of duress to any person who has deliberately killed, Lord Lane C.J. said *[1991] 1 Q.B. 660* , 667: 'It seems to us that if those considerations are well founded, the fact that the attempt failed to kill *should* not make any difference.' (Emphasis supplied.) But in my submission everything except the turpitude of attempted murder points away from saying that that offence is already at common law outside the ambit of the duress defence. and I further suggest that actual wickedness is not shown to be a dominant factor in the calculation compared with the result.

As I have said, your Lordships are concerned to say what the law is and not what it ought to be. So far from clearing the way for judges to declare that attempted murder is an excepted crime, the uncertainty and vagueness surrounding duress ought to induce caution before deciding to ****440*** reject the received wisdom on the subject. What we can be clear about is that the common

law regards duress as *generally available* but not available in cases of murder and treason, and the statutory codes treat duress as generally available except as expressly mentioned. Your Lordships will have noted what was said by members of this House when comparing the functions of Parliament and the judges in *Reg. v. Howe* , and I would invite your Lordships' attention to two further statements on the subject. In *Abbott v. The Queen [1977] A.C. 755* , Lord Salmon said, at p. 767:

> 'Judges have no power to create new criminal offences; nor in their Lordships' opinion, for the reasons already stated, have they the power to invent a new defence to murder which is entirely contrary to fundamental legal doctrine accepted for hundreds of years without question. If a policy change of such a fundamental nature were to be made it could, in their Lordships' view, be made only by Parliament. Whilst their Lordships strongly uphold the right and indeed the duty of the judges to adapt and develop the principles of the common law in an orderly fashion they are equally opposed to any usurpation by the courts of the functions of Parliament.'

and in *Reg. v. Howe [1987] A.C. 417* Lord Mackay, speaking of what I may perhaps call judicial legislation, said, at pp. 449-450:

> 'In approaching this matter, I look for guidance to Lord Reid's approach to the question of this House making a change in the prevailing view of the law in *Myers v. Director of Public Prosecutions [1965] A.C. 1001* , 1021-1022, where he said: 'I have never taken a narrow view of the functions of this House as an appellate tribunal. The common law must be developed to meet changing economic conditions and habits of thought, and I would not be deterred by expressions of opinion in this House in old cases. But there are limits to what we can or should do. If we are to extend the law it must be by the development and application of fundamental principles. We cannot introduce arbitrary conditions or limitations: that must be left to legislation. and if we do in effect change the law, we ought in my opinion only to do that in cases where our decision will produce some finality or certainty."

Lord Reid was speaking in a different context (about hearsay evidence), but I suggest that the principles espoused in both of the passages which I have cited are appropriate to the present case. It could be said that what your Lordships have recently done with regard to marital rape (*Reg. v. R. [1991] 3 W.L.R. 767*) was in a modern context to 'adapt and develop the principles of the common law,' in the words of Lord Salmon. But, with regard to attempted murder and duress, it does not seem to me that any question of adaptation or development can arise. In these circumstances I respectfully cannot subscribe to the view that it would not be harmful to declare that attempted murder is an excepted crime and thereby possibly deprive the appellant of a defence which was available at the time of his offence. By parity of reasoning I do not think it is satisfactory to say, 'Let us declare this crime to be excepted, ***441** and Parliament can undo our work if it sees fit' if there is a substantial risk (and for my part I think it is much more) that we shall be anticipating Parliament instead of allowing Parliament to make a policy decision after reasoned debate.

My Lords, what I have just said reminds me that this question was presented by the Crown to your Lordships as a question of policy and that *Reg. v. Howe [1987] A.C. 417* was cited as an example of a policy decision. But in fact no example could be more misleading. The appellants in that case pressed your Lordships to accept the lead of the minority in *Abbott v. The Queen [1977] A.C. 755* and to *make* a policy decision by coming into line with what is now acknowledged to be the erroneous decision of this House in *Reg. v. Lynch [1975] A.C. 653* and your Lordships refused to do so *both* because the common law said that duress was not available in relation to murder *and* because the policy of the law was served by adhering to that position. What Lord Lane C.J. said in the Court of Appeal, at p. 664f, is the complete answer to an appeal to policy: if the common law recognised that murder and treason were the only excepted crimes, then we are bound to accept that as the law, whether it seems a desirable conclusion or not.

If the common law has had a policy towards duress heretofore, it seems to have been to go by the result and not primarily by the intent and, if a change of policy is needed with regard to criminal liability, it must be made prospectively by Parliament and not retrospectively by a court.

I am not influenced in favour of the appellant by the supposed illogicality of distinguishing between attempted murder on the one hand and conspiracy and incitement to murder on the other and I agree on this point with the view of Lord Lane C.J.: short of murder itself, attempted murder is a special crime. But I am not swayed in favour of the Crown by the various examples of the anomalies which are said to result from holding that the duress defence applies to attempted murder. As Lord Lane C.J. said, at p. 668b, it would be possible to suggest anomalies wherever the line is drawn. The real logic would be to grant or withhold the duress defence universally.

Attempted murder, however heinous we consider it, was a misdemeanour. Until 1861 someone who shot and missed could suffer no more than two years' imprisonment and I submit that, when attempted murder became a felony, that crime, like many other serious felonies, continued to have available the defence of duress.

My Lords, having considered all the arguments on either side, I am of the opinion that your Lordships *are* constrained by a common law rule (though not by judicial authority) from holding that the defence of duress does not apply to attempted murder. Accordingly, I would allow the appeal, quash the conviction and set aside the probation order but, in the special circumstances of this case, I would not propose that a new trial be ordered.

LORD BROWNE-WILKINSON.

My Lords, the speeches of Lord Jauncey of Tullichettle and Lord Lowry both demonstrate that at the present time it is uncertain whether or not the law permits duress to be pleaded ***442*** as a defence to a charge of attempted murder. In this case your Lordships have to clarify the position one way or the other.

The law does not allow duress as a defence to murder itself on the policy grounds that it is not right to allow a man to take the life of another in order to save his own. As the speech of Lord Jauncey demonstrates, that policy reason applies equally to attempted murder. I can see no logical or policy reason for differentiating between the case of the successful and the unsuccessful would-be murderer.

I therefore agree that the appeal should be dismissed but express the hope that Parliament will consider the whole question of duress as a defence to all crimes with particular reference to the question whether duress is not better regarded as a mitigating factor than as a defence.

Representation

Solicitors: Gepp & Sons, Chelmsford ; Crown Prosecution Service, Headquarters .

Appeal dismissed. Certified question answered in negative. No order as to costs. (M. G.)