

*Privy Council Appeal No. 29 of 1975*

Stanley Abbott - - - - - *Appellant*

v.

The Queen - - - - - *Respondent*

FROM

**THE COURT OF APPEAL OF TRINIDAD AND TOBAGO**

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL DELIVERED THE 20TH JULY 1976**

*Present at the Hearing :*

LORD WILBERFORCE

LORD HAILSHAM OF ST. MARYLEBONE

LORD KILBRANDON

LORD SALMON

LORD EDMUND-DAVIES

[*Majority Judgment delivered by LORD SALMON*]

On the 16th July 1973 the appellant was convicted of the murder of Gale Benson and sentenced to death. On the 9th July 1974 his appeal against conviction was dismissed. He now appeals to their Lordships' Board contending that his conviction should be quashed and a new trial ordered.

This appeal raises a point of law of great importance, namely, does duress afford a defence to anyone charged, as a principal in the first degree, with the crime of murder?

The relevant facts, as given in evidence mostly by the appellant himself, can be stated quite shortly. The story starts in May 1971 when a man called Malik bought and gave the appellant a return air ticket from Trinidad to London with orders to carry out certain commissions for him in London and to return to Trinidad immediately on receipt of instructions from Malik to do so. When the appellant expressed his resentment at being ordered about, Malik threatened to kill the appellant's mother unless his instructions were obeyed. The appellant regarded Malik as a very dangerous man—no doubt with good reason. Malik has since been hanged for murder.

The appellant left for England in May 1971 and in December was summoned back to Trinidad by Malik. The appellant arrived two days later. He went to see Malik who was then living at 43 Christina Gardens where he had set up a sort of commune over which he presided and which consisted of about five other men in addition to Malik's wife and children. The appellant told Malik that he wanted to go home and live with his mother but Malik insisted upon his joining the commune. And he did so.

One of the inmates of the commune was a man called Hakim Jamal. Gale Benson was his mistress. On about the 24th December the appellant heard Malik tell Jamal that he should send for someone from the U.S.A. whom he could trust. Two days later a man called Kidogo arrived and joined the commune. The appellant was given to understand that this man was a hired assassin and not employed for manual work and that he had killed police in Boston U.S.A.

On the evening of the 1st January 1972 Malik summoned a meeting at the house opposite 43 Christina Gardens of all the men in the commune other than Jamal. At this meeting Malik spoke about liquidating Gale Benson on the ground that she was causing Jamal mental strain. The appellant pleaded for her life and suggested that, if they wanted to get rid of her, they should buy her an air ticket and send her away. Malik said he wanted blood and he and Kidogo looked at the appellant who said that he could see murder in their eyes and that he felt mortally afraid. He said that if he had gone to the police that night and told them of the plot to kill the girl, he did not think that they would have believed him because of Malik's cloak of respectability created by his luxurious home and the famous people who had visited him there. He said that he did not believe that the police would have given him or his mother protection. He then retired for the night to his bedroom in Christina Gardens. Soon after he awoke early the next morning, Malik indicated to him and the others that he wanted a hole to be dug quickly and where he wanted it dug. He said that Gale Benson would soon be arriving by car and would be handed over to the appellant. He said that if she saw the hole and got suspicious, the appellant was to tell her that it was to be used for the purpose of rotting manure. Malik said that the appellant was then to grab her and take her into the hole. He added that if the appellant did anything to endanger the safety of the men around the hole or Malik's safety or that of his children, the appellant and his mother would die that morning.

Malik then left and the appellant and the other men started hastily to dig a hole about 4ft. square and 4ft. deep. Just as the hole was completed Gale Benson arrived in a jeep driven by one of the members of the commune called Yeates. The appellant invited her to come and look at the hole. She went to its edge and asked what it was for. The appellant replied that it was for her and thereupon flung his arm round her neck and jumped into the hole with her. The hired assassin Kidogo then jumped into the hole after them. Whilst the appellant held her, Kidogo attempted to stab her to death with a cutlass. The girl struggled frantically and perhaps because of her struggles and the confined space in which Kidogo and the appellant were operating, she only received a number of comparatively minor stab wounds; when it seemed impossible for the *coup de grâce* to be administered by Kidogo the appellant called for help. Yeates then jumped into the hole, seized the cutlass from Kidogo, placed the tip of the cutlass's blade against the girl's neck with one hand and with the other struck a blow on the end of the cutlass handle driving the blade down through the girl's lung. She collapsed, dying but not dead. Four of the men including the appellant then buried her while she was still alive—as was indeed obvious to all the participants as she was still struggling, and as a post-mortem examination by the distinguished pathologist, Dr. Keith Simpson, afterwards confirmed.

Before dealing with the main point of this appeal, it would be convenient to dispose of two submissions addressed to this Board on comparatively minor points.

Firstly it was argued on behalf of the appellant that he was only a principal in the second degree and that therefore, on the authority of *D.P.P. v. Lynch* [1975] A.C. 653, he was entitled to be acquitted on the

ground of duress. As this issue had not been left to the jury, it was contended that the conviction should be quashed and a new trial ordered. It is unnecessary to say any more about this submission than that it was clearly hopeless. The facts which have been recited in this judgment speak for themselves. They make it obvious that the appellant was a principal in the first degree in that he took an active and indeed a leading part in the killing.

Secondly it was submitted on behalf of the Crown that the case for the appellant was inconsistent with duress and that accordingly the trial judge was right in not leaving that issue to the jury. Much stress was laid on the fact that in the written statement which the appellant made to the police on the 25th February 1972, he had said nothing which could support a defence of duress: the nearest he got to duress was to say, "We were under the very strong influence of Michael (Malik)". By no stretch of the imagination could this constitute evidence of duress. Nevertheless, having regard to the evidence already recited which the appellant himself gave at the trial, their Lordships consider that it might have been possible for the jury to find duress although it may well be that they would not have done so. In these circumstances, their Lordships consider that if duress affords a defence to a charge of murder as a principal in the first degree, the learned trial judge should have left this issue to the jury. In no event, however, can any criticism be made of the learned trial judge because some months before the trial, on the 17th April 1973 in the case of *Malik & Abbott v. The Queen* [unreported], the Court of Appeal had held that in the law of Trinidad duress was no defence to the crime of murder.

Turning now to the main point, it is necessary first to examine *Lynch's case*. By a majority of three to two the House of Lords held that if duress was relied upon and there was any material to support it, it would afford a complete defence to anyone charged with murder as a principal in the second degree unless the Crown satisfied the jury beyond reasonable doubt that the accused had not acted under duress.

The short facts as stated in evidence by the accused in *Lynch's case* were that he was ordered by a well-known member of the I.R.A. who was reputed to be a ruthless gunman to drive him and two others to a particular road. Lynch firmly believed that he would be shot if he refused. So he drove the three men according to the orders which he had received. To Lynch's knowledge one of them was carrying a rifle, another had a gun in his pocket and all three were wearing balaclava helmets. In the course of the journey he strongly suspected from their conversation that they were about to shoot a policeman. He was right. At a certain point on the journey he was told to stop the car. He obeyed. The other three men, pulling the balaclava helmets over their faces, jumped out of the car and ran across the road. Three shots rang out. They then ran back to the car and jumped in, ordering Lynch to return to their starting point. He did so. The rest of the evidence established that these three men driven by Lynch had murdered a policeman when they jumped out of the car driven by Lynch.

The trial judge refused to leave duress to the jury on the ground that it afforded no defence to murder and Lynch's appeal was dismissed by the Court of Appeal. Lynch then appealed to the House of Lords with the result which has already been stated. On his re-trial the jury rejected the defence of duress and he was again convicted of murder.

Whilst their Lordships feel bound to accept the decision of the House of Lords in *Lynch's case* they find themselves constrained to say that had they considered (which they do not) that that decision is an authority which requires the extension of the doctrine to cover cases like the present they would not have accepted it.

Their Lordships will now consider the question whether *Lynch's case* can properly be regarded as any authority for the proposition advanced on behalf of the appellant that duress affords him a complete defence although he was a principal in the first degree, having clearly taken an active, prominent and indispensable part in the actual killing of Gale Benson.

The majority of the noble and learned Lords who decided Lynch's case certainly said nothing to support the contention now being made on behalf of the appellant. At best, from the appellant's point of view, they left the point open. Indeed there are passages in some of their speeches which suggest that duress can be of no avail to a charge of murder as principal in the first degree. The noble and learned Lord Morris of Borth-y-Gest said at p.671:

"It may be that the law must deny such a defence [duress] to an actual killer, and that the law will not be irrational if it does so".

He then went on to explain the difference between the situation in which a man under a real threat of death or serious violence (a) carries a gun or drives a car to a place with the knowledge that at such place those exercising the duress plan to kill and (b) the man who under the same threat is the actual killer. Of the former he said:

"The final and fatal moment of decision has not arrived. He saves his own life at a time when the loss of another life is not a certainty".

Of the latter, he said:

"The person is told that to save his life he himself must personally . . . pull the trigger or otherwise . . . do the actual killing. There, I think, before allowing duress as a defence it may be that the law will have to call a halt".

At p.677 he said of the dissenting judgment of Bray C. J. in *Reg. v. Brown and Morley* (1968) S.A.S.R. 467:

"In a closely reasoned judgment the persuasive power of which appeals to me [Bray C.J.] held that it was wrong to say that no type of duress can ever afford a defence to any type of complicity in murder though he drew a line of limitation when he said at p.499, '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'".

The noble and learned Lord Wilberforce at p.680 says:

"Indeed, to justify the deliberate killing by one's own hand of another human being may be something that no pressure or threat even to one's own life . . . can justify—no such case ever seems to have reached the courts. But if one accepts the test of heinousness, this does not, in my opinion, involve that all cases of what is murder in law must be treated in the same way. Heinousness is a word of degree, and that there are lesser degrees of heinousness, even of involvement in homicide, seems beyond doubt. An accessory before the fact, or an aider or abettor, may (not necessarily must) bear a less degree of guilt than the actual killer: and even if the rule of exclusion is absolute, or nearly so in relation to the latter, it need not be so in lesser cases".

At p.683 the same noble and learned Lord says:

"The conclusion which I deduce is that although in a case of actual killing by a first degree principal the balance of judicial authority at the present time is against the admission of the defence of duress, in the case of lesser degrees of participation, the balance is, if anything, the other way."

It seems to their Lordships that if one adds these passages from the speeches of the noble and learned Lords Morris of Borth-y-Gest and Wilberforce to those of the two noble and learned Lords who dissented in *Lynch's case*, the majority of the House was of the opinion that duress is not a defence to a charge of murder against anyone proved to have done the actual killing. However this may be, their Lordships are clearly of the opinion that in such a case, duress, as the law now stands, affords no defence. For reasons which will presently be explained, their Lordships, whilst loyally accepting the decision in *Lynch's case*, are certainly not prepared to extend it.

When the noble and learned Lords Simon of Glaisdale and Kilbrandon stated in their dissenting speeches in *Lynch's case* that the drawing of an arbitrary line between murder as a principal in the first degree and murder as a principal in the second degree cannot be justified either morally or juridically, they clearly meant that since, rightly, it had always been accepted that duress was not a defence to a charge of murder as a principal in the first degree, the cases and dicta (e.g. Bray C. J. in *Reg. v. Brown and Morley* (*supra*) and *R. v. Kray* (1969) 53 Cr. App. R. 569) which suggested that duress could amount to a defence to a charge of murder in the second degree should not be followed. The noble and learned Lords were clearly not conceding that if, contrary to their view, duress was capable of being a defence to a charge of murder as a principal in the second degree it should therefore be capable of being a defence to a charge of murder as a principal in the first degree.

No doubt the facts might be such that murder by a principal in the second degree may sometimes be as heinous a crime as murder by a principal in the first degree. On the other hand, as pointed out by the majority in *Lynch's case* the facts may often be such that murder by a principal in the second degree involves only a comparatively slight participation in the crime, not nearly so heinous or blameworthy as the act of the man who did the actual killing.

If duress affords a defence, as *Lynch's case* decides, to all murderers who are principals in the second degree, it may be that sometimes the facts may be such that some villainous murderers in this class will be lucky in that *Lynch's case* will allow them to escape conviction and go free. This does not however seem to their Lordships to afford any sound reason for changing the law by ruling that duress should allow the man who does the actual killing to go free. It was no doubt because the noble and learned Lords forming the majority in *Lynch's case* considered that the law had always recognised that a principal guilty of murder in the first degree might be treated differently from one guilty of murder only in the second degree that, rightly in their Lordships' view, they did not extend the principle in *Lynch's case* to those who had taken part in the actual killing and concluded that although duress did operate as a defence to those in the first class it might well not do so to those in the latter class.

Prior to the present case it has never even been argued in England or any other part of the Commonwealth that duress is a defence to a charge of murder by a principal in the first degree. The only case in which such a view was canvassed is *S. v. Goliath* (1972) (3) (Translation) S. A. 465 (A.D.): this was a case decided under a mixture of Roman-Dutch and English law after South Africa had left the Commonwealth. From time immemorial it has been accepted by the common law of England that duress is no defence to murder, certainly not to murder by a principal in the first degree. Hale stated:

“ 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" (Hale's Pleas of the Crown vol. 1 p.51).

Blackstone stated in his Commentaries (Book IV p.30) that a man under duress

"ought rather to die himself than escape by the murder of an innocent."

The textbooks all accept this principle (see Russell on Crime 12th ed. 1964 p.90; Kelly's Criminal Law 19th ed. 1966 p.70; Glanville Williams, Criminal Law 2nd ed. 1961 p.759 and Smith and Hogan, Criminal Law 3rd ed. 1973 pp.164-8). Some of these textbooks, wrongly, according to the decision in *Lynch's case*, have extended the principle to exclude duress as a defence to any charge of murder including murder by a principal in the second degree. According to the Corpus Juris Secundum, "Criminal Law" para. 44, the American view of the common law is identical on this point with the English textbook writers cited above.

The Codes of many countries within the Commonwealth were carefully examined in *Lynch's case* and it is unnecessary now to re-examine them. In these Codes murder has been excluded as a crime to which duress may be a defence. There can surely be no doubt that those who drafted the Codes and those who adopted them considered that they were bringing the law of the Commonwealth into line with the law of England. They did however also exclude (perhaps on account of local conditions) some other crimes to which duress is still a defence in England. As already indicated *Lynch's case* made duress available as a complete defence to anyone charged with murder as a principal in the second degree, but left untouched what for hundreds of years has never been doubted, namely, that on a charge of murder, duress is of no avail to a man who does the actual killing.

Counsel for the appellant has argued that the law now presupposes a degree of heroism of which the ordinary man is incapable and which therefore should not be expected of him and that modern conditions and concepts of humanity have rendered obsolete the rule that the actual killer cannot rely on duress as a defence. Their Lordships do not agree. In the trials of those responsible for war time atrocities such as mass killings of men, women or children, inhuman experiments on human beings, often resulting in death, and like crimes, it was invariably argued for the defence that these atrocities should be excused on the ground that they resulted from superior orders and duress: if the accused had refused to do these dreadful things, they would have been shot and therefore they should be acquitted and allowed to go free. This argument has always been universally rejected. Their Lordships would be sorry indeed to see it accepted by the common law of England.

It seems incredible to their Lordships that in any civilised society, acts such as the appellant's, whatever threats may have been made to him, could be regarded as excusable or within the law. We are not living in a dream world in which the mounting wave of violence and terrorism can be contained by strict logic and intellectual niceties alone. Common-sense surely reveals the added dangers to which in this modern world the public would be exposed, if the change in the law proposed on behalf of the appellant were effected. It might well, as the noble and learned Lord Simon of Glaisdale said in *Lynch's case*, prove to be a charter for terrorists, gang leaders and kidnappers. A terrorist of notorious violence might *e.g.* threaten death to 'A' and his family unless 'A' obeys his instructions to put a bomb with a time fuse set by 'A' in a certain passenger aircraft, and/or in a

thronged market, railway station or the like. 'A', under duress, does obey his instructions and as a result, hundreds of men, women and children are killed or mangled. Should the contentions made on behalf of the appellant be correct, 'A' would have a complete defence and, if charged, would be bound to be acquitted and set at liberty. Having now gained some real experience and expertise, he might again be approached by the terrorist who would make the same threats and exercise the same duress under which 'A' would then give a repeat performance killing even more men, women and children. Is there any limit to the number of people you may kill to save your own life and that of your family?

We have been reminded that it is an important part of the judge's role to adapt and develop the principles of the common law to meet the changing needs of time. We have been invited to exercise this role by changing the law so that on a charge of murder in the first degree, duress shall entitle the killer to be acquitted and go scot-free. Their Lordships certainly are very conscious that the principles of the common law must not be allowed to become sterile. The common law, as has often been said, is a living organism. During the last decade there have been many important cases in which its principles have been adapted and developed by the judges (see for example *Conway v. Rimmer* [1968] A.C. 910; *West Midland Baptist (Trust) Association v. Birmingham Corporation* [1970] A.C. 874; *Arenson v. Arenson* [1975] 3 W.L.R. 815). Their Lordships however are firmly of the opinion that the invitation extended to them on behalf of the appellant goes far beyond adapting and developing the principles of the common law. What has been suggested is the destruction of a fundamental doctrine of our law which might well have far reaching and disastrous consequences for public safety to say nothing of its important social, ethical and maybe political implications. Such a decision would be far beyond their Lordships' powers even if they approved—as they certainly do not—of this revolutionary change in the law proposed on behalf of the appellant. 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.

Their Lordships have explained in some detail all the reasons why they decline to extend the decision in Lynch's case. These are their sole reasons and they do not include any apprehension about the reliability of juries, which apparently may be questioned by some—but certainly not by any of their Lordships. They have no doubt that when duress is established juries will not hesitate to find duress. On the other hand they have equally little doubt that when duress is not established juries will have no hesitation in rejecting it. What their Lordships cannot accept is the novel proposition that duress is a defence to a charge of murder against a man who takes part in the actual killing.

Their Lordships however consider that the law relating to duress is in an unsatisfactory state as was pointed out long ago in Stephen's History of the Criminal Law in England Vol. 2. pp. 107-8:

“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. It is, of course, a misfortune for a man that he should be placed between two fires, but it would be a much greater misfortune for society at large if criminals could confer impunity upon their agents by threatening them with death or violence if they refused to execute their commands. If impunity could be so secured a wide door would be open to collusion, and encouragement would be given to associations of malefactors, secret or otherwise. No doubt the moral guilt of a person who commits a crime under compulsion is less than that of a person who commits it freely, but any effect which is thought proper may be given to this circumstance by a proportional mitigation of the offender's punishment.

These reasons lead me to think that compulsion by threats ought in no case whatever to be admitted as an excuse for crime, though it may and ought to operate in mitigation of punishment in most though not in all cases."

Any murderer who kills under duress would be less, in many cases far less, blameworthy than another who has killed of his own freewill. Should not the law recognise this factor? A verdict of guilty of murder carries with it a mandatory sentence, in this country life imprisonment, in other parts of the Commonwealth death. There is much to be said for the view that on a charge of murder, duress, like provocation, should not entitle the accused to a clean acquittal but should reduce murder to manslaughter and thus give the Court power to pass whatever sentence might be appropriate in all the circumstances of the case.

Even had their Lordships taken the view (which they do not) that they would be justified in changing the policy of the common law of England, by making duress a defence to a charge of murder as a principal in the first degree, they would not have allowed this appeal. Their Lordships, in reliance on *Australian Consolidated Press Ltd. v. Uren* [1969] 1 A.C. 590 at p.644, would not have been prepared to say that the Court of Appeal were wrong in being unconvinced that such a change of policy was desirable in Trinidad and Tobago. The Chief Justice after quoting the passage from Blackstone's Commentaries to which their Lordships have referred said that

"[it] could hardly be faulted as a principle of fairness and justice. It continues to be the law of our land, and . . . it is in complete harmony with commonsense and the notions and standards of justice in our society."

For the reasons given earlier in this judgment their Lordships will humbly advise Her Majesty that this appeal should be dismissed.

[*Dissenting Judgment by LORD WILBERFORCE  
AND LORD EDMUND-DAVIES*]

The question raised by this appeal is not whether the appellant should be acquitted of the murder of Gale Benson, but rather whether a new trial should be ordered so that he may have the opportunity, hitherto denied him, of being heard on his plea that his participation in the acts resulting in her death was due to his having acted under duress. We start from



the point that the majority, as they expressly state in the judgment, are satisfied that, if duress be a defence open to a principal in the first degree to murder, there is here evidence supporting that plea of such a nature that the proper course would be to leave it to the jury for their assessment, evidence, in fact, of threats of death not only to the accused man but to an innocent third party, his mother. Accepting this, those of their Lordships who are in the minority would nevertheless in no circumstances be prepared simply to advise Her Majesty that this appeal should be allowed and a judgment and verdict of acquittal entered. They go no further than to hold that the evidence as to duress is of such a nature that the interests of justice demand that a new trial be ordered in order that this evidence should be given consideration.

The accused, Stanley Abbott, is under sentence of death, and subject to the discretion of the Executive there is no reason to think that the sentence will not be carried out, following upon the dismissal of his appeal. Accordingly, even were it permissible and proper in cases of lesser gravity to leave the law to take its course and allow the legislature breathing space to consider possible amendments of a law which the majority of their Lordships themselves describe as being "in an unsatisfactory condition", this is emphatically not such a case. For Abbott the time to declare what the law is brooks of no delay.

The dreadful circumstances leading up to and culminating in the death of Gale Benson at the hands of the appellant and others have been related in the majority judgment. They are such as to establish clearly that Abbott was a principal in the first degree to her murder. The sole question of law is whether it is open to such an accused to plead that he acted under duress. For the purposes of this appeal, it is unnecessary to consider what *sort* of duress or how *much* duress. If the Crown is right, there is no let-out for any principal in the first degree, even if the duress be so dreadful as would be likely to wreck the morale of most men of reasonable courage, and even were the duress directed not against the person threatened but against other innocent people (in the present case, Abbott's mother) so that considerations of mere self-preservation are not operative. That is indeed "a blueprint for heroism" (*S. v. Goliath* (1972) (3) (Translation) S. A. 465 (A.D.)). The question is whether it is also the common law, which, being indivisible, has to be applied in Trinidad and Tobago as in Great Britain. In our opinion it is not.

The starting point in this appeal must be the decision of the House of Lords in *D.P.P. for N. Ireland v. Lynch* [1975] A.C. 653; which decision was not available to the trial judge in this case or to the Court of Appeal. This established that on a murder charge the defence of duress is open to a person accused as a principal in the second degree. Not only has the actual decision in *Lynch* to be respected but also its implications, for it was based upon a consideration in some depth of topics scarcely adverted to by their Lordships in the present appeal. The question that immediately arises is whether any acceptable distinction can invariably be drawn between a principal in the first degree to murder and one in the second degree, with the result that the latter *may* in certain circumstances be absolved by his plea of duress, while the former may never even advance such a plea.

The simple fact is that *no* acceptable basis of distinction has even now been advanced. In *Lynch* Lord Simon of Glaisdale and Lord Kilbrandon, who dissented, adverted to the absence of any valid distinction as a ground for holding that duress should be available to *neither*, the former saying (687 B):

"How can an arbitrary line drawn between murder as a principal in the first degree and murder as a principal in the second degree be justified either morally or juridically?"

Lord Morris of Borth-y-Gest restricted himself to saying (671 DE):

“It may be that the law must deny such a defence to an actual killer, and that the law will not be irrational if it does so”.

Of those of their Lordships who are in a minority in the present appeal, Lord Wilberforce found (681 CD):

“. . . no convincing reason, on principle, why, if a defence of duress in the criminal law exists at all, it should be absolutely excluded in murder charges whatever the nature of the charge; hard to establish, yes, in case of direct killing so hard that perhaps it will never be proved: but in other cases to be judged, strictly indeed, on the totality of facts. Exclusion, if not arbitrary, must be based either on authority or policy”.

Lord Edmund-Davies (at 715 DE) expressed agreement with the observation in *Smith and Hogan*, 3rd ed. p. 166 that:

“The difficulty about adopting a distinction between the principal and secondary parties as a rule of law is that the contribution of the secondary party to the death may be no less significant than that of the principal”.

Little advantage is to be gained by referring all over again to the many cases cited in *Lynch*. But mention must obviously be made of *Reg. v. Brown and Morley* [1968] S.A.S.R. 467, where Bray C. J. ended his illuminating judgment with the words,

“. . . as at present advised I do not think duress could constitute a defence to one who actually kills or attempts to kill the victim”.

But he adduced no reason, and when *Lynch* was before the Court of Criminal Appeal of Northern Ireland, Lord Chief Justice Lowry said:

“We find it . . . difficult to justify the distinction drawn by Bray C. J. but not apparently reflected in any other way, between principals in the first and second degree in murder and, by way of contrast, we note the case of *R. v. Farduto* (1913) 10 D.L.R. 669 . . . That case was admittedly decided under the Canadian Criminal Code, but it also discussed the common law and, in upholding the conviction, made no distinction, with regard to duress as a defence to murder, between principals in the first and second degree”.

And it had earlier been said in Northern Ireland by Murnaghan J. in *A.G. v. Whelan* (1934) I.R. 518 at 526:

“It seems to us that threats of immediate death or serious personal violence so great as to overbear the ordinary power of human resistance should be accepted as a justification for acts which would otherwise be criminal”.

As to South Africa, it is noteworthy that, although in *Hercules* [(1954) (3) S.A. 826 (A.D.)] duress was treated as a mitigating factor reducing murder to manslaughter, in *S. v. Goliath* ((1972) (3) (Translation) S.A. 465 (A.D.)) it was held to be a complete defence, Rumpff J. saying at p. 480:

“It is generally accepted . . . that for the ordinary person in general his life is more valuable than that of another. Only those who possess the quality of heroism will intentionally offer their lives for another. Should the criminal law then state that compulsion could never be a defence to a charge of murder, it would demand that a person who killed another under duress, whatever the circumstances,

would have to comply with a higher standard than that demanded of the average person. I do not think that such an exception to the general rule which applies in criminal law is justified”.

Great stress has been laid by the majority of their Lordships upon the apparent unanimity with which great writers of the past have rejected duress as a defence. But, on any view, they have to be read with circumspection in these days, for the criminal courts have long accepted duress as an available defence to a large number of crimes from which those same writers withheld it. This, again, is a topic extensively canvassed in *Lynch*, and, while no purpose would be served by traversing it again, the point is one to be borne in mind in assessing the present day authority of writers of earlier centuries and of Stephen in the last century. Their work needs to be looked at with a fresh eye and with a readiness to regard it as at least conceivable that what Hale and others propounded as the law in their day does not necessarily hold good today. This is in fact what the Courts, in the cases cited in *Lynch*, have been doing continuously over the last century. In the result, it is inaccurate to treat *Lynch* as having invented an entirely new defence contrary to fundamental legal doctrine. As Lord Wilberforce said (at 685A):

“The House is not inventing a new defence: on the contrary, it would not discharge its judicial duty if it failed to define the law’s attitude to this particular defence in particular circumstances”.

And, *Lynch* having been decided as it was, it is still less permissible to claim that acceptance of this appellant’s submissions threatens, in their Lordships’ words, “the destruction of a fundamental doctrine of our law”.

Something must be said about the significance attached by the majority of their Lordships to the absence of any direct decision that it is open to principals in the first degree to murder to advance a plea of duress. As to this, two observations need to be made:

(i) There is little use in looking back earlier than 1898, for until then an accused could not give evidence on his own behalf; and to advance such a plea without any opportunity of explaining to the jury why he acted as he did would be to attempt something foredoomed to failure. It is significant, too, that the increasingly humane attitude of the Courts in relation to duress has developed since the gag on accused persons was removed.

(ii) As was pointed out in *Lynch*, the balance of such judicial authority as exists was against the admission of the defence of duress in cases of first degree murder. But this balance was a weak one and one which both of us thought might have to yield in an actual case. While there are in the law reports a number of *obiter dicta* (that is, in cases where murder was not charged) to the effect that duress is not available in murder, apparently in only one case has it been directly so held. The one exception is nearly 140 years old—*Reg. v. Tyler* (1838) 8 C. & P. 616—where Lord Denman C. J., using unqualified terms which certainly cannot be regarded as accurately stating the law of today, said (at p. 620):

“It cannot be too often repeated that the apprehension of personal danger does not furnish any excuse for assisting in doing any act which is illegal”.

Apart from the unqualified and therefore unacceptable generality of those words, the decision is for additional reasons an unsatisfactory guide to the proper outcome of the present appeal; see *Lynch*, pp. 713 H to 714 B. It has further to be borne in mind that the present case involves a feature

(viz. threats of death to an innocent third person) which has not been considered in the United Kingdom or, so far as we are aware, elsewhere in the Commonwealth except in the Victoria case of *R. v. Hurley and Murray* (1967) V.R. 526.

*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 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, decided September 20, 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. Again, no one can doubt that our law would today allow duress to be pleaded in answer to a charge, under section 18 of the Offences against the Person Act 1861, of wounding with intent. Yet, here again, should the victim die after the conclusion of the first trial, the accused when faced with a murder charge would be bereft of any such defence. It is not the mere lack of logic that troubles one. It is when one stops to consider why duress is *ever* permitted as a defence even to charges of great gravity that the lack of any moral reason justifying its *automatic* exclusion in such cases as the present becomes so baffling—and so important.

The majority have deemed it right to resurrect in the present appeal objections to the admissibility of a plea of duress which, if accepted, would leave *Lynch* with only vestigial authority, even though the decision resulted from their demolition. One example of this is the alleged ease with which bogus pleas of duress can be advanced, and the so-called "charter for terrorists, gang leaders and kidnappers" originally raised by Lord Simon of Glaisdale in *Lynch* (at p. 687 *H et seq.*), just as though the plea of duress had merely to be raised for an acquittal automatically to follow. But the realistic view is that, the more dreadful the circumstances of the killing, the heavier the evidential burden of an accused advancing such a plea, and the stronger and more irresistible the duress needed before it could be regarded as affording any defence (cf. *Lynch* p. 681 per Lord Wilberforce). That the learned trial judge in the present case was perfectly capable of dealing searchingly with any plea of duress is clearly established by his admirable summing-up on those issues which he in fact left to the jury as well as by the remarks he made on the evidence of duress which he did not leave to the jury. And those who are forever apprehensive of the gullibility of juries need to be reminded yet again of the wise words of Dixon J. in *Thomas v. The King* [1937] 59 C.L.R. 279 at p. 309:

" . . . a lack of confidence in the ability of a tribunal correctly to estimate evidence of states of mind and the like can never be sufficient ground for excluding from inquiry the most fundamental element in a rational and humane criminal code ".

A new point advanced for the first time in their Lordships' majority judgment, and one, accordingly, upon which appellant's counsel has not been heard, questions the desirability of "changing the policy of the common law of England" and thereby effecting a corresponding policy change in far-off Trinidad and Tobago. The point is not, with respect, a valid one, even were it proper to rely upon it at this late stage of a case concerning a man under sentence of death. The Court of Appeal made no reference to there being anything special in the local conditions of Trinidad and Tobago calling for any different approach there from that

proper to be adopted in the United Kingdom. Furthermore, if there be any local features of a special kind, who is to say that a local judge and a local jury are incapable of appreciating and giving full consideration to them?

To hold that a principal in the first degree in murder is never in any circumstances to be entitled to plead duress, whereas a principal in the second degree may, is to import the possibility of grave injustice into the common law. Such a conclusion should not be arrived at unless supported by compelling authority or by the demands of public policy shown to operate differently in the two cases. There are no authorities compelling this Board so to hold, nor are there reasons of public policy present in this case which are lacking in the case of principals in the second degree. It has to be said with all respect that the majority opinion of their Lordships amounts, in effect, to side-stepping the decision in *Lynch* and, even were that constitutionally appropriate, to do it without advancing cogent grounds.

For these reasons, those of their Lordships who are in the minority would have humbly advised Her Majesty that this appeal should be allowed and that a new trial should be ordered.

In the Privy Council

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STANLEY ABBOTT

v.

THE QUEEN

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