Transferred Malice, Joint Enterprise and Attempted Murder

***R v Grant & Others* [2014] EWCA Crim 143, Court of Appeal**

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Facts: Nathaniel Grant, Kazeem Kolawole and Tony McCalla were all charged with a single count of attempted murder and two counts of inflicting GBH with intent. They were tried before His Honour Judge Stephens QC and jury at the Old Bailey in March 2012. The Crown's case was that the three defendants were members of, or associated with, the Grind and Stack gang (GAS) or Organised Crime/One Chance gang (OC). Shortly after 9pm one evening in March 2011, the three defendants, on bicycles, had pulled up outside the Stockwell Food & Wine shop in south London, directly after Roshaun Bryan had run inside. Bryan was, or was suspected to be, a member of a rival gang, the All 'Bout Money gang (ABM). One of the defendants – Grant – fired two shots into the shop. One bullet hit and paralysed a 5-year-old girl, Thusha Kamaleswaran, whose uncle owned the shop; the other hit, and remains in the head of, a customer, Roshan Selvakumar. Bryan was unhurt.

During their trial, the defendants contended that the charges of attempted murder and GBH with intent were mutually inconsistent, as they involved the same *actus reus* but different *mens rea*: intention to kill vis-à-vis intention to do GBH. However, Judge Stephens QC ruled that if a defendant shot with the intention of killing he intended to cause at least really serious bodily harm. The lesser intent may be subsumed in the greater. Moreover, a single act could amount to more than one offence, and the relevant counts in the indictment were not mutually exclusive. The jury convicted on all three counts and the trial judge imposed life sentences on all three defendants. Grant (the gunman) was sentenced to a minimum term of 17 years' imprisonment, while Kolawole and McCalla were given minimum terms of 14 years each. The defendants appealed, essentially repeating their submissions at trial.

HELD, DISMISSING THE APPEALS, that there was "no rule of law nor any legal principle nor any policy ground" which supported the appeal. The appellants' intention to kill Bryan included an intention to cause him GBH (at [35]). Proof of the *mens rea* for attempted murder "by definition" involved proof of the *mens rea* for causing GBH with intent (at [36]). A finding of intention to kill (count 1) led "inevitably" to a finding of intention to cause GBH (counts 2 and 3) – this was "the consequence of the hierarchy of intent, with intention to kill at the top". It was "impossible" to kill without causing really serious harm (at [40]). Nor were the various charges "mutually exclusive or inconsistent" (at [37]).

COMMENTARY

The present case raises two main issues: the scope of the transferred malice doctrine, and the scope of the joint enterprise doctrine.

Transferred Malice

It is trite law that if D fires a gun at V, intending to kill V, but the bullet misses and instead hits and kills W (an innocent bystander), then D is guilty of the murder of W, as well as the attempted murder of V (*R v Gnango* [2011] UKSC 59, [2012] 1 AC 827). D's mens rea with respect to his intended victim (V) is "transferred" to the unintended victim (W). As Lord

Mustill explained in *Attorney-General's Reference (No.3 of 1994)* [1998] AC 245 (at page 262):

> "The effect of transferred malice… is that the intended victim and the actual victim are treated as if they were one, so that what was intended to happen to the first person (but did not happen) is added to what actually did happen to the second person (but was not intended to happen), with the result that what was intended and what happened are married to make a notionally intended and actually consummated crime. The cases are treated as if the actual victim had been the intended victim from the start."

The principles set out above are not unique to murder. If D swings a belt at V, intending to do at least some harm to V, but the belt misses and instead hits and wounds W, then D is guilty of the malicious wounding of W, contrary to s.20 of the Offences Against the Person Act 1861 (*R v Latimer* (1886) 17 QBD 359). If D punches V, who stumbles into and knocks over W, who suffers fatal injuries as a result of falling over, then D is guilty of the manslaughter of W (*R v Mitchell* [1983] QB 741).

In all of the above cases, the issue was straightforward: D's mens rea with respect to the intended victim (V) was transferred in its entirety to an "unintended" victim (W) in order to convict D of exactly the same offence with which he would have been liable had V been shot, or struck with a belt, or punched. The question for the trial judge and for the Court of Appeal in the present case was more complicated: whether or not transferred malice applied when D's mens rea with respect to V (the intended victim) is different to, but greater than, that needed in order to convict him of an offence in respect of W (the unintended victim). The answer was an unequivocal "yes". According to Rafferty LJ (at [35] and [36]):

> "Within the appellants' intention to kill Bryan lay an intention to cause really serious physical harm to Bryan. Proof of the mens rea for attempted murder by definition involves proof of the mens rea for causing grievous bodily harm with intent."

This must be correct. The principle that a greater mens rea includes a lesser mens rea is implicit in legislation (see in particular s.6 of the Criminal Law Act 1967) and case law (see for example, *R v Mandair* [1995] 1 AC 208, in which the House of Lords accepted that a charge of causing GBH with intent to do GBH (s.18 OAPA 1861) included the lesser offence of maliciously inflicting GBH (s.20 OAPA 1861) – see in particular Lord Templeman's robust speech (at 219)).

However, transferred malice principles do not, apparently, apply in the following situation. Suppose that D fires a gun at V, intending to kill V. One or more of the bullets misses V and instead hits and injures W. Here, although D would be guilty of the murder or attempted murder of V (depending on whether V was killed), he would <u>not</u> be guilty of the attempted murder of W. This was the decision of the Supreme Court of California in *People v Bland* (2002) 28 Cal. 4th 313, 121 Cal. Rptr. 2d 546, which was relied upon by His Honour Judge Peter Rook QC in a pre-trial hearing in the present case in October 2011. Grant, Kolawole

and McCalla had all originally been charged with two further counts: the attempted murders of Kamaleswaran and Selvakumar. However, these counts were dismissed by HHJ Rook QC, who said that "[t]here are great difficulties in applying… transferred malice to attempted murder of an unintended victim. The intent alleged [is] to kill a particular victim, Bryan. No further intent can be said to have been formed after the pulling of the trigger. The offence was complete at that stage." The Court of Appeal in the present case did not discuss the veracity of HHJ Rook QC's decision; Rafferty LJ simply noted that "[t]he court is no longer concerned with the attempted murder of more than one victim, consequent upon the ruling of HHJ Rook" (at [34]).

People v Bland involved a gang-related shooting not unlike the facts of the present case. Jomo Bland was a member of the Insane Crips gang in Long Beach, California. One evening in March 1999 he shot and killed Kenneth "Kebo" Wilson, a member of a rival gang called the Rolling 20's Crips, as he was driving his car. Wilson's passengers, Skylar Morgan and Leon Simon, were also shot and injured. At trial, Bland was convicted of the first degree murder of Wilson and the attempted murder of Morgan and Simon. However, on appeal, the Court of Appeals reversed the attempted murder convictions. The Supreme Court of California agreed, by a 5-2 majority, with the appeal court. Giving judgment for the majority, Chin J stated:

> "To be guilty of attempted murder, the defendant must intend to kill the alleged victim, not someone else. The defendant's mental state must be examined as to each alleged attempted murder victim. Someone who intends to kill only one person and attempts unsuccessfully to do so, is guilty of the attempted murder of the intended victim, but not of others."

In reaching its decision, the Supreme Court approved two earlier Californian decisions, *People v Czahara* (1988) 203 Cal. App. 3d 1468 and *People v Calderon* (1991) 232 Cal. App. 3d 930. In the former case, Michael Czahara (D) had been convicted of the attempted murders of his ex-girlfriend, Carole Christie (V), and her new boyfriend, Ronald Johnson (W). D had fired at least two shots at V with a handgun from a distance of no more than 6 feet whilst she was sitting in the driver's seat of her car; both she and W, who was sitting in the passenger seat, were seriously injured. The evidence showed that D was aiming at V when he opened fire. The Court of Appeals allowed D's appeal against his conviction of attempting to murder W. Low J stated:

> "The purpose of the transferred intent rule – to ensure that prosecution and punishment accord with culpability – would not be served by convicting a defendant of two or more attempted murders for a single act by which he intended to kill only one person."

Calderon is the closest, factually, to the present case. Danny Calderon (D), fired a shotgun four times at another man called Hiep Bui (V) after an argument. D missed V, but hit a seven-year-old boy, Felix Angel (W), who was playing five feet away, causing a fractured skull and a broken arm. D subsequently pleaded guilty to two counts of attempted murder but later appealed, successfully, against his conviction for attempting to murder W. The Court of Appeals justified its decision on the basis that, as D had been convicted of the

attempted murder of V, there was no purpose to be served by invoking transferred malice in order to convict him of the attempted murder of W as well. Sonenshine J explained that D had "committed a completed crime against his intended victim which is as serious as the greatest level of culpability which could be achieved by transferring that intent to his unintended victim, obviating the need to apply the doctrine".

This issue does not appear to have been raised before an English appellate court and HHJ Rook QC's dismissal of the two counts of attempted murder of Kamaleswaran and Selvakumar in the present case means that it still has not done so. It is submitted that, should this issue ever arise, the English courts should follow the Californian courts. Consider the following situations:

1. D1, a gang member, fires into a room containing V, a rival gang member, intending to kill him (and only him). The room also contains two innocent bystanders of whom D1 was completely unaware. The bullets miss everyone in the room.
2. D2, a gang member, fires into a room containing V, W and X, three rival gang members, intending to kill all of them. The bullets miss everyone in the room.

According to *Bland*, *Calderon* and *Czahara*, D1 is guilty of one count of attempted murder whereas D2 is guilty of three counts. This seems sensible and reflects the fact that although the actus reus in both situations is identical, D1's mens rea differs from D2's. If transferred malice were to be applied to the first situation then both D1 and D2 would be guilty of three attempted murders, glossing over the fact that D2 intended to kill three people whereas D1 intended to kill only one. As the Californian Court of Appeals explained in *Czahara:*

> "[The] attacker who shoots at two or more victims, with the intent of killing all, is more culpable than the one who aims at a single individual, even when the latter also injures a bystander."

Joint Enterprise

Although Grant was the gunman, Kolawole and McCalla were convicted alongside him. Whether this was on the basis of secondary liability or joint enterprise is not entirely clear. At certain points in the judgment they are described as "secondary parties" (at [6] and [20]) whereas at others they are said to be "jointly responsible" (at [8] and [12]). Ultimately, it should make no difference to the Crown's case whether the three appellants were all jointly engaged in an enterprise to murder Bryan or whether Grant was the primary offender and Kolawole and McCalla were abetting him. The principles applicable in both situations are the same.

The Court of Appeal was not invited to consider the applicable principles, which is perhaps surprising given McCalla's account of the events on the night of the shooting. Whereas Grant and Kolawole denied being at the Stockwell Food & Wine shop at all, McCalla had admitted being present but had denied knowledge of the gun. This is tantamount to a denial of the mens rea required for secondary liability / joint enterprise. The jury's guilty verdict indicates that they did not accept this defence either. However, it would have been interesting to have seen what the Court of Appeal's response would have been had this question been explored on appeal, *viz*.: whereas it is now accepted that in secondary

liability / joint enterprise cases where V is murdered by the principal (P), the mens rea required of any secondary party is that they had contemplated that P might kill with malice aforethought (see inter alia *R v Powell & Daniels; R v English* [1999] 1 AC 1; *R v Rahman & Others* [2008] UKHL 45; [2009] 1 AC 129; *R v A & Others* [2010] EWCA Crim 1622; [2011] QB 841), what is the requisite mens rea where V survives a murder attempt?

In attempted murder cases, D must have acted with an intention to kill, an intention to do really serious harm is not enough (*R v Whybrow* (1951) 35 Cr. App. R. 141; *R v Walker & Hayles* (1990) 90 Cr. App. R. 226). What, therefore, is the mens rea of any secondary party? Some guidance is provided by the Court of Appeal in *R v O'Brien* [1995] 2 Cr. App. R. 649, where Michael O'Brien had been convicted under secondary liability principles of the attempted murders of two police officers, who had been shot at by his co-accused Paul Magee. Glidewell LJ stated (at 658 – 659):

> "[Defence counsel] argues that, since the intention of the principal in attempted murder must be to kill, so a secondary party is only guilty if he knows that the principal does intend to kill – that he 'will shoot to kill'. We do not follow the logic of this argument… If the jury concluded that O'Brien knew that Magee might shoot to kill and if he had actually killed [the police officers], O'Brien would have been guilty of murder. There is no logical reason why the same knowledge should not make him guilty of an attempt to commit that offence."

However, although this seems – at first glance – to require proof of contemplation by the secondary party (S) that that principal (P) might act with intent <u>to kill</u> (and that foresight by S that P might act with intent <u>to do GBH</u> is insufficient), it is submitted that *O'Brien* does not go that far. Rather, *O'Brien* decides that, in attempted murder cases, it is unnecessary to prove that S foresaw that P "will" act with intent to kill, it is sufficient to prove that S foresaw that he "might" do so. *O'Brien* therefore does not exclude the possibility of S being liable for attempted murder on the basis that he foresaw that P might act with intent to do GBH. *O'Brien* was followed by the Court of Appeal for Northern Ireland in *R v Loke* (1999), unreported. In that case, Carswell LCJ upheld the appellant's conviction following the trial judge's direction that contemplation by S that P might act with intent to kill was sufficient mens rea, rejecting the submission that S needed to have formed exactly the same mens rea, i.e. an intention to kill, as P. Again, this does not exclude the possibility that contemplation by S of P acting with intent to do GBH may be sufficient mens rea.

Clarification of this point from the Court of Appeal would have been welcome. In its absence, it is submitted here that in both murder and attempted murder cases involving one or more secondary parties, the law need <u>not</u> go so far as to require proof that S contemplated that P might act with intent to kill; foresight by S that P might act with intent to do GBH is sufficient. As Lord Bingham explained in *Rahman & Others* (at [24]):

> "[It] must often be very hard for jurors to make a reliable assessment of what a particular defendant foresaw as likely or possible acts on the part of his associates. It would be even harder, and would border on speculation, to judge what a particular defendant foresaw as the intention with which his associates might perform such acts. It is safer to focus on the defendant's foresight of what

an associate might do, an issue to which knowledge of the associate's possession of an obviously lethal weapon such as a gun or a knife would usually be very relevant."