



Neutral Citation Number: [2021] EWCA Crim 1472

Case No: 202102486 A1

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**  
**ON APPEAL FROM THE CROWN COURT AT INNER LONDON**  
**HIS HONOUR JUDGE DARLING**  
**REFERENCE BY HM ATTORNEY-GENERAL UNDER**  
**SECTION 36 OF THE CRIMINAL JUSTICE ACT 1988**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 11/10/2021

**Before :**

**LORD JUSTICE BEAN**  
**MR JUSTICE JEREMY BAKER**  
and  
**SIR RODERICK EVANS**

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**Between :**

**R**  
- v -  
**CHARLES O'BRYAN**

**Appellant**

**Respondent**

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**Mr Peter Ratliff for the Attorney General**  
**Mr Pavlos Panayi QC for the Offender**

Hearing date: 5 October 2021  
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**Approved Judgment**

**Lord Justice Bean :**

1. This is an application on behalf of the Attorney General to refer as unduly lenient a sentence of four years imprisonment for causing grievous bodily harm with intent, passed at the Crown Court at Inner London by His Honour Judge Darling on 12 July 2021.
2. The Offender, Charles O'Bryan, was 21 years old at the time of the offence. At around 15.20 on 4 February 2021 he was walking north on Upper Street, London N1. The victim, George Isaac, was walking south on the same side of the road. Members of the public were on the road and pavement. CCTV footage, which we have seen, shows that as the two got closer they noticed each other. The ensuing fight lasted 20 seconds.
3. The victim put his bag to the floor and stepped off the pavement. The Offender ran towards him, swinging the first punch but missing. The victim threw a punch towards the Offender's face. The Offender continued his movement forward toward the victim, pushing the victim back. The victim was propelled backwards, falling to the floor. While the victim was on the floor the Offender sought to attack him further, but was caught and pulled to the floor himself. The two grappled and the victim punched, or punched at, the Offender some six times, including to the area of his head. While on their feet the two wrestled, and held each other. The Offender took a folding flick or lock knife from his pocket with his right hand. He made two forceful downward chopping movements with his right arm and hand in order to release the blade of the knife, which appears locked in place. The blade was of some size. The blade having been exposed and fixed in place, the Offender pushed forward, and stabbed or attempted to stab the victim four times, with apparent force. A taxi driver pulled his vehicle up and on to the pavement, shouting 'Oi, oi', at which point the Offender ran from the scene. He discarded the knife, and left the shoes he was wearing at an associate's house. The mobile telephone he was using was not recovered by police.
4. Meanwhile the victim walked to his home address, which was nearby, where his mother called the police. Officers found the victim in the hallway on a chair with stab wounds to his back, abdomen and leg. He was losing consciousness. Police officers provided first aid. The London Ambulance Service arrived and attended to the victim.
5. The Helicopter Emergency Medical Service ('HEMS') team arrived and administered a blood transfusion (one unit of packed red cells), and frozen plasma (two units) and tranexamic acid to aid clotting.
6. The victim was taken to the Royal London Hospital Emergency Department, where he arrived at 16.05. It was noted that he had a 4cm in length wound to the right upper abdomen; a wound to the left side of the mid-back; and a wound to the left buttock. An ultrasound of the abdomen showed there was an abnormal volume of free fluid in his abdomen, which would prove to be blood. Treatment in the Emergency Department included the administration of a central line cannula, blood transfusions (three units of packed red cells), and frozen plasma (four units) and tranexamic acid to aid clotting.
7. The medical notes from the Trauma Team Leader record 'Discussion with Mr Griffiths [surgeon] for transfer to theatre immediately, theatres ready. Decision not to intubate as more sensible to intubate in theatre just prior to opening abdomen. Thoracostomies

/ chest drain not performed as no evidence of significant chest injury and conscious of time delay to theatre.'

8. Mr Isaac was taken from the Emergency Department and 'admitted to theatres' at 18.47, that is to say some 2 hours and 40 minutes after arrival at the hospital.
9. An emergency operation was performed by three trauma surgeons under general anaesthetic. The victim was intubated and was breathing by way of a ventilator. A surgical incision down the midline of the abdomen (laparotomy) was performed to gain access to the abdominal cavity. A full laparotomy was performed.
10. During the operation it was noted that there was a stab wound to the abdomen; a large volume of blood in the abdominal cavity; a large blood clot at the back of the abdomen on the right side (a 'retroperitoneal haematoma'); injuries to an artery and vessels in the abdomen (a partially transected ileo-colic artery with active bleeding, and a divided right inferior epigastric vessels with active bleeding); an injury to the middle part of the small intestine ('divided jejunum') and 'associated through-and-through injury' to the small bowel mesentery with active bleeding. The stab tract to the abdomen had entered the area in the back of the abdomen behind the peritoneum (retroperitoneum) adjacent to the inferior vena cava (the largest vein of the human body) at the level of the lower pole of the right kidney, but there was no obvious injury to either structure.
11. The injured blood vein and vessels (ileo-colic artery and right inferior epigastric vessels) were clamped, and repaired with sutures. The right side of the large bowel was removed (a right hemicolectomy) without joining the ends of the bowels. A portion of the small bowel (10cm resection) was removed without joining the ends of the bowel. Four 'packs' (cloth swabs) were placed and left in the abdomen to contain bleeding in the abdomen. The abdominal cavity was covered with a sterile vacuum assisted dressing.
12. The record noting the result of the operation and update to the family appears to have been made at 19.37.
13. After the operation the victim was transferred to the Acute Critical Care Unit (ACCU). The Trauma Surgical team advised that a repeat operation would be needed. Whilst on the ACCU the victim was sedated and treated with painkillers and antibiotics.
14. On 6 February 2021 the victim underwent a second operation performed by the Trauma Surgical Team. It was noted that there was no further bleeding in the abdomen. The cloth swabs were removed; the large, and small, bowel ends were joined with staples and sutures; the abdominal cavity was closed in layers using deep sutures and superficial staples; the wound to the left mid-back was closed with sutures and staples. The victim was returned to the ACCU.
15. On 8 February 2021 the victim was extubated, and began breathing for himself. He was alert and awake. On 11 February 2021 the victim was transferred to a Trauma Ward. On 15 February 2021 it was noted that the victim had sustained a fracture to a thumb bone on his right hand, and had a possible infection at the site of the abdominal surgery wound. On 17 February 2021 a scan of the abdomen and pelvis showed a collection of fluid in the right lower abdomen, with evidence of infection. Whilst in hospital he tested positive for Covid-19.

16. A letter from the victim's doctor dated 7 June 2021 noted that as a consequence of his injuries the victim had undergone 'emergency surgery'. She noted that the victim had 'so far made a good recovery', but the operation was recent and there was no certainty as to what longer term effects there might be.
17. The victim declined to assist the investigation.
18. The Offender was arrested on 8 February 2021 and was interviewed. He was asked, inter alia, about why he had stabbed the victim; whether it was a case involving gangs or self-defence; where the knife was; where the telephone he had been using at the time and in the hours after the offence was; and why he had no telephone or bank cards on him when arrested but did have cash and a piece of paper with telephone numbers on it. He answered 'no comment' to all questions asked. He was noted to appear visibly upset, holding back tears, when watching the CCTV footage of the incident.
19. The Offender was charged on 8 February 2021 with offences of attempted murder and possession of an offensive weapon in public, and appeared before the North London Magistrates' Court on 9 February 2021. His case was sent to the Crown Court.
20. The Offender appeared before the Crown Court at Inner London on 18 May 2021, when he entered pleas of guilty to causing grievous bodily harm with intent (Count 2) and having a bladed article in public (Count 4). Those pleas were acceptable to the prosecution, and the count of attempted murder (Count 1), and alternative count of inflicting grievous bodily harm (Count 3), were ordered to lie on the file following the hearing for sentence on 9 July 2021. No basis of plea was submitted.
21. The Offender had no previous convictions or cautions. The Offender submitted a 'mitigation bundle' which included 14 letters and references which spoke to the Offender's positive good character.
22. A pre-sentence report was prepared in respect of the Offender. The Offender stated he had made a 'stupid mistake' of carrying a knife. When he saw the victim he thought the victim was part of a group who wished him harm. He felt he had been recognised by the victim, and thought if he ran at the victim to confront him he would back down. He asserted that the victim had threatened to stab him during the fight. He had not believed that he had actually stabbed the victim. The Offender was assessed as being a low risk (16%) of being convicted of an offence within two years; and a low risk of committing a serious offence in the future (0.56%).
23. The prosecution submitted, and the Reference argues, that the following aggravating features were present:
  - i) The Offender was armed with a flick or lock knife, in a public place, at the time of the offence;
  - ii) The knife was carried in anticipation of its use in a violent confrontation if necessary;
  - iii) The Offender stabbed the victim three times, and attempted to stab him once more;
  - iv) Life-threatening injury was caused to the victim;

- v) The offence took place in daytime, on a busy street, with members of the public in close proximity;
  - vi) The Offender was the primary instigator of violence;
  - vii) More harm was caused than was necessary for the commission of the offence [this was rightly not pursued in argument before us];
  - viii) The Offender discarded his knife and shoes after the incident in order to avoid detection. The mobile telephone he was using at the time of and immediately after the incident were not recovered.
24. The Reference accepts that the following mitigating features are present:
- i) The Offender had no previous convictions and there was evidence of positive good character;
  - ii) The Offender fell to be sentenced on the basis that he was a party, or connected, to a dispute in which he felt threatened;
  - iii) It appears that the Offender deployed the knife when he considered the victim was getting the better of him in the fight;
  - iv) There was some evidence of remorse.
25. Mr O'Bryan appeared for sentence on 9 July 2021. By this time the new Sentencing Council Guideline for causing grievous bodily harm or wounding with intent had come into force (it took effect on 1 July 2021). It was common ground that the use of the knife placed the offence in culpability category B: the prosecution accepted that there was insufficient evidence for the judge to be satisfied to the necessary standard that the weapon used, which, as already noted, was never recovered, was a "highly dangerous weapon" so as to make this a case of higher culpability, although the fact that it appeared from the CCTV to have been some kind of flick or lock knife was rightly treated as an aggravating factor in the case.

*The July 2021 Guideline*

26. The categorisation of harm in the new guideline needs to be quoted in full:
- "All cases will involve "really serious harm", which can be physical or psychological or wounding. The court should assess the level of harm caused with reference to the impact on the victim.

**"Category 1**

- Particularly grave or life-threatening injury caused.
- Injury results in physical or psychological harm resulting in life-long dependency on third-party care or medical treatment.

- Offence results in a permanent irreversible injury or psychological condition which has a substantial and long-term effect on the victim's ability to carry out their normal day to day activities or on their ability to work.

### **Category 2**

- Offence results in a permanent, irreversible injury or condition not falling within Category 1.

### **Category 3**

- All other cases of really serious harm.
- All other cases of wounding.”

### *Sentencing remarks*

27. Judge Darling said:-

“There are new guidelines in force as of the start of this month and I have been taken through with some care. Like many guidelines, in my judgement this case does not fit with any precision into one particular category. I am satisfied, so far as the broad category, that this is a Category 2. It is not a Category A. On the face of it, the majority of factors that are relevant to my decision are to be found in Category B, but there are some Category C, lesser culpability, factors there and they are there for all to see.

Category 2B is a starting point of five years, with a range of four to seven. Category 2C is a starting point of four years, with a range of three to six years. If this is not a 2B, it is the top end of a Category 2C.

I have to consider the amount of credit to which you are entitled for your plea of guilty. I have to consider the aggravating features and, in your case, the significant number of mitigating features.

This is not a mathematical exercise. At the end of the day, I have to come up with a sentence which is fair to you and is fair to society, who are entitled to be protected from behaviour like this. However I get to it, and, for example, the credit to which you are technically entitled is something less than a third, but I have already mentioned that it takes courage to plead straight away, albeit not at the first appearance, to a Section 18 when your first charge is attempted murder.

Doing the best that I can in those circumstances, it seems to me that the starting point in this case is properly one of six years. I

am, however, prepared to give you full credit for your plea of guilty, which reflects your age, your lack of previous convictions, and all the other factors that are clear on the basis of the papers.

In those circumstances, the sentence in relation to count two will be one of four years' imprisonment."

28. He imposed a concurrent sentence of 12 months imprisonment on the count of possession of a bladed article as to which no issue arises in this court.

### *Culpability*

29. The Reference accepts that the judge was correct to find that in respect of 'Culpability' the offence fell within 'B – Medium Culpability'. The knife used was not recovered, and there was accordingly no basis for concluding that it was necessarily a 'highly dangerous weapon' per se. We agree with Mr Ratliff that the judge was wrong to conclude that there were elements of 'C – Lesser Culpability'. The only factor which arguably might have applied was 'excessive self-defence', however on analysis the Offender was not acting in excessive self-defence. He was not attacked; he was the principal instigator of mutual violence; he had the 'upper hand' in the fight before choosing to deploy his concealed knife when he considered that he did not otherwise hold an advantage. Mr Panayi did not argue otherwise.
30. Mr Ratliff points to the fact that the Offender routinely carried a flick or lock knife to use if necessary. He then deployed the weapon to inflict multiple stabs wounds in a violent confrontation primarily instigated by him. We accept Mr Ratliff's submission that, having regard to the facts and circumstances of the case, the knife was a dangerous weapon that fell not far short of a 'highly dangerous weapon'.

### *Harm*

31. The Reference argues that the judge fell into error in concluding that the offence fell into 'Category 2' in respect of 'Harm'; and submits that the case fell within 'Category 1' on the basis that 'life-threatening injury' was caused.
32. The Reference concedes that there was no statement from a doctor which asserted in terms that the Offender's injuries were 'life-threatening', however it is submitted that the evidence established that they were. Arteries and blood vessels in the abdomen were cut and were actively bleeding; there was an injury to the small intestine; the small bowel was injured and was actively bleeding. When police officers arrived soon after the stabbing the victim was losing consciousness.

### *Submissions for the offender*

33. Mr Panayi submits that the present case does not fall within what the new guideline describes as one of "life-threatening injury". He points to the absence of expert medical evidence addressing this issue. He emphasises that the chronology of the day of the stabbing demonstrates that the victim was not regarded as being in immediate danger at any stage. Mr Isaac was able to walk home unaided; his mother called the police who in turn summoned an ambulance; and on his arrival at hospital some two hours elapsed

before he was taken to theatre for a laparotomy. Category 1, he submitted, must be reserved for cases of exceptionally serious harm in the context of the offence of causing grievous bodily harm.

*Was this “life-threatening injury” within the meaning of the Guideline?*

34. We were told that this is the first case to reach this court in which the July 2021 Guideline has had to be interpreted. Mr Ratliff was right in our view to accept that the phrase “life-threatening injury” does not cover every wounding causing injury which, left untreated, might lead to death. Most non-superficial injuries caused by a knife, save perhaps to an arm or leg where no artery is severed, will lead to loss of blood which, if no intervention takes place, could lead to infection or death from loss of blood or the spreading of blood to neighbouring organs. The Guideline must be read as a whole, and it must always be remembered that firstly (as with the previous Guideline) the harm caused must be “really serious” to come within the s 18 Guideline at all. Secondly, the sentence we italicised above at the start of the section on categorisation of harm emphasises that “the court should assess the level of harm caused with reference to the impact on the victim”. Thirdly, apart from the reference to life-threatening injury, the cases placed within Category 1 are where “particularly grave” injury is caused (as opposed to “grave” injury, which is Category 2), or where the injury results in lifelong dependency on third party care or medical treatment; or where the injury is permanent and irreversible and will have a substantial and long term effect on the victim’s ability to work or carry out normal day to day activities. In short, we accept Mr Panayi’s submission that Category 1 is reserved for cases of exceptional seriousness even within the class of s 18 cases.
35. Since the Sentencing Council did not define life-threatening injury we think it would be unwise for us to attempt to give a comprehensive definition or to substitute wording of our own for that of the guideline. But we are satisfied that where more than two and a half hours elapsed between Mr Isaac’s arrival at hospital and his operation, and there is no expert medical evidence that his life was in imminent danger, this is not a case which falls within the Sentencing Council’s classification of life-threatening injury. It is rightly not suggested that there is any other feature of the injuries caused which would elevate the case from Category 2 to Category 1.

*Application to the facts of this case*

36. We think, therefore, that the wounding in this case was properly categorised as “grave injury” and thus category 2B rather than “particularly grave or life-threatening injury” so as to be elevated to category 1B.
37. The principal aggravating factors to be taken into account were the nature of the knife and the fact that the offender inflicted three stab wounds (and attempted a fourth) in the course of the scuffle. On the other hand the mitigating factors included the fact that at the time of the offence Mr O’Bryan was only 21 years old, had no previous convictions of any kind, and had an impressive set of positive references as to his good character. We consider that his youth and positive good character entitled him to a more than trivial reduction in the starting point which would have applied to, for example, an older defendant with a record of previous violent offending.



38. The offender was also, as the judge noted, entitled to a discount for his plea of guilty of almost a third, in circumstances where he had not indicated a plea of guilty in the Magistrates' Court (where the s 18 offence was not charged) but agreement had been reached soon after the case was sent to the Crown Court that the prosecution would accept his plea of not guilty to attempted murder but guilty of the s 18 offence.
39. Taking into account the mitigating factors to which we have referred, we do not consider that a starting point of more than seven years' imprisonment before discount for plea was justified on the facts of this case. If the judge had taken a starting point before discount for plea of seven years imprisonment (which we note is the top of the category range for category 2B as well as the starting point for Category 1B), giving a final sentence of five years or slightly less, we do not think that Mr O'Bryan could have mounted a successful appeal to this court. But we do not consider that the judge's sentence of four years was unduly lenient.
40. These are the reasons why, after conclusion of the oral argument, we announced our decision to grant leave for the reference to be made but to decline to interfere with the sentence passed by the judge.