THE COURT OF APPEAL

Sheehan J.
Mahon J.
Edwards J.

Record No: 190/2013

Between

The People at the suit of the Director of Public Prosecutions

Respondent

V

Stephen O'Reilly

Appellant

JUDGMENT of the Court delivered on 20th March 2017 by Mr. Justice Edwards.

Introduction

1. On 8th July, 2013 the appellant was convicted by the unanimous verdicts of a jury in the Dublin Central Criminal Court of two offences, namely causing serious harm contrary to s. 4 of the Non Fatal Offences against the Person Act, 1997 ("the Act of 1997") (Count No. 1); and production, in a manner likely unlawfully to intimidate another person, of an article capable of inflicting serious injury, contrary to s. 11 of the Firearms and Offensive Weapons Act, 1990 (Count No. 2).

2. The appellant was subsequently sentenced to 12 years' imprisonment on Count No. 1 to date from 23rd February, 2012 with the final 3 years of the said 12 year sentence suspended upon conditions. Count No. 2 was taken into consideration.

3. The appellant now appeals against his conviction and also against the severity of his sentence. This judgment deals solely with the appeal against conviction.

Summary of the evidence before the jury

4. The injured party was a Mr. Stephen O'Brien. The case involved the very serious stabbing of Mr. O'Brien on the evening of the 16th of August 2011 in the course of which Mr. O'Brien sustained significant injuries including a penetrating injury to the chest, in which the membrane of his lung was burst by the blade of the knife which then continued into and penetrated his lung, thereby causing some internal bleeding and also causing Mr. O'Brien to suffer a pneumothorax, the latter of which required to be treated surgically by the insertion of a chest drain in order to facilitate the re-inflation of Mr. O'Brien's collapsed lung.

5. The primary evidence concerning who perpetrated the stabbing came from the injured party himself, who claimed to recognise his assailants as being the appellant, and Gerard ("Ger") Keogh. The jury also heard evidence from Mr. Keogh, who on the injured party's account had acted as an accomplice to the appellant, but who denied that that was the case. Mr. Keogh confirmed that the injured party had been stabbed by the appellant and sought to place all the blame on the appellant.

6. In the course of his evidence Mr. O'Brien told the jury that he was living at 2A Montrose Court in Artane on 16th August, 2011. On that day he had collected his social welfare payment. Later he was at home alone when two people came to his flat and they were his friend Ger Keogh, and the appellant Stephen O'Reilly. He said that he knew Stephen O'Reilly both by the names Chisler and Stephen. When asked what happened next he said:

> *"A. Well, within a flash he took my eye out, he took a large scar across me he took my whole forehead off.*
>
> *Q. With what?*
>
> *A. A knife, an apex knife, and stabbed me a couple of times in the back.*
>
> *Q. And what conversation, if any, did you have with him?*
>
> *A. None, it just happened.*
>
> *Q. And where were you when he stabbed you*
>
> *A. "Give us, give us your bank card", I was asked.*
>
> *Q. Sorry, where were you when he stabbed you?*
>
> *A. About two foot away from the door, the front door.*
>
> *Q. I see. Now, what did you say about the bank card?*
>
> *A. Oh they asked for my bank card and*
>
> *Q. Who asked you for the bank card?*
>
> *A. I'm not sure which one, I think it was Chisler.*
>
> *Q. What did you do?*
>
> *A. I actually gave it to him, I didn't want to be stabbed again, you know, and gave him my PIN number and he*

disappeared."

7. Mr. O'Brien further gave evidence that €180 was later taken from his bank account. He claimed that as he lay bleeding Mr. Keogh had stood watch over him armed with a knife, awaiting the return of the appellant. He said that when Chisler came back the two of them *"sat on the end of the bed and having a big smile between each other and one said to me, 'Do you want your balls chopped off?' I said, 'No', and he says, 'Do you want your ears chopped off?' I says, 'No', and then they left".*

8. Mr. O'Brien to the jury that after his assailants had left he sought assistance from his neighbours, that an ambulance was called and that he was taken to hospital.

9. The jury further heard from a Mr. Paul Burke who placed Mr. Keogh and the appellant in each other's company near the *locus* of the offence. They also heard evidence from a paramedic who had brought Mr. O'Brien to hospital, having assessed Mr. O'Brien's injuries as being life threatening. The jury further heard evidence from the nurse who treated Mr. O'Brien on his arrival at hospital and evidence from Prof. Broe, the surgeon who inserted a drain to re-inflate Mr. O'Brien's collapsed lung.

10. In the course of the Garda investigation into the attack the appellant was arrested and interviewed. In the course of being interviewed the appellant denied knowing Mr. O'Brien. When it was put to him that Mr. O'Brien's phone number had been found on his phone under the name "Stephen O'B" he relented and agreed that he knew Mr. O'Brien. The prosecution adduced evidence before the jury in support of their case concerning his initial lie when he claimed that he did not know Mr. O'Brien.

The grounds of appeal

11. The appellant initially sought to appeal against his conviction on nine discrete grounds as set out in his notice of appeal. However, at the oral hearing before this Court counsel for the appellant indicated that the appeal would in fact be confined to 2 grounds. These were Grounds 7 and 8 in the original notice of appeal and were in the following terms:-

> "7. The trial was unsatisfactory and the verdicts are unsafe having regard to the refusal by the trial judge to recharge the jury on foot of requisitions made to him by prosecuting counsel *inter alia* as to the appropriate warning to the jury in respect of the evidence of a person who might be regarded as an accomplice.
>
> 8. The trial was unsatisfactory and the verdicts are unsafe having regard to the manner in which the trial judge recharged the jury in respect of the definition of serious harm including in circumstances where the prosecution evidence was to the effect that the injury itself (as opposed to the action of stabbing) had not caused a risk to the life of the complainant; the jury asked a question on the matter; and counsel repeatedly requisitioned in respect of same."

The alleged inadequacy of the accomplice warning

12. In the course of charging the jury, the trial judge told them:

> *"In respect of Mr. Keogh's evidence, a further matter of law has been referred to and I will deal with it, he is potentially an accomplice, it has been established through questioning by Mr. Ó Lideadha that he himself asserts he did nothing wrong. He was there, but he did not engage in any robbery, he did nothing wrong and did not assault and was not involved in the criminality, so to speak. He was arrested, he was not charged and he is not likely to be charged at this juncture, but he comes with the assailant, he knocks on the door and immediately behind him the assailant enters. He sits on the bed, on one account of it, with the assailant afterwards and smokes with him and he leaves with him. I think those facts, if you accept that they are established to your satisfaction, would give you a fair basis of believing, and it is open to you to draw that conclusion, that Mr. Keogh was actively involved, he was an accomplice and that being so, you must again treat his evidence to the extent that he blames Mr. O'Reilly for the wrongdoing with scepticism, with care, with caution, realising that people who are engaged in criminal activity often seek to put the blame elsewhere, to try and exonerate themselves, to minimise their involvement. So, that is a further caution necessary for you in assessing the evidence of Mr. Keogh and what he says if you are of the view on the evidence that he amounts to or was an active participant in what happened, an accomplice."*

13. Counsel on both sides raised requisitions with the trial judge with respect to this aspect of the judge's charge. Counsel for the prosecution stated:

> *"Judge, my only concern is just in relation to the accomplice warning and I am just relying on Ms. Coonan's book, Judge, where she seems to suggest that the law is that where the prosecution relies on the evidence of an accomplice and Mr. Keogh may be an accomplice:*
>
> > *'The trial judge must instruct the jury on the dangers of acting on such evidence in the absence of corroboration. This warning must be given, even where it is clear there is evidence capable of constituting corroboration and this is because the task of determining whether evidence is corroborative is clearly for the jury.'*
>
> *And I would suggest, Judge, that perhaps it would – if the jury were warned of that and then it was pointed out to them what the evidence was that could be – could amount to corroboration, namely the evidence of Mr. O'Brien."*

14. Counsel for the defence supported the prosecution's requisition:

> *"Well, first of all, Judge, I would agree with my friend's submission with regard to that matter. In my respectful submission, you, Judge, did not use the word 'dangerous' to convict on the evidence of an accomplice in the absence of corroboration and I would ask you to do so and, as far as corroboration is concerned, I would ask the Court to tell the jury in explicit terms that if, having considered the evidence of Mr. O'Brien, the jury comes to a conclusion his evidence cannot be relied on beyond reasonable doubt, then the position is that it appears that the evidence of Mr. Keogh is not corroborated in as far as the allegation of the offences is concerned and, therefore, the warning would be fully activated in that sense."*

15. The trial judge ruled on the requisition applications as follows:

> *"Alright, the first proposition that has been raised is in respect of the advice I gave the jury with regard to Mr. Keogh's evidence and that of being a potential accomplice. I am satisfied I have adequately dealt with that. I did not use the*

word 'dangerous' but I used language which I believe is very close to it, if not as strong as to say that it was open to the jury to consider him to be an accomplice and that, in that capacity, to be someone who would be self-serving potentially in their evidence. I have not coupled it with a direction to the jury to search through the evidence to look for corroborative evidence and I believe that, in fact, in doing so I have been fair to the defence to the accused, saying that whether or not there was corroboration they should treat Mr. Keogh's testimony with a degree of scepticism, with a degree of care, having regard to the risks that he is not telling the truth and being potentially an accomplice and someone actively involved in this crime. So, I am satisfied that that has been adequately dealt with."

16. We were referred to para. 33-05 in *"The Judge's Charge in Criminal Trials"* by Genevieve Coonan and Brian Foley (Round Hall: 2008) where the authors state:

> *"Where prosecution relies on the evidence of an accomplice, the trial judge must instruct the jury on the dangers of acting on such evidence in the absence of corroboration. This warning must be given even where it is clear that there is evidence capable of constituting corroboration. This is because the task of determining whether evidence is corroborative is purely for the jury. That said, if the trial judge fails to administer the warning in circumstances where there is clear corroborative evidence, the appellate court may apply the proviso contained within s. 3(1)(a) of the Criminal Procedure Act, 1993 and find that no miscarriage of justice has occurred. In R. v. Lewis [1937] 4 All E.R. 360 Lord Hewart C.J. noted that the English version of the proviso will be applied where:*
>
> > *'… the corroborative evidence exists, and is of such a convincing, cogent and irresistible character that it is apparent that, even after a proper direction, the jury, would inevitably have come to the same conclusion.'"*

17. We were also referred to para. 33-16 of the same work where the authors state:

"The essence, of course, of the warning is that the jury should have communicated to it that it may be dangerous (but not necessarily improper) to convict on uncorroborated evidence. Although the courts have said time and time again that the warning need not be given in any particular form of words, the decision of Butler J. in *Dental Board v. O'Callaghan* [1969] I.R. 181 is nevertheless useful in setting out its essential constituents. In that case he said:

> 'The rule is that the tribunal of fact, be it District Justice or jury, must clearly bear in mind and be warned that it is dangerous to convict upon the evidence of an accomplice unless it is corroborated; but that having borne that in mind and having given due weight to the warning, if the evidence is nonetheless so clearly acceptable that the tribunal is satisfied beyond doubt of the guilt of the accused to the extent that the danger which is generally inherent in acting on the evidence of an accomplice is not present in the case, then the tribunal may act upon the evidence and convict.'"

18. Counsel for the appellants submits that the jury in this case were misdirected in as much as the trial judge did not give a warning in the requisite terms and specifically made no warning as to the dangers of convicting an accused upon evidence given by an accomplice unless it is corroborated. The trial judge told the jury that the evidence of Mr. Keogh was supported in part by the evidence of Padraig Burke and also appeared to suggest that the appellant's telling of a lie to the Gardaí (falsely denying that he knew the complainant) could be regarded as supporting evidence as to the guilt of the appellant in that context.

19. In the course of requisitions defence counsel referred on a number of occasions to the fact that both Mr. Keogh and Mr. Burke had accepted that they could be wrong about the occasions to which they had referred in their direct evidence. It was suggested that this had pointed up the particular need in the circumstances of this case for the trial judge to direct the jury as to the danger of convicting on the uncorroborated evidence of an accomplice.

20. Counsel for the respondent accepts that a trial judge ought to give a corroboration warning where accomplice evidence is before the jury. However he submits that the partial accomplice warning given by the trial judge in this case was not such as to render the trial of the appellant unfair. There was as a matter of fact a substantial amount of evidence in the case tending to corroborate the evidence of Mr. Keogh including:

> (i) the evidence of Mr. Stephen O'Brien that the appellant attacked him;
>
> (ii) the evidence of Mr. Paul Burke placing the appellant in Mr. Keogh's company near the *locus* of the offence at about the time of the offence, the two being unaccounted for during a short period; and
>
> (iii) the appellant's lies when asked if he knew Mr. O'Brien.

21. As the trial judge had pointed out, it would not have helped the defence case for the jury to have had it pointed out to them that there was this abundant material that was potentially corroborative of the evidence of Mr. Keogh. Counsel for the respondent has submitted that, in the context of the broad warning that the trial judge gave, linking it to a need to search for corroborative evidence, where there was abundant material that was potentially corroborative of the evidence of Mr. Keogh, would have served to diminish the thrust of the warning given by implying that the dangers inherent in Mr. Keogh's evidence would been lessened by its corroboration. As matters stood before the jury, the warning stood, stark and unqualified. Accordingly, it was submitted, the refusal of the trial judge to give the conventional warning was not unfair to the appellant.

22. Counsel for the respondent further submits that even if we are satisfied that the trial judge's corroboration warning was inadequate, and represented a misdirection, this is a situation in which we ought to apply the *proviso* under s. 3(1)(a) of the Criminal Procedure Act, 1993.

23. Having carefully considered the submissions on both sides we are not satisfied that we can uphold the limited warning given by the trial judge as being adequate. To do so would be to fly in the face of clearly established jurisprudence, in particular *Dental Board v. O'Callaghan* [1969] I.R. 181 and the more recent reiteration of the principles stated therein by the Supreme Court in *The People (Director of Public Prosecutions) v. Gilligan* [2006] 1 I.R. 107 where Denham J. (as she then was) emphasised (at para. 72):

> "The warning is mandatory, but, that having been given, corroboration is not. The trier of fact, having considered the circumstances and the warning, may determine that the evidence is credible and accept such testimony. Alternatively, it is open, in all the circumstances, to require that there be independent evidence to support the testimony of such a witness. Such a determination will depend on the facts and circumstances of the case."

24. The rationale for the rule requiring the giving of a corroboration warning in respect of the evidence of an accomplice is well

recognised, and is rehearsed in some detail (at paras. 4-22 – 4-26) by Declan McGrath B.L., in his well regarded work on *"Evidence"* (2nd Ed.), in the following terms:

> "4-22. The requirement for a corroboration warning in respect of accomplices is predicated on the danger that an accomplice might fabricate evidence and/or falsely implicate an accused. There are a number of reasons why an accomplice might attempt to do so. The first, and perhaps most obvious danger, is that an accomplice may attempt to transfer blame. There is a natural tendency for an accomplice faced with punishment for a criminal offence to minimise his or her own role in the crime and this, consequently, may lead him or her to exaggerate that of the accused.
>
> 4-23. Secondly, an accomplice may hope to obtain more favourable treatment by co-operating with the prosecution in helping them to convict his or her confederates. To this end, 'he may be tempted to curry favour with the prosecution by painting their guilt more blackly than it deserves'. … In other cases, an accomplice may have received or may hope to receive a lighter sentence by virtue of his or her co-operation with the prosecution. This danger is particularly acute when the accomplice remains unsentenced at the time he or she gives evidence.
>
> 4-24. In addition there is the possibility that an accomplice may be actuated by malice or a desire for revenge towards the person implicated by him or that he or she may implicate an innocent party in order to shield the real culprits.
>
> 4-25. There is also the objection that the accomplice is by definition a criminal and thus is an inherently unreliable witness because of his moral culpability. In *Cosgrave v. DPP* [2012] 3 I.R. 666 at p. 731, Hardiman J. took the view that an accomplice is necessarily a person of compromised character and his confession of involvement in the crime was sufficient to establish that 'but little credit is due to him'.
>
> 4-26. These dangers may not be obvious to the jury and are accentuated by the fact that 'the accomplice knows all the details of the crime and will be able to relate them accurately and in order to involve another person has only to introduce him into the story which in its main essentials, is true.' Hence, it is easy for an accomplice to weave a detailed and convincing narrative which it is difficult to unravel on cross examination."

25. There was a clear need for a full accomplice warning in the circumstances of this case in our view. There had to be a basis for concern that the evidence of Garry Keogh could be unreliable at least in some respects in circumstances where the victim was clearly contending in his evidence that Keogh had been affording comfort and assistance to the appellant at the time of the crime and in its immediate aftermath, even if he did not personally wield the knife. For many of the reasons suggested by McGrath he may well have been motivated to seek to transfer blame and to minimise his own involvement. It will be recalled that his evidence was that he did not participate in any robbery of Mr. O'Brien with the appellant. He said that what Mr. O'Brien was suggesting was "completely untrue".

26. It was not enough in the circumstances for the trial judge to merely invite the jury to treat Mr. Keogh's *evidence "with scepticism, with care, with caution realising that people who are engaged in criminal activity often seek to put the blame elsewhere, to try and exonerate themselves, to minimise their involvement."* It was necessary for the trial judge to go further and to link the infirmity or potential infirmity of such evidence with the desirability that it should be independently supported. In the circumstances of this case, it was necessary to give the conventional warning and to tell the jury in terms that it is dangerous to convict on the evidence of an accomplice in the absence of corroboration, but that having borne that in mind, and having given due weight to the warning, they were not precluded from doing so if they were satisfied beyond reasonable doubt that the accomplice's evidence was true and could be relied upon. The trial judge did not tell the jury this, and this was an error of principle.

27. It is appropriate to remark that the circumstances of this case are readily distinguishable from those in *The People (Director of Public Prosecutions) v Quinn* [2015] IECA 308, where we indicated, *obiter dictum*, that a warning in less strident terms than the conventional accomplice warning might have sufficed in the circumstances of that case. In the *Quinn* case the trial judge had correctly concluded that the impugned witnesses were not in fact accomplices in the generally understood sense, although they were possibly liable to prosecution for other matters and might therefore have had an incentive to put forward a certain account of events. In the present case, however, Mr Keogh is alleged to have been an accomplice with the appellant in the crime the subject matter of the trial. That is far from the situation that obtained in the *Quinn* case, and there can be no doubt but that if the allegation is correct Mr Keogh was indeed an accomplice in the generally understood sense.

28. All of that having been said there was, as counsel for the respondent has pointed out in his excellent written submissions, abundant evidence in the case tending to corroborate the evidence of Mr. Keogh. In saying that, we recognise and acknowledge without hesitation that the task of determining whether evidence is corroborative is, strictly speaking, one for the jury. Nevertheless we are also convinced that if the jury had been properly instructed in this case they would inevitably have come to the conclusion that the evidence of Mr. Keogh was corroborated by some or all of the matters identified by counsel for the respondent in his submissions to this Court. In those circumstances we are prepared to apply the *proviso* contained within s. 3(1)(a) of the Criminal Procedure Act, 1993 and find that no miscarriage of justice has occurred as a result of the trial judge's misdirection on this issue. We therefore reject this ground of appeal.

The serious harm issue

29. Counsel for the appellant has submitted that the trial judge ought to have granted a direction on Count No 1, and to have withdrawn that count from the jury, at the end of the prosecution case.

30. The basis for this submission was that the prosecution had failed to satisfy the first limb of Lord Lane's statement of the principles applicable to how a judge should approach a submission of "no case" contained in *R. v. Galbraith* [1981] 73 Cr.App.R. 124; [1981] 1 W.L.R. 1039. Lord Lane had stated:

> *"How then should the judge approach a submission of "no case"? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case."*

31. The appellant's argument was therefore based upon an alleged insufficiency of evidence. In order to appreciate the thrust of his argument it is necessary to set out in the first instance the ingredients of the offence of causing serious harm contrary to s. 4 of the Act of 1997 and also to set out the relevant evidence in the area of the alleged deficiency.

32. Section 4 of the Act of 1997 is in the following terms:

> " (1) A person who intentionally or recklessly causes serious harm to another shall be guilty of an offence.

(2) A person guilty of an offence under this section shall be liable on conviction on indictment to a fine or to imprisonment for life or to both."

33. Accordingly it is necessary for the prosecution to prove that the accused caused serious harm to another and that he did so intentionally or recklessly. Serious harm is defined in s. 1 of the Act of 1997 as meaning "injury which causes a substantial risk of death or which causes serious disfigurement or substantial loss or impairment of the mobility of the body as a whole or of the function of any particular bodily member or organ."

34. The appellant's case is that although the prosecution successfully proved that the injured party was assaulted by stabbing, and that he was caused harm, the evidence did not establish that he was caused serious harm.

35. Apart from the injured party's own testimony concerning what injuries he suffered and what treatment he received for them, the main evidence as to the nature and degree of the harm caused to the injured party came from the ambulance paramedic, Jason Kennedy, who attended to the injured party at the scene of the stabbing and who conveyed him to hospital by ambulance; from Ms. Melanie Brady, an accident and emergency nurse at Beaumont Hospital who received the injured party from the ambulance crew; and from Professor Patrick Broe, the surgeon who operated on the injured party.

36. A statement from Jason Kennedy was read into the record at the trial pursuant to s. 21 of the Criminal Justice Act, 1984 in the course of which he stated:—

> *"On arrival to the house I noticed a patient sitting down in the kitchen with another person giving first aid by holding a cloth to the patient's head. There was evidence of blood on his chest, clothing, on the back of his neck, hair, on the floor and all over his hands. When I treated him there was an avulsion to his forehead which we dressed. There was an incision-like haemorrhage to the posterior occipital area of the head which we dressed. At this stage I directed the crew to expose and examine. We discovered wounds to the patient's left hand side, upper left arm incision no haemorrhage, lower left forearm incision no haemorrhage, posterior incision left hand side at lung no haemorrhage but evidence of pneumothorax. At this stage I decided to run a line to maintain blood pressure while directing the crew to check all vitals and to check all dressings. Placed patient on oxygen and removed to hospital immediately. … I did not want the patient to talk … because of the injury to his lung and placed him on oxygen for the short journey to Beaumont, approximately 4 minutes away. At this stage I had the Beaumont Resus Room on standby that he was a Delta classified patient, which is life-threatening. On arrival to A&E patient was fatal and the emergency staff were waiting in the Resus Room for handover which we did, handed over the patient."*

37. Nurse Melanie Brady gave evidence before the jury at the trial. She told them that on the night of 17th August, 2011 she was a nurse working in the Accident and Emergency Unit in Beaumont Hospital. She was asked about the injured party's arrival to the A&E by ambulance and in particular concerning what she remembered about his injuries. She stated that he had multiple stab wounds to the head, the arms and to the back and that he was in a critical condition when he was admitted. He was short of breath and it was confirmed on x-ray that he had a collapsed lung from a stab wound. She stated that he was admitted to the hospital for surgery but that she had no further dealings with the patient affidavit after he left the A&E unit.

38. Professor Patrick Broe gave evidence on day 2 of the trial. He was the admitting surgeon on call at Beaumont Hospital on the night in question. He stated that at roughly 1.15 a.m. a 46 year old man, i.e. the injured party, was brought in by ambulance having sustained multiple stab wounds to the left upper scapular area on his chest, the scalp, the left upper arm and the left forearm. The patient was quickly resuscitated so that by the time he was seen by the doctors on Prof. Broe's team his blood pressure and pulse were satisfactory, his oxygenation was satisfactory and his level of consciousness was satisfactory. The witness was asked about the injured party's treatment and this gave rise to the following exchanges:

> *Q. In relation to his treatment, first of all his chest wound, how was that treated?*
>
> *A. Well, it's standard management of someone who comes in with multiple penetrating trauma would be to establish the extent of them first. So, he had established quickly that he had six individual stab wounds, two to his scalp as I say, one to his upper left arm, one to his left forearm and two on his back into his chest and one of the ones into his chest penetrated into his chest cavity, collapsed his lung and required the insertion of a drain into his chest so that the lung could re expand. That was all done fairly shortly after his admission and he then, once he was stable, underwent some scans, CT scan of his brain and a CT scan of his chest and abdomen to look for my occult injuries.*
>
> *Q. Now, I think you are aware of the definition of serious harm in the Non Fatal Offences Against the Person Act of 1997; isn't that right?*
>
> *A. Correct.*
>
> *Q. Now, in particular I think you're aware that serious harm is defined as "means injury which creates a substantial risk of death or which causes serious disfigurement or substantial loss or impairment of the mobility of the body as a whole or of the function of any particular bodily member or organ." What is your view as to whether or not the injuries sustained by Stephen O'Brien come within that definition of serious harm?*
>
> *A. Well, the penetrating injury to his chest, by definition, if his lung was collapsed that means that the stab wound into his chest, one of them, had burst the membrane of the lung and entered and punctured his lung and therefore that knife was technically very close to major structures such as the heart, the pulmonary artery and the thoracic aorta and had either of those three structures been lacerated then obviously the potential for death is extremely high. So*
>
> *Q. So, in the definition of serious harm I think there are three different limbs?*
>
> *A. Yes.*
>
> *Q. I think as you're aware and I think one is injury which creates a substantial risk of death?*
>
> *A. And yes.*
>
> *Q. The second limb I'm sorry?*

A. Yes, yes, go ahead, sorry.

Q. If you could perhaps tell the jury which, if any, of those

A. It's the first of those. So, this injury put this patient, this person, at substantial risk of death as a result of penetrating his thoracic cavity. The five lacerations elsewhere on his body would not be in that category. He bled a lot from them but he would not have been in that category. The penetrating injury to his chest, and we read all too frequently of instantaneous death or very quick death as a result of stab injuries to the chest in particular because the structures are big, the volumes of blood going through them are enormous and you can exsanguinate very quickly as a result of a penetrating stab injury to the aorta, to the heart or to the pulmonary artery.

Q. And I think when you say exsanguinate, does that mean bleed out?

A. Bleed out.

Q. Thank you very much. If you answer any questions.

39. Prof. Broe was cross examined by counsel on behalf of the appellant and was asked just two questions as follows:

"Q. So I think, doctor, what you're really saying is that the sticking a knife deep into somebody in this area will result in a serious risk to the life of the person if that knife strikes against and punctures certain things you've identified, luckily in this case it didn't happen?

A. No.

Q. But it could have happened; isn't that correct?

A. Correct."

40. Prof. Broe was then re-examined by counsel for the prosecution, giving rise to the following further exchanges:

"Q. Just arising out of that, Professor Broe, if you could just clarify, arising out of my friend's question, the injury which Stephen O'Brien received in this case, is it your evidence that that of itself did not create a substantial risk of death or did it is it your evidence that it did create a substantial risk of death, that injury?

A. Well, a stab wound to the chest has a lethal potential, that's all I can say. I mean in this case, as counsel has said, it penetrated into his lung tissue only and the lung tissue has a low blood pressure. So, the volume of blood loss from a bleeding lung is small unless you lacerate the major pulmonary artery which is about that width in someone in a male of his build. So, he did bleed from his lung. We drained about three or four hundred CCs into that drain when it went in. So, he had lacerated structures within his chest but not ones that exsanguinated at such a rate that meant that he would have been in a very serious situation by the time of arrival at hospital. So, the deaths that occur as a result of a stab wound result nearly always from a lacerated thoracic aorta, a lacerated pulmonary artery or a lacerated ventricle of the heart, neither of which he had, but the potentials were there I mean you're talking, you know, the distance of the penetration of the knife of a number of centimetres or millimetres in some case.

Q. And I think you say that he came within there was a substantial risk of death; is that right?

A. I think you have to conclude that, although luckily for the patient it didn't happen, the potential for that kind of a penetrating injury to the chest is very highly associated with major vessel injury.

Q. Thank you."

41. At the close of the prosecution case counsel for the appellant applied for a direction on Count No. 1 on the basis that the prosecution had failed to establish that the injured party had suffered serious injury. He conceded that the evidence went so far as to establish that the deep penetrating wound inflicted had the potential to create a serious risk of death but he submitted that the evidence did not establish that a substantial risk of death was in fact created in this particular instance. Counsel for the prosecution responded to this contending that the evidence of Prof. Broe in particular could only be interpreted on the basis that the injury had created a substantial risk of death. Counsel made the point that it cannot seriously be suggested that a deep penetrating wound to the chest, which has the potential to create a substantial risk of death, and which is inflicted on someone who is lucky enough to be right beside a hospital so that he can be operated upon immediately, does not represent serious harm. She submitted that there was sufficient evidence to allow the matter to go to the jury.

42. The trial judge ruled as follows:

"The second issue raised by Mr. Ó Lideadha is on the first count of the indictment, assault causing serious harm and here again the evidence of Professor Broe is carefully phrased and analysed and it is the submission that Professor Broe's evidence does not go far enough because he says that in the instant case this significant the more significant of the injuries sustained by Mr. O'Brien in fact did not threaten his life. The definition of serious harm under the act is an injury which creates a substantial risk of death or which causes harm and goes on. In any event we needn't worry about the latter aspects of the definition in the act because both counsel for the prosecution and Professor Broe focused on the first section of the act and I am satisfied, without any hesitation, that the injury sustained by the victim, Mr. O'Brien, and as described in the medical evidence by Professor Broe, well comes within the definition of an injury which creates a substantial risk of death. It did not in fact threaten his life as it happened but it certainly did in its inception or on its infliction represent a substantial risk. It was within the area of vital organs. It penetrated the lung. It caused the collapse of the lung. It required restorative surgery and I am satisfied that it is open to the jury, having regard to all of the evidence and the arguments that will be raised one way or another, to make their decision; does this fall within the definition of creating a substantial risk? It is a matter of evidence and for the jury to decide. I therefore propose to allow that charge rest with the jury."

43. The appellant did not go into evidence and so the trial proceeded to the next stage, namely the closing speeches of counsel and the judge's charge to the jury. In the course of his charge to the jury the trial judge stated (*inter alia*):

"Here the attack on Mr. O'Brien as described by him would seem to have been done with a degree of vigour, a weapon used and he was stabbed six times, one taking his eye and the other and another at least penetrating from behind his back into his lung. So, I don't think you'll have much difficulty in meeting those proofs from the evidence and the account you've heard. It's a matter, again, for you. Causes serious harm to another, and this is defined in the Act and it has been read to you and I read it as a definition, means: "Injury which creates a substantial risk of death or which causes serious disfigurement or substantial loss or impairment of the mobility of the body as a whole or of the function of any particular bodily member or organ." That's the definition and Professor Broe who spoke to you about all of this said that he considered the injuries inflicted on Mr. O'Brien to amount to serious harm. He said, in particular, the penetrating wound that invaded the lung from the back and caused damage there, that injury in particular, the rest he said on their own could not or would not amount to serious harm, in his view, but that particular one and all of them together, which creates a substantial risk of death. It's a matter for you, having regard to his evidence, whether or not you believe that that definition has been met. Mr. Ó Lideadha has argued that what Professor Broe was saying to you, in fact, was that the an injury of that sort has the potential, but that particular injury didn't because it didn't strike any of the vital three organs he spoke about in the interior, but the definition talks about a substantial risk of death and you have to be satisfied on the evidence you've heard from Professor Broe in its entirety, that what occurred to Mr. O'Brien meets that. If you have a reasonable doubt about it, well then you acquit the accused of the offence. It's your assessment of Professor Broe's evidence in that regard, coupled with all of the other evidence you've heard of the victim himself telling you how he was, of how he was found and described by the ambulance personnel as a critical high risk, they were put on alert, the staff were waiting for him, he had to be operated on, lung drained, all of that done, did that amount to a substantial risk of death [in the case] of Mr. O'Brien,[that] is a matter for you to assess, ladies and gentlemen."

44. Counsel for the appellant was unhappy with the trial judge's charge on this issue and sought to requisition him. Counsel stated:

"With regard to the issue of serious harm, the Court, in my respectful submission, did not articulate the proposition on which the defence relies with clarity. The doctor said that a wound of this kind had the potential to cause serious harm and the prosecuting counsel specifically asked does that mean what you're really saying is, or something along those lines, clearly inviting the witness to say what he really meant was the injury did, in fact, cause a risk to the person's life and the answer was not in the affirmative. It is a question of potential and that was not articulated. And not only that, but the Court then referred to something counsel for the prosecution had referred to, which is the comments of the hospital staff saying, in effect, that he was at high risk, counsel prosecution referred to it as a delta, I think, classification admission and the Court referred to the fact that the lung was drained. Now, in my respectful submission, that is completely irrelevant to the question of whether or not there was serious harm in this case. The fact that the nurses or any other emergency personnel make an assessment that because of the nature of an injury certain precautionary emergency steps should be taken, is entirely irrelevant from the point of view of discerning whether or not, in fact, the injury qualified under the offence.

In effect, what it means, what is being said is the expert didn't say it but you can infer from the fact that the nurse treated it as an emergency, that in fact it amounts to serious harm and that, in my respectful submission, is not correct. Now, this witness did actually say in evidence that, in his opinion, it met the criteria under the under the Act, but I would ask the Court to make to give a specific direction to the jury that it is not for an expert to decide for the jury the ultimate issue as to whether or not an offence has been committed by a particular definition under the Act. They should be specifically directed on that and told that what they must address is the substantive evidence the witness gave as to whether the injury actually caused serious harm in the sense of caused a risk caused I don't have the actual phrase itself, I'll ask my junior just to get the phrase. Yes, I mean, what he said was a potential substantial risk a potential risk of death. An injury which creates a substantial risk of death and the injury didn't. The stabbing, stabbing in that direction may well have caused a substantial risk of death, but the actual injury did not and the so I'm asking for the Court to tell the jury that the expert doesn't decide the question for the jury, they must address the substantive evidence."

45. In response to the requisition the trial judge stated:

"In respect of the evidence on the serious harm matter, again it seems to be that Mr. Ó Lideadha is making an argument for both ends of the spectrum. He, on the one hand, says that Professor Broe's evidence is the evidence to be acted [on] and considered and that the evidence of the nurse and other personnel, paramedical personnel is entirely irrelevant and then goes on to say that, in addition, he should tell the jury that it isn't Dr Broe's, Professor Broe's, evidence to be given, but that they must look at all of the evidence and satisfy themselves. I've spoken to the jury about this, but I don't propose to revisit it, save to this, I will remind the jury when they return when I call them back, that in respect of the alternative verdict open to them of actual bodily harm."

46. The jury returned with a question having been deliberating for one hour and twenty minutes. They asked:

"FOREMAN: We are wondering can we have some further advice on the definition, the legal definition, of serious harm or could we get a copy of the Acts or the section of the Act and secondly if we could be presented with a copy of the doctor from Beaumont Hospital's testimony."

47. The judge recharged the jury in response to this on the morning of day 4. He commenced by reviewing the evidence of Prof. Broe again for the jury and having done so then continued:

"How do you apply that then to the definitions that you have there? The -- it is important, and you have the wording, serious harm means, "Injury which creates a substantial risk of death". Professor Brough is the expert and he's called as such. However, we are not trying the accused man by expert, we're trying by the evidence and your view of it, and I have said that one of the values of a jury is that you bring your good common sense to bear. The definition of serious harm talks about the risk, Professor Broe talks about the potential, and you ask yourself this: if taking a large kitchen-like knife that you've been shown as the exhibit and you plunge into the back of another person to the point that it gets within millimetres of his heart, his aorta or pulmonary artery, which if punctured would lead to inevitable almost instant death because of the extent of the bleeding, is that presenting to that person a serious -- a risk within the definition that's there; a substantial risk of death? It's the risk of it that you're being asked to deal with. As Mr. Ó Lideadha has elicited from Professor Broe, luckily on this occasion that didn't happen, but you use your good sense. Does what was done present a serious risk of death? If it does, and you're satisfied that beyond doubt on the evidence you've heard, it's open to you to convict. If you are unsure of it, if you are left with a reasonable doubt, then it is open to you consider

the alternative offence, which is that of causing harm, of which I've given you the definition of also."

48. A short time later, in response to yet another requisition from counsel for the appellant, the trial judge brought the jury back and stated to them:

> *"Ladies and gentlemen, both counsel have asked me to draw your attention to a word in the definition of serious harm which I overlooked to mention, it appears, in what I was saying to you. It is this: the section serious harm means, "Injury which creates a substantial risk". So, coupled with your view of the evidence and what you've heard, you have to be mindful of what, is that the injury presented a serious risk of death, all right? Thank you."*

49. Following this there was yet another requisition from counsel for the appellant who said:

> *"Judge, I'm sorry, Judge, because I know I may be trying your patience, but in my respectful submission, it is essential to make clear the distinction to the jury because the Court has told the jury in emphatic terms the question is, what was done, whether what was done created a serious risk. And instead of saying to the jury -- well, I'm asking you, Judge, to say to the jury that not only is it a consideration, but it is the consideration, and the question is not whether or not the actual stabbing action involved a -- involved a serious risk, instead it is whether or not the actual injury did, otherwise the jury is left with the unqualified direction which the Court just gave minutes ago. That's my submission.*
>
> *JUDGE: Do you wish to say anything?*
>
> *MS ROWLAND: I've nothing to say, Judge.*
>
> *JUDGE: The section says, "A person who intentionally or recklessly causes serious harm to another shall be guilty of an offence." I am satisfied that the submission made by Mr. Ó Lideadha is not in fact correct in law, having regard to how this section is drafted, and I'm satisfied that I have directed the jury adequately and sufficiently in respect of the law in this area. I don't propose to recharge them."*

50. In submissions before this Court counsel for the appellant has contended that the trial judge's commentary on the medical evidence in the case went beyond that permitted and involved him entering the arena or at the very least would have been taken by a reasonable impartial observer to have so entered the proceedings, in an adversarial fashion and that on any objective assessment it must regrettably be taken to have unnecessarily and unfairly prejudiced the accused in the mind of the jurors as they considered their verdicts. In particular he complains concerning the trial judge's summary of the evidence of Prof. Broe (quoted above) and submits that the trial judge erred in law and in fact in instructing the jury that the evidence of Prof. Broe amounted to expert evidence that the test for "serious harm" had been met. Rather it was the case that Prof. Broe stated that a wound of the type suffered by the injured party had the potential to cause serious harm.

51. The witness was specifically asked by prosecuting counsel whether he was stating that the injury in question did, in fact, cause a risk to the person's life and this was not met with an answer in the affirmative. The issue of potential which was expressed by Prof. Broe was not addressed by the trial judge in his charge to the jury. It was submitted that the trial judge should have instructed the jury that the decision as to whether the evidence given by Prof. Broe met the test for serious harm and lay squarely with them and could not be stated as a matter of fact in evidence.

52. It was further submitted that the trial judge erred in referring to and endorsing statements made by counsel for the prosecution relating to comments made by hospital staff to the effect that the injured party was at critical high risk; that they were on alert, that he had to be operated on, and that it was necessary for his lung to be drained. It was submitted that these matters were not relevant in any sense to the issue of serious harm in respect of which Prof. Broe gave evidence. However, the trial judge implied to the jury that these were factors which they should take into account when deciding on the issue of serious harm.

53. There is also a complaint that the trial judge erred in recharging the jury on the morning of day 4 in respect of the definition of serious harm. It was submitted that the trial judge's recharge had suggested that the act of stabbing and the nature of the weapon used were relevant to the issue before the jury concerning whether or not an injury had been caused which created a substantial risk of death. It was submitted that it is the injury and the injury alone which was at issue and whether such an injury brought about a substantial risk of death. How the injury was inflicted was not directly relevant to that.

54. In seeking to respond to the appellant's complaints counsel for the respondent suggests that s. 4 of the Act of 1997, incorporating the definition of the phrase "serious harm" should read as follows:

> "A person who intentionally or recklessly causes [injury which creates a substantial risk of death or which causes serious disfigurement or substantial loss or impairment of the mobility of the body as a whole or of the function of any particular bodily member or organ] to another shall be guilty of an offence."

55. The respondent has submitted that the word injury is not a term of art and that it takes its plain and ordinary meaning. Its ordinary meaning includes both the act whereby the damage is inflicted and, if accompanied with the indefinite article, the damage itself. In support of this contention, counsel referred the Court to the definition of "injury" in the Oxford English Dictionary which is to the following effect:

> *"1. Wrongful action or treatment; violation or infringement of another's rights; suffering or mischief wilfully and unjustly inflicted; With an and pl, A wrongful act; a wrong inflicted or suffered.*
>
> *…"*

56. The Court was asked to note that the legislature did not preface the word injury in the definition with the indefinite article which might have suggested that they intended to refer solely to damage inflicted, e.g. an injury (or injuries in the plural), as contended for by the appellant. Counsel for the respondent has submitted that the absence of the indefinite article is consistent with a legislative intention that the broader interpretation of the term applies which includes the infliction of the injuries sustained. In those circumstances counsel submits the trial judge was correct in his interpretation of serious harm as including the infliction of the wounds on the injured party. Approaching the testimony of Prof. Broe in that way, there was ample evidence before the jury upon which they could find beyond a reasonable doubt that serious harm had been done to the injured party.

57. Counsel for the respondent argues in the alternative that the evidence of Jason Kennedy, taken at its height, was sufficient

evidence for a jury to find that the injuries caused to the injured party, which included an apparent *"pneumothorax"* (subsequently borne out), were *"life threatening"* and that therefore serious harm was caused to him. Mr. Kennedy's evidence was consistent with the evidence of the accident and emergency nurse who referred to the injured party's condition as being *"critical"* and with Prof. Broe's evidence that he had been *"quickly resuscitated so that by the time he was seen by the doctors on my team… his blood pressure and pulse were satisfactory, his oxygenation was satisfactory and his level of consciousness was satisfactory."*

58. Counsel for the respondent, addressing the criticisms of the judge's charge, points out that the trial judge repeatedly advised the jury that the determination of whether there was serious harm was for them alone. Counsel did not accept that the trial judge had sought to endorse prosecuting counsel's comments in telling the jury that there was evidence other than that from Prof. Broe which they might find relevant to the issue namely that of the victim, the paramedic, and the nurse. While acknowledging the expertise and evidence of Prof. Broe, the trial judge told the jury that whether or not they accepted that evidence and the issue as to what weight they attached to it was uniquely a matter for them. Counsel for the respondent submits that in the last analysis the trial judge's charge with respect to the definition of causing serious harm contrary to s. 4 of the Act of 1997, and how the jury should approach the evidence relevant to that charge, was correct.

Analysis and Decision

59. We consider that counsel for the respondent has advanced a serious argument in support of interpreting the word "injury" within the definition of serious harm contained in s.1 of the Act of 1997 as bearing the wider meaning that he contends for, namely as embracing both wrongful action and damage caused.

60. There is, however, a counter argument which says that s.4 (including the term "serious harm" as defined in s.1) of the Act of 1997 has to be viewed in the context of the Act of 1997 read as a whole, and in particular having regard to the terms of s.13 of that Act.

61. S.13(1) of the Act of 1997 creates the offence of endangerment, and it provides:

> "A person shall be guilty of an offence who intentionally or recklessly engages in conduct which creates a substantial risk of death or serious harm to another"

62. The counter-argument is to the effect that if the intention of the legislature had been to allow the definition of injury for the purposes of s. 4 of the Act of 1997 to be satisfied by wrongful action (as opposed to actual damage) "which creates a substantial risk of death", as well as by actual damage "which causes serious disfigurement or substantial loss or impairment of the mobility of the body as a whole or of the function of any particular bodily member or organ", there would have been no need to include so much of s. 13 of the Act of 1997 as relates to the creation of "a substantial risk of death". It is suggested that the enactment of s.13 of the Act of 1997 in the terms in which it was enacted supports the notion that "injury" for the purposes of s. 4 of the Act of 1997 means actual damage that either "creates a substantial risk of death" or "which causes serious disfigurement or substantial loss or impairment of the mobility of the body as a whole or of the function of any particular bodily member or organ"

63. We consider it unnecessary in the circumstances of this case to rule definitively on this issue because we are satisfied that even if the statute is given the narrower interpretation contended for by the appellant, there was evidence in this case capable of satisfying the definition of serious harm.

64. We consider that it is sufficient for the purposes of the definition if the injured party is placed at substantial risk of death, or caused serious disfigurement or substantial loss or impairment of the mobility of the body as a whole or of the function of any particular bodily member or organ" at any point, however brief or transient, as a result of the infliction of violence on him or her. The fact that prompt first responder or paramedical assistance, or accident and emergency resuscitation, quickly stabilises the patient so as to greatly reduce the risk of death, and to restore or ameliorate the loss of the function of a bodily member or organ, is neither here nor there. The substantial risk of death, and/or loss or impairment of a bodily member or organ, although quickly addressed in that situation, has nonetheless existed.

65. There was clear evidence in this case from the ambulance paramedic Jason Kennedy that when he encountered the injured party in this case the latter had multiple stab wounds, and an apparent pneumothorax (or collapsed lung). The pneumothorax, as we know, was subsequently confirmed by the evidence of Prof. Broe. This was clear evidence of the substantial impairment of a bodily organ, namely the lung involved. The ambulance paramedic, a trained first responder, graded or categorised the condition of the patient as being a "Delta" case i.e., a patient with life threatening injuries. He immediately placed him on oxygen and communicated with the resuscitation team in the Accident and Emergency Department at Beaumont Hospital, which fortunately was only four minutes away, to have them on standby to receive the patient and treat him immediately upon arrival of the ambulance at the hospital. Mr. Kennedy was not challenged or cross-examined with respect to his assessment that the patient had life threatening injuries at the time of his involvement with him.

66. Similarly, Nurse Brady was not challenged or cross-examined on her evidence that when the injured party was first brought in to Accident & Emergency, and until he was stabilised, he was regarded as "critical".

67. Prof. Broe's evidence was entirely consistent with this. His testimony was that by the time his team arrived in A & E the patient had been stabilised, and it was following this that he was taken to the operating theatre for surgery. It was never suggested to Prof. Broe, that the patient had not needed stabilisation, that the patient had not been critical before being stabilised, or that an as yet untreated pneumothorax was not a life threatening condition, or at the very least the substantial impairment of a bodily organ, namely the lung involved.

68. The exploration in the cross-examination of Prof. Broe of the extent to which there was a "substantial risk of death", focussed narrowly on the risk of death from exsanguination in circumstances where, fortuitously, none of the injured party's major blood vessels was impacted by the knife that penetrated the chest. Prof. Broe was, of course, obliged to concede that the stabbing had merely created the potential for death by exsanguination. However, contrary to what was contended both to the judge and jury at the court of trial, and again to this court, the matter does not begin and end there. There was clear evidence of a penetrating wound to the chest involving a lung, of pneumothorax, of breathing difficulty necessitating oxygen, of perceived criticality and perceived threat to life in the early stages of the involvement of medical personnel requiring stabilisation by the emergency resuscitation team, and of the need for subsequent surgery involving the insertion of a chest drain to re-inflate the collapsed lung in the operating theatre. There was clear evidence both of a substantial risk of death, happily abated at a relatively early stage, and of substantial impairment of a bodily organ, namely the lung involved, before the insertion of the chest drain.

69. In the circumstances the trial judge was entirely correct to allow the matter to go to the jury in our judgment. He was also

entirely correct to draw the jury's attention to the entirety of the medical evidence, including that of Jason Kennedy, and Nurse Brady as well as that of Professor Broe. We find no error in the matter in which he charged the jury.

70. We therefore are not disposed to uphold this ground of appeal.

Conclusion.
71. In circumstances where this Court has not upheld either of the grounds of appeal being relied upon, we consider the trial to have been satisfactory, and the conviction to be safe. The appeal against conviction is therefore dismissed.