[2016 Gib LR 253]

CELECIA v. ATTORNEY-GENERAL

BONNICI v. ATTORNEY-GENERAL

COURT OF APPEAL (Kay, P., Potter and Rimer, JJ.A.): October 13th, 2016

Criminal Law—attempted murder—sentence—no mandatory sentence of life imprisonment for attempted murder—life sentence mandatory for murder (Criminal Offences Act 1960, s.59(1)) but maximum for attempt (s.8)

Sentencing—life sentence—fixed minimum term—term normally one third of notional determinate sentence

The appellants had been charged in the Supreme Court with attempted murder.

The appellant Celecia had invited the victim to his house and, when she arrived, immediately stabbed her in the neck and the chest. Her injuries had been potentially life-threatening. Celecia had a long history of mental illness and had been diagnosed with paranoid schizophrenia. He had pleaded not guilty to attempted murder but had been convicted and sentenced to life imprisonment. The judge recommended that he serve a minimum of 10 years. At that time, it had been conventional for judges to recommend a minimum period. It was subsequently established that the minimum period should be fixed rather than simply recommended. Celecia was re-sentenced by the judge to life imprisonment with a fixed minimum period of 10 years.

Celecia sought permission to appeal against his conviction. He submitted that (a) the judge's direction on intent had lacked balance and effectively usurped the function of the jury; (b) the evidence of the number and location of the stab wounds was equivocal, being just as consistent with an intention to cause grievous bodily harm as with an intention to

kill; (c) the fact that he had only historic and minor previous convictions and that he had more recently agreed to be bound over to keep the peace should have resulted in the judge giving an effective good character direction; and (d) the court should have entertained a "lurking doubt" about his conviction for attempted murder. Celecia also challenged his sentence.

The appellant Bonnici had pleaded guilty to two separate offences. In 2009, he had attacked a doctor in hospital, stabbing him in the back. The doctor had been seriously injured and medical opinion was that he would have died but for the swift attention he received. He had not recovered from the psychological harm caused by the offence. Bonnici had pleaded guilty to wounding with intent to cause grievous bodily harm. Although initially remanded in custody, he had later been released on bail. In 2010, whilst on bail, Bonnici stabbed the then Minister for Justice in a frenzied attack in the presence of the Minister's children and others. The Minister had suffered serious injuries which, but for major emergency surgery, would have been fatal. Bonnici had been sentenced to life imprisonment. The Chief Justice had initially recommended a total minimum period of 19 years but later fixed the minimum period as 12 years and 4 months. At the times of the offences, Bonnici had been suffering from an undiagnosed psychotic mental illness.

On appeal against his sentence, Bonnici submitted that (a) the consecutive notional determinate sentences for the two offences, totalling 24 years and 8 months, were manifestly excessive; and (b) the sentences were vitiated not only by the Chief Justice's reference to the inapplicable English Sentencing Council Definitive Guideline on Attempted Murder but also by the failure to have regard or sufficient regard to the mitigating factor of mental illness which had remained undiagnosed and untreated at the time.

In relation to the appeals against sentence, the court had to consider (a) whether, at the time of the offences, attempted murder carried a mandatory life sentence; and (b) when a life sentence was imposed (whether it was mandatory or discretionary) what fraction of the notional determinate sentence should constitute the minimum or tariff period. The Attorney-General submitted *inter alia* that (a) the assumption in *Celecia* that, since murder carried a mandatory life sentence (Criminal Offences Act 1960, s.59(1)), a person convicted of attempted murder was also, on the true construction of ss. 7 and 8, subject to the mandatory life sentence; and (b) the minimum period should be one third, not one half, of the notional determinate sentence, but it should remain permissible for the sentencing judge to increase the minimum above one third if other factors, such as the seriousness of the offence, so required.

Held, ordering as follows:

(1) Celecia would not be granted permission to appeal against his conviction for attempted murder. The judge had given an impeccable direction on how the jury should approach any views which she might

express: "Do not accept those views unless you agree with them." The passage to which Celecia objected (including the sentence: "If he stabbed her in the neck and more importantly dragged the knife into the area of the heart, what can his intention have been?") amounted to permissible judicial comment. The evidence referred to, *e.g.* that two months before the offence Celecia had said he would stab the complainant, was capable of supporting the Crown's case as to the identity of the perpetrator and the *mens rea* of attempted murder. More importantly, the number and locations of the stab wounds, inflicted by a man who had lured his victim to his premises and opened the door armed with a knife, were entirely consistent with an intention to kill. It could not be said that the trial judge should have given an effective good character direction but, even if one had been given, it was difficult to see how it could have assisted Celecia on the limited issue of which of the two intentions he had had (*i.e.* to kill or to inflict grievous bodily harm). It could not be said that the jury had not been justified in finding an intention to kill and there was nothing arguably unsafe about the conviction. Furthermore, the court had no "lurking doubt" about the conviction (paras. 14–18).

(2) Under the law in force at the time of the offences, there had not been a mandatory sentence of life imprisonment for attempted murder. The current position was that Gibraltar followed England and Wales, where the sentence for attempted murder was a maximum of life imprisonment but in most cases determinate sentences were passed. The present cases had, however, to be considered under the earlier regime. The assumption made in *Celecia* had been that, since murder carried a mandatory life sentence pursuant to the Criminal Offences Act 1960, s.59, a person convicted of attempted murder was, under s.8, also subject to the mandatory life sentence. This was not, however, correct. There was a clear distinction between the language of s.59(1)—"shall be sentenced to imprisonment for life"—and s.8—"shall . . . be liable to be punished in the same manner"—the former being plainly mandatory and the latter merely fixing a maximum sentence. A number of anomalies would otherwise result. This interpretation was inconsistent with s.13(2) which, in respect of conspiracy to murder, provided that an offender would be "liable to imprisonment for life." It was unthinkable that an offence that only just crossed the threshold of conspiracy to murder should attract a mandatory life sentence for each conspirator, however great or small his role. It would also be odd if a defendant who had intended to kill could avoid a life sentence by reason of being convicted only of manslaughter, for example by reason of provocation, whereas if the facts were changed only by the survival of the victim there would be a mandatory sentence of life imprisonment (provocation not being a defence to attempted murder) (paras. 21–27).

(3) The minimum period for a life sentence in Gibraltar should normally be one third, rather than one half, of the notional determinate period (with adjustment for time spent in custody on remand). The minimum period, or tariff, was calculated by identifying what the

determinate sentence would have been if it had not been necessary to impose the life sentence, and then subtracting from it a fraction or percentage, just as a prisoner serving a determinate sentence might be considered for early release or parole when he had completed a part of his sentence. In the present cases, the judges had proceeded on the basis that the minimum period should be one half of the notional determinate sentence, similar to the approach in England and Wales. In England and Wales, an offender was eligible for parole half way through his sentence. In Gibraltar, however, the Prison Act 2011, s.54(1) provided that a person serving a determinate sentence could be released after serving at least one third of his sentence or six months' imprisonment, whichever expired the later. Generally, a discretionary life sentence would be passed only when the court was dealing with an offender who was likely to remain a serious danger to the public for an indeterminate period, often by reason of mental illness. The notional determinate sentence indicated the sentence he would have received but for the unforeseeability of the period of danger, and the minimum period related to the point at which, but for the continuing risk, he would have been eligible to be considered for parole. The underlying assumption was that consideration for parole should come on to the agenda at or about the time when it would do so for an offender serving a determinate sentence but, of course, the actuality of parole would not arise until the body entrusted with the subsequent assessment of risk was satisfied that the offender no longer constituted a serious danger to the public. As the English authorities demonstrated, there was a rational link between the judicial task of fixing the minimum period and the statutory role of the Parole Board in risk assessment. The offender should serve the tariff period appropriate to his offence but further incarceration would only be justified if he remained a serious risk. In Gibraltar, where even a very long determinate sentence carried a right to consideration for parole at the one-third stage, it was not justified to maintain a minimum period of one half of the notional determinate sentence in cases of life imprisonment. That would subvert the rationale for the minimum. The court did not accept the Crown's submission that the sentencing judge could increase the minimum above one half if other factors, *e.g.* the seriousness of the offence, so required. The seriousness of the offence, leaving aside the question of the unforeseeability of future danger, was already factored in to the notional determinate sentence and the only justification for keeping the life prisoner in custody for longer than his determinate sentence comparator would be the element of continuing risk (paras. 28–37).

(4) Celecia's appeal against his sentence would be allowed and a sentence of life imprisonment with a minimum period of 5 years and 8 months substituted. A discretionary life sentence had been, and remained, appropriate given the severity of the offence and the serious danger he presented to the public. The judge had decided that the notional determinate sentence, following a trial, was 20 years by reference to the English Sentencing Council Definitive Guideline on Attempted Murder, which had significantly increased the tariff for attempted murder. The corresponding

increase had not in fact occurred in Gibraltar at that time. It had not therefore been appropriate for the judge to have relied on the Guideline. When determining the correct tariff period, the court kept in mind that the offence was based on an intention to kill. Mental illness could mitigate the notional determinate sentence, but the scope for it to do so where the mental illness was caused or exacerbated by substance abuse and where there was a history of failure to take prescribed medication was significantly reduced. In all the circumstances, the correct notional determinate sentence was 17 years. Applying a two-thirds discount, the appeal would be allowed and the court would substitute a sentence of life imprisonment with a minimum period of 5 years and 8 months, with credit for time spent on remand (paras. 42–44).

(5) Bonnici's appeal against sentence would also be allowed and a sentence of life imprisonment with a minimum period of 7 years and 8 months substituted. The offences were particularly heinous, namely a vicious attack on a doctor in hospital and an attempt to assassinate a government minister. The notional determinate sentences had, however, been erroneously calculated by reference to the English Guideline and the minimum period had been fixed at one half. The cumulative gravity of the offences took the starting points to the top of the respective brackets. The court agreed with the starting point of 25 years, from which there should be a modest discount for guilty pleas (10%, as postulated by the Chief Justice) and a limited discount for the potential mitigation of undiagnosed mental illness. The appropriate notional determinate sentence was therefore 23 years. Applying a discount of two thirds, the minimum period would be 7 years and 8 months, with credit for time spent on remand (paras. 46–48).

Cases cited:

(1) *Att.-Gen's Ref. (No. 32 of 1996)*, [1997] 1 Cr. App. R. (S.) 261; [1996] Crim. L.R. 917, applied.
(2) *R.* v. *Hunter*, [2015] EWCA Crim 631; [2015] 1 W.L.R. 5367; [2016] 2 All E.R. 1021; [2015] 2 Cr. App. R. 9, applied.
(3) *R.* v. *Pope*, [2012] EWCA Crim 2241; [2013] 1 Cr. App. R. 14; [2013] Crim. L.R. 421, considered.
(4) *R.* v. *Sullivan*, [2004] EWCA Crim 1762; [2005] 1 Cr. App. R. 3; [2005] 1 Cr. App. R. (S.) 67; [2005] 1 Prison L.R. 210, applied.
(5) *R.* v. *Szczerba*, [2002] EWCA Crim 440; [2002] 2 Cr. App. R. (S.) 86; [2002] Crim. L.R. 429, applied.
(6) *R.* v. *Vye*, [1993] 1 W.L.R. 471; [1993] 3 All E.R. 241; (1993), 97 Cr. App. R. 134, referred to.
(7) *R. (Foley)* v. *Parole Bd.*, [2012] EWHC 2184 (Admin); [2012] A.C.D. 123, applied.

Legislation construed:

Criminal Offences Act 1960, s.7: The relevant terms of this section are set out at para. 22.

s.8: The relevant terms of this section are set out at para. 24.
s.59(1): The relevant terms of this sub-section are set out at para. 23.

Prison Act 2011, s.54(1): The relevant terms of this sub-section are set out at para. 33.

R. Fischel, *Q.C.* for the Attorney-General;
J. Phillips for the defendants.

1 **KAY, P.,** delivering the opinion of the court: These two appeals arise from two unconnected cases but we have heard them together because they raise some common issues in relation to sentencing for the offence of attempted murder. The facts of both cases are disturbing. We shall deal first with the facts in *Celecia* and take the summary from the sentencing remarks of the trial judge.

2 Whilst the complainant Jesamine Martin was having a coffee with a friend at Casemates, the defendant, then aged 48, telephoned her and asked her to come to his house to help him put some music on to his laptop. Miss Martin made her way to his flat at 14 Bayside House. When she arrived she knocked on the door, the defendant opened it and immediately stabbed her once in the neck and once in the chest before closing the door. Miss Martin went first to the next door neighbour's flat and asked him to call for help. He was unhappy with her being in his flat for fear of upsetting his elderly and ill mother, so Miss Martin left and made her way outside the block with the intention of going to her grandmother's house which was nearby. Once outside she collapsed and the ambulance arrived shortly after.

3 There was no doubt from the medical evidence that these were potentially life threatening injuries described by the doctor as very serious and grievous. The wounds of the neck penetrated not only skin, fat and muscle but more importantly the thyroid gland and narrowly missed the jugular vein. The wound to the chest travelled through the rib cage and punctured the lung; it was millimetres away from the heart.

4 Celecia pleaded not guilty to attempted murder and to the alternative offence of wounding with intent to cause grievous bodily harm. At the trial he denied that he was the perpetrator but he was convicted of attempted murder.

5 Celecia had a long history of mental illness with a diagnosis of paranoid schizophrenia. He was sentenced to life imprisonment and the judge recommended that he serve a minimum of 10 years. At that time it was conventional for the judge to recommend a minimum period. Subsequently, however, it became established that the minimum period should be fixed and not simply recommended by the judge, it then being the task of the Parole Board to decide when, if ever, after the expiration of the

minimum period, it was safe to release the offender on licence. After this was recognized, Celecia was re-sentenced by the judge who converted the recommendation of 10 years into a fixed minimum period of 10 years. Before us, Celecia seeks leave to appeal against his conviction, having been refused such leave by the Chief Justice who granted him leave to appeal against sentence.

6 As regards the facts in *Bonnici*, in his case he pleaded guilty to two offences committed a year apart. On November 6th, 2009, he wounded Dr. Mahmood Khan with intent to cause grievous bodily harm. Initially he was remanded in custody but in March 2010 he was released on bail. On November 9th, 2010, he attempted to murder Mr. Daniel Feetham, who was then the Minister for Justice. At the time of these offences Bonnici was suffering from a psychotic mental illness which had not yet been recognized or treated. If his mental illness had been the subject of diagnosis then, it is inconceivable that he would have been granted bail. When it came to sentencing, the Chief Justice had the benefit of a recent psychiatric report which opined that Bonnici had a history of a paranoid personality disorder which had evolved into a serious mental illness, probably paranoid schizophrenia.

7 The horrific nature of the two offences coupled with that diagnosis resulted in the sentence of life imprisonment. Initially the Chief Justice recommended a total minimum period of 19 years. However, following further litigation, he later re-sentenced Bonnici, fixing the minimum period as 12 years and 4 months.

8 We take the following account of the facts of the two offences from the original sentencing remarks of the Chief Justice. The grievous bodily harm with intent relates to events on November 6th, 2009 when Bonnici's daughter was seen in Accident and Emergency by the duty doctor and the paediatrician was asked to attend. On being told he could not go into the treatment area, Bonnici pushed a nurse making her fall. He shouted that he wanted Rodriguez and wanted to kill him. The psychiatric report shows that he blamed a Dr. Rodriguez for failing to diagnose an illness. Therefore whilst his daughter's admission into A&E may have triggered the rampage, it was not the underlying reason. Dr. Nadeem and Dr. Khan intervened and tried to calm him down. The defendant attacked Dr. Nadeem, throwing him to the floor and kicking his face and head. He then pushed Dr. Khan into a treatment cubicle and as he did so stabbed him in the back. He then continued to brandish his knife, calling for Dr. Rodriguez. Thereafter he was arrested and a lock knife was found in his pocket. The impact which this offence has had on Dr. Khan has been catastrophic. He suffered serious injury resulting in fluid in his thorax cavity and the medical opinion is that it was only the swift medical attention he received that saved his life. However, Dr. Khan has unfortunately not recovered from the psychological harm which the attack

caused. He has been diagnosed with post-traumatic stress disorder and developed paranoid ideation. At the time of sentencing he had not gone back to work since the incident and the Chief Justice observed that his personal life had also been very seriously affected. He added, "it cannot be overstated when I say that Bonnici has destroyed Dr. Khan's life."

9 As regards the offence of attempted murder, on December 2nd, 2010 the former Minister for Justice, Mr. Feetham, was walking up Library Street towards the O'Callaghan Elliott Hotel in the afternoon with his children and the children of some family friends, holding each of the younger children by the hand. Bonnici came behind Mr. Feetham and stabbed him in the back, with what the Chief Justice described as "a huge knife." Mr. Feetham got the children to run away and he spoke to Bonnici, who, after providing a paranoid explanation for the attack, lunged at Mr. Feetham and a struggle then ensued with Mr. Feetham on his back and Bonnici on top, trying to stab him in the area of his chest and throat, in what the Chief Justice described as "a frenzied attack." Mr. Feetham was able to wrench the knife away and threw it some distance, but he was then head-butted and punched by Bonnici. Mr. Feetham suffered serious injuries. But for major emergency surgery requiring the removal of his spleen, he would have bled to death in less than one to two hours. The Chief Justice said:

> "The aggravating features of the offence are evident; it was committed whilst on bail. Mr. Feetham was specifically targeted because of the public office he held. There was an element of preplanning, as is apparent from the Defendant carrying the knife, albeit the target may have originally been someone else. It was committed in the presence of [Mr. Feetham's] children and the children of family friends. It was a sustained attack which continued until members of the public intervened."

10 It must be obvious from the facts in both *Celecia* and *Bonnici* that we are here dealing with very grave offences.

Celecia: conviction

11 On July 25th, 2016, Dudley, C.J. refused Celecia permission to appeal against conviction. At the commencement of the hearing before us on October 4th, 2016, the application was renewed but we refused it. We now give our reasons.

(i) *Summing up on the issue of intention*

12 The first ground of appeal is in the form of a criticism of the judge's direction on the issue of intention. Although Celecia's primary defence was that he was not the perpetrator, if the jury rejected that defence there was still a burden on the Crown to prove an intention to kill in order to

establish attempted murder. The judge dealt with this in the following passage:

> "Now how do you decide intent? You decide intent by considering what the Defendant did or did not do. You should look at his actions before, at the time and after the alleged offence, all these things may shed light on his intention at the critical time. If you find for example that some 2 months before the stabbing the Defendant told Mr. Dudley that he was going to stab Jesamine because he did not want her there and if you further find that whilst in the A&E room he says 'I stabbed her long and fast and I would do it again to that girl,' you may think that those matters are relevant when considering his intent. Equally if you find that the Defendant stabbed her, you might think the location of the stabbing is relevant to intent. If he stabs her in the neck and more importantly drives the knife into the area of the heart, what can his intention have been?"

13 The submission on behalf of Celecia is that this passage lacked balance and effectively usurped the function of the jury. It is suggested that the facts referred to by the judge—the conversation with Mr. Dudley and the words spoken in the A&E room—did not strengthen the Crown's case on intention to kill. Moreover, the final two sentences put the matter in the form of rhetorical question in a way which strongly indicated that the judge considered that there could only be one answer.

14 We reject these submissions. In an earlier passage, the judge had given an impeccable direction on how the jury should approach any views which she might express: "Do not adopt those views unless you agree with them." We are entirely satisfied that the passage to which exception is taken amounted to permissible judicial comment. The evidence of the Dudley conversation and the statement in the A&E room, if accepted by the jury, was capable of supporting the Crown's case, not only on the identity of the perpetrator but also on the *mens rea* of attempted murder. More importantly, the number and locations of the stab wounds inflicted by a man who had lured his victim to his premises and had opened the door armed with the knife were entirely consistent with an intention to kill. Mr. Charles Salter submits that it is equivocal evidence, just as consistent with an intention to cause grievous bodily harm. However, that analysis remained before the jury which also received directions from the judge on the lesser *mens rea*. We do not consider that the judge's comment gave rise to any risk that the jury was unfairly steered towards a finding of intention to kill.

(ii) *Character*

15 Celecia had only modest previous convictions: possession of an offensive weapon in 1978 and a breach of the peace in 1990. More

recently, in 2005, he had agreed to be bound over to keep the peace. Mr. Salter (who was not instructed at trial) submits that this should have resulted in the judge giving an effective good character direction in accordance with *R.* v. *Vye* (6), which has now been revisited in *R.* v. *Hunter* (2). It seems that trial counsel did not ask the judge to give such a direction. Moreover, Mr. Salter makes it clear that his submission is limited to the potential impact of such a direction on the jury's assessment of intention and not on the issue of the identification of the assailant.

16 We do not consider this proposed ground of appeal to be arguable. We say this for two principal reasons. First, it is difficult to see how an effective good character direction could have assisted Celecia on the limited issue of which of the two intentions he had. In contending for the lessor intention (to inflict grievous bodily harm), Mr. Salter is conceding that, having found Celecia to be the assailant, the jury was not dealing with a person of effective good character but with someone whose basic account it had rejected and who, at the very least, had committed an egregious offence of wounding with intent to cause grievous bodily harm. Secondly, even if we had come to the conclusion that the judge ought to have given an effective good character direction (and we have not), it would not have followed that this would have resulted axiomatically in a conclusion that the conviction for attempted murder is unsafe. As Hallett, L.J. said in *Hunter* ([2015] EWCA Crim 631, at para. 89), "there can be no fixed rule or principle that a failure to give a good character direction or a misdirection is necessarily or usually fatal. It must depend on the facts of individual cases."

17 In the present case, once the jury had found Celecia to have been the assailant, then given the other indisputable facts, in particular premeditation and the infliction of two stab wounds to obviously vulnerable parts of the body, it cannot be said that the jury was not justified in finding any intention to kill. There was nothing arguably unsafe about that conclusion.

(iii) *"Lurking doubt"*

18 The submission that we should entertain a "lurking doubt" about Celecia's conviction for attempted murder is fanciful in the extreme. Having rejected the other two grounds of appeal, we have no doubt about the safety of the conviction. In the circumstances, it is unnecessary for us to dwell on the so-called "lurking doubt" principle which we observe is now viewed with a high degree of exceptionality by the Court of Appeal Criminal Division: *R.* v. *Pope* (3) ([2012] EWCA Crim 2241, at para. 14).

Appeals against sentence

19 We now turn to the appeals against sentence. Before we address the respective individual circumstances, there are two legal issues which we

have to determine. They are: (1) at the time of these offences, did attempted murder carry a mandatory life sentence in Gibraltar? and (2) when a life sentence is imposed (and in the case of *Bonnici* it is conceded that one was inevitable, whether it was mandatory in law or on a discretionary basis), what fraction of the notional determinate sentence should constitute the minimum or tariff period?

(i) ***Is a life sentence mandatory for attempted murder in Gibraltar?***

20 In *Celecia*, it was assumed that, pursuant to the local statutory provisions, conviction for attempted murder carries a mandatory life sentence.

21 In *Bonnici*, as we have said, it was common ground (and still is) that whether a life sentence was mandatory or discretionary, it was inevitable that one would be imposed in this case. In England and Wales the sentence for attempted murder is a maximum of life imprisonment but in most cases determinate sentences are passed. As we understand it, this is now reflected in legislation currently applicable in Gibraltar but the present cases still fall to be considered under the earlier regime.

22 The statutory provisions which applied to these cases were as follows. The offence of attempted murder was a statutory offence pursuant to s.7 of the Criminal Offences Act 1960, which provided: "A provision which constitutes an offence, shall unless the contrary intention appears, be deemed to provide also that an attempt to commit such offence shall be an offence against such provision."

23 By s.59(1), "a person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of the offence of murder and on conviction upon indictment shall be sentenced to imprisonment for life."

24 Section 8 provided:

> "Subject to the provisions of any other law, any person charged with any offence may, if it appears upon the evidence that he did not complete the offence charged but that he was guilty only of an attempt to commit the same, be convicted of an attempt to commit the same; and thereupon such person shall, where no punishment is specified for such attempt, be liable to be punished in the same manner as if he had been convicted of the offence with which he was charged."

25 The assumption which was made in *Celecia* was that, since murder carries a mandatory life sentence (s.59), a person who was charged with murder but convicted only of the alternative offence of attempted murder under s.8 was also, on the true construction of ss. 7 and 8, subject to a mandatory life sentence, and if that was so in a case where the offence on

the indictment was murder, it must also be so where the victim did not die and the charge throughout was one of attempted murder. On behalf of the Crown, Mr. Robert Fischel, Q.C. submits that this assumption was well founded, even if it resulted in anomalies because it flowed from the clear language of the statute.

26 We do not accept this submission or the assumption which it seeks to support. There is a clear distinction between the language of s.59(1)—"shall be sentenced to imprisonment for life"—and the language of s.8—"shall . . . be liable to be punished in the same manner." In our judgment, whilst the language of the former is plainly mandatory, that of the latter is not. Its purpose is to fix the maximum, not a mandatory sentence. This interpretation is consistent with s.13(2) which, when dealing specifically with conspiracy to murder, used the language of "liable to imprisonment for life" and not the mandatory "shall be sentenced to imprisonment for life." It is unthinkable that an offence which only just crossed the threshold of conspiracy to murder should attract a mandatory life sentence for each and every conspirator, however great or small his role. There would also be other anomalies. On the charge of murder, a defendant, even one who had intended to kill, might succeed in being convicted only of manslaughter, for example by reason of provocation. In such a case, there would no longer be a mandatory life sentence. He might receive a determinate sentence. It would be odd if, in a case in which the facts were changed only by the survival of the victim, there would be a mandatory sentence of life imprisonment (provocation not being a defence to attempted murder).

27 For these reasons we consider that the law in force at the time of these offences did not impose a mandatory sentence of life imprisonment.

(ii) ***What fraction of the notional determinate sentence constitutes the tariff or minimum period?***

28 When a life sentence is imposed, the question arises: how much of it must be served before the prisoner is eligible to be considered for parole? It is this portion which is usually described as the minimum period or the tariff. It is common ground that it is arrived at by identifying what the determinate sentence would have been if it had not been necessary to impose the life sentence and then subtracting from that notional determinate sentence a fraction or percentage of it, just as a prisoner serving a determinate sentence may be considered for early release or parole when he has completed a part of his sentence.

29 In each of the present cases, the sentencing judge proceeded on the basis that the minimum period or tariff should be one half of the notional determinate sentence. This reflects the view of this court, expressed *obiter* in the first sentencing appeal of *Bonnici* (Criminal Appeal No. 4 of 2012).

Mr. Salter submits that that approach, which replicates the approach taken in England and Wales, is not appropriate in Gibraltar where the statutory framework for early release or parole is different.

30 In England and Wales, the relevant statutory provision is s.82A(3) of the Powers of Criminal Courts (Sentencing) Act 2000 which provides that the minimum period of a discretionary life sentence shall be fixed by the court taking into account, among other things, the seriousness of the offence and the early release provisions, "as compared with [section 244(1) of the Criminal Justice Act 2003]." In *R.* v. *Sullivan* (4), which was concerned with the minimum period in relation to mandatory life sentences for murder, the Court of Appeal Criminal Division said ([2004] EWCA Crim 1762, at para. 7):

> ". . . [I]n order to compare a minimum term with a determinate sentence it is necessary approximately to double the determinate sentence. This is because in the case of a sentence of a fixed duration the offender is either released or eligible for parole at the half way stage."

31 We apprehend that the court meant "halve" rather than "double" the notional determinate sentence.

32 In cases of discretionary life sentences, half of the notional determinate sentence had already been identified as the norm in *R.* v. *Szczerba* (5) and it was reiterated, notwithstanding intervening legislative amendments, in *R. (Foley)* v. *Parole Bd.* (7), where Treacy, J. said ([2012] EWHC 2184 (Admin), at paras. 64–65):

> "64 In the case of an indeterminate sentence the punitive element is normally regarded as having been reached at the half way point of the [notional determinate] sentence. That is the guidance given by Szczerba and which has been applied by judges up and down the country for the last decade. Although part of the rationale . . . no longer applies because of changes in practice, the rule provided by Szczerba remains in place in its own right . . .
>
> 65 Moreover once the tariff period has expired, the Parole Board is considering further time in custody solely on the basis of risk."

33 In Gibraltar, the legislation governing early release on parole is different. There is a single provision, now s.54(1) of the Prison Act 2011, which provides:

> "Subject to subsections (2) to (8) [which are concerned with subsequent stages], the Minister shall act on the advice of the Parole Board and may release on licence—
>
> (a) a person serving a sentence of imprisonment or detention for a determinate period, after such person has served not less

> than one-third of his sentence, or six months, whichever expires the later . . ."

34 Thus, there is no adjustment to one half in respect of longer determinate sentences.

35 Generally, a discretionary life sentence is only passed when the court is dealing with an offender who is likely to remain a serious danger to the public for an indeterminate period, often by reason of mental illness. The notional determinate sentence indicates the sentence he would have received but for the unforeseeability of the period of danger and the minimum period relates to the point at which, but for the continuing risk factor, he would have been eligible to be considered for parole. The underlying assumption is that consideration for parole should come on to the agenda at or about the time when it would do so for an offender serving a determinate sentence but of course the actuality of parole will not arise until the body entrusted with the subsequent assessment of risk is satisfied that an offender serving a life sentence no longer constitutes a serious danger to the public. As the English authorities demonstrate, there is a rational link between the judicial task of fixing the minimum period and the statutory role of the Parole Board in risk assessment. The offender should serve the tariff period called for by his offence but further incarceration is only justified if he remains a serious risk.

36 In these circumstances, we do not consider that, in a jurisdiction where even a very long determinate sentence carries a right to consideration for parole at the one-third stage, it is justified to maintain a minimum period norm of one half of the notional determinate sentence in cases of life imprisonment. That would be to subvert the rationale for the minimum. Indeed, on behalf of the Crown, Mr. Fischel appears to accept this. His submission is that the starting point should be one third rather than the halfway stage but that it remains permissible for the sentencing judge to increase the minimum above one third if other factors such as the seriousness of the offence so require.

37 We do not accept that aspect of Mr. Fischel's submission. The seriousness of the offence, leaving aside the question of the unforeseeability of future danger, is already factored into the notional determinate sentence. The only justification for keeping the life prisoner in custody for longer than his determinate sentence comparator is the element of continuing risk. For these reasons we conclude that in Gibraltar the minimum period should normally be one third rather than one half of the notional determinate period (with adjustment for time spent in custody on remand).

Sentence in the case of *Celecia*

38 Celecia's sentence is one of life imprisonment with a minimum period of 10 years.

39 The first thing that we have to decide is whether it is appropriate that Celecia should have a discretionary life sentence now that we have held that a life sentence was not mandatory. The guiding principle is that stated by Lord Bingham, C.J. in *Att.-Gen.'s Ref. (No. 32 of 1996)* (1) ([1997] 1 Cr. App. R. (S.) at 265):

> "It is therefore plain that evidence of an offender's mental state is often highly relevant, but the crucial question is whether on all the facts it appears that an offender is likely to represent a serious danger to the public for an indeterminate time."

40 It is clear that the simple facts of this case point to an offence of great seriousness. Celecia, then aged 49, lured an innocent woman to his home and, as soon as she arrived, he stabbed her twice in her chest and neck. She was fortunate to survive. The offence was premeditated, he intended to kill her and the judge detected no remorse.

41 The judge had before her a psychiatric report from Dr. Antonio Segovia Martin. There was no later report from him or from anyone else. At the hearing before us, consideration was given to obtaining a current report from the psychiatrist responsible for Celecia's mental health treatment in prison but in the end Mr. Salter, wisely in our view, was content to proceed on the basis of Dr. Segovia Martin's report. His conclusion was that, when he saw Celecia in October 2011, the diagnosis was one of paranoid schizophrenia. There was a long history of substance misuse and repeated psychotic episodes. There had been 18 admissions to the psychiatric hospital, mostly relating to psychotic episodes precipitated by substance misuse. Although the symptoms responded to medication, relapses occurred when he "systematically stopped medication." There was also a mental and behavioural disorder due to his use of benzodiazepines.

42 Although Celecia had reached middle age with only relatively modest previous convictions, it is plain from his personal history as set out in Dr. Segovia Martin's report, his diagnosis and the worrying facts of this attempted murder that the threshold described in *Att.-Gen.'s Ref. (No. 32 of 1996)* was passed in this case. We are satisfied that Celecia fell to be sentenced as someone likely to represent a serious danger to the public for an indeterminate time. We consider that a discretionary life sentence was and remains appropriate.

43 We turn to the notional determinate sentence and the tariff period. When the judge decided that the notional determinate sentence, following a trial, was 20 years, she did so by reference to the Definitive Guideline on Attempted Murder published by the Sentencing Guidelines Council in July 2009. They apply to offences in England and Wales committed on or after July 27th, 2009. They significantly increased the tariff for attempted murder. This was because, once the provisions of the Criminal Justice Act 2003 had come into force, the tariff in relation to mandatory life sentences

for murder had been significantly increased and it was therefore logical and necessary to increase sentences for attempted murder. However, the corresponding increase in the murder tariff in Gibraltar did not occur until the enactment of s.513 of the Criminal Procedure and Evidence Act 2011, which was not in force at the time of this attempted murder. In the light of this, it is now common ground that it was not appropriate in this case for the judge to rely on the Definitive Guideline published by the Sentencing Guidelines Council in relation to an offence committed in July 2010. Accordingly, any guidance from England and Wales has to be based on the approach of the Court of Appeal, Criminal Division before the increase in the tariffs in that jurisdiction for murder and attempted murder. To the extent that this court in the first sentencing appeal of *Bonnici* expressed a contrary view, *obiter*, we respectfully decline to follow it. As we have indicated, we are reinforced in this position by the present stance of the Crown.

44 What, then, is the correct tariff period in relation to Celecia's sentence of life imprisonment? We must keep in mind that the offence is based on an intention to kill. We also acknowledge that mental illness can mitigate the notional determinate sentence but the scope for that is significantly reduced when the mental illness is caused or exacerbated by substance abuse and there is a history of failure to take prescribed medication. When we stand back and consider the dreadful nature of this offence, together with the lack of mitigation which would have arisen from a guilty plea or other manifestation of remorse, we conclude that the correct notional determinate sentence was not quite as high as the 20 years fixed by the judge but was one of 17 years, with credit for the time spent on remand. To that we apply the discount of two thirds, to which we referred earlier, with the result that we allow Celecia's appeal against sentence and substitute a sentence of life imprisonment with a minimum period of 5 years and 8 months. He remains entitled to credit for the period on remand prior to his admission to bail.

Sentence in the case of *Bonnici*

45 In the case of *Bonnici*, Mr. Salter concedes that a sentence of life imprisonment was and remains inevitable and that the Chief Justice was justified in constructing the minimum period on the basis of consecutive notional determinate sentences for the two offences of wounding Dr. Khan with intent to cause him grievous bodily harm and the attempted murder of Mr. Feetham. The submission is that the consecutive notional determinate sentences totalling 24 years and 8 months were manifestly excessive.

46 As in the case of *Celecia*, the notional determinate sentence was arrived at by reference to the English Guideline and the minimum period was fixed at one half on the same basis. As we have indicated, we consider this to have been erroneous in both respects. We must therefore consider

what the notional determinate sentence should have been before quantifying the minimum period on the basis of one third of it.

47 Both offences committed by Bonnici were particularly heinous. Dr. Khan was at work in his hospital and had done absolutely nothing to incur Bonnici's wrath. He was viciously attacked and was left with physical and profound and enduring psychological damage. Mr. Feetham was attacked in a public place in the presence of his and other children. It was an attempt to assassinate a government minister. In submitting that a total determinate sentence of almost 25 years on the basis of 8 years plus 16 years 8 months was too long, Mr. Salter submits that, as a starting point, it was vitiated not only by reference to the inapplicable English Guidelines but also by the failure to have regard or sufficient regard to the mitigating factor of mental illness which, unusually, remained undiagnosed and untreated at the time. It is accepted that mental illness can be a mitigating factor. In addition, there was the mitigating factor of guilty pleas, albeit not at the earliest opportunity.

48 We find this to be a particularly difficult case. The offences were, frankly, outrageous. Moreover, the attempt to kill Mr. Feetham occurred when Bonnici was on bail for the appalling attack on Dr. Khan. There is no doubt that notional determinate sentences had to be consecutive but with an eye on totality. We gain little assistance from the English authorities preceding the guidelines because they do not include a truly comparable case. The cumulative gravity of these offences takes the starting point to the top of the respective determinate brackets. Although we arrive at it through a different route, we consider that the consecutive determinate sentences should reach the sort of starting point adopted by the Chief Justice, namely 25 years. From that there should be a modest discount for guilty pleas. We do not disagree with the 10% postulated by the Chief Justice. The potential mitigation of undiagnosed mental illness seems to us to have some but rather limited value, having regard to Bonnici's history as disclosed in the psychiatric reports of Dr. Kennedy Herbert and the aggravating feature of the attempted murder having been committed whilst on bail. For this uniquely disturbing combination of circumstances, we consider that the appropriate notional determinate sentence, even after modest reduction for the features to which we have referred, should be 23 years. To this, however, we must apply the bigger discount to which we have referred. This produces a minimum period of 7 years 8 months (with credit to be given for time spent in custody on remand). To that extent, Bonnici's appeal is allowed.

49 Finally, we add this in respect of both cases. When members of the public read or hear of minimum periods, they sometimes believe and fear that prisoners will automatically or probably be released at that stage. That is not the case. Neither of these men will be released until the point after their respective minimum periods at which the Parole Board feels able, on

up-to-date information, to recommend to the Minister that the offender no longer constitutes a serious danger to the public. It is not for us to determine when, if ever, that will be. There is no material before us to suggest that it will be in the near future.

Order accordingly.