

## **BROADCASTING CROWN COURT SENTENCING – A TENTATIVE STEP FORWARD FOR OPEN JUSTICE?**

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### **Introduction**

On the 28<sup>th</sup> July 2022, the case of R v Ben Oliver (2022) made history, when the sentencing remarks<sup>1</sup> of Munro J were filmed and broadcast from The Old Bailey, marking the first time cameras were allowed into the Crown Courts under the auspices of the Crown Court (Recording and Broadcasting) Order 2020 (“the 2020 Order”). This represented a significant development in the ongoing realisation of open justice in fact rather than simply in theory. This much-vaunted principle dictates that all should be able to see the inner workings of the courts. However, how to meaningfully realise this has long been a matter of debate.

The full 19-minute-long sentencing remarks were filmed and broadcast live shortly after 10:40am on TV news channels (including Sky News and BBC News) before being uploaded in full onto a YouTube channel hosted by Sky News<sup>2</sup>. Short extracts were then shown on news programmes on all major TV channels including on both lunchtime and evening news bulletins, such extracts typically being no more than about 10 seconds each (for example, on lunchtime ITV and BBC bulletins). To complement this, journalists and commentators on these programmes explained the significance of the occasion and gave insight into the difficult balancing act faced by the judge in weighing up the evidence, the aggravating and mitigating factors and remaining true to the relevant sentencing guidelines. The event was covered by over 100 UK online and print news sources that day and the following day. This short commentary seeks to both explain and examine this event; and consider what it might suggest for open justice going forward.

### **The Background**

Under s41 of the Criminal Justice Act 1925, the taking of photographs in Court is prohibited, as is sketching or attempting to sketch any person in Court with a view to publication. Additionally, the recording of proceedings was prohibited under s9 of the Contempt of Court Act 1981. Not only is it a criminal offence, but also a matter of contempt. Although the principle of Open Justice is a cherished one, the public right (Scott v. Scott<sup>3</sup>) to attend in person to observe judicial proceedings does not carry with it the right to take photographs. Martin Dockray<sup>4</sup> posited that the cause of the legislation was the publication in 1912 by the Daily Mirror of a photograph of the Judge passing the death sentence in the Frederick Seddon case, deemed to be shocking at the time. However, audiences have become being used to seeing photographs in newspapers and then subsequently of course film and television coverage of crime (both true crime and fiction). Indeed, there appeared to be a general aversion to inviting the public to observe matters of the state; yet when broadcasts of

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<sup>1</sup> The full sentencing remarks have been published and are available on the Judiciary website at <https://www.judiciary.uk/wp-content/uploads/2022/07/R-v-Ben-Oliver-Sentencing-Remarks.pdf> (accessed on 13.09.2022)

<sup>2</sup> Accessible at [Cameras in court: Man jailed for life in first TV court sentencing - YouTube](#) (accessed on 13.09.2022)

<sup>3</sup> Scott v. Scott [1913] A.C. 417

<sup>4</sup> Martin Dockray, “Courts on Television”, (1988) 51 Mod Law Rev. 593

Parliamentary proceedings began, the fabric of society not only remained intact but was arguably strengthened by the enhanced scrutiny and understanding offered<sup>5</sup>.

The drama of court proceedings is inherently televisual and since the days of the programme *Crown Court*<sup>6</sup>, broadcasters have been seeking to broadcast criminal cases. The experiences of the USA provided insight. There has been the long running dedicated Court TV channel<sup>7</sup> and there have been a number of high profile broadcasts, in particular the OJ Simpson trial. Such examples have both whetted the appetite and also horrified some commentators – Helena Kennedy writing in *The Guardian* in 2013<sup>8</sup> warned that witnesses may be deterred from giving evidence, victims might not come forward, and that the behaviour of lawyers and judges may be altered should cameras be permitted in Courts.

Television cameras have been admitted into the courts by means of a stealthy operation, first in Scotland, then in the Supreme Court and then (in 2013) into the Court of Appeal. The legislation for the latter (s32 of the Crime and Courts Act 2013) was sufficiently wide to allow a trial of filming sentencing remarks, which now the 2020 Order has implemented.

### **The Justification**

The Government appears to consider this change definitively in favour of open justice. Former Lord Chancellor Dominic Raab in the press release concerning the Ben Oliver case<sup>9</sup> stated that this was a move for transparency, asserting that

“The public will now be able to see justice handed down, helping them understand better the complex decisions judges make”

thereby reinforcing public confidence in the judiciary. Of course, the principle of Open Justice gives the public the right to attend courts, though this is limited by physical space, lack of knowledge and (increasingly) distance from courts. Even with more use of digital proceedings, the courts appear reluctant to promote access without creating hurdles. In their absence, the press is therefore *de*

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<sup>5</sup> The House of Lords was first broadcast on TV in January 1985 as an experiment, which soon became permanent. Live broadcasting of Parliament began in 1989. Lord Soames, arguing in favour of the broadcasting of the Lords, said that television had become the: "most important and influential medium of communication - and certainly not one to be ignored if we wish attention to be paid by the general public to our business in this House".

<sup>6</sup> *Crown Court* was produced by Granada Television and ran from 1972 to 1984. Broadcast on early afternoons, *Crown Court* presented fictional courtroom dramas spread across three consecutive 25-minute programmes with the action confined to the courtroom. The prosecution and defence cases would be presented and then a jury of members of the general public would come to a verdict based on the evidence they had heard. The jury verdict was unscripted.

<sup>7</sup> Court TV commenced broadcasting in 1991 until 2006 when it was rebranded as TruTV, In 2019, Court TV was relaunched as a digital TV channel

<sup>8</sup> Helena Kennedy, "Cameras In Court are a threat to justice", *The Guardian* 3 November 2013 (accessed at [Cameras in court are a threat to justice | Helena Kennedy | The Guardian](https://www.theguardian.com/uk-news/2013/nov/03/cameras-in-court-are-a-threat-to-justice) on 13.09.2022)

<sup>9</sup> Gov.uk (27 July 2022) Accessed at <https://www.gov.uk/government/news/crown-court-sentencing-remarks-to-be-broadcast-for-first-time> on 13.09.2022)

*facto* the eyes and ears of the public<sup>10</sup>. However, research (such as Davies (1998)<sup>11</sup>, Moran (2014)<sup>12</sup>, Chamberlain and others (2019)<sup>13</sup>) has shown that very few cases are ever covered in the press, let alone on television.

### **Is There Going To Be An Increase In Coverage?**

It is highly unlikely that the public will see many cases covered this way.

Under the 2020 Order, only authorised news broadcasters are permitted to film cases, these being the BBC, ITN, Sky and Press Association only, and the Lord Chancellor must authorise any further organisations<sup>14</sup>. Broadcasters wanting to cover a case must apply to the trial Judge who has discretion to refuse or allow taking (inter alia) reporting restrictions into account, and such application must be made at least 5 working days in advance. As such, only cases that have attained some considerable interest are likely to be considered for broadcast. Should local and regional media, and indeed national media beyond those specified above (such as GB News and print media with websites such as the Daily Mail/Mail online) wish to facilitate broadcast, they would need to apply to the authorised broadcasters further in advance to ask them to apply to the trial Judge for permission to broadcast.

Secondly, only cases heard by a High Court Judge or a Senior Circuit Judge can be broadcast at present. This will again reduce the scope for coverage, as this will inevitably mean only the most serious kinds of trials will be eligible. This will inevitably lead to preference of major courts, like the Old Bailey at the expense of regional Crown Courts. Given that filming could be done with lightweight handheld cameras, it would not be necessary to install equipment in all courtrooms. Similarly, with the experience of digital courts, filming could be carried out using the same CVP technology used for that. Indeed, there should be no logistical barriers to covering sentencing in the Magistrates Courts, an aspect of justice that is severely under-reported. Instead, the barriers are legal and strategic – the law makes no provision for this currently, presumably because it is assumed there is no appetite to broadcast such matters. As Lord Keen of Elie commented in the Parliamentary debate on the 2020 Order, these provisions are seen as a “toe in the water”, commenting “(w)e are proceeding here very carefully”.<sup>15</sup> We might question whether this really is transparency in a meaningful sense, or merely a symbolic nod to open justice?

### **Will The Public Get Greater Understanding?**

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<sup>10</sup> Lord Judge argued that ‘(w)ithout the commitment of an independent media the operation of the principle of open justice would be irremediably diminished’ (R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs, [2010] EWCA Civ 65

<sup>11</sup> Davies N (1998) The decline of the court reporter. Available at: <http://www.nickdavies.net/1998/11/01/the-decline-of-the-court-reporter/>

<sup>12</sup> Moran L (2014) Mass-mediated ‘open justice’: Court and judicial reports in the Press in England and Wales. *Legal Studies* 34(1): 143–166

<sup>13</sup> Chamberlain, P., Keppel-Palmer, M., Reardon, S., & Smith, T. (2021). It is criminal: The state of magistrates’ court reporting in England and Wales. *Journalism*, 22(9), 2404–2420.

<sup>14</sup> In the debate about the 2020 Order Lord Keen of Elie on behalf of the Government made it plain that only these organisations would be authorised by the Lord Chancellor, and such authorisation can be withdrawn. Hansard, Vol 803 Monday 8<sup>th</sup> June 2020 ([https://hansard.parliament.uk/lords/2020-06-08/debates/ABB51149-34F3-46FF-87CF-8F2AD0354F00/CrownCourt\(RecordingAndBroadcasting\)Order2020](https://hansard.parliament.uk/lords/2020-06-08/debates/ABB51149-34F3-46FF-87CF-8F2AD0354F00/CrownCourt(RecordingAndBroadcasting)Order2020) accessed 13.09.2022)

<sup>15</sup> *ibid*

Given the prevalent news values around crime and courts – sex, violence and celebrity primarily<sup>16</sup> – it would seem unlikely that cases selected for broadcast for sentencing remarks would differ from those that have been covered previously by TV broadcasters using traditional (albeit indirect) reporting methods, such as the reporter outside the court. The member of the public is unlikely to get a broader view of the work of the courts than before.

The selection process and criteria for the judiciary to allow broadcast will need to develop of course. *R v Ben Oliver* fit dominant news values - a guilty plea to manslaughter, an autistic defendant who had suffered the trauma of sexual abuse, a chaotic and troubled family background, and the violent killing of an elderly relative who had (allegedly) abused members of the family. Judge Sarah Munro carefully and empathetically rehearsed all of these factors in sentencing Oliver and viewers of the full 19 minutes of the sentencing remarks would have been aware of these; viewers of the clips shown on the lunchtime news would not have been without further context. This again suggests a snapshot approach may have the unwanted effect of misleading the public who don't have the full picture, thus undermining the purpose of broadcasting sentencing remarks.

The value of this development will be primarily seen by those who watch the sentencing remarks in full, thus understanding the complexities in the round. At the time of writing<sup>17</sup>, the full sentencing could be seen on a YouTube channel hosted by Sky News (Sky News- Courts<sup>18</sup> viewed by 12,100 people although another YouTube video of the remarks hosted by Sky<sup>19</sup> has 554k views) and another by GB News<sup>20</sup> which has garnered 25k views.

Comments have been disabled on the Sky channel, but there have been over 400 comments on the GB News channel. Many of these show considerable sympathy and empathy with the defendant with many commenters highlighting the defendant's past and the nature of the abuse perpetrated on him. A number of commenters took a stance on the sentence passed with views ranging from the perceived leniency of a life sentence (Oliver was sentenced to serve a minimum of 9 years and 8 months) to others castigating the Judge for passing such a perceived long sentence, suggesting that Oliver had been failed by "the system". It is of course difficult to say whether all commenters had watched the sentencing remarks in full, but one could speculate that greater context around sentencing guidelines might be needed for the viewers to understand the rationale for sentence length. A further strand of comment discussed the televising of the courts generally; while a small minority appreciated that this could increase transparency, a greater proportion bemoaned the "Americanisation" of justice and argued that courts should not be broadcast at all. Future research will be needed to track the perception the public has of the courts as a result of direct broadcasting, but these comments provide a novel insight into the perception of those engaging with a form of open justice.

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<sup>16</sup> For consideration of news values in Court Reporting, see particularly Jones P, Wardle C (2008) No emotion, no sympathy: The visual construction of Maxine Carr. *Crime, Media, Culture* 4(1): 53–71; Soothill K, Walby S (1991) *Sex Crime in the News*. London: Routledge. For more wider consideration of news values generally, see (inter alia) Galtung J, Ruge MH (1970) The structure of foreign news: The presentation of the Congo, Cuba and Cyprus crises in four foreign newspapers. In: Tunstall J (ed.) *Media Sociology: A Reader*. Urbana, IL: University of Illinois Press, pp. 259–298; Harcup T, O'Neill D (2016) What is news? *Journalism Studies* 18(12): 1470–1488.

<sup>17</sup> 15<sup>th</sup> August 2022 (updated 13<sup>th</sup> September 2022 – after an initial surge of views, there have been few views recorded in the month between first views count and the updated count. This may indicate that the sentencing remarks have a short lifespan in the public interest).

<sup>18</sup> Accessible at <https://www.youtube.com/watch?v=pUxrgS2hNpQ&t=56s> (accessed on 13.09.2022)

<sup>19</sup> Accessible at <https://www.youtube.com/watch?v=X2NZtcfqjDs&t=62s> (accessed on 13.09.2022)

<sup>20</sup> Accessible at <https://www.youtube.com/watch?v=swVPzXzGHHg&t=85s> (accessed on 13.09.2022)

## **The Future**

R v Ben Oliver is the first case of its kind to be broadcast but will not be the last. The Courts, the Judiciary, and the Broadcasters will need to be transparent about how cases are selected and should work to reflect the wider work of the criminal courts – not just a snapshot of rarer cases. It is a tentative step forward for open justice, but one that is somewhat restricted, and remains an arguably lukewarm gesture. Full trials are unlikely to be covered any time soon, but there is no clear reason why sentencing remarks in all Crown Court cases and all Magistrates' Courts cases could not be filmed and made available to the public in some form. If the Government and courts are serious about making justice truly accessible, this should be seen as the beginning of a new journey for open justice and not the end of the road.