IN THE COURT OF APPEAL
CRIMINAL DIVISION

CASE NO 202103340/A3
NCN [2022] EWCA Crim 1116

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 21 July 2022

Before:

THE VICE-PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)
(LORD JUSTICE HOLROYDE)

MR JUSTICE JAY

MR JUSTICE BENNATHAN

REGINA
v
THOMAS SALMON

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Lower Ground, 18-22 Furnival Street, London EC4A 1JS
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MR M SOREL-CAMERON appeared on behalf of the Appellant.
MR B REECE appeared on behalf of the Respondent

J U D G M E N T

1. THE VICE-PRESIDENT: This appellant pleaded guilty to an offence of assault occasioning actual bodily harm, contrary to section 47 of the Offences Against the Persons Act 1861 (count 1) and an offence of assaulting an emergency worker, contrary to section 39 of the Criminal Justice Act 1988 and section 1 of the Assault on Emergency Workers (Offences) Act 2018 (count 2). For each offence he was made subject to a Hospital Order pursuant to section 37 of the Mental Health Act 1983 with a Restriction Order pursuant to section 41 of that Act. He now appeals against his sentence by leave of the single judge.
2. The appellant is now aged 57. He has the misfortune to have suffered from mental health problems for many years, and has spent periods of time as a psychiatric in-patient. Each of the three consultant forensic psychiatrists who has prepared a report in this case has diagnosed him as suffering from paranoid schizophrenia. His disorder is chronic and treatment-resistant.
3. The appellant had previously been sentenced on 16 occasions for a total of 31 offences, none of them particularly serious in itself. Between 2004 and 2008 his convictions included offences of possessing a bladed article, assaults on police and harassment.
4. In June 2019 a neighbour accused the appellant of assault. The appellant was arrested and was later charged with an offence contrary to section 20 of the Offences Against the Person Act 1861. That charge was ultimately left to lie on the file. Following that arrest the appellant was admitted to a psychiatric Intensive Care Unit. The present offences were committed whilst at that Unit.
5. On 20 August 2019 he was acting in an aggressive and hostile manner. He threw the contents of a cup of lukewarm coffee at a ward matron, Ms Cunningham. Some of the coffee struck her face, but she suffered no injury, pain or discomfort. That was the count 2 offence.
6. It appears that a general instruction had been given that the appellant should not be given hot drinks, in case of similar events. A week later however, in the course of an argument with staff, he threw the contents of another cup of coffee at a clinical support worker, Ms Evelyn-Dipper. This time the coffee was hot and caused the side of Ms Evelyn-Dipper's face to blister. Three months later an area of darker pigmentation of the skin could still be seen where the coffee had struck her. That was the count 1 offence.
7. The appellant was subsequently admitted to a Low Secure Unit, but in April 2020 he was discharged into the community. It appears that his antipsychotic medication ceased the following month.
8. The criminal proceedings were protracted. At a hearing in March 2021 the appellant was remanded in custody. Within a short time he was assessed as being acutely unwell and was transferred to a mental health unit pursuant to section 48 of the Mental Health Act 1983. Reports were thereafter prepared assessing his fitness to plead. He eventually pleaded guilty to both offences on 5 August 2021.
9. At the sentencing hearing on 29 September 2021, before HHJ Levett in the Crown Court at Ipswich, the judge was assisted by a number of psychiatric reports. He also heard oral evidence from one of the consultants. In the circumstances, no pre-sentence report was necessary and none is necessary now.
10. Dr Thomas, in a report dated 12 May 2021, noted that the appellant, who had been

receiving antipsychotic medication for about a week since his admission to hospital, was currently in isolation because he was floridly psychotic and aggressive. There was a long history of psychosis and of discontinuing medication when in the community. He was not currently fit to plead. Dr Thomas recommended a Hospital Order with a Restriction Order "given the charges that have been shared with me, his psychiatric history and his behaviour over the last week where he has been secluded due to his risk of violence to others".

11. In a further report dated 20 July 2021, Dr Thomas said that the appellant had received increasing doses of medication over the preceding 2 months and was now fit to plead. However, his mental state had only been stable for a relatively brief period and many of his delusions remained treatment-resistant. Dr Thomas continued to recommend a Hospital Order with a Restriction Order.
12. Dr Broughton, instructed by the appellant's then solicitors, provided a report dated 7 June 2021. He also regarded the combination of a Hospital Order with a Restriction Order as appropriate, having regard to the risk to the public. He repeated that view in a further report dated 27 August 2021, noting that the appellant did not believe he was unwell and would not accept medication unless detained in hospital. The appellant's insight into his mental illness and its correlation with his future risk of violence remained impaired and, in the doctor's opinion, the public protection imperative, outlined under section 41, continued to be engaged.
13. Thus the written expert evidence before the judge was wholly supportive of the making not only of a Hospital Order but also of a Restriction Order.
14. Dr Thomas gave oral evidence at the sentencing hearing. He confirmed the diagnosis and explained:

> "Mr Salmon has been ill since his late teens and his history is he gets medicated and then discharged and as soon as he is in the community he stops taking treatment and starts using illicit substances. When people with schizophrenia do these two things their prognosis is very poor, and he is now at a point where even though he is on injectable medication he still has delusions."

15. Dr Thomas said that the appellant was insistent that as soon as he was discharged he would stop taking his medication, an intention which the applicant himself effectively confirmed in his interventions during this stage of the hearing.
16. Dr Thomas acknowledged that the offences of which the appellant had been convicted were at a low level of seriousness, but he made two points. First, that those with mental disorders are often not prosecuted or have charges dropped because of an understandable wish for them to be dealt with by mental health services rather than by the courts. Secondly, that he could see an increase in the appellant's aggression and an increasing resistance to treatment. Although the risk of violence was effectively managed in hospital, the appellant would not engage with mental health services in the community.
17. Dr Thomas explained that when discharged from a section 37 Hospital Order, the appellant would follow a managed route to sheltered accommodation under a Community Treatment Order (“CTO”). Such an Order would require the appellant's co-operation. He would be prescribed weekly injectable medication and, if he did not take it, the CTO

would be rescinded and he would be brought back to hospital under a section 37 Order. If a section 41 Restriction Order were made, discharge would require consideration of the case by a Tribunal or the Secretary of State's representative.

18. The hearing inevitably took some time. Unfortunately, it did not run entirely smoothly. The court had a heavy list, and the judge was trying to accommodate both this hearing and an ongoing trial. At the start of the morning he heard prosecution counsel's opening and the oral evidence of Dr Thomas. He then put the remainder of the hearing back to 4.00 pm so that he could continue the part-heard trial.
19. When this case was resumed in the afternoon, the judge began immediately to give his sentencing remarks. The appellant interrupted repeatedly, criticising and sometimes abusing the doctors and the judge. The judge continued despite those interruptions. After some time, when it appeared he had in mind not only a Hospital Order but also a Restriction Order, defence counsel, then as now Mr Sorel-Cameron, reminded the judge that he had not yet made his oral submissions as to whether a Restriction Order should be made, although he had put in written submissions in that regard. The judge heard Mr Sorel-Cameron's submissions and then made the orders to which we have referred. He stated that, in the light of Dr Thomas's evidence, he regarded the Restriction Order as necessary to protect the public from serious harm, taking into account the high risk of further offences and the appellant's worsening attitude.
20. By section 37 of the Mental Health Act 1983, where an offender is convicted of an offence punishable with imprisonment and certain evidential requirements are satisfied, the court may order that he be admitted to and detained in a hospital. Subsection (2)(b) requires the court to be:

> "... of the opinion, having regard to all the circumstances including the nature of the offence and the character and antecedents of the offender, and to the other available methods of dealing with him, that the most suitable method of disposing of the case is by means of an order under this section."

21. Section 41(1) of the 1983 Act gives the Crown Court the power to restrict the offender's discharge from hospital if:

> "... it appears to the court, having regard to the nature of the offence, the antecedents of the offender and the risk of his committing further offences if set at large, that it is necessary for the protection of the public from serious harm so to do..."

22. Again, there are certain evidential requirements which must be satisfied.
23. In deciding whether a Restriction Order is necessary to protect the public from serious harm, the court should consider all relevant circumstances including the nature of the instant offence, the antecedents of the offender and the risk of his committing further offences.
24. The 1983 Act does not itself contain a definition for this purpose of "serious harm". In the context of the sentencing of dangerous offenders, section 306 of the Sentencing Act 2020 defines "serious harm" as meaning "death or serious personal injury whether physical or psychological". We are not immediately persuaded that that test can be read

directly across to the different context of the Mental Health Act, not least because in well-established case law such as R v Birch (1990) 90 Cr App R(S) 78, it was held that the harm "need not be limited to personal injury". We need not however explore that question further, because we accept that where, as here, the harm foreseen is in the category of physical or psychological injury, the court should apply the test of the risk of death or serious injury.

25. The single judge, when granting leave, directed that a further psychiatric report be obtained. It has been provided by the appellant's current responsible clinician, Dr Abrar and is dated 27 May 2022. Dr Abrar records that the appellant's overall presentation has been characterised by paranoid persecutory delusions and thought interference. He continues, as we note he has done over many years, to accuse various persons of being witches, who cast spells, interfere with him telepathically and get him into trouble. His mood fluctuates, and he becomes angry when challenged about his medical condition and treatment. He continues to lack insight into those matters and, although compliant with his weekly medication in the hospital, he repeatedly states that he does not need to take it. There have been episodes of verbal aggression, but these have easily been managed by staff and there has been no violence. It has not been possible to complete psychological treatment relating to the instant offences because the appellant does not view himself as at fault and does not believe he is unwell.
26. Dr Abrar assesses the appellant's mental health disorder as relapsing and remitting in pattern and remaining moderate in intensity. His ongoing detention in hospital is appropriate, but the plan is for managed transition to the community. The appellant has in the past been managed on a CTO "with partial success due to his substance misuse issues and non-compliance with medication". Dr Abrar's opinion is that a Restriction Order "is unlikely to provide any additional safeguards as compared to those provided by a CTO".
27. The sole ground of appeal is that in the circumstances of this case it was not necessary for the protection of public from serious harm to impose a Restriction Order, and the judge was accordingly wrong to do so. No challenge is made to the making of the Hospital Order.
28. In his very thorough and careful submissions on behalf of the appellant, Mr Sorel-Cameron points to the following features of the case. The present offences were committed some 11 years after the appellant's last previous conviction; they caused no serious injury, and were not intended to do so; the appellant had only twice before been convicted of an offence involving an assault; he has never in the past been convicted of any offence which resulted or was intended to result in serious injury: on the contrary, all his convictions involved a low level of offending. All that is so despite the fact that he has for long periods been in the community, suffering from a severe psychiatric condition and not taking his medication, and he has not been accused of any further offence since August 2019.
29. Mr Sorel-Cameron accepts that there was a basis on which the judge could properly find that there was a high risk that the appellant, if in the community and unmedicated, would assault others; but, he submits, that is very different from a risk that the appellant will cause serious harm. His core submission is that there was simply no evidential basis on which the judge could find a risk of serious harm.
30. Mr Sorel-Cameron has drawn our attention to a number of cases in which this court

quashed a Restriction Order. Those, however, were case-specific decisions; and we note that they were cases in which the judge, though not of course bound by the opinion of the reporting medical practitioners, had in fact made an order which was not recommended or supported by them. We therefore find those cases of limited assistance.

31. On behalf of the respondent, Mr Reece has submitted that the absence of any serious injury caused by the present offences has to be seen in the context of the appellant having access in hospital only to a hot drink, and then only by a lapse in the general instruction to which we have referred. Mr Reece submits that the judge had to have regard to the risk when the appellant is in the community, unmedicated because he will not take his medication, with easy access to more dangerous items and substances.
32. We are very grateful to both counsel whose respective written and oral submissions have been admirably focused and helpful.
33. We accept that none of the appellant's convictions has involved the actual or intended causing of serious harm. But as the judge said, the history of past offending was only one factor to be considered and was not decisive. The judge expressed the view that the risk was posed by the appellant's unpredictable nature and by his worsening attitude. We respectfully agree. The appellant has the misfortune to suffer from a serious psychiatric disorder. He has little or no insight into it, he denies that he is unwell and he can confidently be expected not to take his medication if he is able to avoid doing so. He continues to behave in an angry and aggressive manner, even in the hospital setting. We think it is a telling feature that, even in that setting, it was necessary to issue a general instruction that he should not be given any hot drink lest he use it as a form of weapon. It is also telling that his past management in the community has been only "partially successful".
34. We see force in the respondent's submission that the appellant's quick resort to the use of cups of hot liquid, when nothing more injurious was available to him, raises concerns as to the risk of serious harm he would pose in the community. We also bear in mind the common experience of the criminal courts that the use of even a moderate degree of physical violence can and, sadly often does, result in serious injury. In those circumstances the judge, who was plainly well aware of the serious consequences of the difficult decision he was making was, in our view, entitled to conclude on the evidence before him that a Restriction Order was necessary.
35. We do not think that Dr Abrar's recent report changes the position. In the light of Dr Thomas's oral evidence, there is no reason to disagree with Dr Abrar's view that the procedure for recall to hospital, after discharge, would follow a similar route whether or not a Restriction Order was made. But Dr Abrar does not, with respect, specifically address an important difference between the two processes, which is that the section 41 Order would place an additional restriction on discharge from hospital. It therefore focuses on precautionary measures before discharge rather than the procedure to be adopted after the appellant has been discharged. The reasons which Dr Thomas gave in his oral evidence for regarding a Restriction Order as necessary accordingly are not, in our view, undermined by Dr Abrar's report.
36. For those reasons, grateful though we are to Mr Sorel-Cameron for his diligence on the appellant's behalf, this appeal fails and is dismissed.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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