Neutral Citation Number: [2023] EWCA Crim 1288

Case No: 202203815 A3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT MAIDSTONE
MR RECORDER HARRIS
T20200542

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 November 2023

Before:

LORD JUSTICE STUART-SMITH
MR JUSTICE CHOUDHURY
and
HER HONOUR JUDGE SHANT KC

- -

Between:

REX

Respondent

- and -

JOSEPH HAWKRIDGE

Appellant

- -
- -

Jessica Peck (instructed by **Sonn Macmillan Walker**) for the **Appellant**
Antony Bartholomeusz (instructed by **CPS Appeals Unit)** for the **Respondent**

Hearing date: 11 October 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 3 November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Stuart-Smith:

1. On 9 December 2022 in the Crown Court at Maidstone, the Appellant faced an indictment alleging a single count of stalking involving serious alarm or distress contrary to section 4A(1)(b)(ii) of the Protection from Harassment Act 1967. Appearing before Mr Recorder Harris he pleaded not guilty to that offence but guilty to a lesser charge of harassment contrary to s. 2 of the same Act. He was then sentenced by the Recorder to 8 weeks' imprisonment suspended for 12 months, with a restraining order and a surcharge order also being imposed.

2. He now appeals against that sentence with the leave of the single judge. On his behalf Ms Peck, who represented him in the Court below, submits that the Recorder failed to give appropriate consideration to the effects of a custodial sentence upon the Appellant, should have given consideration to a mental health disposal pursuant to section 37 of the Mental Health Act 1983 ["the MHA"], and should have ordered a medical report to address a mental health disposal.

The factual and procedural background

3. The facts giving rise to the Appellant's conviction are unremarkable and do not need to be repeated in any detail. The harassment consisted of unwanted contact between July 2019 and May 2020 with a person with whom he had previously been in a relationship that had ended at her insistence in 2017. It was agreed between the parties that the offence should be categorised under the Harassment/Stalking Guideline as falling within category 1A, which would give a starting point of 12 weeks custody with a category range from a high-level community order to 26 weeks in custody.

4. In order to put the current appeal into context it is necessary to deal with the medical and procedural background leading up to and including the hearing on 9 December 2022.

5. The Appellant has a history of mental illness going back to 2017 and has a confirmed diagnosis of schizophrenia. From November 2021 the Appellant had been detained as an in-patient at the Cygnet Hospital in Maidstone pursuant to section 3 of the MHA. Since February 2022 Dr Walter Nzeakah had been his Responsible Clinician, having known him as Speciality Doctor on the ward since his admission to the Cygnet Hospital in November 2021.

6. On the instructions of the Appellant's solicitors, Dr Nzeakah prepared a psychiatric report dated 19 September 2022 for the Court. His instructions were to report on various aspects of the Appellant's condition including whether or not the Appellant was suffering from any form of mental illness and/or psychosis, whether he was suffering from such an illness at the time of the offences and what effect any illness he was suffering from would have upon him. He was expressly asked to address "(ix) whether [the Appellant] is fit to participate as per Pritchard criteria? (x) if [the Appellant] is not fit to participate, whether a s. 37 order is an appropriate court disposal? (xi) If [the Appellant] is fit, whether he would be a suitable candidate to receive a Community Mental Health Treatment Order."

7. Dr Nzeakah's report provided a thorough review of the history of the Appellant's mental illness. His diagnosis included Schizophrenia and Moderate Personality

Disorder. In answer to the specific question whether the Appellant would have been able to form the intention to harass another at the material time of the offences, his response was:

> "It is difficult to say with certainty whether Mr Hawkridge would have been able to form such an intention as his mental state at the time of the offence is not accessible to me. However, I have not seen any evidence of intellectual disability or neurocognitive impairment of a serious degree that would preclude him from being able to form an intention to harass another person."

8. In answer to the question whether the Appellant was fit to participate, Dr Nzeakah's headline response was that he had adequate comprehension of the charge against him and what it meant.

9. Dr Nzeakah's summary and recommendations were set out in section 16 of his report. At 16.12-16.14 he said:

> "16.12 My informed opinion is that his reasoning ability was not significantly impaired by his mental illness so as to render him unable to appreciate the nature and quality of his actions or to not know that what he was doing was legally wrong. …
>
> 16.13 I am satisfied that Mr Hawkridge has a good comprehension of the charges against him, understands what it means to plead guilty and can instruct his counsel as required. … I have no concerns about his ability to follow court proceedings.
>
> 16.14 … Mr Hawkridge is also able to consider the evidence against him and challenge the jury if the situation demands it. I believe therefore that Mr Hawkridge is fit to plead."

He did not expressly answer the question set out above, namely "if [the Appellant] is not fit to participate, whether a s. 37 order is an appropriate court disposal?" However, in the light of the opinion that we have just set out, he went on to answer the alternative question based on the assumption that the Appellant was fit. His opinion was set out at 16.15-16.18 as follows:

> "16.15 The risks associated with Mr Hawkridge's illness are significantly mitigated by his current detention in hospital. As his psychotic symptoms appear to have begun to remit following the commencement of clozapine treatment in June, he has now been referred to the community team for identification of suitable accommodation placement. The concern remains however that he will require significant amount of support to continue to take his medications and engage with heath care professionals once discharge into the community.
>
> 16.16 His historical pattern of discontinuing treatment and disengaging while in the community leading to relapse in mental state and associated escalation of his risks is an indication that a

> Community treatment order under the Mental Health Act might be necessary.
>
> …
>
> 16.16 If Mr Hawkridge continues to maintain his current trajectory of clinical improvement, I estimate he may be ready for discharge within two or three months from now i.e. around November or December 2022. During this remaining period, we are aiming to consolidate on the improvements made in his mental state by engaging him in 1:1 psychoeducation sessions which might help to improve his insight into his illness. The outcome of the psychoeducation sessions and self-medication trial will help guide the clinical decision as to whether a community treatment order will be necessary when he is being discharged from hospital."

10. In our judgment the key points to emerge from this passage are:

    i) The risks associated with his illness were significantly mitigated by his current detention in hospital;

    ii) The risks associated with him being discharged into the community were an indication that a Community Treatment Order under the Mental Health Act *might* be necessary; and

    iii) On current trajectory, it was estimated that the Appellant may be ready for discharge into the community in November or December 2022.

11. In opening the case to the Recorder on 9 December 2022, counsel for the prosecution told the Recorder that he understood the defence position to be that Ms Peck wanted him to proceed to sentence that day without adjourning for a report. The following exchange then took place:

> "RECORDER: You're not going to invite me to adjourn for a report?
>
> MS PECK: I'm not, your Honour, no, purely because in the circumstances of this matter, as your Honour may have seen from the documents uploaded already, there is a very significant mental health concerns at play here. Mr Hawkridge is currently subjected to section 3 detainment at hospital. I have an update from his responsible clinician from the 2nd of December stating that there's no imminent plans to discharge him, and even when they do eventually discharge him, he will be subjected to a community treatment plan. My submissions therefore, your Honour, will actually be for you to take perhaps an unusual course and impose a conditional discharge, because a community order will not be workable with him – currently subjected to a section 3 order, and should your Honour actually be considering custody, in which case we would – I am informed already the recommendation from his responsible clinician would actually be a section 37. But my submissions will be that once credit is taken into account, the age of this matter, it doesn't cross the custody threshold

> in my respectful submission, and therefore, as a community order would not be workable, the best course of action would be a conditional discharge."

12. A little later, Counsel read Dr Nzeakah's update verbatim into the record as follows:

> "Although Mr Hawkridge has improved a lot in his mental state over the last few months, he is still lacking insight into the nature of his illness and the social support/continued treatment he will need when discharged into the community. He still needs further psychological work around improving his insight and relapse prevention planning. There is no imminent plan to discharge him from hospital or from the section 3, especially as we are looking to place him on a community treatment order when he does leave hospital. There will not be any major difference in terms of his ongoing treatment plan, whether he is on a civil or forensic section. If he wasn't already on a section 3, then I will definitely be recommending a section 37."

13. It seems to us that the significant features of the update provided by Dr Nzeakah to the Court are:

    i) The Appellant was still subject to section 3 detention at the hospital;

    ii) There were now no imminent plans to discharge him either from the hospital or the section 3;

    iii) When he was discharged he *would* be subject to a community treatment plan;

    iv) There would not be any major difference in terms of his ongoing treatment plan whether he was on a civil or forensic section;

    v) If he was not already on a section 3, then Dr Nzeakah would definitely be recommending a section 37.

14. It is to be noted that this last feature was slightly ambiguous because there was already a section 3 detention order in place. Dr Nzeakah did not go so far as to say that a section 37 hospital order should be put in place in substitution for the existing section 3 detention. However, his opinion that the Appellant should either be sectioned under section 3 or be made the subject of a hospital order under section 37 was clearly stated.

15. The Recorder added a note to the sidebar which set out his understanding of what he had been told: "update from author of psych report read to me confirms no release date yet in sight and I am therefore invited to sentence today as PSR will not assist."

16. In mitigating for the Appellant, Ms Peck concentrated on trying to persuade the Recorder that the custody threshold was not passed, that a community order would self-evidently be inappropriate, and that he should take an unusual course and impose a conditional discharge. The basis of her submission that a community order would be inappropriate was that he was still detained and there were no imminent plans to discharge him from hospital. She referred to the Sentencing Council's Guideline on Sentencing Offenders with Mental Health Concerns, but her submission was directed

to persuading the Recorder that the Appellant's culpability was reduced. She concluded her submissions by saying:

> "Unfortunately, this is a young man who has faced great difficulties in combating his mental health and he is making great strides in doing that with a lot of support not only from the hospital but his family, and this is someone who, unfortunately, we are in a bit of a Catch-22 situation of where do you go? Which is why, in my respectful submission, a conditional discharge for two years or have that watch over Mr Hawkridge for another two years. A restraining order will be imposed which will give Miss Katnoria the peace of mind that, in my respectful submission, she ultimately seeks from having heard her victim personal statement and would be the most effective way of dealing with this matter whilst Mr Hawkridge remains under section 3 and remains receiving treatment he desperately required."

The sentencing remarks

17. The sentencing remarks are clearly structured and set out. The Recorder stated that he was sentencing without a PSR because he was satisfied it would not assist in the circumstances that the Appellant was in. He did not refer to the possibility of obtaining a further medical report. After summarising the facts, he turned to the agreed categorisation of the offence as falling within category 1A, which he endorsed.

18. Then, having listed the relevant aggravating features he turned to mitigation and said:

> "There is a psychiatric report which I have read carefully. You have serious mental health issues. There is a diagnosis of schizophrenia and you have been sectioned on more than one occasion, most recently in May 2021. You remain in care and I understand that although the report indicated that there was some expectation that you might be released into the community at about now – November or December of this year – in fact, the further update from the writer of that report which I have been provided with indicates that there are no current plans to release you into the community, and that at the point of which that happens there will in any event be a care plan put into place."

19. He then turned to the Guideline on Sentencing Offenders with Mental Disorders, but only in relation the effect of his mental illness on culpability for the offence, which he concluded had some impact but did not eliminate the Appellant's culpability. Having reviewed the other features advanced in mitigation he concluded that the case did pass the custody threshold and that a conditional discharge would not fairly reflect the Appellant's offending. Applying an appropriate discount for the Appellant's plea, he reached the sentence of 8 weeks custody which he imposed and suspended. By that route he came to the sentence that he passed.

The present appeal

20. There are three grounds of appeal:

    i) The Recorder erred in not giving consideration to a mental health disposal.

ii) The Recorder erred in not giving appropriate consideration as to the effects of custodial sentence upon the Appellant.

iii) The Recorder erred by not ordering a second medical report to address a mental health disposal.

21. The main thrust of Ms Peck's oral submissions is that, by one route or another, the Recorder should have arrived at a position where he either imposed a conditional discharge or a Hospital Order pursuant to section 37 of the MHA. She submits that, had the Recorder considered the effects of a custodial sentence upon the Appellant, he should have appreciated that a custodial sentence was inappropriate, first because the Appellant was already detained, having been sectioned under section 3 of the Act; and second because, even if it was suspended, the default result if he were to reoffend would be activation of the custodial sentence. At the very least he would run the risk of being arrested and held in custody on remand. For that reason the Recorder should have considered a conditional discharge as she had submitted, where further offending would not so readily lead to a period in custody; or he should have considered making a Hospital Order under section 37.

Respondent's Notice

22. By its respondent's notice and oral submissions, Mr Bartholomeusz submits that the Recorder gave sufficient consideration to the possibility of imposing an order pursuant to section 37 of the MHA; that the Recorder was not asked to adjourn for a further medical report or further medical evidence; and that no submission was made that a mental health disposal should be imposed if the offending be found to cross the custody threshold. He submits that the provisions of s. 232 of the Sentencing Code were complied with as the Recorder had the report and update from the Appellant's responsible clinician. He submits that the Recorder had sufficient material before him to enable him to weigh on the one hand the Appellant's interest in obtaining suitable mental health treatment and on the other the need to achieve the purposes of sentencing set out in section 57 of the Sentencing Code. He submits that the suspended sentence imposed by the Recorder achieved a suitable balance by allowing him to continue to receive treatment under section 3 of the MHA while also serving to deter the Appellant from committing further offences.

The legal framework

Disposals under the MHA

23. Section 3 of the MHA makes provision for a person to be sectioned without the need for a court order. It is not necessary to set out the terms of section 3 in detail as they are very well known. It is sufficient to note that an application for admission may be made in respect of a patient on the grounds that he is suffering from a metal disorder of a nature or degree which makes it appropriate for him to receive medical treatment in hospital; and it is necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment and it cannot be provided unless he is detained under the section: see section 3(2).

24. Section 37 makes provision for the making of Hospital Orders by the Court, as follows:

Powers of courts to order hospital admission or guardianship.

(1) Where a person is convicted before the Crown Court of an offence punishable with imprisonment other than an offence the sentence for which is fixed by law, …, or is convicted by a magistrates' court of an offence punishable on summary conviction with imprisonment, and the conditions mentioned in subsection (2) below are satisfied, the court may by order authorise his admission to and detention in such hospital as may be specified in the order or, as the case may be, place him under the guardianship of a local social services authority or of such other person approved by a local social services authority as may be so specified.

…

(2) The conditions referred to in subsection (1) above are that-

(a) The court is satisfied, on the written or oral evidence of two registered medical practitioners, that the offender is suffering from mental disorder and that either-

(i) The mental disorder from which the offender is suffering is of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment and appropriate medical treatment is available for him; or

…

(b) The court is of the opinion, having regard to all the circumstance 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.

…

(4) An order for the admission of an offender to a hospital (in this Act referred to as "a hospital order") shall not be made under this section unless the court is satisfied on the written or oral evidence of the approved clinician who would have overall responsibility for his case or of some other person representing the managers of the hospital that arrangements have been made for his admission to that hospital …, and for his admission to it within the period of 28 days beginning with the date of the making of such an order; and the court may, pending his admission within that period, give such directions as it thinks fit for his conveyance to and detention in a place of safety.

…

(8) Where an order is made under this section, the court shall not-

(a) pass sentence of imprisonment or impose a fine or make a community order (within the meaning of Part 12 of the Criminal Justice Act 2003 or a youth rehabilitation order (within the meaning of Part 1 of the Criminal Justice and Immigration Act 2008] in respect of the offence,

…"

25. Section 40(5) of the MHA provides that, upon the making of a hospital order pursuant to section 37 of the MHA, a civil section under section 3 of that Act will cease to have effect.

The Sentencing Act 2020

26. Section 57(2) of the Sentencing Act 2020 identifies the purposes of sentencing adults to which the Court must have regard as including:

(a) the punishment of offenders;

(b) the reduction of crime (including its reduction by deterrence),

(c) the reform and rehabilitation of offenders,

(d) the protection of the public, and

(e) the making of reparation by offenders to persons affected by their offences.

However, section 57(2) does not apply in relation to making a hospital order pursuant to s 37 of the Act: see section 57(3). Section 57 of the Sentencing Act reenacted in materially identical terms section 142 of the Criminal Justice Act 2003.

27. S. 232 of the Sentencing Act 2020 provides:

"**Additional requirements in case of offender suffering from mental disorder**

(1) This section applies where—

(a) the offender is or appears to be suffering from a mental disorder, and

(b) the court passes a custodial sentence other than one fixed by law ("the sentence").

(2) Before passing the sentence, the court must obtain and consider a medical report unless, in the circumstances of the case, it considers that it is unnecessary to obtain a medical report.

(3) Before passing the sentence, the court must consider—

> (a) any information before it which relates to the offender's mental condition (whether given in a medical report, a pre-sentence report or otherwise), and
>
> (b) the likely effect of such a sentence on that condition and on any treatment which may be available for it.
>
> (4) If the court did not obtain a medical report where required to do so by this section, the sentence is not invalidated by the fact that it did not do so.
>
> (5) Any court, on an appeal against the sentence, must—
>
> (a) obtain a medical report if none was obtained by the court below, and
>
> (b) consider any such report obtained by it or by that court.
>
> …"

28. The Guideline on sentencing offenders with mental disorders reflects the terms of s. 232(2) of the Sentencing Code at section 1 paragraph 6. It continues by saying:

> **"A report may be unnecessary if existing, reliable and up to date information is available**. If considering making a hospital or interim order, the court can request information about a patient from the local health services (s.39 of the MHA). Further information about s.232 and requests for reports can be found at **Annex B** of this document."

Annex B mirrors s. 232 (4) and (5) of the Sentencing Code.

29. The Guideline provides little additional guidance on when it is appropriate to impose a section 37 Hospital order. Annex C restates the section 37 criteria that the court must be satisfied on the written or oral evidence of two doctors, at least one of whom must be approved under section 12, that the offender is suffering from mental disorder of a nature or degree which makes it appropriate for the offender to be detained in a hospital for medical treatment and appropriate treatment is available. The guideline states that a section 37 Hospital order is an alternative to punishment, which is consistent with the provision of section 37(8)(a) that the court may not pass a sentence of imprisonment or make a community order or impose a fine at the same time as making a Hospital Order.

30. The thinking behind the section is clear and is similar to the analogous principle that a court may not pass a suspended sentence and a sentence of immediate custody at the same time: it is necessary to avoid establishing conflicting regimes or regimes where one is rendered either unnecessary or unhelpful by the other. Passing a sentence of immediate custody at the same time as making a section hospital order would lead to irreconcilable confusion about whether the defendant is to be detained in hospital or in prison. If a suspended sentence or a community sentence were to be imposed at the same time as making a hospital order, similar irreconcilable confusion is likely to be caused, not least if the defendant were to reoffend (whether in a hospital setting or

otherwise) and be brought back to court for the potential activation of a suspended sentence.

31. At our request, Counsel searched for any authority on the question whether it could be appropriate (or not) for a person who is already sectioned to be sentenced to a custodial sentence. The nearest to an authority in point that their researches have identified is *R v Moses Edward Belford*, a decision of this court in October 2000. The Appellant was charged with an offence of assault occasioning actual bodily harm. Between the date on which he pleaded guilty and the date on which he was sentenced, he was sectioned pursuant to section 3. The Assistant Recorder imposed a sentence of 12 months imprisonment. That sentence was set aside and a suspended sentence of imprisonment was substituted. It is not clear whether the Appellant was still sectioned by the time of the appeal and there is no consideration of the point of principle whether it was or could be appropriate to impose a sentence of custody on someone who was already sectioned. While thanking counsel for their efforts, we do not consider that it would be safe to draw any principled conclusions from *Belford*.

Subsequent information

32. In preparation for this hearing two further psychiatric reports have been provided, a further report from Dr Nzeakah dated May 2023, and a report from Professor Forrester dated August 2023. In addition Dr Nzeakah kindly made himself available to the court at the hearing so that we could take oral evidence from him if required.

33. Dr Nzeakah's report traces the Appellant's progress since December 2022. He describes the nature of the Appellant's illness as "chronic and enduring with a relapsing and remitting course linked to his fluctuating level of compliance with treatment." It is plain that the trajectory of improvement that he identified in his reports to the court below has not been maintained and that he presents significant challenges for those responsible for his medical well-being.

34. At 8.7 he states:

> "Appropriate medical treatment remains available to him in Kingswood Ward Cygnet Hospital Maidstone where he is currently detained under civil section 3 of the MHA. The recommended treatment regimen will entail:
>
> a. Medical Supervision of his maintenance treatment with long-acting injectable antipsychotic medication (optimising dosage in response to mental state changes and any emergent medication adverse effects).
>
> b. Nursing support in the form of regular 1:1 sessions for monitoring of mental state and associated risk behaviours, administering medications as prescribed, supporting/facilitating safe access to the community.
>
> c. An integrative psychological intervention package comprising of offence related work focused on victim empathy, developing arousal reduction and self-management strategies for distress

> tolerance, cognitive-behavioural approaches including belief modification, acceptance and defusion techniques, as well as psychoeducation sessions that could improve his level of insight into his mental disorder.
>
> d. Occupational therapy aimed at supporting him to develop an alternative self-identity of personal functioning that is more likely to lead to desistance."

35. The only difference between the regime and powers if a person is sectioned under section 3 rather than being subject to a hospital order made under section 37 identified by Dr Nzeakah is at paragraph 8.9 of his report. Having indicated that recall powers under the framework of a Community Treatment Order are likely to be required for appropriate supervision and monitoring in the community post discharge from hospital, he says:

> "Detention on a Section 37 Hospital order could make it more likely that he will be accepted for follow up care by the Forensic Outreach and Liaison Service (FOLS), a specialized team who are able to provide typically more robust supervision and monitoring in the community that the standard community mental health teams."

36. His summary and recommendations include:

> "9.2 His hospital detention continues to be necessary in the interests of his own health, personal safety and for the protection of others. Appropriate medical treatment (as detailed in 8.7 above) is available for him in Kingswood Ward Cygnet Hospital Maidstone where he is presently detained under Section 3 of the MHA.
>
> 9.3 Considering his poor insight and limited engagement with professional help. I do not believe Mr Hawkridge in his current presentation will maintain a sufficient level of concordance with voluntary treatment for his mental disorder if not subject to treatment under the MHA.
>
> 9.4 It is my recommendation that given the nature and degree of Mr Hawkridge's illness, as well as the likely impact of the associated risks of this illness with regards to further offending behaviour, a hospital order under Section 37 of the MHA Act 1983 (as amended) would be indicated at this time.
>
> 9.5 If the court does impose a Section 37 Hospital order, it will supplant his current Section 3 MHA detention and he will remain on admission in Kingswood Ward to continue receiving appropriate medical treatment over the next six to nine months (subject to his level of engagement with and response to treatment).
>
> 9.6 With regards to his index offence of stalking & harassment. Mr Hawkridge was made subject to a Stalking Protection Order (SPO) in December 2022.1 anticipate that at the point of discharge from

> hospital Mr Hawkridge will be suitable for a civil Community Treatment Order (CTO) in order to provide a mechanism for more structured monitoring as well as for prompt recall to hospital were he to disengage from treatment and begin to deteriorate in the community.
>
> 9.7 Such supervised treatment in the community would normally be provided by the locality Community Mental Health Teams (CMHT). However a Section 37 Hospital order could provide an opportunity for him to be diverted to the Specialist Forensic Outreach and Liaison Service (FOLS) who typically provide more robust risk monitoring and management than is available with standard CMHTS."

37. Professor Forrester is of essentially the same opinion. I mean no disrespect to him by treating his report more shortly for that reason. He agrees with Dr Nzeakah's assessment that the Appellant's condition is severe and enduring in nature. It can respond to treatment, although the treatment that was most successful (clozapine) had to be discontinued following a period of non-concordance with the necessary blood-tests. The position is complicated by the Appellant's history of mental disorder due to substance misuse and his underlying history of personality difficulties. He endorses Dr Nzeakah's opinion that it is appropriate for him to be detained in hospital and agrees that a hospital order under section 37 is applicable and appropriate.

38. Dr Nzeakah attended the appeal remotely and gave oral evidence in line with his more recent report, for which we are grateful.

Discussion and conclusions

39. We have not called for a pre-sentence report. It is unnecessary and inappropriate to do so given the detailed evidence that we have from Dr Nzeakah and Professor Forrester.

40. In what were otherwise careful and clear sentencing remarks, the Recorder did not give any consideration to the effects of a custodial sentence upon the Appellant. The obligation to do so was mandatory because of section 232 of the Sentencing Act 2020. The Appellant was clearly suffering from a mental disorder, as was amply evidenced in the materials before the Recorder; and the Recorder proceeded to pass a custodial sentence other than one fixed by law. The requirements established by section 232(1) were therefore satisfied. That being so, the terms of section 232(3)(b) are that, before passing such a sentence the Recorder was under a mandatory obligation ("must") to consider the likely effect of such a sentence on the Appellant's condition and on any treatment which may be available for it. That obligation existed whether or not he had been asked to consider it though, for the avoidance of doubt, we consider that Ms Peck raised the issue sufficiently in her submissions when saying that, if he were to be considering custody, Dr Nzeakah's recommendation would be for an order under section 37.

41. We are confident that, had the Recorder complied with the obligation to consider the effect of a custodial sentence on the Appellant's condition he not only should but also would have appreciated that passing a custodial sentence was inappropriate in this case. First, all the evidence was that the Appellant needed to be detained in a hospital setting,

whether on the basis of being sectioned under section 3 or under a hospital order pursuant to section 37. Second, the imposition of a suspended sentence created a real risk of conflicting regimes, even though the sentence the Recorder passed was ordered to be suspended. There is considerable force in Ms Peck's submission that the prospect of conflicting regimes was maximised by imposing a suspended sentence rather than a conditional discharge because, if the Appellant were to reoffend, the default position would be that he would (or should) be arrested and that his suspended sentence would be activated. That is an unacceptable outcome in the present case where he is currently subject to detention under a different regime having been sectioned.

42. Two points should be mentioned. First, we can understand why the Recorder may have thought it was a good idea to impose a suspended sentence on the facts of this case. At the time of sentencing it was uncertain whether or when the Appellant might cease to be detained in hospital. The Recorder may have felt it was desirable to have a suspended sentence in place if the Appellant came to be discharged. However, in circumstances where the prospect of being discharged was uncertain, any possible benefit of having the suspended sentence in place was outweighed by the prospect of conflicting regimes being invoked if he were to reoffend while still sectioned.

43. Second, it may reasonably be observed that Ms Peck's suggestion of a conditional discharge also carried a risk of conflicting regimes if the Appellant were to re-offend. That is true, even if the risk of conflict may have been less acute because of the procedure that would be likely to be followed if it were to be alleged that he had re-offended.

44. We suspect that the Recorder did not go down the route that was required if he was to impose a hospital order because he knew that the Appellant was already sectioned. However, he should still have considered the possibility of a medical disposal. It was not open to him to make a hospital order on the date he came to sentence because he did not have evidence from two registered medical practitioners and he had not heard oral evidence from the approved clinician as to the matters required by section 37(4). We are, however, satisfied that, on the facts of this case, the Recorder should have set in train the necessary steps with a view to the possible making of a hospital order on another occasion, either by the Recorder himself or another judge.

45. We are therefore satisfied that there were important procedural errors in the course adopted by the Recorder and that his order should be set aside. We have the advantage of the medical reports from Dr Nzeakah and Professor Forrester, which we have considered, and the benefit of having heard from Dr Nzeakah in person. It is therefore open to us to make a hospital order and we are confident that is the right disposition of this appeal on the facts of the case. We have considered Ms Peck's suggestion that we should revert to the idea of imposing a conditional discharge. We have considered that possibility but reject it because it seems to us to add little or nothing on the facts of this case other than the possibility of conflicting regimes if the Appellant were to re-offend during the currency of the conditional discharge.

46. On the making of the hospital order, the present civil section under section 3 will cease to have effect. Counsel are requested to liaise and agree (if possible) the terms of the order that we should make. In case of disagreement, counsel should provide short written submissions identifying the points of and reasons for the disagreement. The restraining order and other ancillary orders are not affected by this ruling.