Neutral Citation Number: [2010] EWCA Crim 955
No: 200903627 A9
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 25th March 2010

B e f o r e:

LORD JUSTICE ELIAS

MR JUSTICE JACK

RECORDER OF REDBRIDGE
HIS HONOUR JUDGE RADFORD
(Sitting as a judge of the Court of Appeal Criminal Division)

R E G I N A

v

DONNA OSKER

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(Official Shorthand Writers to the Court)

Mr A Cave appeared on behalf of the **Appellant**

J U D G M E N T
(As approved by the Court)

1. RECORDER OF REDBRIDGE: On 20th March 2009, at the Peterborough Crown Court sitting at Huntingdon, the appellant, who was born on 17th April 1994, pleaded guilty to one count of causing a public nuisance, the offence occurring on 21st October 2008. The case was then adjourned so that psychiatric reports could be prepared. On 12th June 2009, before His Honour Judge Enright, the appellant was made the subject of a hospital order under section 37 of the Mental Health Act 1983 as amended with a restriction order without limit of time being directed under section 41 of the same Act.

2. The appellant now appeals with the leave of the full court against the making of the restriction order. There is no suggestion that it was in any way wrong for the judge to have made the hospital order that he did under section 37.

3. The facts of the offence of public nuisance can be stated shortly. At about 8.45 in the evening on 22nd October 2008, police were alerted to the appellant, standing on a ledge at the top of a multi-storey car park in Peterborough. Her arms were outstretched. She had blood across her trousers and neck. It seemed she had cut herself with a razor blade that she still had in her possession. She informed the police negotiators that she wanted "to end it all". The car park and the surrounding footpaths and roads were closed to the public. At about 11.10 that evening the appellant was taken into custody and detained under the Mental Health Act. Later, for her own safety, she was remanded into custody and later still transferred to the Annesley House Women's Secure Service institution.

4. At the time the appellant had four previous criminal convictions for six offences, principally for public order offences, including two for a public nuisance respectively committed on 12th February 2007 and 30th May 2008 arising from earlier incidents.

5. Dr Magner, a consultant psychiatrist at the Kneesworth House Psychiatric Hospital, prepared a report for the sentencing court dated 9th June 2009. In it he referred to earlier psychiatric reports by a Dr Nair and a Dr Alexander, which were also before the court and which we too have read. Dr Magner said that the earlier reports had provided the detailed background information and the appellant's full psychiatric history. Dr Magner stated in his report that he was in full agreement with the clinical findings and diagnosis set out in those earlier reports, which were to the effect that the appellant suffered from a personality disorder of the borderline type.

6. Dr Magner made the recommendation in this report that the appellant should be made the subject of a section 37 order to enable her to be treated at his hospital for what he said was a serious mental disorder as defined by the Mental Health Act 1983 and as amended by the Mental Health Act 2007. He added in his report that in his view it was not necessary that any restriction order pursuant to section 41 should be made.

7. Dr Magner gave oral evidence before Judge Enright on the day of sentence. He reiterated the opinions he had expressed in his earlier report and said that the risk of harm presented by the appellant was primarily that of self-harm. He went on to say that the risk of harm for the general public was minimal, less than 25 per cent. The history of harm, he added, that he was aware of was of a not serious domestic kind which had

not occurred outside a psychiatric institution. Dr Magner went on to advise the judge that there would be adverse consequences to the desired flexibility in the appellant's treatment plan should a restriction order be made. As to the incidence of risk to others, Dr Magner went on to add that the appellant posed no significant risk to others when psychiatric institution staff were required to intervene in her distress and, to use his words, control and restraint was used. At such times he said there was a risk of some form of aggression, verbal or physical. He commented that the appellant posed less of a risk of harm to others in the community, rather than the 25 per cent risk she posed when she was in hospital. He asserted that she did not pose a high risk to the general community, in his view.

8. In answer to further questions from the judge, Dr Magner said that the level of violence the appellant was capable of was impulsive aggression in relation to direct contact, such as hitting, banging and destruction. She would, he said, be capable of inflicting bruises. Trained people would be anticipating such behaviour so it would be much less serious for them than for an unsuspecting person who came into contact with the appellant.

9. In his sentencing observations, Judge Enright said that he found there was a significant risk of serious harm to others posed by the appellant which, based on his view of Dr Magner's qualification of risk, led him to conclude that an order under section 41 was necessary. In reaching that conclusion the judge said he had in mind the nature of the appellant's disorder, her antecedents, and in particular he referred to an incident on 12th February 2007. That incident, we now understand, was an occasion when the appellant telephoned a hospital and reported that she had turned the gas on in her flat and, to quote the words in the report of the incident, "was going to blow her flat up". This, we learned, led to the evacuation of the street in which the appellant lived and her arrest on suspicion of causing public nuisance. The judge said he also took account of the appellant's potential when acting impetuously to cause serious harm to others.

10. In the grounds of appeal lodged on the appellant's behalf by Mr Cave, who appears today for the appellant, it is argued that the judge erred in finding that it was necessary to impose a section 41 restriction order, given that no medical expert recommended it and that on proper analysis Dr Magner had only assessed the risk as 25 per cent whilst the appellant was in hospital, with the risk to the public when in the community being significantly lower. In the advice on appeal which accompanied the grounds it was further submitted that the appellant's antecedent criminal record indicated a limited number of such offences, and that they were irregular, and that the nature of the current offence did not involve the causation of serious harm to the public.

11. The court's attention has helpfully been drawn to a number of reported cases which the court has in the past had before it concerning review of when it is and when it is not appropriate for a section 41 restriction order to be upheld.

12. When this matter came before the full court on 12th January of this year, the constitution granted leave to appeal against sentence and adjourned the application so that Dr Magner could be approached to confirm whether he had been aware of the incident of 12th February 2007, which was mentioned specifically by the judge in his ruling, an incident which was, we know, referred to in Dr Alexander's report. That was

the incident in which the appellant switched off the gas at her home, threatening to blow up her flat.

13. We now have the benefit of reading a letter dated 3rd February of this year in which Dr Magner makes it expressly clear that he was aware of that incident, having had sight, as he had said, of Dr Alexander's report before drafting his own. He said he believed the incident to be quite similar to many of the appellant's impulsive attention seeking self-harm attempts and expressed the view that it did not make any serious risk to the public. He said that he remained of the view the appellant should not be considered more dangerous than the majority of those who are mentally ill and who are detained under the civil protection powers provided by section 2 or section 3 of the Mental Health Act 2003.

14. This constitution of this court has also now been provided with a report dated 11th February of this year from Dr Louise Quinn, a consultant psychiatrist and the appellant's present responsible clinician. Dr Quinn confirms the previous diagnosis of the borderline personality disorder with which the appellant is suffering. She also has provided more detailed information about the incident of 12th February 2007 which had been referred to by Judge Enright. It seems that on that occasion the appellant had rung the emergency services and had advised them that she was going to try to kill herself. She was advised to turn off the gas, which she had done. When the police arrived the appellant was found to be leaning out of her window, smoking a cigarette. Dr Quinn reports that whilst in hospital, in the environment there, the appellant has on occasion assaulted carers and can be verbally abusive, but she agrees with Dr Magner that the appellant does not, in her view, pose a specific danger of serious harm to members of the public. Dr Quinn furthermore goes on in her report to detail the reasons why the imposition of a section 41 restriction order is inhibiting the appellant's proper care and treatment. She expresses the view that the experienced clinical team, in whose care the appellant is, are very mindful of the need for longer term care, with a gradual and considered increase in responsibility, with the section 37 hospital order to be followed by a supervised community treatment order providing a safe and necessary legal framework in the future.

15. We have reminded ourselves of the legal framework here, assisted, as we have been, by the citation of authority by Mr Cave, albeit of course those cases are fact-specific, as each such case is bound to be. We refer in that connection, without citing in terms, the helpful adumbration of principles as found in paragraphs 6 to 10 of the judgment of this court given by King J in the case of R v Ian Douglas Hurst *[2007] EWCA Crim 3436. We turn, with those principles in mind, to their application in this case.*

16. It is, of course, correct that the judge was not precluded from making a restriction order merely because it was not thought necessary by any of the psychiatrists whose reports he had read. However, reference was made by the judge in his ruling to the incident of 12th February 2007 in regard to his assessment of risk of serious harm to the public that the appellant was presenting. It was unfortunate, in our judgment, that when Dr Magner had given evidence before the judge earlier he was not asked about his understanding of that incident and how it might affect, if it did, his view of the matter. We now have the benefit of reading the account of that incident that has been provided

to this court by Dr Magner and indeed Dr Quinn. We have concluded that, in reality, the facts of that incident do not undermine the assessment of risk which had been given orally to the judge in evidence. On a proper understanding of that risk, we judge that when not in a psychiatric institution, but at large, the material before the court below did not substantiate there being such a risk of serious harm to the public of the commission of offences in future by the appellant requiring a section 41 restriction order. It was an insufficient basis, in our view, to infer from the appellant's antecedents or the facts of the particular offence that such a risk existed, given the contra-indications from the psychiatrists who had reviewed the appellant's case.

17. Having now had the benefit too, as of course Judge Enright had not, of reading the fresh reports from Drs Magner and Quinn, we are the more satisfied still that disposal by a stand-alone section 37 order was, and is, the correct sentence in this case. The section 41 restriction order, moreover, would inhibit the effective treatment of the appellant and is not, in our judgment, justified in the proper application of the statutory test which has to be met before its imposition. For those reasons we quash that part of the sentence which imposed that restriction order. To that extent the appeal against sentence is allowed.