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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 13th November 2013

B e f o r e:
LORD JUSTICE LLOYD JONES
MR JUSTICE IRWIN
MR JUSTICE GREEN
R E G I N A

v

DARREN GABRIEL ANDERSON

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165 Fleet Street London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)

Mr N Peacock appeared on behalf of the **Appellant**
Miss J Martin appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

1. LORD JUSTICE LLOYD JONES: On 8th May 2009 in the Crown Court at Truro (Recorder Selfe and a jury), the appellant was convicted of wounding with intent, contrary to section 18 of the Offences Against the Person Act 1861. Sentence was adjourned. However, thereafter the appellant, who had been represented by solicitor and counsel at trial, dispensed with the services of his legal team and he failed to comply with arrangements for the preparation of a psychiatric report and a pre-sentence report. On 19th June 2009 he appeared for sentence, again before Recorder Selfe. He was not represented on this occasion and he was sentenced to a term of imprisonment for public protection, with a minimum term of 7 years and 6 months. The time which he had spent in custody on remand was to count towards sentence. His co-accused, Gary John Maxey, pleaded guilty to the same offence and was sentenced to an indeterminate sentence of imprisonment for public protection, with a minimum term of 5 years.

2. Darren Anderson now appeals against sentence by leave of the single judge, who granted the necessary extension of time, which was 1390 days. He has been represented before us this afternoon by Mr Peacock and we are very grateful to him and to Miss Martin who has appeared on behalf of the Crown, for their assistance.

3. The facts of the index offences were that the victim, Jason Leach, was vulnerable and had an alcohol problem. H e met the appellant in a bar and they exchanged telephone numbers. The appellant recognised that the victim was vulnerable and could be exploited. Three days later the appellant telephoned the victim and arranged to visit him. He did so and left but subsequently returned at 10.30 that night, as the victim was preparing to go to bed. On the second occasion the appellant was accompanied by Maxey.

4. In evidence at the appellant's trial Maxey described how they had gone to the victim's address to beat him because he was a "nonce". The appellant asked to borrow money from the victim and they went to the cash point to see if he had money in his account. He did not and so they all returned to his flat. At this juncture the victim explained that he needed to go to bed. The appellant produced a knife and asked the victim for his wallet. The co-accused pushed the victim to the floor and the appellant said: "I'm going to cut you up." The appellant dragged the knife across the victim's throat three times, cutting it and causing deep wounds. The victim was terrified and pleaded with the accused not to hurt him. The appellant told the victim to get into bed or he would shoot him. He was asked for his mobile phone and wallet and threatened with death if he did not comply. The appellant said that he would call an ambulance at 6 o'clock in the morning after they had been to the bank.

5. The accused took turns to hold the knife. Maxey had a meat cleaver which was on display. They made jokes and they rifled through their victim's belongings. Maxey struck the victim on the head twice and started to cut his arm. The appellant said that he could not cut the victim's throat so he would suffocate him and he stuffed a sock in his mouth and a pillow over his face. He slashed his throat again. The appellant took photographs of the victim with the sock in his mouth. The accused eventually left,

effectively leaving the victim for dead. The victim managed to summon an ambulance and was indeed close to death. One of the paramedics stated that she had never before seen such an appalling injury.

6. The victim had been left with scarring which had made him self conscious. He had been tortured over a period of hours in a most sadistic way. At the conclusion of the trial the appellant had turned towards the victim and made a gesticulation as if cutting his throat. As he was taken down he issued threats about killing the victim.

7. The appellant was 21 at the time of the wounding offence. He is now 25. He had been before the courts on 26 previous occasions for a total of 47 offences. These included offences of dishonesty, arson, indecent assault, common assault and public order offences. He had previously breached community orders and had served sentences of detention.

8. There was a pre-sentence report before the Recorder on that occasion. The appellant had not co-operated in the preparation of the report but it had nevertheless been prepared. The report noted that he had been described previously as having the potential to commit a very serious crime. In the view of the author he presented a high risk of reoffending and of committing further specified and serious specified offences which carried a concomitant risk of serious physical and/or psychological harm. Custody having been recognised as inevitable no alternative recommendation as to sentence was made.

9. In sentencing for that offence the Recorder observed that the attack had been preplanned, savage and prolonged. The attack had amounted to torture. The victim was vulnerable. They had photographed the incident. They had not tried to seek medical help for the victim. The victim's windpipe had been exposed. He was within millimetres of a wound that would have proved fatal. The victim was scarred for life and had been psychologically affected by the attack. The starting point for a determinate sentence would be between 10 and 16 years. There were aggravating features: the attack took place in the victim's home; he was particularly vulnerable and had been deliberately targeted; weapons had been used in repeated attacks and there had been two of them. The taking of photographs and the use of the pillow made the offence even worse. The Recorder considered that a determinate sentence would have been 15 years' imprisonment. However, there was no doubt that he was dangerous within the meaning of the Act and accordingly he imposed a sentence of imprisonment for public protection with a minimum term of 7 years and 6 months.

10. We pause there to observe that it is what has happened subsequently which has given rise to this appeal. The appellant was detained in Her Majesty's Prison Exeter, where on 4th September 2009 he took a cellmate hostage, tied him to the bed, produced a homemade razor and threatened to cut his throat. He had shown the victim photographs of his previous offence. The appellant had planned the offence for months. He stuffed a gag into his victim's mouth and had written out a list of demands to the prison authorities. A standoff ensued which lasted two to three hours. He had told the victim three times that he would slit his throat. Eventually the appellant calmed down and gave in.

11. A search of the cell revealed the extent of the planning: he had formulated plans to cause an explosion; obtained a drawing of how to make a nail bomb; had diagrams of how to make knives and had written a plan of how to kill a cellmate by tying him to the bed and cutting him to bits. The appellant told the victim he could hear voices and he would be in no doubt that the appellant intended to kill him. While the victim did not suffer any physical injury he was understandably badly affected psychologically.

12. The appellant was charged with false imprisonment and making threats to kill arising from the incident at Exeter prison. In June 2011 at Exeter Crown Court the appellant pleaded guilty to those charges and he appeared for sentence on those offences on 22nd March 2012 before His Honour Judge Wassall sitting in the Exeter Crown Court.

13. A number of reports were available to Judge Wassall on that occasion. The first was the pre-sentence report dated 3rd June 2009, which had been prepared for the earlier hearing to which we have already referred. There was a report from Dr Nadkarni dated 28th February 2011. Dr Nadkarni concluded that the appellant suffered from a severe personality disorder and might benefit from an assessment at the Personality Disorder Unit at Broadmoor. However the appellant did not want the report to be disclosed to health care staff and that had prevented a referral. Dr Nadkarni nevertheless considered the appellant to be fit to plead.

14. There was a report from Dr Somekh dated 21st July 2011. Dr Somekh also considered him fit to plead. He was in no doubt that the appellant suffered from a severe disorder of personality development and met the criteria for psychopathic disorder within the meaning of the Mental Health Act 1983. There had been a sudden change in his offending in the preceding 2 to 3 years, in terms of the use of weapons and level of violence. It was not difficult to see a link between this and his personality disorder. Further, he had behaved in this manner whilst not being under the influence of substances. He suffered from a severe personality disorder and met the criteria for hospital disposal and the recommendation was one for a hospital order under section 37 of the Mental Health Act, with a restriction order under section 41. Dr Somekh also stated that it was unrealistic that the appellant should be in a medium secure environment and that due to the grave danger he posed the only possible institution which would be suitable for his detention would be a high security unit such as Broadmoor.

15. There was also a report from Dr Nadkarni dated 11th October 2011. Dr Nadkarni agreed with Dr Somekh that the appellant suffered from a severe disorder of personality within the meaning of the Mental Health Act 2007. Broadmoor was willing to offer him a bed. However, Dr Nadkarni did not agree with Dr Somekh as to the appropriate disposal. Dr Nadkarni favoured a hospital and limitation direction; that is a hybrid order under section 45A of the Mental Health Act, because there was uncertainty as to whether the appellant would continue to be motivated in relation to treatment.

16. Following the incident at HMP Exeter the appellant had been transferred to HMP Frankland in Durham and on 26th October 2011 he was transferred to Broadmoor High Security Hospital where he was under the care of Dr Callum Ross. Indeed, he remains at Broadmoor High Security Hospital. Dr Ross had prepared a report dated 8th

February 2012, in which he agreed with both Dr Somekh and Dr Nadkarni, as to the diagnosis. In his view the appellant required treatment in a high security hospital, given the extreme and sadistic violence displayed in the secure setting already. However, he agreed with Dr Nadkarni as to disposal and his recommendation was one of a hospital and limitation direction, that is a hybrid order under section 45A of the Mental Health Act.

17. It is right to point out that the reason given by Dr Ross for that conclusion was that if the appellant refused to engage in treatment, he would (under a section 37 order) be stuck, as he put it, within the hospital system with discharge available to him only through the Mental Health Tribunal or the Ministry of Justice. In his view both would be disinclined to discharge a man who for whatever reason chose not to take part in the treatment that was being recommended to him. Moreover there was a very real possibility that under a hospital order the appellant might disengage from treatment. That risk was particularly so should he find the hospital environment to be rewarding for him. In Dr Ross's view that was a very real consideration for the individuals cared for in Broadmoor, who lead chaotic lives and for whom the emotional support offered in hospital was itself a reward.

18. Judge Wassall heard evidence from both Dr Ross and Dr Somekh. Sentencing the appellant Judge Wassall observed that he was an extremely dangerous man. He posed a risk beyond "significant" of inflicting really serious harm in random and unpredictable circumstances to any member of the public. This assessment was based on the reports the judge had read and but for those the sentence would have been one of life imprisonment. The judge had heard from the psychiatrists and both agreed that he was suffering from a blend of two serious personality disorders. This combination made him a dangerous offender. Both agreed that he was susceptible to treatment over a long period, probably 5 years. Both agreed that he fell within the criteria for a section 37 hospital order coupled with a section 41 restriction order. However Dr Ross favoured a section 45A hospital order with a limitation direction, as otherwise if the appellant refused treatment he would effectively block a bed. However, in the judge's view, such an order was not appropriate where the offence was intimately connected to the person's mental illness. In considering the appropriate sentence the judge observed that if the appellant were to refuse treatment, he would still be mentally ill and still someone requiring detention under section 37. In addition the judge in passing sentence imposing a section 37 order with a limitation direction, made clear to the appellant that the order operated independently of the order of imprisonment for public protection made in 2009.

19. On the appellant's behalf Mr Peacock submits that in the light of the subsequent events and diagnosis, the sentence of imprisonment for public protection imposed for the index offence should be reconsidered. In particular, he submits that the term of imprisonment for public protection was wrong in principle and that the most appropriate sentence was one of a section 37 hospital order, with a section 41 restriction order, the same order which has since been imposed in relation to the later offences.

20. There are before this court today two further psychiatrist reports in accordance with the directions given by the single judge when granting leave to appeal. There is a report

from Dr Somekh, dated 20th July 2013. This report was written after Dr Somekh had seen Mr Anderson in Broadmoor. Dr Somekh stated that the appellant's behaviour in the proceedings in 2009, that is sacking his legal team and refusing to co-operate, had not been in his own interests and this was consistent with his mental condition. In Dr Somekh's view it was inconceivable that the violent behaviour shown in 2008 could not be somehow directly related to the present condition when it was accepted that the appellant's behaviour in 2009 was so connected. He reported that the appellant had settled at Broadmoor, that his diagnosis was the same and he had started a course of appropriate treatment.

21. There was also before the court a report by Dr Jose Romero-Urcelay dated 24th July 2013. Dr Romero-Urcelay, who I understand is the treating psychiatrist at Broadmoor responsible for the appellant, stated that he was confident that the chronic and pervasive nature of this disorder, which dated back to early childhood, was functionally linked to his offending behaviour, particularly in relation to violent offences. He considered that he was appropriately placed in a hospital setting. The purpose of his treatment was to reduce his risk of re-offending and he appeared to be fully committed and active in his recovery process. He observed that had his legal team sought psychiatric reports at the time of the conviction for the index offence, this would in all likelihood have recommended a hospital order.

22. We have today had the advantage of hearing the evidence of Dr David Somekh in court. He considers that the appellant is suffering from a severe personality disorder; that is a disorder of emotional development. By definition, he says, this involves lifelong threats. He also described the behaviour comprising the offences in 2009 as being typical of someone suffering from this condition. He considered that the first offence was entirely understandable in the light of the mental health problems of the appellant. He described the offending in 2009 as rather histrionic, serving no particular purpose, but accepted that it was very frightening conduct. So far as the 2008 offence was concerned (the index offence), he considered this was very troubling, sadistic behaviour. It was largely inexplicable, but it was understandable in terms of the severe personality disorder from which the appellant suffers. He said the only other possible explanation might be that the appellant had been under the influence of substances and that he had investigated that possibility and found it much less plausible.

23. With regard to the appellant's offending prior to the 2008 offence, his view was that this was not necessarily linked to the disorder. He pointed out that the appellant was in very disadvantaged circumstances, living on the streets, surviving as best he could. He considered that this offending was consistent with those disadvantaged circumstances. He considered that the 2008 offence was quite out of keeping with those circumstances and was linked to the appellant's mental make up. He told us that when he saw the appellant at Broadmoor the appellant had been remarkably compliant but he qualified that by saying that he thought this maybe “a bit of a honeymoon phase”. He pointed out that the course of treatment for this type of personality disorder could be painful and that there may be more turbulent times ahead as the appellant's treatment proceeds. He explained that it is a long-term treatment.

24. In Dr Somekh's view the most appropriate outcome in respect of the 2008 offence would have been and remains a hospital order with restrictions. In Dr Somekh's view that would provide sufficient protection for the public. When asked about the distinction between a mental relapse and a relapse to criminality he observed that he considered that to be a false distinction and that if there were any significant offending by the appellant after his release, that would immediately be followed by his recall under a hospital order.

25. Having regard to the history of this matter and in particular the further offences committed by the appellant following his imprisonment, we are satisfied that the appellant was suffering from a severe personality disorder at the time when he committed the index offence and at the time when he was sentenced for it. That view has been confirmed by the further psychiatric reports provided by Dr Somekh and Dr Romero-Urcelay, who is currently responsible for the appellant's treatment. However, it does not follow from that that this court should substitute a hospital order with restrictions as proposed by the two psychiatrists and as proposed by counsel on behalf of the appellant. Rather the question for our consideration is whether the sentence of imprisonment for public protection was wrong in principle.

26. The differences between imprisonment for public protection and hospital orders under section 37 and restrictions order under section 41 were summarised by Hughes LJ in Attorney-General's Reference No 54 of 2011 [2011] EWCA Crim 2276, at paragraph 17, where he said:

27.

> "It is true that the detention for public protection regime and the section 37/41 hospital order regime have features in common. Under both regimes discharge on release is discretionary and in the hands of the Secretary of State, that is to say the Ministry of Justice. In both cases regard is had, in making the discretionary decision whether or not to release, to danger. In neither case is there any absolute right to release. Secondly, release under both regimes is conditional and the defendant is subject to recall. That said, there is an absolutely crucial difference between the two forms of regime. Under an order for detention for public protection release is dependent upon the responsible authority being satisfied that the defendant is no longer a danger to the public for any reason and principally not at risk of relapsing into dangerous crime. Under the hospital order regime release is dependent upon the responsible authority being satisfied that the defendant no longer presents any danger which arises from his medical condition. Similarly, and critically, release under the detention for public protection regime is on licence and the licence can be revoked if the defendant shows that he remains a danger to the public from crime. It is possible and indeed inevitable that the licence conditions will be designed, among other things, to prevent association with dangerous criminals. Under the hospital order regime, recall is available but only if the defendant's medical condition relapses. Simple crime does not trigger a recall under the hospital order regime."

28. The issue for us is an assessment of the residual risk, if the appellant successfully completes a course of treatment for his personality disorder. The question is whether we are satisfied that there is no need for a power of recall if there is a relapse in criminality as opposed to a medical relapse. We are satisfied, as I have said, that the second offence was intrinsically linked with the personality disorder suffered by this appellant. However, it does seem to us that there is a continuing risk of return to criminality. In this regard we note first that Dr Somekh does not link his offending prior to the 2008 offence to his personality disorder. I have already referred to the nature of that previous offending. Secondly, we draw attention to the nature of these offences. In particular, the offence in 2008 was committed jointly with another who is not said to have suffered from any personality disorder or mental health condition. These offences were not committed while the appellant was delusional. No doubt his responsibility was diminished to a certain extent by his personality disorder. But in our view, there remains a strong element of criminality. In these circumstances we consider that there is a strong risk of return to criminality, even if the appellant's personality disorder can be effectively treated and alleviated. We note that this was a factor in the mind of Judge Wassall in Exeter Crown Court when sentencing in 2012 for the 2009 offences, when he said this:

29.

> "I shall also say, to make it clear, that this Order operates independently, as I understand it, of the Order of imprisonment for public protection made by the sentencing court in 2009, and you are still, once the term of seven-and-a-half years has expired for that, going to also have to establish to the Parole Board that your risk can safely be managed in the community before you are released from that sentence."

30. It is clear to us that Judge Wassall felt able to impose a hospital order with restrictions under section 37 and 41, at least in part, because the public had the additional safeguard that a sentence of imprisonment for public protection remained in force and that therefore the appellant's release into the community could only be achieved if both the Mental Health Review Tribunal and the Parole Board thought that appropriate and safe. If we were reviewing the decision of Judge Wassall, we could not say that his decision was wrong in principle. On the contrary, it seems to us that it was a perfectly legitimate exercise of his judgement.

31. Dr Somekh has told us, in his evidence today, that if the appellant were released into the community from a hospital order and re-offended in any significant way, as a matter of custom and practice he would be recalled under the hospital order. However, it does not seem to us that that is a sufficient protection for the public given the risk with which we are concerned. Furthermore, Dr Somekh accepted in his evidence that the fact that there are at present running concurrently an order for imprisonment for public protection with a hospital order under sections 37 and 41 does not and would not interfere in any way with the treatment which the appellant needs and which he is receiving at Broadmoor Hospital.

32. In these circumstances, we are unable to say, even in the light of subsequent events, that the sentence for the index offence was wrong in principle. Accordingly the appeal will be dismissed.