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No. 2010/06632/A2
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 24 March 2011

B e f o r e:

LORD JUSTICE GROSS

MR JUSTICE HEDLEY

and

MRS JUSTICE NICOLA DAVIES DBE

R E G I N A

– v –

TAHER AHMED CHOWDHURY

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(Official Shorthand Writers to the Court)

Mr M Tregilgas–Davey appeared on behalf of the Appellant

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

Thursday 24 March 2011

LORD JUSTICE GROSS: I shall ask Mr Justice Hedley to give the judgment of the court.

MR JUSTICE HEDLEY:
1. This judgment sets out the views of the court in respect of the appeal before us, but no order indicated by this judgment will be drawn up, for reasons that will become apparent from it, unless and until certain conditions are met.

2. This is an appeal against a hospital order with a restriction order, such appeal being brought with the leave of the single judge. The order was imposed on 1 November 2010 by His Honour Judge Wiggs sitting in the Crown Court at Salisbury following the appellant's guilty plea to an offence of wounding with intent.

3. The learned judge had the requisite two medical reports and heard oral evidence from one of the doctors. The only issue in the appeal is whether, in addition to the hospital order under Section 37 of the Mental Health Act 1983, the judge should have imposed a restriction order under Section 41 of the same Act.

4. It is of some significant that the appellant had a background of mental illness, but he was a man of good character. He had on one occasion been detained by the police pursuant to their powers under the Mental Health Act and he was subsequently diagnosed with a "depressive psychosis". He was treated in the community and a distinct improvement was seen in his condition.

5. He decided with his wife, as part of his rehabilitation, to return to his homeland of Bangladesh for a visit. He did so. They took the view that his recovery was complete and the medication was discontinued.

6. He returned to this country but there was some delay before he was re−united with the psychiatric treating team.

7. He had employment at a restaurant in Salisbury. The matters which gave rise to the offence arose in the early hours of 18 December 2009. Apparently without any cause or provocation the appellant invaded the room of the victim (a fellow worker) and issued threats to kill. He attacked the victim with a knife and stabbed him several times. The medical evidence demonstrates that at least one of these injuries (perhaps two) was life−threatening. Fortunately, he received prompt and skilled medical treatment. In the event the victim appears to have made a full physical recovery from the injuries, subject to surgical scarring.

8. The appellant was arrested at the scene. He was found to be medically unfit for interview.

9. He was originally, and unsurprisingly, charged with attempted murder, but as the medical evidence was collated, it became apparent to all, and accepted by all, that the proper disposal would be under the Mental Health Act 1983. A decision was therefore taken to accept pleas to wounding with intent. The learned judge rightly approved that course.

10. It was common ground at the sentencing hearing that the conditions required by Section 37 of the Mental Health Act 1983 were fully met. It was apparent that all were agreed that

an order under that Act was a proper disposal in this case. The arguments principally centred around the question of whether or not there should have been a restriction order. The learned judge was concerned by the opening words of Section 41 of the Mental Health Act which are in these terms:

> "(1) Where a hospital order is made in respect of an offender by the Crown Court, and 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, the court may, subject to the provisions of this section, further order that the offender shall be subject to the special restrictions set out in this section...."

11. The medical evidence spoke with one voice in saying that a restriction order was not required in this case. The learned judge took another view. In the course of his sentencing remarks he said this:

> "As I have said already, I am quite satisfied that that is a mental disorder and it is appropriate to make a hospital order. I repeat myself by saying that although I take very high regard for the views expressed by the two psychiatrists and it is plain that Dr Davies has given very good care, and Dr Cantrell more recently, to the defendant Mr Chowdhury, and indeed assistance to his wife, it is my decision at the end of the matter, and my decision as to whether it is necessary to make a restriction order for the protection of the public from serious harm, and I am very concerned about the fact that there has been a time when the defendant decided not to continue with psychiatric treatment. It may well be that his insight is better and getting better, but I also have to have regard to precisely what the defendant did, and it was very, very serious indeed. And in those circumstances I have decided within the terms of section 41 that it is necessary for the protection of the public from serious harm to make a restriction order under that section without limitation of time."

12. It is beyond argument that the learned judge was entitled to depart from the unanimous medical view in pursuit of his duties to secure the protection of the public from serious harm. The responsibility for protecting the public from serious harm is the responsibility of the court and it is not a responsibility that the court can delegate to the medical profession unless satisfied that no reasonable decision made by the medical profession would in any way imperil the safety of the public.

13. The learned judge clearly identified one particular risk, namely the withdrawal from compliance with medication, and he was clearly impressed by the fact that it had happened when the appellant had gone abroad. It is hardly surprising that the learned judge should have entertained those anxieties or given expression to them, or indeed looked for a means of making them effective.

14. Dr Paul Cantrell, who is the treating psychiatrist in the medium secure unit in which the appellant is presently held, and who was one of the reporting doctors before the learned judge, has prepared two further reports dated 21 December 2010 and, pursuant to the order of the single judge giving leave, on 23 February 2011. Dr Cantrell has made it crystal clear in his reports that in his view a Section 41 restriction is not required; its effect would be to slow down the progress of the appellant's treatment through the various stages from acute admission to ultimate rehabilitation. He is convinced that the appellant does not meet in any substantial way the criteria of being a real risk of re–offending. He indicates that the appellant has good support from his wife and has shown himself compliant with treatment; he is a "model patient". Moreover, Dr Cantrell points out that, even when the Section 37 order is discharged, it will be replaced with a community treatment order which enables the treating psychiatrist to keep control over the appellant and gives to the treating psychiatrist the sanction (if sanction it be) of being able to recall him to secure conditions. On the other hand, the terms of the community treatment order are a matter exclusively for the medical profession and are not a matter for this court. That raises the difficulty that the responsibility for public safety resides with this court and not to the same extent with the medical profession, though clearly it is a matter to which they will have serious regard.

15. It follows from all that that there is a powerful clinical case to be made against the imposition of a restriction order under Section 41. We acknowledge the force of that and we acknowledge that those are matters that must be considered with great seriousness. On the other hand, as we have already acknowledged, there is real force in the learned trial judge's anxieties about one aspect of the future, namely non–compliance through non–presence in the jurisdiction. This court cannot conceal from itself the gravity and the life–threatening consequences of the offence. On the other hand, the court must have in mind the appellant's antecedents and must have regard to the views of Dr Cantrell about the risk of the commission of future offences that the appellant poses.

16. The court is faced, as will not infrequently be the case, by the conflicting pressures of the treatment needs of the appellant on the one hand and the desire to ensure the safety of the public on the other.

17. We draw attention to the provisions of Section 37(8) of the Mental Health Act 1983. That clearly contemplates the ability of the court to make orders over and above the hospital order itself. It specifically precludes the making of a sentence of imprisonment or a community order, or, in relation to young people, referral orders or attempts to bind over parents or guardians. But it preserves the powers of the courts to make other orders and so thought was given as to whether there were other orders that could be made which could secure the prevention of the appellant from simply leaving the jurisdiction as and when he chose to do so.

18. The researches of both the court and of counsel indicated that direct restrictions like

travel orders or serious crime prevention orders with travel restrictions were simply not available in the circumstances of this case. It might have been possible to have considered powers under anti–social behaviour orders or restraining orders, but we were strongly disinclined to follow that route as it seemed to this court to involve a degree of artificiality and use of orders that were clearly not contemplated by the statute which initially created them.

19. In the end the position we have come to is this. The appellant has indicated through counsel a willingness to offer to the court certain undertakings. Those are: to surrender his Bangladeshi passport; not to apply for another Bangladeshi passport; to surrender his UK passport; not to apply for another UK passport; not to apply for any other travel documents; and to give irrevocable instructions that such documents are not to be returned to him without the written consent of his treating psychiatrist.

20. It is not the intention of this court to prevent the appellant from leaving the jurisdiction if he has made the necessary arrangements with his treating psychiatrists. The intention of the court is to prevent a unilateral leaving of the jurisdiction with the consequential risk of a lapse in medication at the time when that may not be in his interests and therefore most certainly not in the interests of public safety.

21. We have considered whether the appellant is competent to deal with these matters. In both his reports Dr Cantrell makes it crystal clear that in his view the appellant is competent to deal with fairly sophisticated matters of confidentiality in reports. We are satisfied, bearing in mind that competence is an issue specific matter, that he is competent to give the undertakings which have been indicated. It is important that those undertakings are given with the benefit of legal advice; that they are given freely; and that they are given with a clear understanding of the potential consequences of a breach of those undertakings.

22. It is also important that notice of these undertakings is served on the High Commission of Bangladesh and the UK Passport Office. It should be served on the two responsible medical practitioners, and it should be directed that the order of the court should travel with the appellant's medical records so that anyone responsible for him knows what the position is.

23. We said at the beginning of this judgment that it would be a setting out of the provisional views of the court, but that the order would not be drawn up until matters had been complied with. It will now be apparent what was meant by that. The court is disposed to allow the appeal and to remove the restriction order, provided that the undertakings which have been indicated are formally forthcoming and are in a form that is acceptable to this court and in the knowledge that both the Bangladeshi and the current UK passports have in fact been deposited with a responsible person.

24. That is as far as this court can take the matter at the moment.

LORD JUSTICE GROSS: We will seek to deal with the approval of the undertakings on paper. We would like you to send the material to the court within seven days and it should be marked for the attention of Hedley J.

MR TREGILGAS–DAVEY: Certainly.

LORD JUSTICE GROSS: We had better give you liberty to apply, but if at all possible we would like to deal with any remaining matters on paper. If, however, the whole thing unravels, then it may be necessary to seek a further hearing.

MR TREGILGAS–DAVEY: Certainly, my Lord.