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No: 2012/1145/A4
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 4 December 2012

B e f o r e:

LORD JUSTICE ELIAS

MR JUSTICE BEAN

THE RECORDER OF CHESTER
HIS HONOUR JUDGE ELGAN EDWARDS DL
(Sitting as a Judge of the CACD)

R E G I N A

v

ALAN FLETCHER

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(Official Shorthand Writers to the Court)

Mr P Rowlands appeared on behalf of the **Appellant**
Mr M Phillips appeared on behalf of the **Crown**

Judgment

As Approved by the Court

1. LORD JUSTICE ELIAS: On 19th June 2006 in the Crown Court at Wolverhampton before His Honour Judge Onions, the appellant pleaded guilty to the offence of destroying property, being reckless as to whether life is endangered, contrary to section 1(2) of the Criminal Damage Act 1971. He was sentenced on 4th September to an indeterminate sentence for the protection of the public and the minimum term was two years 188 days. He now appeals against sentence by leave of the full court.

2. The background to the offence was this. The appellant was a tenant of two-storey, three-bedroomed, mid-terraced house. He had a lodger living with him. On 8th March 2006, when he was drunk, he made four 999 telephone calls making threats that he intended to harm people at his premises and that he was going to set a fire. He also reported that his sister had set fire to various premises. The lodger smelt smoke and saw the fire. He managed to get out of the house, as did the appellant shortly after him. The fire service arrived and they had to restrain the appellant who was trying to get back into the premises. He was aggressive and abusive towards them. He had burns to his face and initially he claimed it was his sister who had started the fire. It subsequently transpired that he had set fire to the settee in his house and the fire had spread. The sitting room had been destroyed and the rear lounge. The kitchen and the hallway had suffered smoke damage.

3. When sentencing, the judge had before him details of the antecedents and a number of reports. The antecedents demonstrated that here was a man who was continually committing offences, on the whole relatively minor ones. He had convictions for 57 offences - 42 different appearances, 39 of which were in the Magistrates' Court. His offending included nine offences of criminal damage, eight for being drunk and disorderly, 10 for threatening behaviour and a series of other offences. He had been in prison for affray and possession of a bladed article and criminal damage in 2000. He had also been convicted of arson, when he poured petrol through his brother's letterbox, for which he was placed on probation in 1999 with a condition that he had to receive psychiatric treatment.

4. There were three reports. One was from a Dr Roy, consultant psychiatrist. He outlined the personal history of the appellant. He noted that in more than a dozen assessments by various medical health professionals the appellant had never been found to be suffering from any serious major or enduring mental illness and that he was noted to display manipulative and attention seeking behaviour. He considered that the appellant had adjustment disorders which reflected the failure to cope with stress and he suffered from unstable personality traits. His opinion, like those before him, was that the appellant was not suffering from any major or serious mental illness although he had problems. He failed to learn from experience. He had episodes of mood swings when his life did not move forward as hoped and he had a propensity to alcohol. He noted that his intelligence was at the lower end of the normal range.

5. Another report from Dr Appleford, a consultant psychiatrist, dated August 2006, agreed with the view of Dr Roy. He accepted that the appellant had difficulties coping with life changes and a pattern of developing periods of mood changes. He also considered that his history and presentation suggested an IQ at the lower end of the normal range.

6. There was a pre-sentence report which noted that the appellant had apparently committed the offence as a result of his obsession with getting admitted to the Penn Road Psychiatric Unit. His sister had been admitted to a secure hospital after having committed arson and the author of the report considered it likely that he was simply mimicking her behaviour. He was unable to recognise the risks he had caused to others and was a socially inadequate man. He had learning difficulties. He was unable to cope with stress and when he had been to the Penn Road unit on an outpatient basis he had failed to cooperate and had had to be discharged. The author concluded that he presented a high risk of re-conviction and a high risk of harm to members of the public. In his conclusion he said this:

> "Given Dr Roy's assessment that Mr Fletcher is not mentally ill, a hospital order is not a viable sentencing option, despite Mr Fletcher's bizarre behaviour and his obsessions and fantasies.
>
> He is a man who desperately needs professional help and hopefully of imprisonment for public protection is imposed he will be placed in an institution which can offer him the appropriate resources in order to reduce risk."

7. When passing sentence, the judge recognised that he had to focus on the risk of harm in future from this appellant. Not surprisingly in view of the reports before him, he concluded that the only proper sentence was an indeterminate one for public protection. The judge said this:

> "The psychological report shows that you have some problems, but not mental health problems - they are problems to do with personality and not mental health - so there is not a lot they can do to help you by way of drugs or treatment. All they can do is try and help you by training you and counselling you. Your behaviour is unpredictable, you are reliable, especially when you have had too much to drink, and you have no less than eight offences of being disorderly when you are drunk ... That all drives me to the conclusion that at the moment you do represent a significant risk to other people, so there will have to be an indeterminate sentence for public protection."

8. The ground of appeal is essentially that the judge was not properly informed as to the mental state of this particular appellant. Counsel submits that the fact that the appellant was not suffering from a mental illness under the Mental Health Act was not the end of the story. Indeed, he submits it obscured the real issue in the case which was that the applicant was instead suffering from a severe mental impairment, or at least a mental impairment under the Mental Health Act 1983.

9. Counsel has sought to adduce fresh evidence in order to make good this ground of appeal. We have two reports produced to us. One was from Dr Harm Boer, a consultant forensic psychiatrist who specialises in working with people with learning disability and is approved for the purposes of section 12(2) of the Mental Health Act. The other is from a Dr Morgan, who is a consultant psychiatrist and medical lead at the

Forensic Learning Disability Service at Brooklands Hospital, Birmingham. Dr Boer has attended this morning and has been subject to examination by counsel.

10. The circumstances in which a hospital order can be made under the Mental Health Act were set out in section 37(2) of the Mental Health Act. The conditions for making such an order at that time (the section has subsequently been amended) were that the court should be satisfied on the written or oral evidence of two registered medical practitioners that the offender was suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment (mental disorder); that the mental disorder was of a nature or degree which makes it appropriate for the appellant to be detained in hospital for medical treatment; and that in the case of a mental impairment, that such treatment is likely to alleviate or prevent the deterioration of his condition.

11. The submission is that the appellant is and was at the relevant time suffering from, if not severe mental impairment, at least mental impairment within the meaning of that definition; that the original reports failed to focus on this, no doubt because those particular psychiatrists did not have any special knowledge or understanding of learning disabilities; and that the disorder is susceptible to treatment which is "likely to alleviate or prevent a deterioration in his condition". It is submitted that had these reports had been available to the judge at the time then this would have been the appropriate disposal, together with restrictions imposed by section 41 of the 1983 Act.

12. The report of Dr Boer confirms that there is and was at the material time the relevant mental impairment. He found that the applicant's intellectual deficit is profound. He was found to have an overall Wechsler adult intelligence scale score of 56. It is right to say that there is some albeit minor difference in emphasis between Dr Boer and Dr Morgan as to precisely how serious the impairment is. Dr Boer considers that the appellant is closer perhaps to the concept of being severely mentally impaired, whereas Dr Morgan would say it was only a mental impairment and was not particularly severe, given that the appellant could hold down a job and was able on occasions to live independently. Nothing in fact turns on that because, as we have said, section 37 can apply even where there is a mental impairment.

13. Dr Boer went on to note that the appellant would be categorised as having a mild learning disability and he thought it would perhaps be more significant than that. A relevant intelligence scale score of under 60 would generally suggest severe mental impairment and Dr Boer confirmed this morning in answering questions that even if 56 slightly underestimated the scale, as Dr Morgan thought, it would not be significantly above that figure. In addition, Dr Boer confirmed this morning that this impairment was treatable. Indeed the appellant was transferred to hospital some time ago and has been under the treatment of Dr Boer and he confirms that in the last year in particular there has been improvement in the appellant's condition and there is every reason to hope that that will continue. He accepts that before the appellant could be released there would have to also be treatment in relation to alcohol deficit. The evidence is that prison was a wholly inappropriate place for this appellant. He was quite unable to carry out successfully the proposed course that he would need to undertake before being released, principally because of his learning disabilities.

14. As we have said, Dr Morgan confirms the position as stated by Dr Boer, at least to the extent of agreeing that there was relevant mental impairment which was treatable. He also was satisfied that it would have been a situation when the offence was committed. We have therefore both these reports clearly of the view that the appropriate order, had this information been available to the court at the relevant time, would have been to make a hospital order under section 37, together with restrictions under section 41.

15. In the circumstances, we have no doubt that that order is in the interests both of this appellant and of the public in a case of this kind, and accordingly we uphold this appeal and we substitute for the sentence of imprisonment for public protection an order that the appellant be placed in hospital pursuant to section 37, but is subject to the restrictions imposed by section 41. That order is to commence from today.