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No: 201000775 A1
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 20 October 2011

B e f o r e:

LORD JUSTICE HUGHES
(Vice President of the CACD)

MR JUSTICE CRANSTON

MR JUSTICE HICKINBOTTOM

R E G I N A

v

TANIA LOUISE GOUCHER

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(Official Shorthand Writers to the Court)

Mr J Luckhurst appeared on behalf of the **Appellant**

Mr H Hughes appeared on behalf of the **Crown**

J U D G M E N T

(As Approved by the Court)

1. THE VICE PRESIDENT: Cranston J will give the judgment of the court.

2. MR JUSTICE CRANSTON: This application for leave to appeal under section 16A of the Criminal Appeal Act 1968 against a hospital disposal, limited to the restrictions imposed under section 41 of the Mental Health Act 1983, was referred to the full court by the single judge. This court, with a different constitution, adjourned the matter so that a further medical report could be prepared ([2011] EWCA Crim 1456). That report is now available.

3. In summary, this applicant, now 23 years old, was admitted as a patient at Bethlam Royal Hospital in November 2008. A few days following her admission, she approached another patient and poured very hot water over him, causing burns, albeit no permanent harm. She was discharged into the community, but on return to the Bethlam Royal Hospital in mid February 2009, she approached a patient watching television and struck her, causing a bruise to a cheek. She also hit that patient on the head.

4. As a result of this conduct, she was charged with two counts of assault occasioning actual bodily harm and one count of common assault.

5. Later that year at the Crown Court at Croydon, she was found to be acting under a disability when committing these assaults, and thus under section 4(5) of the Criminal Procedure (Insanity) Act 1964 to be unfit to be tried. Under section 4A(2) of that Act a fact−finding trial followed in which she was found to have committed the assaults.

6. In sentencing her, HH Judge Pratt had two reports before him. They recommended a hospital order under section 37 of the Mental Health Act 1983. The need for the hospital order has never been questioned, and the judge imposed one. The judge then had to consider the issue of a restriction order under section 41(1) of that Act. That section reads:

> "(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, and an order under this section shall be known as 'a restriction order'."

7. The first report before the judge was from Dr Magner, the applicant's treating psychiatrist. Dr Magner, in his report dated 13 November 2009, said that without treatment in the community, the applicant posed not only a significant risk to herself, but also a risk to others. That risk was, in his view, very likely to occur, but the severity of her violence would probably not be severe. Overall, a low to moderate risk of violence to others would be anticipated if she were well supervised and on appropriate treatment.

8. The second report before the judge was a report from a Dr Davies, who would have been the responsible clinician if she were to be released into the community. Dr Davies said that her offending had been committed during a particularly disturbed

period in the onset of her condition. He noted that aggressive behaviour had not been a concern during her time at the hospital where she was. He went on to say that he was not inclined to the view that the applicant should remain subject to a section 41 restriction order. That order, in his opinion, would not be proportionate.

9. The judge said that it was apparent that the applicant was seriously ill and would take a long time to recover. Notwithstanding Dr Magner's opinion, the judge firmly believed that a restriction order was necessary to protect the public from serious harm from the applicant. He therefore imposed the restriction order without limit of time. The judge noted that, in due course, the applicant would be able to apply for a community treatment order.

10. Following the sentence in December 2010, Dr Magner prepared another report on the applicant. In that report, he set out the condition of the applicant at that point, but went on to say that he remained of the opinion that the imposition of a restriction order was not absolutely necessary. The applicant could be adequately managed under the civil sections of the Mental Health Act, and in particular, she might benefit from having a supervised community treatment order when it was considered clinically appropriate to return to her to the community.

11. In submissions on the applicant's behalf, Mr Luckhurst has contended that while the judge applied the correct test, he reached the wrong conclusion. The offences occurred, as Dr Davies had highlighted, at a time when the applicant was in a particularly disturbed period of the onset of her condition. In Mr Luckhurst's submission, the imposition of the restriction order was disproportionate to her medical history and her previous offending. The medical reports of Dr Magner and Dr Davies evidenced little risk of an escalation of her offending.

12. In Mr Luckhurst's submission, the test under section 41 for a restriction order was the risk of serious harm to the public, and the reports did not anticipate that serious harm. He also referred to the robust provisions for community treatment following the enactment of the Mental Health Act 2007.

13. We have the benefit of a report on the applicant from Dr Fotiadou, consequent on the order of the court when it adjourned the matter on the previous occasion. Dr Fotiadou is a psychiatrist at the Bethlam Royal Hospital and is now the treating psychiatrist for the applicant. In her report of 26 June of this year, Dr Fotiadou refers to the background, including the onset at the age of 20 of paranoid schizophrenia. She refers to her abuse in the past of alcohol and to her offending history. As well as the index offences, Dr Fotiadou recounts the aggression which the applicant has demonstrated towards the police and indeed to her own mother. When in a low secure unit in December 2010, Dr Fotiadou reports there were attacks on others and verbal aggression to staff. The applicant, however, responded well to medication. Notwithstanding that, in March of this year the applicant had to be moved to a more highly staffed unit following an unprovoked attack on another patient and a threatened attack on others.

14. Following her admission to the Spring Ward on 21 April 2011, where she showed early aggression towards staff, the position settled down. Her behaviour improved

considerably, and there have been no further incidents of violence since then, and also indications of an improvement in her mental state. In particular, Dr Fotiadou says this:

> "I do not believe that the section 41 (Restriction Order) is necessary for her management and the protection of the public. [The applicant] can be treated under the Civil Section of the Mental Health Act (1983) and upon discharge, if she was taken off the Restriction Order, she will be placed on a Community Treatment Order. This will ensure that she is discharged at suitable accommodation with 24 hour support and that her adherence to medication, abstinence from illicit substances/alcohol and her attendance at outpatients will be closely monitored.
>
> The above measures will lead to close supervision and monitoring of her mental state and are likely to reduce the risk of relapse and prevent further incidents of violence."

15. The judge was faced with a difficult issue in assessing this applicant's risk of posing future serious public harm. He went about the task with care. There is no doubt that he applied the correct test. Where we would differ, with respect, is with his assessment of the risk of future serious harm to the public. The recent report of Dr Fotiadou confirms that although there is a risk of harm, it does not fall within the category of serious harm to the public required by section 41.

16. We would grant leave, allow the appeal and quash the section 41 restriction order. However, we underline the need for a carefully controlled, staged and conditional discharge of this applicant into the community.

17. THE VICE PRESIDENT: You must understand, if the point arises again, what this court is concerned with is whether the judge was right or wrong; it is not concerned with subsequent developments.

18. MR LUCKHURST: Indeed. My Lord, one other matter is costs. The registrar, because Miss Goucher is under a disability, was unable to grant a legal aid order, I understand.

19. THE VICE PRESIDENT: A representation order; that is quite right. What do you need; an order from central funds?

20. MR LUCKHURST: Indeed.

21. THE VICE PRESIDENT: Yes, her costs should be paid out of central funds, Mr Luckhurst.

22. MR LUCKHURST: I am grateful.