Neutral Citation Number: [2012] EWCA Crim 2557
No. 2012/03300/A4

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 6 November 2012

B e f o r e:

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
(Lord Judge)

MR JUSTICE MITTING

and

MR JUSTICE GRIFFITH WILLIAMS

_____

R E G I N A

- v -

SHANE WILLIAM JENKIN

_____

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(Official Shorthand Writers to the Court)

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Mr R F Linford appeared on behalf of the Appellant

Mr A Macfarlane appeared on behalf of the Crown

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

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Tuesday 6 November 2012

THE LORD CHIEF JUSTICE: I shall ask Mr Justice Mitting to give the judgment of the court.

MR JUSTICE MITTING:

1. On 13 April 2012 in the Crown Court at Truro the appellant (aged 33) pleaded guilty to causing grievous bodily harm with intent, contrary to section 18 of the Offences against the Person Act 1861. On 11 May 2012 he was sentenced to life imprisonment, with a specified minimum term of six years (less 382 days spent in custody on remand). In addition, a Hospital Order was made under section 45A of the Mental Health Act 1983, with a restriction order under section 41. The effect is that he was required to be admitted to a secure mental hospital at the start of his sentence. If and when released from the mental hospital, he will serve the balance of the life term in prison. His suitability for release on life licence after the expiry of the minimum term will be determined by the Parole Board. The sole criterion will be the safety of the public.

2. He appeals against sentence by leave of the single judge.

3. Tina Nash was the appellant's partner of twelve months. She and her two children, aged 13 and 3, lived with him in a house in Hayle, Cornwall. Their relationship was characterised by violence on his part for which he had been arrested and prosecuted, but always to no avail because she withdrew her complaint against him under, she said, the threat of what he would do if she did not. He would frequently threaten to kill her and to burn down her house.

4. The offence occurred about four weeks after the appellant's release from prison while on remand for an offence alleged to have been committed against her, in respect of which no evidence was offered because she withdrew her complaint.

5. On the evening of 21 April 2011 he and she talked to new neighbours over the garden fence. He had drunk, on his own admission, four large bottles of cider and may have smoked two cannabis cigarettes as well. He said later that he was not drunk. During the conversation, to Miss Nash's consternation which she did not conceal, he offered to share his prescription tablets with the neighbours. She tried to take the container of tablets from him, and soon thereafter went up to bed.

6. She heard the appellant ascending the stairs. Immediately after he entered the room he put the bedclothes over her head and lay with all of his seventeen-and-a-half-stone weight on top of her. He strangled her until she lost consciousness. The next thing she knew was the appellant pulling the duvet away, saying "Oh, my God, your eye is hanging out of your head". "Oh, my God, look at your face. You're blind". "It's all your fault. I'm going to get 20 years for this. You're blind and you're not going to see your kids grow up. It's all your fault."

7. As the medical evidence later confirmed, while Miss Nash was unconscious the appellant had gouged out both of her eyes with his fingers, blinding her in both eyes and disfiguring her for life.

8. She pleaded with him to call an ambulance. He refused. He took her mobile phone and that

of her son away from her so that she could not call one for herself. He then went to sleep on the sofa. That permitted her to reach either the kitchen or bathroom downstairs for water, of which she drank copiously.

9. When the appellant woke up he repeatedly said "It's all your fault because of the bloody tablets".

10. By 10am (about eleven or twelve hours after he had gouged out her eyes) her children had woken up. The appellant gave Miss Nash her son's mobile telephone. She called her former partner who came round immediately, saw her condition and summoned help. The appellant was present but said that it was nothing to do with him.

11. The appellant's first account of the incident was given two days later to an acquaintance who had agreed to let him stay for a day or two: he had punched his girlfriend and thought that he had shattered her eye socket and had pushed his fingers into her eyes. One of them had popped out, as had the other.

12. On 25 April 2011 he was arrested. He told the police in interview that, after an argument about tablets, he had grabbed Miss Nash by the head, fallen on her, and his thumbs had gone into her eyes. He did not call an ambulance because he believed that the police would follow.

13. He later gave similar account to Dr John Parker, the consultant forensic psychologist who is currently treating him. To Dr Alcock, a second consultant forensic psychiatrist, he denied attempting to kill her, stating "I never had any plans to kill her". That is likely to have been true. What was not was his attempt to suggest that the gouging may have been an accident or unintended.

14. In the opinion of Mr Wilson Holt, the consultant ophthalmologist who treated Miss Nash, extreme force would have been required to cause the injuries observed: the displacement of her left eye from its socket and the disruption of the globes of both eyes with no lens visible.

15. Dr Amanda Jeffrey, a consultant pathologist, said that "severe force would have been necessary to produce these injuries".

16. Their impact upon Miss Nash does not require to be stated to be understood. This was a terrible crime. The judge described it as "barbaric". It was also a crime of great cruelty. The appellant intended that his victim should live, blinded and disfigured, all because she had crossed him over the tablets. It is difficult to conceive of a graver offence, short of homicide.

17. Given the nature of the crime, a contribution to its occurrence of mental disturbance was, unsurprisingly, investigated. In conversations with the two psychiatrists the appellant described how he was the victim of persecution by the police. It is unnecessary to set out the details of his claims. They persuaded both Dr Parker and Dr Alcock that he suffered from a delusional disorder which, by the date on which he came to be sentenced, and currently, was showing signs of responding to treatment: principally, anti-psychotic drugs. Dr Alcock was of the opinion that the appellant would require prolonged pharmacological and psychological treatment. He recommended a Hospital Order with a restriction, as did Dr Parker. Both gave evidence to the

judge. Dr Parker raised the possibility of a hybrid order under section 45A of the Mental Health Act 1983, the sentence which the judge was to impose.

18. The reason he did so, which Dr Parker noted and was evidenced by his previous convictions, was in part the appellant's long history of violent offending. He was violent long before he was delusional. In 1994 (aged 14) he admitted grievous bodily harm in the classroom, when he left his victim with a broken cheekbone and a scratched eye lens. Later in 1994 (aged 15) he admitted an offence of robbery with an accomplice in which for three hours the victim was subjected to physical assaults: kicking, punching and cutting with a knife. The victim sustained a broken leg and facial injuries. In 1997 (aged 18) he assaulted three people when he punched them in the face. In 1998 (aged 19) he head-butted a policeman called to a domestic incident involving him. In 1999 (aged 20) he and another man forced their victim to the ground and kicked him to the head and body, causing a fracture of his skull, facial injuries and broken ribs. For that offence he was sent to a young offender institution for four years. In 2006 and again in 2010 he punched a doorman who refused him entry into a nightclub.

19. As already noted, according to Miss Nash (whose account there is no reason to doubt) the appellant used violence extensively during their relationship, of which he was never convicted.

20. In careful sentencing remarks Judge Clarke QC concluded that a sentence of public protection, either life imprisonment or imprisonment for public protection, was necessary to protect the public from the risk of serious harm caused by the commission of further serious offences of violence. He concluded that:

> ".... whatever his mental disorder may have been and the extent of that disorder, he must bear significant responsibility for what happened."

He concluded that a sentence of life imprisonment was justified for the offence and set a minimum term over the Sentencing Council's guideline range for a category 1 section 18 offence because of "the extreme violence and its catastrophic consequences". He also concluded that it was appropriate for the appellant to receive hospital treatment for his mental disorder and so made an order under section 45A.

21. There were, in reality, two questions which the judge had to address:

> (1) Was it necessary to protect the public from a risk of serious harm that an order for indefinite detention of the appellant should be made?
>
> (2) If so, what was the appropriate order out of the four available alternatives:
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> (i) an order under section 37 of the Mental Health Act 1983, coupled with a restriction order under section 41;

(ii) a life sentence;

(iii) a sentence of imprisonment for public protection;

(iv) either (ii) or (iii) coupled with an order under section 45A?

22. As to (1) Mr Linford concedes, correctly, that it was and is necessary to protect the public from the risk of serious harm that an indefinite order of some kind should be made. The facts of the offence, the appellant's record and his mental condition demand it. The only question is which of the four alternatives should be adopted? Mr Linford submits that it should be an order under section 37, with a restriction order under section 41. He submits, correctly, that the conditions for the making of such an order are satisfied in that the appellant suffers from a mental disorder that is of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment and that, having regard to "all the circumstances including the nature of the offence, the character and antecedents of the offender", the most suitable means of dealing with him is the making of a Hospital Order; and that, having regard to the same factors, and the risk of his committing further offences, it is necessary for the protection of the public from serious harm that the order should be coupled with a restriction order.

23. The effect of such an order is, as the Vice President explained in Attorney General's Reference No 54 of 2011 [2011] EWCA Crim 2276, that "release is dependent on the responsible authority being satisfied that the defendant no longer presents any danger which arises from his medical condition".

24. We are satisfied that such an order would not be the right disposal of this case. Irrespective of his delusional disorder, the appellant poses a significant risk of serious harm to members of the public occasioned by the commission of offences of violence. Even if his mental disorder is cured, or substantially alleviated, that risk will remain. A sentence is required which addresses that residual risk. As Mr Linford concedes, the appellant satisfies the statutory test for the imposition of an indefinite sentence set out in section 225(1)(b) of the Criminal Justice Act 2003. He submits that imprisonment for public protection would suffice to manage the risk to the public, and that the imposition of a life sentence is not justified. The principal ground for that submission is that the appellant's responsibility for the offence should be treated as substantially diminished by his mental condition.

25. Before the judge, and in the reports, Dr Alcock expressed the opinion that the appellant's actions were "significantly driven by his paranoia", though not so as to impair his capacity to form a specific intent. Dr Parker expressed the opinion that "the index offence would not have occurred if he had not been acutely psychotic at the time". In evidence before us Dr Parker has qualified that statement. He is now of the opinion that the offence "probably" would not have taken place and that the appellant's psychosis escalates the risk which he poses to the public which predates the illness.

26. However, there was, as the judge observed, no question of insanity or anything approaching insanity. The assessment of the degree of responsibility for a grave offence is quintessentially a matter for the judge. Judge Clarke's conclusion that "he must bear significant responsibility for

what happened" is, in our view, not capable of being disturbed. Nothing we have seen undermines it. On the contrary, we agree with it. Before the offence the appellant's responsibility lay, in part, in his drinking to excess, perhaps smoking cannabis, and failing to take the tranquillisers for the condition which he was aware he had. His reaction when questioned about the crime afterwards was not to suggest that he was driven to commit it, or that Miss Nash was the source of any threat to him -- a belief which could be explained by delusions -- but to minimise and excuse his own actions.

27. This was a case in which, applying the guidance in R v Kehoe [2009] 1 Cr App R(S) 9, the offence was particularly grave and the culpability of the appellant was significant. The Kehoe indications are not cumulative; they are alternative. In this case, as we have observed, both limbs apply. The judge's conclusion that a sentence of life imprisonment was justified was, in our view, right.

28. Section 45A permits a court to direct that an offender be removed to, and detained at, a hospital when satisfied on the evidence of two registered medical practitioners that the mental disorder from which the offender suffers is of a nature or degree which makes it appropriate for him to be detained in a hospital in order to receive treatment. The judge was right to be so satisfied. The delusional disorder from which the appellant suffered, and still suffers, is amenable to treatment. Psychosis has been reduced by anti-psychotic medicine. Whether, and if so when, his mental condition reaches a state in which it is no longer necessary for him to continue to be detained in a hospital for treatment, he can be released from hospital. But the risk that he poses to the public from causes other than his mental condition requires that he is released from hospital into a prison.

29. Only if the Parole Board concludes that it is no longer necessary for the protection of the public that he should be detained at all can he be released. The nature of his offence and his character and antecedents require no less.

30. For those reasons we dismiss this appeal.