Neutral Citation Number: [2011] EWCA Crim 376
No. 2009/03302/A5
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Wednesday 9 February 2011

B e f o r e:

LORD JUSTICE GROSS

MR JUSTICE RAMSEY

and

SIR CHRISTOPHER HOLLAND

R E G I N A

- v -

O

Computer Aided Transcription by
Wordwave International Ltd (a Merrill Communications Company)
165 Fleet Street, London EC4
Telephone No: 020 7404 1400; Fax No 020 7404 1424
(Official Shorthand Writers to the Court)

Miss R Smith appeared on behalf of the Appellant

Mr M Fenhalls appeared on behalf of the Crown

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

Wednesday 9 February 2011

LORD JUSTICE GROSS:

1. On 11 September 1998, in the Crown Court at Merthyr Tydfil, before His Honour Judge Curran, the appellant (then aged 16) pleaded guilty to one count of rape of his 6 year old brother, contrary to section 1(2) of the Sexual Offences Act 1956. On 11 December 1998 he was sentenced to detention for life with a minimum term of 30 months' detention under section 53 of the Children and Young Persons Act 1933.

2. On 16 August 1999, pursuant to section 47 of the Mental Health Act 1983, the Secretary of State directed that the appellant be removed from Her Majesty's Young Offender Institution Feltham and be detained in a secure unit, Spring Hill, pursuant to a Transfer Direction. The appellant has remained ever since in a secure hospital rehabilitation unit.

3. On 12 July 2005 the single judge refused an extension of time in which to seek leave to appeal against sentence. The application was not renewed.

4. The appellant now appeals against sentence upon a Reference by the Criminal Cases Review Commission ("the Commission") under section 9 of the Criminal Appeal Act 1995 on the basis that the Court of Appeal should quash the life sentence imposed and substitute a hospital order under section 37 of the Mental Health Act 1983 with a restriction under section 41 of the same Act.

5. The view expressed in the Statement of Reasons of the Commission is that the medical criteria for making a hospital order were met at the time of sentence and continue to be met.

6. Nothing more need be said about the facts of the offence. So far as previous disposals are concerned, tiring of repeated adjournments, His Honour Judge Curran, in the absence of a second report, and against the background of at least some confusion as to the availability of a bed, understandably found himself boxed in. He passed the sentence he did for want of any alternative.

7. Dismissing the application for leave to appeal years out of time the single judge, again understandably, commented on the delay and also questioned the purpose of the application.

8. Today we have been assisted first by Miss Smith for the appellant, to whom we are grateful both for her skeleton argument and her oral submissions this morning, and to Mr Fenhalls representing the Crown. We should make it plain that the stance of the Crown is that it is neutral on the appeal. Mr Fenhalls appears solely to underline the Crown's interest in the protection of the public. In that regard he helpfully submits that if the court is otherwise minded to make the order sought by the appellant, section 41, if anything, offers the public better protection than might otherwise be the case.

9. With regard to fresh evidence, we are satisfied for the reasons Miss Smith has given in her skeleton argument that the material presented to us by the Commission should be admitted in accordance with section 23 of the Criminal Appeal Act 1968.

10. Now that the overall position has been clarified, we are able to adopt the succinct summary contained in the Statement of Reasons of the Commission at paragraph 91:

> "The medical criteria for imposition of a section 37 hospital order appear to have been met at the time of trial.
>
> (a) Mr O did suffer from a mental disorder within one of the four categories then applicable, although two reports were not then available to give evidence of that.
>
> (b) Although there was some question about his treatability at the time of sentence, medical opinion and the Mental Health Review Tribunal subsequently concluded that hospital treatment was likely to alleviate his condition or prevent it from deterioration, and improvement has been documented.
>
> (c) Although there was no evidence that a bed was available at the time of sentence, it appears in fact to have been the case that a bed might have been available within 28 days. After sentence a bed was made available.
>
> Medical opinion is that Mr O now meets the medical criteria for section 37 under the Mental Health Act 2007 and a bed is available.
>
> Case law holds that a section 37 order may be substituted when it becomes apparent that the criteria were met at trial and indicates that such an order should be made when the criteria are met.
>
> Case law and the change in benefit entitlement indicate that there would be benefit in a substitution being made."

11. In broad terms we agree. Only very brief elaboration is required, although any case involving as it does reliance on evidence of mental condition not adduced at the time of the original court appearances must require the most careful scrutiny. That we have sought to give it, though our conclusions can be stated almost summarily. We are satisfied that the appellant met the section 37 criteria at the time of sentencing. Moreover, a sentence can be varied if satisfaction of those criteria only becomes apparent after sentencing: see R v De Silva (1994) 15 Cr App R(S) 296. On all the evidence we are satisfied that the appellant currently satisfies the criteria under section 37, as they now stand.

12. Practical considerations reinforce this view. Since 1999, when the Secretary of State directed a transfer, the appellant has resided in a secure hospital rehabilitation unit. As it seems to us, that speaks for itself. Protection of the public is of obvious significance and concern;

hence, as we have already underlined, Mr Fenhalls' presence this morning. In agreement with Mr Fenhalls we accept that that consideration is best addressed by the imposition of a section 41 restriction without limit of time.

13. It is a requirement of section 41 that there be oral evidence. That evidence was supplied by Dr Huckle who helpfully attended this morning, having prepared a very clear report on the appellant. His evidence expressly supports the imposition of a section 41 restriction. We are grateful to him for the clarity of his written report and his oral evidence this morning.

14. Finally, we come to the utility of the exercise -- a matter which troubled the single judge. We are persuaded that there is utility in making the appellant a patient rather than a prisoner because: first, it is manifestly the right order to make on all the evidence; secondly, as Dr Huckle explained, there are advantages in terms of treatment; thirdly, it has advantages to the appellant in terms of benefits; fourthly, for the reason we have already covered flowing from Mr Fenhalls' submission, the protection of the public is best ensured in this fashion. So far as concerns utility, the relevant authorities include: R v Beatty [2006] EWCA Crim 2359, and R v Hempston [2006] EWCA Crim 2869. Accordingly, the exercise is not academic -- a matter which would otherwise have told strongly against it.

15. In the circumstances we: (1) allow the appeal; (2) quash the sentence of detention for life; (3) substitute a hospital order under section 37 of the Mental Health Act 1983 (as amended), with a restriction under section 41 of the same Act, unlimited in time.

16. It is satisfactory that the court is now able to achieve a sensible outcome. We only express regret that it has taken some thirteen years to do so.