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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 1 June 2012

B e f o r e:

LORD JUSTICE ELIAS

MR JUSTICE GLOBE

RECORDER OF LIVERPOOL - HIS HONOUR JUDGE GOLDSTONE QC

R E G I N A

v

SHAUN EDWARD TUDOR

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(Official Shorthand Writers to the Court)
Mr SJ Taylor appeared on behalf of the **Appellant**

J U D G M E N T

(As Approved by the Court)

1. LORD JUSTICE ELIAS: I will ask the Recorder of Liverpool to give the judgment of the court.

2. RECORDER OF LIVERPOOL: On 15 November 2011 in the Crown Court at Nottingham, the appellant, aged 43, having earlier pleaded guilty to offences of attempted rape and sexual of a 10 year-old boy, was sentenced by HHJ Burgess to Imprisonment for Public Protection with a specified period of 4 years and 10 months less time spent on remand. Judge Burgess had taken a starting point of 14 years as the notional determinate sentence, and discounted it fully for the appellant's plea of guilty.

3. The appellant appeals by leave of the single judge, and we treat at the outset as a nullity the appellant's purported abandonment of his appeal, made in circumstances upon which clearly it is unsafe for us to act.

4. The facts of the offences are these. On the afternoon of 20 July 2011, the 10 year-old victim, B, and his 11 year-old friend had been playing with his family's dog in woods in Mansfield. They started to make their way home when they came across the appellant, who told them he was looking at nature. The appellant then pretended to fall over. B told his friend to wait whilst he went over to see what the problem was and if he could help the appellant. The appellant engaged him in conversation by asking if he knew where there was a sewer or tunnel in the woods. B said that there was. The appellant said there was not and that he would prove it. He handed B a pair of binoculars and then pretended to limp from his fallen position. By this time both the appellant and B were out of sight of B's friend.

5. The appellant then grabbed B, picked him up onto his back in a piggyback style, took to him to some bushes and threw him onto the ground. B, thinking that the appellant was a nice man, was not concerned at this stage, but then the appellant told B to lie down and said that he would not hurt him. He placed his hand around B's throat with one hand whilst the other was over his mouth. B was scared and tried to push the appellant away. This did not deter the appellant from removing B's clothing. When B asked him why he was doing it, he simply told him to "fuck off".

6. He then proceeded to suck B's penis as he lay on the ground, and when B asked him what he was going to do, he said that he was going to "shag him". The appellant removed his penis, turned B over and tried to insert his penis into B's anus. Having been unable to penetrate him, he rubbed his penis against B's anus and ultimately ejaculated onto B's stomach and groin. He then started to walk away, but as he did so he said to B, "Don't tell anyone or I will track you down and kill you". B was scared, returned to his friend, but did not tell him what had happened because the appellant was still in the area.

7. The boys returned to B's home. B was sobbing uncontrollably and was struggling for breath. He told his mother that he had been raped. She called the emergency services, and upon their arrival B was clearly very distressed and asked an officer to "save" him. He subsequently told the police what had happened.

8. The police then searched the area and found that the appellant was missing from his low secure ward at a mental health unit which was on the outskirts of Mansfield. He had been given unescorted leave from the unit between 3.25 and 5.25, during which time the offences had been committed, but had not returned. He was eventually found at about 10.15 that evening and was arrested. He told the police that over the past 24 years, referring to the period during which time he had been in mental hospitals of one kind or another, he had been doing so well. When he was interviewed by the police he admitted the offences, denying only an element of premeditation. He told the probation officer prior to being sentenced that if he were released into the community, he would definitely re-offend against children.

9. Against that background it was accepted by all parties that the appellant, a paedophile suffering from mild mental impairment and dis-social personality disorder, was dangerous within the meaning of section 225(1)(b) of the Criminal Justice Act 2003. It was likewise accepted by all that the only options open to the court were an indeterminate sentence of Imprisonment for Public Protection, or a Hospital Order without restriction of time pursuant to the provisions of sections 37 and 41 of the Mental Health Act 1983. The appellant had in 1988 been made the subject of such an order for an offence of indecent assault against a male, and at the time of these offences was on unescorted leave, as we have indicated, from what was a low secure ward at the mental health unit in which he was then living. He had been an in-patient in various institutions throughout the period since the making of the original order in 1988. He had never been conditionally discharged into the community.

10. When the case was listed for sentence, the sentencing judge had before him an up-to-date and very detailed psychiatric report from Dr Bernadette McInerney, signed 10 November 2011 and dated 27 October. Its purpose was to enable the court to consider whether it could be used to support the making of a section 37/41 order, for which of course two reports and one live witness would be required. It concluded clearly and unequivocally in the following terms:

> "Mr Tudor continues to meet the criteria for the diagnosis of Mental Disorder. The nature and degree of this disorder would normally warrant detention in hospital for treatment, but in this case the evidence is that treatment has failed. I therefore cannot recommend further detention in hospital for treatment of Mr Tudor's Mental Disorder as it presents at present."

11. That finding clearly entitled the judge, in the exercise of his discretion, to decline to make a Hospital Order under sections 37/41 of the Mental Health Act 1983, and in fact it is agreed that on the basis of that report he could not have contemplated doing so. Nevertheless, counsel for the appellant, Mr Taylor, sought to persuade the sentencing judge, as he has sought to persuade us, that because of the stark alternative which the court had by way of sentencing options, we should adjourn the sentence hearing for the preparation of a second psychiatric report. It is the judge's ultimate refusal to adjourn for the preparation of such a report which gives rise to this appeal, because it is said that the sentencing judge before he passed the sentence of Imprisonment for Public Protection raised the appellant's legitimate expectations by giving a number of

indications that he would in fact adjourn for the preparation of such a report before ultimately deciding not to do so, and that in all the circumstances his decision to sentence the appellant was unfair in that the appellant was left with a legitimate sense of grievance and feeling of injustice.

12. In any event, it is argued that it was wrong in principle for the sentencing judge to proceed to sentence without allowing the defence an adjournment to obtain a second psychiatric report in light of the following circumstances. It is submitted that the absence of such a report precluded the sentencing judge from making a fully informed decision as to which sentencing option to take.

13. We deal with the second point first. In our judgment, where the court has at considerable public expense commissioned the preparation of a full and thorough psychiatric report in order to consider whether Imprisonment for Public Protection on the one hand or a Hospital Order pursuant to sections 37 and 41 of the Mental Health Act 1983 on the other is appropriate, the circumstances will be rare indeed where a judge who, having been provided with a negative psychiatric report, imposes the otherwise inevitable alternative of Imprisonment for Public Protection will be held to have acted wrongly in principle.

14. In this case it is submitted that because the appellant had spent the previous 23 years in mental hospitals, this was a compelling factor in favour of seeking a second opinion. It cannot, however, be argued, nor has Mr Taylor put it so highly, that for the judge to decide that this appellant's background was so compelling a feature that he should not have taken "no" for an answer to a section 32/41 Hospital Order from one report. It is suggested, however, that the appellant's potential lack of culpability based on his mental impairment was a factor which made it desirable if possible for this appellant to be treated in hospital rather than in prison, and that that factor was insufficiently taken into account in deciding whether or not to adjourn.

15. Mr Taylor concedes that shopping around for a favourable report, particularly at public expense, is a practice which is not to be encouraged. We agree. Whilst we are at pains to acknowledge that there may be circumstances in which a failure to allow such a course to be adopted would be open to criticism, such occasions will be exceptional. By way of example, we could envisage such a course being adopted where the reporting expert had been provided with patently wrong or incomplete information upon which an otherwise conclusive opinion had been based. No such criticism can be made of the sentencing judge in this case. He was fully aware of the reasoned opinion of Dr McInerney and of the appellant's mental impairment, and had those factors fully in mind in ultimately declining the application to adjourn.

16. So we turn to the first ground of appeal and ask ourselves by reference to what happened in court whether the judge's decision to sentence was unfair. Initially the judge questioned whether, if two reports were needed before a Hospital Order under sections 37 and 41 of the Mental Health Act 1983 could be made, there should be a second opinion to refute or support that of Dr McInerney. Miss Pritchard on behalf of the Crown, whilst acknowledging that the judge had a stark choice, felt duty-bound to inform the court, as she is entitled to, of the anxiety of the family of B. The sentencing

judge then, whilst acknowledging the appellant's preference for a Hospital Order rather than a sentence of imprisonment, expressed concern that if he adjourned for another report he was "really just putting off the evil day as far as [the appellant] is concerned". Nevertheless, following further submissions from Mr Taylor the judge asked how long a report would take, and indicated that he did not want to adjourn for any significant period of time. Mr Taylor, rightly mindful of the need for closure for B's family, suggested a period of 6 to 8 weeks. The learned judge then said this:

> "JUDGE BURGESS: ... I want to say something so that the family of this young boy understand. I am in no doubt and I do not think any other judge would come to any other conclusion, but that this man is so dangerous that if he is going to prison, it will be for an indefinite period of time. He has previously been in hospital. He does suffer from mental impairment, that is why he was in the unit that he was in to start with. He has previously been in Rampton. As Mr Taylor has said, really the only decision is to where he is going to be -- in prison or in a secure hospital like Rampton.
>
> The psychiatric report that I have read, comes down in favour of prison, not on the basis that he does not suffer from mental impairment, because he does, but because she concludes he has had so much treatment that more treatment is not going to make any difference and it is a good argument. But that is one doctor's opinion. I am not an expert, I have to rely on the expert's opinion and sometimes second opinions reach different conclusions. The consequence will obviously make an enormous difference to this man's life, whether he is in hospital or in prison and he is a vulnerable person in any event. It is not going to be pleasant wherever he goes. I think that prison is the most likely outcome, but if I were making a Hospital Order I would need two psychiatrists to say that that is where he should be.
>
> It may be that I am being over-cautious, but I think that there should be a second opinion at this stage. I am going to limit it to an absolute maximum of six weeks. I propose, given the conversations that we have already had, to reserve this case to myself. It may have to follow me to Derby. I will take consultation on that. If that is going to cause any additional problems for the family then I would consider releasing it. But this discussion has been extremely frank. If it's a Hospital Order it will be with restrictions and -- I am just trying to think how another psychiatrist is likely to reach another opinion at the moment."

17. He was indicating that he was minded to adjourn for a maximum of six weeks. The judge then, after a further exchange between counsel, rose and invited counsel to consider whether, if the case had to be finalised in Derby, that would cause additional trauma to B's family, indicating that that would make a difference to whether or not he reserved the case to himself.

18. Before he rose for those enquiries, the sentencing judge made two further observations. He said this:

> "I can see the strength in the argument put forward by Dr McInerney, which says that hospital is not the right place for him. However, doctors do differ on opinions, particularly psychiatrists sometimes, which is why there have to be two before a Hospital Order can be made."

19. He then said:

> "And Mr Taylor has conceded that this man is unlikely to be released, be it from hospital or prison. But in the event, it is a fairly drastic decision that I take, although the chances of him ever being at liberty again are probably the same."

20. Upon his return to court, the following exchange occurred involving the judge and both counsel:

> "MISS PRITCHARD. Your Honour, I have spoken to the family, particularly [Mr S], who is the child's father. He is absolutely devastated at the prospect of this case being adjourned. Essentially, the family have been -- their lives have been on hold since the 4th August when he pleaded guilty to these matters. They, because of the press, have had to move house. They have been homeless on occasions and they now live some distance away from where they did live. His concern is putting some sort of closure on this, particularly with Christmas looming, for his 10 year-old child. The thought of this matter going off, is causing him absolute emotion, considerable devastation. I can vouch for that because I have just sat in a room and talked to him. He, clearly, knows what your Honour is saying regarding the two options, but your Honour can only imagine which option he (inaudible).
>
> JUDGE BURGESS. Well of course I do, that is why I find it such a difficult decision. I am dealing on the one hand with a man who has done an absolutely dreadful thing, a man who has done not dissimilar things in the past. He is clearly dangerous, it is conceded as much by his team and he is going away indefinitely. It is just a question -- I know it is not closure, but the family can rest assured that it is one or the other and it is indefinite.
>
> MISS PRITCHARD: He would, if he had to of course, come to Derby. But, your Honour, I am not sure how many weeks it is until Christmas, whether this matter (inaudible).
>
> JUDGE BURGESS: I know. It was the fact that this was being put off until Christmas.
>
> MISS PRITCHARD: (Inaudible) somehow be adjourned before then. Whether that would assist? My application is that it be dealt with today,

but of course, it is a matter for your Honour and I hear what your Honour has to say.

JUDGE BURGESS: Well I have heard all the arguments. It is repeating it. The last thing I want to do is to add to the family's distress. You would have to be brainless not to imagine how awful it is for them.

MISS PRITCHARD: Yes.

JUDGE BURGESS: (Pause) On the one hand, there is a very cogent medical report explaining why she doesn't think -- and she is, after all, a consultant psychiatrist at Rampton, the exact sort of hospital that he might be going to. And she does not contemplate that anything more can be done for him in a place like that. The sort of places that he has been in for the last 25 years have not made the sort of difference that can be contemplated.

MR TAYLOR: As your Honour has observed, we have rehearsed the arguments, but I understand completely, of course, as anyone must --

JUDGE BURGESS: No. I am going to deal with it. I have decided that I am going to justify it now, Mr Taylor. I am sorry, I know I have changed my mind twice, it is very much on the cusp. The report I have got is cogent. I have considered the possibility that another psychiatrist would reach a different conclusion. I think it most unlikely in all the circumstances and I think to adjourn for a further report will simply put off the evil day for everybody, your client included.

MR TAYLOR: Well, your Honour has already considered the two alternatives that face him. Plainly all your Honour is prepared to grant him, if your Honour were to put the matter off at all, is a further six weeks and as your Honour has observed the alternatives must be either indefinite incarceration in prison, or indefinite incarceration in hospital. The latter is the best option available to Mr Tudor.

JUDGE BURGESS: It may be, but the psychiatrist at the moment says given what he has already had in hospital, I cannot see that any further treatment is going to make any difference.

MR TAYLOR: I understand. But your Honour has already observed that sometimes psychiatrists reach different conclusions and --

JUDGE BURGESS: No. I am sorry. I cannot go on swinging from one side to the other.

MR TAYLOR: Your Honour, of course, will appreciate that your Honour has left me in a very difficult position, since your Honour has, with the greatest of respect, moved one way and then the other on a couple of occasions already in the course of this hearing --

JUDGE BURGESS: I know. I do not like moving between the two and the fact is, if you get another psychiatrist who can assess him, and you may have an argument in the Court of Appeal I suppose, but alternatively, he can be transferred under another section of the Mental Health Act if it is deemed appropriate.

MR TAYLOR: Yes, but as we have already observed, only if his condition deteriorates to the extent that it was considered appropriate to do that.

JUDGE BURGESS: Well, it may be that there is a prison psychiatrist who thinks that he needs looking at again should his condition deteriorate.

MR TAYLOR: The only option available to your Honour today is custody and custody which inevitably means for the rest of his life. As against that, the adjournment for a short period of six weeks surely must be in the interests of justice?

JUDGE BURGESS: No. I have changed my mind already and I am not going to do it again. I am sorry. It is unfair on everybody if I go on dithering. Sorry, Mr Taylor."

21. The judge clearly found this decision, that is to adjourn or not to adjourn, very difficult. He was also prophetic when he told Mr Taylor that he may have an argument in the Court of Appeal. When he sentenced the appellant, he encapsulated the competing arguments for and against an adjournment:

> "Mr Taylor's submission that I should adjourn for another report is based on the fact that there should be a second opinion with the possibility of another doctor disagreeing with Dr McInerney. Of course to make a Hospital Order it is necessary to have two doctors reporting on it and he submitted to me that given where this man was likely to go, it was important that there was a second opinion and I was almost persuaded that that was the right thing to do. On the other hand, when I reflect upon Dr McInerney's report, it is not so much her observations of his behaviour that need interpreting, it is a common sense and logical deduction based on what has happened over the last 25 years because although she concludes that he suffers from a mental disorder, as I have described it, in other words mild mental impairment, dis-social traits and paedophilia, she concludes that he is not suitable for treatment because everything has been tried and it has not worked.
>
> If I look at Section 37 of the Mental Health Act and look at the relevant sub-section, I have to consider that the mental disorder from which he is suffering is of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment and that appropriate medical treatment is available for him. I have to be satisfied that the most suitable method of disposing of the case [is] by means of an Order under this

> Section. That is sub-paragraph (b).
>
> I think that the logic of Dr McInerney's report speaks for itself. Everything has been tried and not worked.
>
> I entertain the possibility that somebody might reach a different conclusion but I have to weigh against that the desirability of drawing a line under this case. I am particularly conscious that the family have been living in very difficult circumstances indeed. This has thrown the family of this young boy into turmoil and they are desperate for it to be completed. The remote chance that anybody was going to disagree with Dr McInerney, although it tempted me for a moment, is not such, in my judgment, that it is outweighed by the need to proceed with this case, it having been hanging over everybody's heads since the beginning of August when he first pleaded [guilty]. Accordingly, I refused Mr Taylor's application for a further report."

22. We are sure that the sentencing judge regrets the uncertainty with which he approached the sentencing exercise, and that with the benefit of hindsight a firm decision without prevarication would have been eminently preferable. We have to ask ourselves whether the judge raised the appellant's expectations and, if so, whether by virtue of his failure to fulfil them the decision to sentence was unfair.

23. We have been referred to authorities by Mr Taylor, which were more relevant to the expectation raised in relation to a particular sentence, and where in any event expectations had been raised for longer than was the case in the instant matter. To that extent, we are not assisted by them.

24. There is, in our judgment, no doubt that the appellant's expectations were raised. The judge acknowledged as much and effectively apologised for having done so. But the expectations which were raised were premised on the false assumption that because there was a need for a positive opinion of two doctors in order to send someone to a mental hospital indefinitely, it was only fair for there to be two doctors to consider whether prison should be the option rather than hospital.

25. Whilst we sympathise with the appellant and share the judge's regret that the matter was not dealt with in a more authoritative manner, we find ourselves unable to say that the ultimate decision to sentence rather than to adjourn could properly be perceived by right-thinking members of the public as unfair, rather than as the ultimate reasoned conclusion of a judge who had found the decision a difficult one. There is no doubt, in our judgment, that in the ultimate decision not to adjourn, the sentencing judge balanced the competing arguments and reached the right decision.

26. Accordingly, there being no criticism about the imposition of Imprisonment for Public Protection or the minimum term which was discounted for the appellant's plea, this appeal is dismissed.