Neutral Citation Number: [2010] EWCA Crim 2335

Case No: 201001442 A7

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Date: MONDAY, 20TH SEPTEMBER 2010

B e f o r e:

LORD JUSTICE LEVESON

MR JUSTICE DAVIS

MR JUSTICE LLOYD JONES

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R E G I N A

v

BENJAMIN ALAN COOPER

- -

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Mr J Samuels Qc Appeared On Behalf Of The **Applicant**
Mr H L Bentham Appeared On Behalf Of The **Crown**

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J U D G M E N T

1. LORD JUSTICE LEVESON: On 8 February 2010 in the Crown Court at Preston before Nicol J this appellant pleaded guilty to manslaughter by reason of diminished responsibility and attempted murder. On 16 September 2010 he was sentenced for manslaughter to imprisonment for public protection pursuant to section 225 of the Criminal Justice Act 2003 with a minimum term of 6 years, less time spent on remand, and for attempted murder to a similar sentence with a minimum term of 4 and a half years, less time spent on remand. On both counts a Hospital and Restriction order was made pursuant to section 45A of the Mental Health Act 1983 as amended, directing that the appellant was to remain at Guild Lodge secure accommodation, as opposed to prison. The effect of this order was to make the appellant subject to the restrictions

contained within section 41 of the Mental Health Act 1983 concerning his release from hospital, where upon depending upon any prior assessment of the Parole Board he would be returned to prison. He now appeals against sentence by leave of the single judge.

2. The facts can be recited comparatively briefly. The appellant lived in Millam with his partner, Claire Marshall, their three year old daughter and Miss Marshall's daughter from a previous relationship. The appellant was drinking too much and taking excessive amounts of illicit drugs, which affected his character and the way he behaved. His relationship with Miss Marshall as a consequence broke down in January 2008. After they parted company the appellant obtained an order that he should be allowed to see his daughter, which regularly he did.

3. At about 9.30 on 24 January 2009 the appellant arrived at Miss Marshall's home by prior arrangement to collect his daughter. The appellant then jumped on Miss Marshall and started hitting her until she fell to the floor. He removed his pen knife and made a determined attempt to cut her head from ear to ear. Presumably finding the knife inadequate, he then went into the kitchen and grabbed a larger knife. Miss Marshall's elder child tried to stop the appellant, but he held the knife up to her. The appellant continued to attack Miss Marshall with the larger knife. The child ran from the house with her little sister and tried to get help from neighbours.

4. The next door neighbour, Mr Morris, was at home when Miss Marshall's daughter banged on the door shouting hysterically for help. Mr Morris attempted to pull the appellant off Miss Marshall, but was unable do so. As a result, he drove to the police station to bring back the police. In the meantime, the appellant had left the house and driven off. He was covered with blood. When the police arrived they found Miss Marshall lying face down with the knife on her back.

5. The attack was of the utmost savagery. 21 incised wounds to the head and neck, 12 wounds to the right arm and 8 wounds to the left arm were found, as well as lesser injuries to the lip and mouth. The injuries were multiple and extensive, with both superficial and deep incised wounds to the neck and lower part of the face. Many were caused by cutting or the slashing motion of the weapon, others by deep, penetrating stab wounds. The wounds encircled the whole of the neck, cutting through skin, the superficial anterior and lateral neck muscles and the posterior para-spinal muscles. The spine had also been damaged. In the opinion of the pathologist, the appellant had been trying to cut off Miss Marshall's head. She died very quickly after the attack, her vital organs and arteries having been severed.

6. In the mean time the appellant had driven to the home of his step-father, Gerald Fern. He knocked on the door covered in blood. Mr Fern let him in and asked what he had been up to. The appellant replied he had been doing a bit of butchery and had come to borrow a meat cleaver and a knife. Mr Fern pointed out the knife draw and went into the dining room. As he turned his back, the appellant picked up the meat cleaver and struck Mr Fern two forceful blows on the head, stunning him. A struggle ensued. The appellant pulled a second knife from the drawer and attempted to wound Mr Fern. The

struggle moved into the street, where Mr Fern eventually managed to disarm the appellant, by which time he was bleeding heavily and had been severely injured. The appellant ran back inside, picked up two other knives, and returned to attack Mr Fern once more. The struggle recommenced until the appellant suddenly announced "that's enough." Mr Fern asked why. The appellant replied "Claire is in a worse state than you are". There were a number of eye witnesses to the attack, and the police were soon on the scene.

7. Mr Fern was airlifted to hospital. Had he not arrived so quickly he may not have survived. He suffered a severe laceration to the right ear, which was nearly completely cut off. He had lacerations to the left forehead and left neck, a bruised and swollen right eye, several deep cuts to the right arm and deep lacerations to his skull, right shoulder, chest and back. He had significant injuries to the tendons of his right arm. It was unknown whether the functions of his arm would be permanently affected.

8. The appellant was arrested nearby. He was briefly examined by a psychiatrist before he was interviewed. He gave a detailed account in the interview, describing the weapons and attacks. He said he felt frenzied at the time. He thought Miss Marshall was going to have him murdered so he had seized the initiative. He had attacked Mr Fern, as if he was going to get killed himself he might as well go and get Mr Fern. He would not admit wanting to kill Miss Marshall, but he did accept that probably he wanted to inflict serious injury upon Mr Fern, although he did not know if he actually wanted to kill him.

9. The import of these offences is described in moving terms in victim personal statements from Miss Marshall's daughters, her father and the grandparents of two of her children, who are now looking after all three girls. The effects of these offences will clearly be with them forever.

10. The appellant is now aged 36 and was of prior good character. Although he had no previous history of prior mental disorder, he was clearly, at least in substantial part, in the grip of serious mental disorder at the time of this offending. Initially he was considered unfit to plead and for the purposes of sentence there were not only a number of reports prepared covering his fitness to plead, but also a series of psychiatric reports dealing with the question of diminished responsibility. In particular a report of 21 November 2009 provided on behalf of the appellant by Dr Green stated that the appellant suffered from a major mental illness classified as a delusional disorder or paranoid schizophrenia. Had he not been suffering from a severe mental illness the offences would not have occurred. They were driven, he concluded, by his delusional beliefs. The severity of the illness indicated that his responsibility for his actions was substantially diminished. He recommended a hospital order with indefinite restriction.

11. In a report dated 25 November 2009 prepared for the Crown, Professor Peckitt noted the appellant's heavy drug misuse coupled with aggressive and abusive elements of his personality, which he concluded gave rise to the situation in which he had developed an acute and severe delusional disorder. He considered his possessive, abusive and violent conduct towards his former partner possessed a significant element in the creation of

risk when he became unwell. He concluded that the appellant exhibited the signs of threat control override syndrome, suffering from a severe mental disorder at the time of both offences. He also recommended detention under the Mental Health Act, observing that a restriction order under section 41 would be appropriate because the risk to the public was manifest, and the need for long term supervision almost unquestionable. He raised the alternative disposal of a hybrid order, reserved for cases in which he considered that there was a high level of culpability. Such a sentence would be optimised without loss of opportunity for care and rehabilitation. He also concluded that attaching a tariff of more than five years might undermine and paradoxically weaken the benefits of mental health treatment.

12. A further report was available from the psychiatrist who had been responsible for the appellant's treatment, Dr Abdur. He confirmed that the appellant was suffering from a severe psychiatric illness, paranoid schizophrenia, which is a mental disorder within the meaning of the Act. The condition, he concluded, had deteriorated in the weeks leading up to the offences, and the appellant's illness required continuing detention in a secure hospital for appropriate treatment. It was highly likely that he was driven by his delusional beliefs when he committed the offences and was suffering from paranoid schizophrenia.

13. When passing sentence the judge, who had heard both Dr Green and Professor Peckitt give evidence at length, observed that these were appalling crimes. If the appellant had not been suffering from a mental disorder, they would have led to extremely lengthy sentences of imprisonment. He accepted the conclusion of the doctors that the appellant was suffering from a severe psychotic mental disorder, probably taking the form of paranoid schizophrenia. He went on that the abnormality of mind from which he was suffering was directly linked to his attack on Claire. He attacked her because in his disturbed state he believed that she was planning to kill him. He could have given no thought of the impact on Claire's daughters, especially the two who had witnessed events. In a person of sound mind, indifference or thoughtlessness of this kind would be a further aggravating feature, but the learned judge proceeded on the basis that this was an aspect of the delusional disorder which had such power over the appellant.

14. He also concluded that the appellant was still suffering from a serious mental disorder when he attacked Gerald Fern, a quarter of an hour later. The link, however, was less clear cut. The appellant thought that Mr Fern had been involved in financial conspiracy against him, but did not consider that he was at immediate risk from him. He felt he crossed the point of no return so, "might as well" settle his deluded account with him, too. Even from that distorted perspective, the learned judge concluded that the attack was an act of revenge, not self-defence.

15. The judge accepted that neither offence would have occurred but put for the appellant's illness. Whilst he suffered a complete loss of control prior to killing Claire, he had regained some control by the time he came to attack Gerald. The appellant's disorder was clearly of a nature and degree that made detention in hospital to obtain medical treatment appropriate. Such medical treatment was available, and he had

responded positively to the treatment so far. The judge, however, went on:

> "While I accept that you need treatment for your mental disorder in your case, the sentence I must impose must also meet two other objectives. Your psychosis can cause you to be an extremely dangerous person, as these offences demonstrate. There should be no question of release until the responsible authorities are clear that you no longer represent a danger to public safety. Second, while your responsibility for these crimes is diminished by your mental disorder, it is not wholly extinguished. A significant degree of responsibility remains. You have pleaded guilty to manslaughter on the basis of diminished responsibility. Once you were in the grip of the severe psychosis, I accept that your responsibility for Claire's death was very considerably diminished. It is not, though, eliminated entirely. Professor Peckitt thought that it was overwhelmingly likely that this psychosis was stimulated by your misuse of illegal drugs, particularly amphetamines, and, somewhat ironically, your withdrawal from them in the Autumn of 2009. Dr Green thought it was more likely than not that your drug abuse contributed to your illness. It is true that you had not taken illegal drugs or alcohol at the time of these offences. I accept that you would not have foreseen that these drugs would drive you to mental disorder, but by starting to take them you did voluntarily embark upon a course which was to have such tragic consequences. For that you must bear some responsibility. That applies as much to the attack on Gerald. Here, too, the attack would not have happened but for your delusions, yet you had regained sufficient control after killing Claire to drive your car to his house and to appear relatively calm when you first spoke to him. Although you thought that Gerald was part of the conspiracy against you, your attack on him was not prompted by the same motives as had been your attack on Claire. This means that the difference between these two offences is not just the illegal one, but there is no partial defence to the offence of attempted murder based on diminished responsibility. For these reasons I consider that I must impose a sentence of imprisonment. You undoubtedly pose a very significant risk of causing very serious violence to members of the public. That risk may diminish as treatment continues to be successful, but when, if at all, that will occur is uncertain. The risk will continue for an indefinite time into the future. Only an indeterminate sentence of imprisonment will adequately protect the public."

16. Mr Samuels QC, who appears for the appellant in this court as he did before Nicol J, has taken us to the origins of section 45A of the Mental Health Act 1983, to be found in the White Paper, Protecting the Public, published in 1999, which included the following analysis:

> "8.12. The government proposes changes in the arrangements for the remand, sentencing and subsequent management of mentally disordered offenders to provide greater protection to the public, and to improve

> access to effective medical treatment for those offenders who need it. The central change, if adopted, would be the provision of a "hybrid order" for certain mentally disordered offenders, for whom the present form of hospital order is unsatisfactory, particularly those who are considered to bear a significant degree of responsibility for their offences. The order will enable the court in effect to pass a prison sentence upon an offender and at the same time his immediate admission to hospital for medical treatment.
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> 8.13. The hybrid order, together with other proposals amending the detail of the Mental Health Act 1983 would substantially increase the flexibility of arrangments for dealing with mentally disordered offenders at all stages from remand through to rehabilitation. In particular it would enable the court to deal with some of the most difficult cases in a way which took proper account of the offender's need for treatment, the demands of justice and the right of other people to be protected from harm.
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> 8.14. Existing sentencing arrangements for offenders who are mentally disordered require the court to decide either to order the offender's detention in hospital for treatment or to sentence him to imprisonment or to make some other disposal. In some cases an offender needs treatment in hospital but the circumstances of the offence also require a fixed period to be served in detention. This may be because the offender is found to bear some significant responsibility for the offence, notwithstanding his disorder, or because the link between the offending behaviour and the mental disorder is not clear at the time of sentencing. The hybrid disposal would be a way of enabling the requirement of sentencing in such cases to be met. Under an order an offender would remain in hospital for as long as his mental condition required but if he recovered or was found to be untreatable during the fixed period set by the court he would be remitted to prison. The hybrid order was recommended for use in sentencing offenders suffering from psychopathic disorders by the Department of Health and Home Office working group on psychopathic disorder. The Government is considering whether it might be made available in respect of offenders suffering from all types of mental disorder currently covered by Mental Health legislation."

17. Legislative effect was given to this proposal by section 45A of the 1983 Act initially in respect of psychiatric disorders, but now extended to all forms of mental disorders. Mr Samuels places particular emphasis on paragraph 8.12 and the need for the requirement that an offender retain a significant degree of responsibility for their offence. He also argues that the only two examples of this power being considered by this court, Staines [2006] EWCA Crim 15 and House [2007] EWCA Crim 2559, were cases where the order was appropriate because of the uncertain nature of the appellant's condition, although his suggestion that a mental illness will require treatment and a psychiatric order is likely to merit imprisonment is not reflected in the authorities. In

reality, those suffering from a mental illness such as depression may very well retain significant responsibility for their offending, albeit that the responsibility is substantially diminished, but not extinguished by reason of their illness.

18. Mr Samuels does not seek to challenge the assertion that a substantial period of treatment is likely to be necessary. He submits the pitfall of the sentence is that at the time when a Mental Health Tribunal is prepared to conclude the appellant no longer suffers from a mental illness sufficient to warrant detention in hospital, his therapeutic rehabilitation could be thwarted because the Parole Board would have different criteria to consider. Based on the evidence of Dr Green, he describes the result, in all probability, would be a transfer back to a prison and a heightened risk of relapse with a significant danger to staff and prisoners within the prison setting, before a transfer back to hospital might be affected. Pausing there, we observe that if the appellant's therapeutic rehabilitation were to be so fragile that a prison setting, however structured to deal with one who had suffered serious mental disorder, might cause it to reemerge, for our part we would be very concerned about the potential pitfalls he would face if he had been discharged back immediately into the community. We note that Nicol J considered the risk, but still considered it appropriate to make the order that he did.

19. In any event, we do not accept that the potential risk represents a realistic appreciation of the position. For many years under section 47 of the Mental Health Act 1983 it has been possible for the Secretary of State to transfer those sentenced to a term of imprisonment to a mental hospital if mental illness requiring such treatment has required it. Assuming eligibility for parole, when detention in hospital is no longer necessary the responsible medical officer treating such a prisoner can doubtless recommend either a return to prison or a discharge into the community, presumably in the usual course of events through mental health facilities offering decreasing security. As identified in Staines, the procedure is for the Mental Health Review Tribunal, if so satisfied, to make a recommendation to the Parole Board for release. The offender remains in hospital until such time as the Parole Board makes its decision. Mr Samuels also suggests that in a secure hospital the appellant would not have access to the type of courses that would be necessary to satisfy the Parole Board that he no longer posed a significant risk to the public. Suffice to say we have no basis for concluding that ways could not and would not be devised for the appellant to demonstrate that he did not pose a risk to the public, which in any event would doubtless be necessary in order for him to persuade a Mental Health Review Tribunal that his mental illness was sufficiently abated that his continued detention was no longer justified.

20. As to post release support, although supervision and monitoring arrangements which may be obtained under a life licence are not necessarily the same as a comprehensive and social psychiatric support package and reporting requirements which a Mental Health Review Tribunal might impose as a condition of discharge, we can see no reason why appropriate arrangements could not be made at the instance of the Parole Board. Further, what is absolutely critical for appropriate cases is the wider ability to recall for breach of a life licence, as opposed to a failure to comply with a support package put in to place by the Mental Health Review Tribunal, and in particular the wider ability to

recall, absent collapse of mental health.

21. This analysis is not of course dispositive of this appeal, because the thrust of Mr Samuels' cogent argument is that the appellant bore no significant responsibility for the crimes to which he pleaded guilty. The illness was clearly defined, as was the link between that illness and the offending, so he argued that the judge was wrong to attach that responsibility to the appellant. There was no reliable evidence enabling the court to assess the contribution that had been made in the development of the appellant's psychosis by his voluntary abuse of drugs, the consequences of which he could not have seen. Mr Bentham QC for the Crown challenges this submission and argues that the appellant bore a significant responsibility for what he had done.

22. We revert to the judge's conclusions. He recognised that the appellant had attacked Claire Marshall because of his delusional belief that she was planning to kill him, and his failure to recognise the impact on the daughters, especially the two who witnessed attack, was a further aspect of his delusional disorder. He also recognised that the delusional disorder was a powerful driver in relation to the attempted murder of Gerald Fern. Having considered the papers with real care and having heard both the psychiatrists, he remained of the view that the appellant had regained some control by the time of his attack on Gerald and specifically concluded that his responsibility was not wholly extinguished, but that a significant degree of responsibility remained. By voluntarily ingesting prescribed drugs he had voluntarily embarked upon the course of events which led to his illness, and therefore bore some responsibility, and he had also regained a measure of control when he went on to attack Mr Fern.

23. Nicol J was in the best position to reach conclusions about what the psychiatrist said and the responsibility of the appellant. He did so expressing his views carefully and cogently, and there is no basis upon which it would be appropriate for us to interfere with those conclusions. In those circumstances it is not realistic to argue that the judge was wrong in principle to conclude that the appellant bore a significant responsibility for the offences, and furthermore that public safety did not justify the additional protection that an order under section 45A of the Mental Health Act would bring. In these circumstances, notwithstanding Mr Samuel's helpful submissions, this appeal is dismissed.