Neutral Citation Number: **[2012] EWCA Crim 99**

Case No: 201104969/A4

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

Strand

London, WC2A 2LL

Date: Thursday, 24 January 2013

B e f o r e :

LORD JUSTICE ELIAS

MR JUSTICE FIELD

THE RECORDER OF CARLISLE

(His Honour Judge Batty QC)

(Sitting as a Judge of the Court of Appeal Criminal Division)

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R E G I N A

v

IMTIAZ AHMED

- -

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Mr M George QC appeared on behalf of the **Appellant**

Miss S Wass QC appeared on behalf of the **Crown**

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J U D G M E N T

1. LORD JUSTICE ELIAS: This is an appeal against sentence with the encouragement of this court in circumstances which we describe in a moment. The principal ground now being advanced is that in the light of evidence now available, it is clear that the appropriate way in which this appellant ought to have been sentenced was by way of a hospital order with restrictions under section 37 read with section 41 of the Mental Health Act 1983, whereas the sentencing judge imposed a sentence of imprisonment for public protection.

2. Before considering the detail of the case it is helpful in order to understand the arguments briefly to summarise the relevant principles.

3. In some cases where a defendant is convicted of a criminal offence other than one for which the sentence is fixed by law, the court may, instead of sending him to prison, authorise that he be detained in hospital for treatment. The power is conferred by section 37 of the Mental Health Act 1983. Section 37(1) is as follows:

"Where a person is convicted before the Crown Court of an offence punishable with imprisonment other than an offence the sentence for which is fixed by law, or is convicted by a magistrates' court of an offence punishable on summary conviction with imprisonment, and the conditions mentioned in subsection (2) below are satisfied, the court may by order authorise his admission to and detention in such hospital as may be specified in the order or, as the case may be, place him under the guardianship of a local social services authority or of such other person approved by a local social services authority as may be so specified."

4. The conditions referred to in that subsection relevant to this appeal are specified in subsection 37(2)(a)(i) and 37(2)(b):

"(2) The conditions referred to in subsection (1) above are that --

(a) the court is satisfied, on the written or oral evidence of two registered medical practitioners, that the offender is suffering from a mental disorder and that either --

(i) the mental disorder from which the offender is suffering is of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment and appropriate medical treatment is available for him;

... and

(b) the court is of the opinion, having regard to all the circumstances including the nature of the offence and the character and antecedents of the offender, and to the other available methods of dealing with him, that the most suitable method of disposing of the case is by means of an order under this section."

5. Where it appears to the court, as it almost inevitably will, that the public may be at risk of serious harm if the defendant is released from hospital until the mental disorder is fully under control, a restriction order is combined with a section 37 order. The circumstances in which that order may be imposed is set out in section 41(1) which is as follows:

"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'.”

6. The practical effect of this order is that the defendant will not be released until the relevant medical authorities are satisfied that he no longer presents a danger to the public from his medical condition.

7. Section 41(2) requires that at least one medical practitioner must give evidence orally before the court before the restriction order can be imposed.

8. Sometimes a court may consider that having regard to the nature of the offence and the character and antecedents of the defendant, the section 37 order is not suitable even for somebody who is suffering from a mental disorder and even though the conditions are in principle applicable. It may be, for example, that the court considers that there is an element of culpability which requires punishment. A section 37 order would then be inappropriate because it could lead to a medical discharge at some point prior to the appropriate sentence having been served.

9. Alternatively, the court may take the view that there are concerns about the risks of serious harm to the public even if the defendant is successfully treated for his mental illness. An obvious example may be where a mental disorder does not arise until after the offence has been committed. We were referred to the case of Jenkin [2012] EWCA Crim 2557 which provides an example of such a case. In those circumstances the court may consider that it is necessary to pass an indeterminate sentence, be it life imprisonment or imprisonment for public protection, notwithstanding the mental disorder.

10. The distinctions between an IPP sentence and a section 37/41 hospital order regime were succinctly summarised by the Vice President, Hughes LJ, in the case of Attorney General's Reference No 54 of 2011 [2011] EWCA Crim 2276 where at paragraph 17 he said this:

"17. It is true that the detention for public protection regime and the section 37/41 hospital order regime have features in common. Under both regimes discharge on release is discretionary and in the hands of the Secretary of State, that is to say the Ministry of Justice. In both cases regard is had in making the discretionary decision whether or not to release to danger. In neither case is there any absolute right to release. Secondly, release under both regimes is conditional and the defendant is subject to recall. That said, there is an absolutely crucial difference between the two forms of regime. Under an order for detention for public protection release is dependent upon the responsible authority being satisfied that the defendant is no longer a danger to the public for any reason and principally not at risk of relapsing into dangerous crime. Under the hospital order regime release is dependent upon the responsible authority being satisfied that the defendant

no longer presents any danger which arises from his medical condition. Similarly, and critically, release under the detention for public protection regime is on licence and the licence can be revoked if the defendant shows that he remains a danger to the public from crime. It is possible and indeed inevitable that the licence conditions will be designed, among other things, to prevent association with dangerous criminals. Under the hospital order regime, recall is available but only if the defendant's medical condition relapses. Simple crime does not trigger a recall under the hospital order regime."

11. Where a custodial sentence is imposed on someone with a mental illness, it does not mean that the defendant will be without treatment. There is a power under section 47 of the 1983 Act for the Secretary of State by executive order to transfer the prisoner from prison to hospital so as to secure the necessary medical treatment. If and when he is discharged from hospital, however, he will then return to prison where that is necessary for him to complete the sentence.

12. A disadvantage with imposing a sentence of imprisonment and relying upon the exercise of executive discretion to transfer under section 47 is that there may be a time lag before that can be completed, and there will be circumstances where the delay in treatment could be detrimental both to the defendant and indeed the general public. The Attorney General Reference case provides an example of that. In those circumstances the court may make an order under section 45A of the 1983 Act the effect of which is to subject the defendant to both the custodial and the hospital order regimes. Section 45A(1) is as follows:

"This section applies where, in the case of a person convicted before the Crown Court of an offence the sentence for which is not fixed by law --

(a) the conditions mentioned in subsection (2) below are fulfilled; and

(b) the court considers making a hospital order in respect of him before deciding to impose a sentence of imprisonment ('the relevant sentence') in respect of the offence."

13. The conditions referred to in subsection (2) are precisely the same as those referred to in section 37(2)(a)(i).

14. Subsection 3 then provides:

15. “the court may give both of the following directions, namely-

(a) a direction that instead of being removed to or detained in a prison, the offender be removed to and detained such hospital as may be specified in the direction (in this Act referred to as a “hospital direction”); and

(b) a direction that the offender be subject to the special restrictions set out in section 41 above (in this Act referred to as a “limitation direction”).

16. The advantage of an order under this section, therefore, is that it provides the flexibility for the court both to impose a custodial sentence where it considers that such a sentence is necessary, whether determinate or indeterminate, and at same time to secure the necessary medical treatment without delay as if a section 37 order coupled with restrictions were being imposed. In the case of a dangerous offender he will not be released until he ceases to be a risk to the public both from crime and his mental illness.

17. We turn to the circumstances of the particular case. On 14 December 2004 the appellant, who was 19 years old at the time, killed Jeanette Hullah by means of strangulation in the presence of her baby. At the time of her death Mrs Hullah lived with her husband at an address in Cheetham Hill in Manchester and the appellant was their lodger. The appellant had been acting very strangely in the days before he killed the victim. He had been following her around and he was failing to go to work. He was an undiagnosed paranoid schizophrenic at the time. He said he believed that the deceased was having a sexual relationship with her 18-month old son.

18. When the matter was first listed for trial the appellant was unfit to plea. On 9 May 2008 a jury found that he had done the act that caused the death in this case. At that point he was sentenced to a hospital order under section 37 with a section 41 restriction.

19. He then spent three and a half years in a secure hospital after which he was considered by the responsible medical officer to have recovered sufficiently to be fit to plead. On 5 July 2011 he pleaded guilty to manslaughter by reason of diminished responsibility having in fact been indicted for murder.

20. On 11 August 2011 the learned judge, His Honour Judge Goldstone, heard evidence from three psychiatrists as to whether a hospital order was an option available to the court. They all considered that the appellant suffered from paranoid schizophrenia, but an issue arose whether, on the language of section 37, the conditions for making the order were satisfied.

21. We have only this afternoon, in fact during the course of this hearing, received the transcript of the observations of the judge. Suffice it to say that whereas one doctor was satisfied that the conditions were satisfied, another, Dr Mark Swinton, who was the doctor at the time treating the appellant, did not consider that the illness was of a nature or a degree to warrant a section 37 order. The judge considered the report of a third doctor. For various reasons he found the report to be most unsatisfactory. Accordingly he concluded that he could not rely on that report and therefore the conditions for making the order were not present since there were not two doctors in favour.

22. In view of that, on 16 August 2011 the appellant was sentenced to a period of imprisonment for public protection under section 225 of the Criminal Justice Act 2003. The judge determined that the appropriate minimum term, without taking account of the guilty plea, was one of 12 years. He gave a reduction of one-sixth for the plea, reducing the period to ten years. From that it was necessary to deduct also the period spent in hospital and the period spent on remand which left a period of 5 years and 3 months.

23. Leave to appeal that sentence was granted by the single judge on the basis at that time that the minimum term was too high.

24. On 26 February 2012 the case was heard before this court, (Rix LJ and Griffith Williams and Haddon-Cave JJ) and the minimum term was reduced

from five years and three months to one of three years and three months. The court considered that the starting point of 12 years was appropriate but the judge had wrongly given only one-sixth deduction for the guilty plea in the belief that a manslaughter of this kind had to be treated in the same way as murder, whereas he ought to have given the full one-third deduction.

25. At the hearing counsel had indicated to the court that he would in principle like to raise an additional ground, namely that the judge may have been wrong not to make a hospital order under section 37 with 41 of the Mental Health Act. The Court of Appeal recognised that it was not possible for it to deal with that argument. It only had one medical report before it in any event and have there have to be two before the order can be made. In the event, updated orders needed to be prepared. The appeal was adjourned to enable the appellant to get his tackle in order. The court made no formal order but give directions as to the service of fresh evidence. It later transpired that in fact the court has no power to determine any part of an appeal and adjourn the remainder.

26. No doubt one of the factors which caused counsel to consider mounting an appeal along these lines was that not long after the appellant's return to prison he was in fact transferred to hospital pursuant to section 47 of the Mental Health Act. It seems that the stress of prison life, coupled with the fact that he would not take his medicine, may have led to his deterioration. So it was that two doctors were instructed by the appellant. One, Dr Mendelson, in a report dated 28 June 2012, expressed the view that the appellant suffered from schizophrenia and that the illness was of such a nature and degree as to warrant his detention in hospital with restrictions under sections 37 and 41. It was his view that that was in fact the position at the time when the sentence was considered by the judge. Dr Easton reached the same conclusion in a report dated a month or so later. The appellant then lodged amended grounds of appeal submitting that the hospital order was the appropriate disposal of the case.

27. Dr Mendelson was under the impression that the treating doctor, Dr Swinton, was now in favour of a section 37 order combined with a 41 restriction. Dr Swinton was accordingly instructed by the Crown to provide

evidence. In fact that is not quite his position. He produced a report in the form of a letter on 10 October 2012 where he indicated that although he did not resile from his previous view that a section 37 order was not appropriate at the time when the judge sentenced the appellant, nonetheless, he accepted that if the appellant were to be sentenced today then the conditions were satisfied.

28. In a later report, dated 30 November, he somewhat modified that position. He expressed the view that the appropriate order would not be a section 37 order at all, but one made under section 45A of the Mental Health Act. He gave evidence before us today and explained why he had come to that view. His objection was not based on the nature of the treatment, or the requirement for the treatment, but on the potential wider consequences if a section 37 order with restrictions were to be imposed.

29. As we understand the point, it is this. The appellant is an illegal immigrant. In order to be discharged from hospital he would have to undergo a period of controlled supervision. This would be in appropriate accommodation. Dr Swinton tells us that this is not an option open to an illegal immigrant like the appellant. Thus he cannot be discharged into the community because he cannot undertake the necessary conditioning which would satisfy the hospital that he was safe to be left in the community on his own. As a consequence he has to remain in hospital and he will take up a bed, apparently permanently. This is damaging to the wider public interest. If a section 45A order were made, then although the appellant would receive precisely the same treatment under a section 47 transfer as he currently does, a discharge can be effected by sending the appellant back to prison where the relevant supervision can be provided.

30. If Dr Swinton is right about this - and we have no reason to suppose he is not - it is indeed a most unhappy state of affairs and the authorities need to look at it very speedily. But it seems to us that we cannot properly allow such consideratoins to play a part in determining the proper disposal of this case. The questions we have to ask in the light of this new material are first, whether the evidence should be admitted as fresh evidence; and second, whether it ought to cause us to substitute a hospital order with restrictions.

31. Both the appellant and the prosecution agree that in the light of the evidence now before us, that would be the appropriate course to take. But of course, whatever the parties may think, it is ultimately for the court to be satisfied that it is a proper order to make.

32. We have in fact considered four cases which are, in some respects, analogous to this one. These are the cases of Beatty [2006], Hempston [2006], R v O [2011] and Teasdale [2012]. It is not necessary to go into the detail of those cases. Suffice it to say that a feature in all of them is that the sentencing judge, for one reason or another, never was in a position to impose a hospital order. The relevant material to enable that step to be taken was not available either because the issue was never addressed, or the reports had not been provided, or in one case, Teasdale , it was because the defendant by his own decision had not co-operated and therefore the reports could not be produced. In those cases it was in the interests of the defendant and the public alike that the fresh evidence be adduced from the experts and that a hospital order should be made.

33. If, however, a judge has made a determination not to make a hospital order when he was empowered to do so, it plainly is not legitimate for an appellant to obtain two further reports from two further expert medical witnesses and to seek to rely on those to secure a change in the sentencing outcome.

34. In this case, as we have indicated, the reason the judge did not make this order was that he was not empowered to do so because the conditions of section 37 were not met. In those circumstances the judge did not go further and express any view as to whether he would have made the order had two psychiatrists supported it.

35. We now have to consider whether it would be an appropriate order to make. It is material, in our view, that the appellant was, in effect, a man of good character. It is plain that he would not have committed this offence but for his mental disorder. Nobody has suggested otherwise.

36. We think that in those circumstances it would not be appropriate to impose a sentence as a form of punishment. Even less would it be

appropriate to impose an IPP to protect the interests of the public when it seems to us that, given that the offence was caused by the medical disorder, there is no justification for detaining this appellant once - assuming it ever occurs - the medical authorities take the view that he can properly be returned to the community and the public safety is fully protected. This is a decision, in our view, that should be left to the medical authorities rather than to the Parole Board. That is not to say that Dr Swinton's evidence at the time of the hearing before the judge may not have been correct. We do not have to determine that issue. We are satisfied that in the light of the material now before us, with all three doctors saying that it is in principle the satisfactory outcome and the appropriate outcome, that that is what we should do. As Mr George QC put it to us, the evidence overwhelmingly shows that this appellant is someone who is ill and requires treatment. He is not a criminal who requires punishment.

37. In those circumstances, therefore, we do substitute an order under section 37 with a restriction under section 41 for the IPP imposed by the judge. It is not therefore necessary to go on to consider the alternative ground relating to the minimum term. In those circumstances the appeal succeeds.

38. MR GEORGE: Could I just raise one matter? As your Lordships know this case has had something of a history and my instructing solicitor, who instructed me at the time of the Crown Court matter, of course has not had a representation order because of the way in which the representation is structured, but I know from my own experience in the conduct of this case that she has been involved in a great deal of work having to liaise with the expert witness. There was -- an issue arose about whether it was possible to have a video link to this court. The question of whether the appellant should attend at this court and indeed the listing of this court, which your Lordship probably knows has been a matter of some discussion in the last few days.

39. I have spoken with her on a number of occasions and I am well aware that she has done a great deal of work on this case without the benefit of a representation order. Yesterday she was involved in making a series of telephone calls and e-mails, and I really just ask the court to consider

whether it is possible -- there have been representation orders, of course, to allow the instruction of the experts, that is not a difficulty, but it is ancillary work she has had to do in the course of the conduct of the presentation for this hearing, and I wonder whether the court would consider it appropriate in those circumstances to grant a representation order to my original instructing solicitors for the purpose of covering her costs incurred in assisting in the preparation --

40. LORD JUSTICE ELIAS: I think we would have to have some idea to start with what those costs are.

41. MR GEORGE: I am afraid I have not been provided with a breakdown. It will not be a huge sum of money. It is simply, as your Lordship knows, the representation order ended, of course, when leave was granted. It is not for anything beyond telephone calls and time spent liaising with, as I say, the expert witness and with this court about various arrangements for the hearing. It would be a comparatively modest sum. I am not in a position, I am afraid, to give you the actual figure today.

42. LORD JUSTICE ELIAS: It puts us in some difficulty, I think, without some kind of indication. We will rise for a moment.

(**Short Adjournment**)

43. LORD JUSTICE ELIAS: Mr George, we will make an order for £200.

44. MR GEORGE: I am very grateful.

45. LORD JUSTICE ELIAS: There is one further point I should raise. We have to be assured there is a bed available. I appreciate that Dr Swinton said there would be for a section 45A but not section 37. With very great respect to the doctor, he cannot veto an order of the court in that way.

46. MISS VASS: No. He is entirely aware of that. I raised that with him from the start.

47. LORD JUSTICE ELIAS: I do understand why he put it, but plainly there is a bed there because there he is but can we confirm that is the case?

48. MISS VASS: I will double-check. The information I was given before the hearing started was, in effect, there is no difference between a section 45A bed and a section 37 bed. There is bed, he is in the bed, but I will double-check. Yes.

49. LORD JUSTICE ELIAS: Yes. Can I thank everyone, counsel, the experts and solicitors, for putting all of this together. I know it has been quite difficult.

50. THE CLERK OF THE COURT: One matter, my Lord, you direct that he be held in a hospital or in a hospital unit because this makes a difference as to his release.

51. LORD JUSTICE ELIAS: Is this a hospital, Dr Swinton, or is it a hospital unit?

52. MISS VASS: I don't think there is an answer available this afternoon. I don't know if your Lordships heard what Dr Swinton said, he has never heard of the distinction.

53. LORD JUSTICE ELIAS: There is something in the section. I think it is in the section itself.

54. THE CLERK OF THE COURT: "Where the court makes a restriction order is acquires a discretionary power to direct that a restricted patient be detained in a hospital at a level of security the court deems necessary to ensure the protection of the public." Section 47 of the Crime Sentences Act 1997 provides that the court can make a name a hospital unit when directing the admission of a restricted patient.

55. MISS VASS: Does my Lord require the spelling out of the location?

56. LORD JUSTICE ELIAS: I think the actual hospital is what we need.

57. MISS VASS: Yes, can I leave that ... (**Pause**). Can I leave Dr Swinton --

58. LORD JUSTICE ELIAS: Sorry, my Lord is saying it is just the hospital where he is detained. What is that? The full name of the hospital?

59. MISS VASS: Charles House Hospital.

60. LORD JUSTICE ELIAS: Right. There we are. The associate is keeping us on our toes. Thank you very much.