Case No: 201501170

Neutral Citation Number: [2016] EWCA Crim 670

IN THE COURT OF APPEAL (CRIMINAL DIVISION)

ON APPEAL FROM BIRMINGHAM CROWN COURT

HIS HONOUR JUDGE MATTHEWS

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 09/06/2016

Before :

LORD JUSTICE GROSS

MRS JUSTICE THIRLWALL DBE

and

MRS JUSTICE LANG DBE

- -

Between :

	Saber Mohammed Ali Ahmed	**Appellant**
	- and -	
	Regina	**Respondent**

- -

- -

Ms Stella Harris (instructed by **Michael Purdon Solicitors**) for the **Appellant**

Mr Andrew Jackson (instructed by **CPS**) for the **Respondent**

Hearing date: 29th April 2016

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JUDGMENT MRS JUSTICE THIRLWALL DBE:

1. Saber Ahmed 31, was tried for murder in the Crown Court at Birmingham in 2006 before HHJ Matthews and a jury. On 3 August 2006 he was acquitted of murder and convicted of manslaughter on the grounds of diminished responsibility.

2. On 20 October 2006 HHJ Matthews sentenced him to life imprisonment with a minimum term of 3 years and 6 months, less 462 days spent on remand. The judge recommended deportation.

3. This application referred to us by the single judge is for permission to appeal out of time against sentence and for permission to rely on fresh evidence. We give leave to appeal out of time and we permit the appellant to rely on fresh evidence for reasons we shall give later in this judgment.

Facts

4. On 12 July 2005 the appellant, then 21, went to a police station in Digbeth, Birmingham and volunteered that he had killed his friend, Mr Harun, by stabbing him. Evidence at trial revealed that he had stabbed him three times in what the judge was to describe as a brutal killing. There was no provocation. Mr Harun was described as a peaceful and gentle man.

5. Dr Maganty, a consultant at Reaside hospital, gave evidence at trial on the central issue in the case namely the appellant's mental state at the time of the offence. His evidence no doubt contributed to the jury's decision that the appellant's responsibility for the killing was diminished. Dr Maganty and Dr Kenny Herbert also gave their opinions as to the nature of the appellant's illness as at the date of trial. Before sentencing, the judge considered further reports from Dr Maganty and Dr Moholka, forensic psychiatrist. They confirmed that the appellant was suffering from a severe depressive episode with psychotic symptoms but it was not of a nature or degree which made it appropriate for him to be detained in hospital. As of the end of September 2005 while on remand in prison he was being treated with a high dose of Olanzapine, an anti psychotic drug. Before that medication was prescribed he had attacked a female member of the prison staff. By the time of sentence he was complying with his regime of medication and had some insight into his illness. When he was not given his medication his condition relapsed.

6. Very little was known about the appellant beyond the facts of the offence and his conduct in prison He had left his home in Sudan and entered this country illegally in about 2004 and his application for leave to remain had been refused. By his own account he had no previous convictions and had not previously been in trouble with the police either in this country or in Sudan.

7. It is plain that the judge carefully considered the appellant's mental health. He said

"This is not a case where the court can make an order for your admission to and detention in hospital because the mental illness from which you are suffering is not presently of a nature or degree which makes it appropriate for you to be detained in hospital". The judge was there referring to one of the conditions for the imposition of a hospital order under section 37 of the Mental Health Act 1983.
Section 37 reads:

Powers of courts to order hospital admission or guardianship

37.-(1) 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 … and the conditions mentioned in sub-section (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 …

…

(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 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; or

(ii) …

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

8. The judge concluded, correctly, that an order under the Mental Health Act was not open to him. Manslaughter being a serious offence within the meaning of the Criminal Justice Act 2003, he considered first the provisions of part 5. He found the appellant dangerous and concluded that only a life sentence would protect the public. There was no arguable error in the judge's approach or in the sentence he imposed in the light of the seriousness of the offence and the evidence about the appellant's mental illness. Unsurprisingly there was no appeal.

Further offence

9. In December 2011 in Winchester prison the appellant, in a state of some agitation, confronted another inmate and slashed his face with a razor blade attached to a toothbrush. He was charged with an offence contrary to section 18 of the Offences against the Person Act 1856. Between then and March 2012 his mental health deteriorated very markedly indeed. The appellant was held in isolation and received medical attention but he became extremely unwell, both physically and mentally. He was transferred to Reaside Hospital under section 47 of the Mental Health Act 1983. He has been at Reaside ever since.

10. The appellant was very unwell and unfit to plead for almost a year after the offence. He recovered to some extent and in December 2012 he pleaded guilty to section 20 wounding. He was sentenced by HHJ Thomas QC at Birmingham Crown Court on 6 February 2013. The judge had before him reports from two psychiatrists, one of

whom was the appellant's treating psychiatrist, Dr Bourne. Dr Bourne gave evidence as to her recommended mental health disposal. The judge imposed an order under section 37 of the Mental Health Act and combined it with a restriction order under section 41 of the Mental Health Act, without limitation of time.

Section 41 reads:

Power of higher courts to restrict discharge from hospital

41.-(1) 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".

(2) A restriction order shall not be made in the case of any person unless at least one of the registered medical practitioners whose evidence is taken into account by the court under section 37(2)(a) above has given evidence orally before the court.

(3) The special restrictions applicable to a patient in respect of whom a restriction order is in force are as follows-

(a) none of the provisions of Part II of this Act relating to the duration, renewal and expiration of authority for the detention of patients shall apply, and the patient shall continue to be liable to be detained by virtue of the relevant hospital order until he is duly discharged under the said Part II or absolutely discharged under section 42, 73, 74 or 75 below

…

(c) the following powers shall be exercisable only with the consent of the Secretary of State, namely-

(i) power to grant leave of absence to the patient under section 17 above;

(ii) power to transfer the patient in pursuance of regulations under section 19 above … ; and

(iii) power to order the discharge of the patient under section 23 above; and if leave of absence is granted under the said section 17 power to recall the patient under that section shall vest in the Secretary of State as well as the responsible clinician; and

(d) the power of the Secretary of State to recall the patient under the said section 17 and power to take the patient into custody and return him under section 18 above may be exercised at any time; and in relation to any such patient section 40(4) above shall have effect as if it referred to Part II of Schedule 1 to this Act instead of Part I of that Schedule.

…

11. Orders under section 37 and section 41 are often imposed together. Where a restriction order is imposed without limit of time the patient continues to be liable to be detained or recalled until he is absolutely discharged, if ever.

12. The judge said that had he been minded to pass a determinate sentence it would have been 2 years' imprisonment. It is plain from the judge's sentencing remarks that he was satisfied that
    (i) the appellant was suffering from a serious mental illness
    (ii) section 37 would address the appellant's psychiatric needs

(iii) section 41 would protect the public in the event that release of some sort was being considered,

(iv) the mental health disposal would not cut across the life sentence which remained in effect so that the appellant would not be released save by the parole board.

The current position

13. In addition to the life sentence the appellant is currently subject to orders under the Mental Health Act as follows:-
    i) an order under section 47 MHA with a linked order under section 49
    ii) an order under section 37 MHA with a linked order under section 41.

14. Section 47 provides for the removal to hospital of a person serving a sentence of imprisonment on the direction of the Secretary of State. Before doing so the Secretary of State must be satisfied from reports from two medical practitioners that the prisoner is suffering from a mental disorder of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment, effectively the same test as for an order under section 37. A transfer direction has the same effect as a hospital order under section 37 (see section 47(3)).

15. Section 49 mirrors section 41; where the Secretary of State makes a transfer direction under section 47 he may also direct that the person be subject to the special restrictions set out in section 41. Such a direction has the same effect as an order made under section 41 and is known as a "restriction direction" (see 49(2)).

16. It is convenient to set out here two further provisions of the Act, s45A and 45B. Originally implemented in April 2005, they have been in force in their current form since 3 November 2008. They read as follows:

Power of higher courts to direct hospital admission

45A.-(1) 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.

(2) The conditions referred to in subsection (1) above are that the court is satisfied, on the written or oral evidence of two registered medical practitioners –

(a) that the offender is suffering from mental disorder;

(b) that 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

(c) that appropriate medical treatment is available for him.

(3) The court may give both of the following directions, namely-

(a) a direction that, instead of being removed to and detained in a prison, the offender be removed to and detained in 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").
(4) A hospital direction and a limitation direction shall not be given in relation to an offender unless at least one of the medical practitioners whose evidence is take n into account by the court under subsection (2) above has given evidence orally before the court.
(5) A hospital direction and a limitation directions shall not be given in relation to an offender unless the court is satisfied on the written or oral evidence of the approved clinician who would have overall responsibility for his case, or of some other person representing the managers of the hospital that arrangements have been made-
(a) for his admission to that hospital; and
(b) for his admission to it within the period of 28 days beginning with the day of the giving of such directions;
and the court may, pending his admission within that period, give such directions as it thinks fit for his conveyance to and detention in a place of safety.
…
(8) Section 38(1) and (5) and section 39 above shall have effect as if any reference to the making of a hospital order included a reference to the giving of a hospital direction and a limitation direction.
(9) A hospital direction and a limitation direction given in relation to an offender shall have effect not only as regards the relevant sentence but also (so far as applicable) as regards any other sentence of imprisonment imposed on the same or a previous occasion.

45B…
With respect to any person-
(a) a hospital direction shall have effect as a transfer direction; and
(b) a limitation direction shall have effect as a restriction direction.
…

17. At the time of the original sentence section 45A applied only where the offender was suffering from psychopathic disorder. The appellant did not (and does not) suffer from a psychopathic disorder and so an order under Section 45A was not open to the judge.

18. Whilst the effect of a restriction direction (under section 49 or section 45B) is the same as a restriction order under section 41 there is an important difference as to duration; a restriction direction ceases to have effect on the person's release date. This is the effect of Sections 50(2) and (3) of the Act which read as follows:
50.- …
(2) A restriction direction in the case of a person serving a sentence of imprisonment shall cease to have effect, if it has not previously done so, on his release date.
(3) In this section, references to a person's release date are to the day (if any) on which he would be entitled to be released (whether unconditionally or on licence) from any prison or other institution in which he might have been detained if the transfer direction had not been given; and in determining that day there shall be disregarded-

(a) any powers that would be exercisable by the parole Board if he were detained in such a prison or other institution, and
(b) any practice of the Secretary of State in relation to the early release under discretionary powers of persons detained in such a prison or other institution

Fresh Evidence

19. There was before us comprehensive fresh evidence which we heard and read de bene esse. There were reports dated 22 May 2012; 1 February 2013; 10 February 2014; and 17 November 2015 from Dr Maganty and reports dated 22 January 2013; 1 February 2013; 28 November 2014; and 10 December 2015 from Dr Bourne, the appellant's Responsible Clinician. Both of them gave evidence before us.

20. Dr Maganty has reconsidered all of the information that was available in October 2006, everything that has happened since, and has revisited his opinion. He is firmly of the view that the diagnosis he made in 2006 was wrong. The development of the appellant's condition over the last ten years demonstrates that he is now and was then suffering from schizo-affective disorder.

21. In a report dated 1 February 2013, Dr Bourne includes a detailed analysis of the 6 years the appellant spent in prison. He was very disruptive, difficult and, at times, violent. He did not take his medication either because he did not want to or, more frequently, because it was not provided to him. His behaviour resulted in his being moved from prison to prison and, frequently, being held in isolation in increasing distress. This led him to develop symptoms of post traumatic stress disorder on top of the deteriorating course of his schizoaffective/phrenic disorder.

22. We are satisfied that the evidence of the period 2005-2012 reveals the course of a deteriorating mental condition. We accept that the appellant's conduct at the time of the killing was the first manifestation of what was to become an enduring and relapsing condition. This is not a case where the appellant has developed a new or different disorder in prison. The original diagnosis has been proved wrong by the course of the illness over many years.

23. We are satisfied that it is necessary in the interests of justice to receive the fresh evidence. It provides a firm foundation for the appeal against sentence to the merits of which we now turn.

24. The questions for the court are those set out by this court in **R v Vowles [2015] EWCA Crim 45.** At paragraph 51 Lord Thomas CJ said;

"it is important to emphasise that the judge must carefully consider all the evidence in each case and not, as some of the early cases have suggested, feel circumscribed by the psychiatric opinions. A judge must therefore consider, where the conditions in s37 (2)(a) are met, what is the appropriate disposal. In considering that wider question the matters to which a judge will invariably have to have regard include (1) the extent to which the offender needs treatment for the mental disorder from which the offender suffers (2) the extent to which the offending is attributable to the mental

disorder (3) the extent to which punishment is required and (4) the protection of the public including the regime for deciding release and the regime after release. There must always be sound reasons for departing from the usual course of imposing a penal sentence and the judge must set these out".

25. At paragraph 53 the court reminded sentencing judges of the provisions of section 45A and at paragraph 54 directed them to approach matters in the order we now follow.

The extent to which the offender needs treatment for the mental disorder from which he suffers

26. Unlike the sentencing judge we have had the great advantage of receiving detailed and cogent evidence of the course of the appellant's illness, the effect of treatment, its progress and its remission over many years. We have no doubt that the appellant has a mental disorder that needs continuing hospital treatment, that he responds to it and that it has been successful in controlling his illness.

27. We are satisfied that the conditions in section 37(2)(a) are met. We turn to section 37(2)(b): having regard to all the circumstances and to the available methods of dealing with the appellant are we satisfied that an order under section 37 is the most suitable method of disposing of the case? We have in mind the questions posed in Vowles.

To what extent is his offending attributable to his illness?

28. Although very little is known of the appellant before he came to the attention of the police in 2005 his conduct over the 11 years since then is well documented. It is inescapable that while his mental health was untreated he offended or, at least, engaged in highly antisocial behaviour in prison. Since 2012 he has not offended nor has he been disruptive or antisocial. We have considered whether the reason for this is simply the close supervision in a hospital environment which has reduced his opportunities for criminal or disruptive behaviour. We are satisfied that confinement and supervision are the context of the change and improvement, close confinement and isolation in prison did not have the same effect even when medication was available to him. We are satisfied that the reason for the absence of criminal or any other anti social behaviour is the effective control of his schizo-affective disorder. We accept that the treatment for his symptoms of PTSD have also made a contribution to his stability. In our judgment the evidence is now all one way; the appellant offends only when he is mentally ill. Mr Jackson, who appeared for the Crown, did not seek to persuade us otherwise. This does not mean that the appellant bears no responsibility for the killing. His responsibility was diminished, not eliminated but it means that when the question of release is to be considered his mental health will be the fundamental issue – whether it is considered by the parole board or the First Tier Tribunal. We should add (dealing with the third question in Vowles**)** that he has already served the minimum term imposed upon him, the punitive element of his sentence.

The regime for deciding release

29. The regime for release on life licence is different from the regime for release on a hospital order/restriction order. The focus for the parole board is broad; they consider the likelihood of reoffending and the risk to the public resulting from it. Under the regime of sections 37 and 41 the focus is narrower, it is entirely on the appellant' mental health. If that does not relapse a person is not recalled even if he offends. Given our finding that the appellant offends only when mentally ill it is plain that in this case there is no practical difference between the answers to the broad questions to be asked by the parole board and the answers to the narrow question to be asked by the FTT when considering whether the appellant should be released into the community**.** On the evidence we have seen the overwhelming likelihood is that the appellant will be released either on licence or, were we to accede to the appeal, under the restriction order.

The regime after release

30. The appellant's illness is life long. The seriousness of the offence of which he was convicted in 2006 and the premeditated violence in 2011 demonstrate that when his mental illness is untreated the appellant is very dangerous. Under a life licence recall generally occurs when an offence is committed. Given the likely nature of the offence this would be far too late for the appellant and the public. We were concerned therefore to compare the regime of supervision were the appellant on life licence with the regime were he to be conditionally discharged under the auspices of a section 41 order. Because the appellant has been subject of orders under the Mental Health Act we have the advantage of seeing how things have been managed in practice. The appellant has been free of psychosis for well over a year. He has been permitted frequent unescorted leave in the community. The leave is planned by the Responsible Clinician, Dr Bourne and the programme is approved by the Ministry of Justice. So far leave has been successful. In addition the appellant now has some responsibility for his own medication. He is stable and lucid. It is proposed gradually to rehabilitate him into the community and if he remains well, to grant him a conditional discharge. He would be released (but subject to recall) with the support and supervision of the Community psychiatric service, including a psychiatrist, supervisor and community psychiatric nurse – with a 24 hour mental health placement available to him. If there were to be any signs of relapse they would be picked up at an early stage and would lead to a swift (ie within hours) recall to hospital.

31. Dr Bourne explained that under a section 41 order the appellant would be monitored and supervised by an experienced mental health team, including her, or her successors. Unlike the prison staff who dealt with him between 2005 and 2012 they can recognise and act upon the early warning signs of relapse. These would be picked up well before there was any risk of criminal behaviour. It is Dr Bourne's opinion that the appellant is sufficiently motivated to draw to the attention of his supervisors any concerns he may have about his deteriorating mental health. He knows the signs he should look out for. It follows, Dr Bourne opined, that deterioration would be identified early and would lead to a speedy recall to hospital and appropriate in-patient treatment.

32. Under the life licence regime the system of monitoring is much less close and much

less frequent. Furthermore the probation officers do not have the clinical experience to recognise early stage deterioration of mental health.

33. Although there can never be certainty on such matters, on the evidence we have heard we are satisfied that public safety may much better be secured upon the appellant's eventual release by the regime under a restriction order under the Mental Health Act. Mr Jackson for the prosecution did not seek to persuade us otherwise.

34. There is a further issue; the appellant has family in Khartoum. He has made it clear to the clinical team that he would wish to return to be with them in Sudan as soon as he is able to do so. The team has been in touch with family members in Khartoum and with psychologists and other professionals who will be in a position to assist in treating the appellant once he reaches his home country. Dr Bourne and the rest of the clinical team are satisfied that once the appellant has spent some months in the community in the United Kingdom, under their care, his future mental health will be best secured if he is able to live near his family in Sudan. The team at Reaside have had experience in recent years in achieving the successful resettlement of patients in their country of origin. The precise mechanics of how that may be achieved is not for us.

35. It is not open to this court to impose an order under section 45A alongside the life sentence, since an order under section 45A was not available to the original sentencing court, see section 11 (3)(b) of the Criminal Appeal Act 1968 but we are satisfied that section 45A, even if available to us, would not be the right disposal. The doctors do not expect the appellant's health to deteriorate in the short or even the medium term. But deterioration at some stage is inevitable, even if the appellant consistently takes his medication and complies with treatment. It is imperative that he is subject to appropriate expert supervision on his release and thereafter. That is not possible under S45A.

Conclusion

36. We are satisfied that in all the circumstances of this case it is appropriate to impose a hospital order with a restriction order. This is no reflection on the sentencing judge who passed the only sentence available to him on the evidence at the time. We quash the life sentence and we impose orders under Sections 37 and 41 of the Mental Health Act 1983, the latter without limit of time. To that extent the appeal is allowed.

37. We direct that i) a copy of this judgment be provided by the appellant's advisers to Dr Bourne, to be held on the NHS file of the appellant and that ii) a further copy be provided by the CPS to the relevant officials dealing with the appellant's immigration status at the Home Office and to those dealing with his case at the Ministry of Justice.