IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2023/00337/A3

[2023] EWCA Crim 1559

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 30th November 2023

B e f o r e:

VICE PRESIDENT OF THE COURT OF APPEAL CRIMINAL DIVISION
(Lord Justice Holroyde)

MR JUSTICE BRYAN

MRS JUSTICE HILL DBE

R E X

- v -

NYAL JORDAN HUSKINSON

Computer Aided Transcription of Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

Miss C Daly appeared on behalf of the Appellant

Mr J Janes appeared on behalf of the Crown

A P P R O V E D J U D G M E N T

MR JUSTICE BRYAN :

1. The parties appear before the court on an application for leave to appeal against a hospital order imposed upon the applicant in August 2019.

2. The facts that gave rise to the hospital order and the backdrop to the application is a very serious attack upon his father, Kevin Repton ("the complainant") by the applicant, whereby the applicant slashed his father across the face with a knife. Prior to the attack he told his father: "They've told me to kill you. I've got to kill you. I'm going to kill you now." It was the opinion of the psychiatrists that the applicant was floridly psychotic at the time that the offence was committed and that he suffered from paranoid schizophrenia.

3. 3. On 2nd August 2019, in the Crown Court at Stafford, before His Honour Judge Gosling, the court determined that the applicant (then aged 27) was under a disability, pursuant to section 4(5) of the Criminal Procedure (Insanity) Act 1963 ("CP(I)A 1964").

4. 4. The court appointed Miss Ahya as independent counsel for the applicant, pursuant to section 4 of CP(I)A in the context of the finding of fact hearing. On 11th July 2019, before His Honour Judge Challinor, a jury found that the applicant had done the act of wounding with intent (count 2), pursuant to section 4A(3) of the CP(I)A.

5. On 8th August 2019, the matter came before His Honour Judge Gosling for sentence. In his sentencing remarks, Judge Gosling concluded that the applicant suffered from paranoid schizophrenia which was of a nature and degree to warrant detention in hospital for medical treatment. Dr Bennett and Dr Taylor considered it appropriate to impose a section 41 restriction order as the applicant had relapsed in the past. If he were released into the community under a clinical management scheme he might relapse again if he failed to take the appropriate medication. Consideration was given to other disposals in the case, but the court was satisfied that a hospital order with a restriction order was appropriate. Accordingly, a hospital order with a restriction order was made, pursuant to section 5(2) of the CP(I)A. Count 1 (attempted murder) was ordered to lie on the file against the applicant on the usual terms.

6. A long and complicated procedural history then followed, which it is necessary to set out to put the current application in context.

7. On 29th March 2022, the Ministry of Justice/HM Prison and Probation Service wrote to the applicant in these terms:

> "On 8th August 2019 you appeared at Stafford Crown Court and were found under a disability and unfit to plead on a charge of wounding with intent.
>
> The Secretary of State has been advised that you are now fit to plead to these charges and has decided that you should be remitted to court so that the prosecution against you may resume.

> You will remain in hospital until you appear in court. Once you appear in court the hospital order and restriction order, to which you are subject, will lapse. You will discuss with your care team or legal representative what this will mean for you in practice."

8. The same day, the Ministry of Justice/HM Prison and Probation Service wrote to Stafford Crown Court Listing in these terms:

> "On 8th August 2019 at Stafford Crown Court Mr Huskinson was found under a disability and unfit to plead on a charge of wounding with intent and was admitted to Arnold Lodge. The responsible clinician has now reported that Mr Huskinson can properly be tried for the alleged offence.
>
> After consultation with CPS Midlands and with Mr Huskinson's responsible clinician, Dr Leo McSweeney, the Secretary of State has decided that Mr Huskinson should be remitted to court but will remain in Arnold Lodge pending a court appearance. I should like to know when a date has been set for the court appearance.
>
> The section 37/41 order ceases to have effect on the patient's arrival at court (section 5A(4) of the Criminal Procedure (Insanity) Act 1964). Therefore, the patient's responsible clinician will be made aware of this so that procedures for detention under the civil provisions of the Mental Health Act can be considered and commenced if the patient is still sufficiently ill as to require compulsory treatment in hospital.
>
> A copy of this letter has been sent to the Chief Crown Prosecutor for CPS Midlands area, and Mr Huskinson's responsible clinician."

9. Following receipt of that letter by Stafford Crown Court, the case was referred to His Honour Judge Gosling on 5th April 2022. The Learned Judge directed as follows:

> "Please forward the attached letter to the CPS and list the case for mention. Defendant to attend. Would you please check with the author of the letter that they will be responsible for producing him at court or arranging a live link?"

10. Section 5A(4) of the Criminal Procedure (Insanity) Act 1964 provides as follows:

> "(4) Where —
>
> > (a) person is detained in pursuance of a hospital order which the court had power to make by virtue of section 5(1)(b) above, and
> >
> > (b) the court also made a restriction order, and that order has not ceased to have effect, the Secretary of

State, if satisfied after consultation with the responsible clinician that the person can properly be tried, may remit the person for trial, either to the court of trial or to a prison.

On the person's arrival at the court or prison, the hospital order and the restriction order shall cease to have effect."

11. In this context Criminal Procedure Rule 25.10 states as follows:

"…

(4) Paragraphs (5) and (6) of this rule apply where —

(a) the jury decides that the defendant did the act or made the omission charged as an offence;

(b) the court makes a hospital order and a restriction order;

(c) while the restriction order remains in effect the Secretary of State receives medical advice that the defendant can properly be tried and decides to remit the defendant to the Crown Court for trial; and

(d) the Secretary of State so notifies the court officer.

(5) The prosecutor must serve on the court officer the medical report or reports by reference to which the defendant has been assessed as properly to be tried.

(6) The court must give directions —

(a) for the return of the defendant to the court, which initial directions may be given —

(i) without a hearing, or

(ii) at a hearing, which must take place in the defendant's absence; and then

(b) for the future conduct of the case, which further directions must be given —

(i) at a hearing, and

(ii) **in the defendant's presence**.

(7) Directions under paragraph (6)(a) —

(a) may include directions under rule 3.10 (Directions for commissioning medical reports, other than for

sentencing purposes) for the commissioning of any further report required by the court;

(b) may set a timetable providing for the date by which representations about the future conduct of the case must be served; and

(c) must set a date for a hearing under paragraph (6)(b).

(8) At the hearing under paragraph (6)(b)—

(a) rule 3.21 (Pre-trial hearings in the Crown Court: general rules) applies even if a plea and trial preparation hearing has been conducted in the case before; and

(b) among other things, the court must decide whether to grant or withhold bail."

(emphasis added)

12. The matter was initially listed for 9th May 2022. The listing officer emailed, amongst others, the hospital as follows:

> "This mention hearing will be in court 2 on Monday 9th May, time to be confirmed. The link is below for Mr Huskinson to join the hearing in a private, suitable room."

However, there were difficulties with counsel attending. The court was subsequently informed by the hospital that the applicant was not fit to participate.

13. On 27th May 2022, the case was listed as a mention hearing before His Honour Judge Gosling. Counsel for the prosecution, who also appears before us, Mr Janes, and defence counsel, Miss Ahya, attended. The applicant was not present. We have the benefit of a transcript of that hearing. At that hearing the case was adjourned for material from the applicant's treating clinician to be obtained. No further hearing date was set.

14. The CPS sent an email to the Crown Court requesting the applicant to be "excused from any hearings in order to preserve his current mental health regime". At this time the Crown were reviewing the public interest in prosecuting the case. In the meantime, the case was awaiting psychiatric reports.

15. On 27th October 2022, His Honour Judge Gosling made the following widely shared direction on the Digital Case System:

> "This case has a very protracted history. Ultimately [the applicant] was found unfit to plead and a jury found he did the act. On 8th August 2019 His Honour Judge Challinor made a

> hospital order with a section 41 restriction. The case was relisted on 27th May 2022 because [the applicant] had become fit to plead. The prosecution asked that the case be set down for trial on count 2 (section 18) only. The case is awaiting a trial date. The CTLs are not running – [the applicant] is detained under the hospital order, which will continue until his production at court (see M/6, page M/82). I required counsel on each side (Mr Janes and Miss Ahya) to let the court know their availability. Nothing has happened. The case needs to be set down for trial as a matter of urgency, given its age. There is a further complication. [The applicant] has written to the court directly, asking for the trial to be listed and asking for a transfer of his representation order to CLP Solicitors in London. I have uploaded the letter to U.5, page U23. With those currently representing him, please take instructions on this development. I shall send a copy of the letter to CLP Solicitors to make a transfer application, or not, as they decide. I shall not set a trial date yet. I shall have the case mentioned in the week commencing 14th November 2022 to see what developments there have been and to make further directions. Would Mr Janes and Miss Ahya please liaise and agree a date that they can manage that week – CVP is fine; or if necessary, the following week. There is no point in the [applicant] attending either remotely or in person."

16. Listings in November and December 2022 were adjourned.

17. A final hearing then took place before Her Honour Judge Montgomery KC on 13th January 2023. It was listed as a mention hearing to decide if the Crown would offer no evidence, or if the matter would be fixed for trial, following the Crown's review of the case. Counsel for the prosecution (Mr Janes) and for the defence (Miss Ahya) attended. The applicant was not present.

18. Mr Janes, on behalf of the Crown, indicated that:

> "I had a conference with those instructing me at a senior level within the Crown Prosecution Service and our settled position is that we do not seek to try Mr Huskinson for any count on the indictment. That has been taken following consultation with the officers in the case and involving the input of the complainant … Mr Huskinson's father."

19. Counsel for the Crown then stated as follows:

> "We have also, because there are very much interest and wider public concerns, liaised with Dr Sweeney, who is Mr Huskinson's treating physician, and considered what the result of that decision would be in terms of any ongoing protection for the public through the provision of treatment of Mr Huskinson.

> The position is this: fortunately, there is a lacuna or loophole within the legislation … and it's this. Were Mr Huskinson to have been physically present at court, your Honour, and the Crown had taken the decision either to proceed to trial or formally offer no evidence, as I will subsequently do, then the existing section 37 and 41 hospital order would lapse.
>
> And, absence any application or use of the civil powers for the Mental Health Act 1983, the hospital would have to release Mr Huskinson into the community. Nobody is advocating that as a way forward. Because Mr Huskinson has been previously arraigned on count 1 (attempted murder) and count 2 … on 11th July 2019, it is not necessary for Mr Huskinson to be present if I subsequently offer no evidence. The only matter that your Honour would need (inaudible) direction and order is for your Honour to allow count 1 to come off the file, as it were – that was the order of His Honour Judge Gosling on 8th August 2019 – so that I can then offer evidence. That is my application to your Honour."

20. At this point Her Honour Judge Montgomery KC interjected and stated as follows:

> "… I am afraid I cannot disappear count 1 in the way that you suggest I can. It is not possible to remove from the indictment a count on which a defendant has been arraigned in that way. Nor am I particularly reassured by the phrase 'lacuna', which is going to permit the court to take what is conclusive action on this indictment, allowing for the defendant's order and for the finding of the jury to persist.
>
> It seems to me a much better course, although it may not have the air of finality about it, but in ordinary circumstances defendants would prefer that to lie these matters on the file, not to be proceeded with without the leave of the court or the Court of Appeal Criminal Division, both overcomes any concerns about the operation of the lacuna and indeed the inability of the court to take off an indictment a count to which a defendant has already pleaded not guilty."

21. Counsel for the Crown then agreed to this course. He stated that leaving the matter to lie on the file with the disposal that he had indicated for the public record and for the court record meant that the Crown's decision not to proceed was there for anyone to see subsequently, and Miss Ahya, on behalf of the applicant, replied: "I think that is a sensible course, your Honour, and I agree."

22. Her Honour Judge Montgomery KC then ordered, in relation to the count of attempted murder and the count of wounding with intent on the indictment, uploaded to the DCS on 10th July 2019, that those counts lie on the file, not to be proceeded with without the leave of the court or the Court of Appeal Criminal Division, and stated that: "The case is considered, as is accepted by the prosecution, to have reached its final destination."

23. Pursuant to section 16A of the Criminal Appeal Act 1968, the applicant applies for an extension of time (over three years) in which to apply for leave to appeal against the hospital order.

24. The applicant was initially unrepresented. On 17th March 2023, given the applicant's vulnerabilities, the Registrar granted a representation order for solicitors (CLP Solicitors) to advise him on his appeal and to instruct counsel to lodge grounds of appeal, if appropriate. On 26th June 2023, the Registrar granted a representation order for junior counsel to settle grounds of appeal. This was further extended by the Registrar to 16th August 2023, when the applicant's application was referred to the full court for counsel to appear before the full court.

25. In referring the application to the full court, the Registrar gave the following reasons:

> "I refer this application to the full court. The history of the applicant's proceedings is unusual, and the result overall is that, despite the remittal by the Secretary of State, the applicant is currently still subject to an indeterminate sentence. The grounds of appeal submitted merit the consideration of the court."

26. For appeals against orders made in cases of unfitness to plead, section 16A of the Criminal Appeal Act 1968 provides as follows:

> "(1) A person in whose case the Crown Court —
>
> (a) makes a hospital order or interim hospital order by virtue of section 5 or 5A of the Criminal Procedure (Insanity) Act 1964, or
>
> (b) makes a supervision order under section 5 of that Act,
>
> may appeal to the Court of Appeal against the order.
>
> (2) An appeal under this section lies only —
>
> (a) with the leave of the Court of Appeal; or
>
> (b) if the judge of the court of trial grants a certificate that the case is fit for appeal."

27. Section 16B(1) sets out the powers of the court:

> "(1) If on an appeal under section 16A of this Act the Court of Appeal consider that the appellant should be dealt with differently from the way in which the court below dealt with him —

> (a) they may quash any order which is the subject of the appeal; and
>
> (b) they may make such order, whether by substitution for the original order or by variation of or addition to it, as they think appropriate for the case and as the court below had power to make."

28. Although the hospital order was imposed in 2019, it is said that no grounds of appeal arise until after the final hearing in January 2023, when the applicant was not produced, meaning that section 5A(4) of the CP(I)A was not triggered.

29. In the grounds of appeal it is submitted on behalf of the applicant that if the applicant had been produced at the Crown Court the effect of section 5A(4) of the CP(I)A would have been triggered and the section 37/41 hospital order would have been discharged.

30. The prosecution, for their part, contends that there are no grounds to find that the hospital order itself was wrong in law and/or contrary to the medical evidence provided to the court. In any event, the application does not submit that the hospital order was wrong, but rather that the applicant should have been produced before the Crown Court during the remittal proceedings, such that the order would have lapsed. Therefore, there was no basis upon which this court could properly adopt its powers pursuant to section 16B(1).

Discussion

31. If there were any grounds of appeal in relation to the hospital order that was made on 8th August 2019 (whether on the basis that there was an error of law and/or on the basis that it was contrary to the medical evidence), leave could be sought under section 16A of the Criminal Appeal Act 1968, and the court would have jurisdiction to grant leave if it considered that the grounds of appeal were arguable; and thereafter could hear the appeal, and if the appeal was successful, make any of the orders set out in section 16B(1) of the Criminal Appeal Act 1968.

32. However, on the evidence before us we are satisfied that the Learned Judge did not arguably err in principle in making a hospital order, and that the hospital order was justified on the medical evidence before him.

33. If (as occurred), whilst the applicant was subject to the hospital order, the Secretary of State was satisfied, after consultation with the responsible clinician, that the applicant could properly be tried, then he could (as he did) remit the person for trial to the Crown Court under section 5A(4) of the Criminal Procedure (Insanity) Act 1964 for trial, or to a prison, and on the applicant's arrival at the court, the hospital order and the restriction order would cease to have effect.

34. Following the letter of 29th March 2022 from the Ministry of Justice/HM Prison and Probation Service on behalf of the Secretary of State, the court should have followed the procedure under Criminal Procedure Rule 25.10, and, pursuant to rule 25.10(6),

given directions for the return of the defendant to court, with directions for the further conduct of the case, which further directions must be given at a hearing **and in the defendant's presence**.

35. It was not appropriate for matters to be contrived such that the defendant did not attend at court (with the consequences that would follow under section 5A(4) of the CP(I)A 1964). In circumstances where the Secretary of State had concluded on the evidence that he should remit the matter for trial. To the extent that there were concerns about the defendant's mental health in the context of what would occur when he appeared, then steps could have been put in place in advance under section 3 of the Mental Health Act that would have prevented his release, had such steps been justified.

36. We consider, therefore, that directions should have been given for the return of the defendant to court at which hearing directions could be sought and made, as appropriate, as to the future conduct of the case. This would have allowed the Crown to indicate its position (that it wished to offer no evidence), and the defendant (through his representatives) to make submissions that he wished there to be a trial.

37. What was not appropriate was to contrive for the defendant not to be produced and for the court to order that the counts lie on the file and not to be proceeded with without the leave of the court or the Court of Appeal Criminal Division, treating the case as having reached "its final destination", the effect of which was to leave the defendant subject to an indeterminate sentence in the form of a hospital order.

38. In such circumstances we consider that the appropriate course is as follows:

    1. The application for an extension of time is refused, and we refuse the application for leave to appeal against sentence.

    2. Within seven days the applicant should lodge a Notice of Application to the Court of Appeal Criminal Division to restore the charges which have been ordered to lie on the file. We dispense with any requirement for notice and treat this hearing as the hearing of the application. We accede to that application.

39. Accordingly, we lift the stay and remit the matter back to Stafford Crown Court for a judge of that Crown Court to give initial directions within 28 days, pursuant to CPR 25.10(6)(a) in relation to the section 5A(4) CP(I)A remittal proceedings, which **must** include a direction that the defendant attend a subsequent hearing (for which appropriate arrangements should be made by the hospital at which he is residing to ensure such attendance) under CPR 25.10(6)(b). It will then be for the attending clinicians to take such steps as they consider appropriate before the hearing at which the defendant must attend, and for the Crown to make its application to offer no evidence (if that remains its position) and for the defendant's representatives to make such submissions as they think fit as to whether there should be a trial.

40. In relation to costs, we revoke the representation order previously made by the Registrar and make an order that the reasonable costs of defence counsel's preparation and presentation of this hearing be paid from central funds.