IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand London WC2
16 June 1992

B e f o r e:

LORD JUSTICE WATKINS

MR JUSTICE PHILLIPS

and

MR JUSTICE TUCKEY

R E G I N A

-v-

JAMES KIRK FLEMING

T FIELD-FISHER QC and **A MAITLAND** appeared on behalf of the **Appellant**.

L SELLICK appeared on behalf of the **Crown**.

WATKINS LJ:

1. This is a very worrying case. On 17 December 1990 at the Crown Court in Truro before McCullough J the appellant, who is now 34 years of age, pleaded not guilty to two counts of murder but guilty to manslaughter by reason of diminished responsibility. That was accepted and he was sentenced to imprisonment for life on each of those counts. He now appeals against that sentence by the certificate of the learned trial judge and under section 11(1)(A) of the Criminal Appeal Act 1968. The learned judge said:

> Whether, despite *R v Howell* (1985) 7 Cr App R (S) 360 and *R v Mbatha* (1985) 7 Cr App R (S) 373, sentences of life imprisonment were properly passed in the following circumstances: in May 1983 the appellant was made the subject of a hospital order and a restriction order without limit of time and was admitted to Broadmoor Hospital; in June 1985 he was transferred to another hospital; in March 1987 his conditional

discharge was ordered; in August 1989 his absolute discharge was recommended; in March 1990 the order of conditional discharge was continued; in August 1990, as the result of an irrational attack he killed his wife and his son; in December 1990 he pleaded guilty to manslaughter on the ground of diminished responsibility and the Court, on the basis of two reports, both saying that the criteria for sections 37 and 41 of the Mental Health Act 1983 were met, was invited to make the same orders as in 1983 so that he could again be admitted to Broadmoor Hospital where a bed was immediately available.

2. The vital question in this appeal is whether the judge was right to pass life sentences having regard to the authorities to which he referred and, of course, to the circumstances of the present case which are, of course, a very important consideration.

3. It must also be borne in mind, before regard is paid to the incident which brought about the deaths of his wife and son, that the appellant has been troublesome in the past in a number of other ways. He has a criminal record. He comes from Scotland originally where he was first convicted when he was 17 years of age. That was of theft by house-breaking. Since that time he has committed various offences, some of them against the traffic laws and others of dishonesty and violence – some of the violence being serious. Notably on 4 May 1983, at Bodmin Crown Court for wounding with intent, for causing grievous bodily harm with intent, for arson and wounding, a hospital order under section 65 of the then Mental Health Act 1959 was made and he went to Broadmoor as is indicated in the certificate.

4. Some of his violence needs to be referred to in detail. After a minor argument in 1982 with a man who was sharing a flat with him he stabbed that person in the neck with a kitchen knife. Whilst sharing a cell with another man at Bodmin Crown Court he attacked that person with a cell stool and caused injury. He set fire to a blanket at Bodmin police station. In 1982, when he was *en route* under escort of prison officers from Exeter Prison to Penzance Magistrates' court, he tried to grab hold of a prison officer's right eye and had to be restrained but not before his victim had suffered an abrasion to the bottom of the eye, a scratch to the corner of the eyeball and general bruising in that area.

5. So it will be seen that he is someone who, perhaps because he cannot help it, resorts to violence whether provoked to it or not.

6. He married his wife in July 1989. That marriage pursued its course until eventually came the incident when he put to death his wife and her son by a previous union. The circumstances of that are sufficiently set out in the various papers which are before us and in the quite voluminous medical reports. Suffice it to say of those circumstances they reveal an irrationality in the mind of this man which was positively, at times, menacing and dangerous. Hence, of course, the finding that he was diminished in responsibility for what he did and the verdicts of manslaughter and not murder.

7. He was drinking heavily at one time and he was taking cannabis. The woman he married was his second wife. For a time all seemed to go well. Later the relationship between the two deteriorated. Then came 13 August 1990. The appellant spent most of that day in bed. That night there was apparently no argument between him and his wife nor indeed anything else that seemed to spark off the behaviour which followed. When he woke up

the following morning he felt an overwhelming anger, so he told the maker of the medical report to which I am now referring, towards his wife and the boy Timothy. They were driving him mad, so he thought, and he decided to kill them. He fetched a hammer from the shed, went up to the bedroom and struck his wife's head with it 10 to 15 times. He them went downstairs where Timothy was watching television and did the same thing to him. He then strangled them both. After washing himself he walked to St. Lawrence hospital and told the nursing staff there what he done.

8. In that medical report made by Dr Tidmarsh, a consultant forensic psychiatrist, on 10 December 1990, there appears this summary and conclusion. The doctor states:

> James Kirk Fleming, now thirty-three, is a man of average intelligence. His father was violent to his mother and this is probably relevant to his own violence. His school days were unremarkable and after a promising start his work record deteriorated and he became involved in drugs and a criminal way of life to maintain himself and his first wife. After some involvement with exotic religions and the break-up of his marriage, he became acutely psychotic and violent, this leading to his admission to Broadmoor in 1983. Here psychotic symptoms returned without the help of any drug abuse and it was apparent that he did have a chronic psychotic illness rather than one induced only by drugs.
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> It is obvious with hindsight that after he left Broadmoor in 1985 his psychosis was still active and inclined to relapse, particularly if he failed to take his medication, as all too often he did. He does not readily describe his symptoms to those responsible for him. I believe that what he told me on 6 September 1990 was true, that it was during his relationship with both Linda and Lesley his symptoms became increasingly unpleasant. They decreased when his relationship with Linda came to an end but became intolerable during the second relationship which he could escape from less easily because he was married. I believe that the incident with the hammer in July and his suicide attempt indicate how disturbed he was by his symptoms, and that the murders occurred because he believed that the only way he could rid himself of his hallucinatory voices and psychological discomfort was to kill those he had come to believe were the sources of all this.

9. The doctor went on to state that the appellant was suffering from a chronic paranoid schizophrenic illness which led to the murders. He was of the opinion that his state of mind substantially impaired his mental responsibility for what he did. He then went on to deal with the questions – as did another doctor – of whether the appellant was a fit subject for hospital orders with restrictions under the present Mental Health Act.

10. There is no doubt whatsoever that the judge had before him ample evidence to enable him to make fresh hospital orders with restrictions on discharge.

11. It was argued by the very experienced Mr Field-Fisher QC, who appeared in the court below and appears here, that the judge acted in not doing so contrary to well-established principle in matters of this kind and he flew in the face of authority. Perhaps, he said, that was partly because there was not available at the Crown Court at Truro all the books which the learned judge might have resorted to had they been available to him in order to

remind himself of not only the principle involved but the circumstances in which that principle has been applied in a number of previous cases.

12. Notable among those cases are the two to which the judge refers in his certificate. We have looked at them here, of course. These are both cases coming from courts over which the Lord Chief Justice presided. One of them, namely *Howell*, was a case in which the principle was spelt out by Lord Lane CJ. It was held:

> In circumstances such as these, where medical opinions are unanimous and a bed is available in a secure hospital, a hospital order should be made together with a restriction order under section 41 Mental Health Act 1983.

13. That was a case in which the appellant had been convicted of two counts of rape when he was suffering from schizophrenia and a personality disorder. The trial judge imposed a sentence of life imprisonment. That was quashed and hospital orders made. The Chief Justice concluded the judgment of the Court in this way:

> Before parting with the case however, we would like to order that a copy of this judgment, and of the transcript of the evidence given so helpfully by Dr Perera to this Court this morning, should be attached to this man's documents. The reason for that order is so that any tribunal which considers this man's case in the future may be alerted to the concern which this Court has, and which the judge at the Old Bailey had, over the dangers which would be involved in releasing this man prematurely.

14. The tribunal to which the Chief Justice was referring was the Mental Health Review Tribunal. I should add to what I have already said with regard to the principle that it includes the stricture that a sentencing judge should not pass a sentence of life imprisonment simply because in his opinion it would be wrong that in future the decision of a Mental Health Review Tribunal might determine where the defendant should be.

15. The principle was applied again very soon after *Howell* in *Mbatha* (also referred to in the judge's certificate). In that case the judgment of the Court was given by McCowan J. *Howell* was there considered. Once again judges were warned against avoiding making hospital orders so that there would be no possibility of a Mental Health Review Tribunal handling the matter some time in the future.

16. There are other cases in which the principle has been referred to and applied so that it is by now well known. It would be, in circumstances other than possibly such as this one, wholly inappropriate for a judge to avoid applying that principle and doing so with some strictness. Generally speaking it is to be expected, therefore, that where there is medical evidence to the effect that there is a bed available and that the conditions of the application of a hospital order with restrictions are present, it is a hospital order which should be made.

17. The judge in his sentencing remarks stated:

> You [the appellant] are likely to remain a danger to the public so long as that condition persists: for how long it will persist is not known.
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> The Court, as I have explained to your counsel, declines the submission that the same regime should be imposed as last time, namely, a hospital order with a restriction

> order without limit of time under which you go to Broadmoor Hospital. The sentence that I am passing does not preclude your going to Broadmoor – indeed, it may very well be that you will do so in the very near future [I should interpolate here that he is there now] and that decision will be for the Secretary of State to take – but the sentence now being passed gives additional protection to the public over and above the protection which the public had last time, because on this occasion if this sentence stands and is not quashed by the Court of Appeal and replaced by a hospital order with a restriction order, the effect will be when it is again thought that you should no longer be detained in hospital you will return to prison from which you can only be released from licence by the authority of the Home Secretary, on the recommendation of the Parole Board.

18. Mr. Field-Fisher submits that those remarks reveal a fundamental flaw. The judge, he said, by imposing sentences of life imprisonment, acted in a way which *Howell* and *Mbatha* urged judges not to do. He should have obeyed the explicit principle laid down in the one and followed in the other. There was nothing here, he argued, which could properly persuade him to do anything to the contrary. We have listened with anxiety to those persuasive submissions, but we have come to the conclusion that the judge was entirely warranted in taking the steps he did.

19. The fact is that this is an unusual and exceptional case compared with the like of *Howell* and *Mbatha* and others of a similar kind which have been decided in this Court. It is unusual for the reason that there had been a previous occasion, already referred to, when a hospital order was made with a restriction on discharge and the whole of the process following the making of such orders undertaken until the time came when the authorities considered it was safe to allow this man to be free. Now we know of course that it was not safe. I say that not in criticism of those who made that decision but merely as a fact which the judge had to face and to take account of when coming to his decision in this case.

20. It is clear therefore that what is urged upon us now as the course which the judge should have taken is something the appellant has already experienced. As the judge said, “We have been down that road before.” So it is that we regard this case as exceptional; the experiment, so to speak, has been tried previously and failed with disastrous consequences.

21. The judge therefore was, in our view, acting entirely within his proper judgment to come to the conclusion that there should be imposed this time not a hospital order or orders upon this appellant but a sentence of life imprisonment with the precautions for the public which that sentence entails. For those reasons this appeal is dismissed.

This document was prepared for Mental Health Law Online, based on the words of the judge as stated in (1993) 14 Cr App R (S) 151, with the addition of paragraph numbering and some typographical amendments.