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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 1st December 2015

B e f o r e:

LORD JUSTICE DAVIS
MR JUSTICE CARR DBE
MR JUSTICE WILLIAM DAVIS

R E G I N A
v

ANGELA FLETCHER

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Mr N Grahame appeared on behalf of the **Appellant**
Mr P Jarvis appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

1. MRS JUSTICE CARR:
2. Introduction
3. This is an appeal against sentence for which leave has been granted.
4. On 25th October 2006, in the Crown Court at Kingston upon Hull, the appellant, who is a lady now aged 52 years old, pleaded guilty as follows: (a) on count 1, arson being reckless as to whether life was dangered, contrary to section 1(2) and 1(3) of the Criminal Damage Act 1971 and (b) count 2, criminal damage, contrary to section 1(1) of the Criminal Damage Act 1971.
5. On 12th January 2007 she was sentenced to imprisonment for the protection of the public for an indeterminate period on count 1, with a tariff of 2 years less time spent on remand ("the IPP"), with no separate penalty being imposed on count 2.
6. The appellant, now represented by Miss Grahame, seeks an order quashing the IPP with a Hospital Order, pursuant to section 37 of the Mental Health Act 1983 (“a Hospital Order”), with a restriction order pursuant to section 41 of the Mental Health Act 1983 being substituted in its place.
7. To this end we have read and been taken to fresh evidence, including oral evidence from Dr Martin Lawler, which we have admitted de bene esse. Dr Lawler is a consultant rehabilitation psychiatrist at Waterloo Manor Hospital, Leeds, and has been the appellant's treating consultant since mid 2013.
8. Upon sentencing, the appellant was detained in HMP New Hall from 2007 to 2013, almost entirely in the health wing. Since then she has been in secure psychiatric conditions having been transferred under sections 47 and 49 of the Mental Health Act 1983 and it is in those conditions where she remains to date. She is currently, as we have indicated, resident at Waterloo Manor Hospital.

9. The necessary extension of time for this appeal has already been granted.

10. The Facts

11. The facts leading to the index offence can be summarised as shortly as follows. During the late evening of 16th October 2006 the appellant's neighbour, Mr Charles Ashton, became aware of banging noises coming from the ground floor flat below him and some 20 minutes later he heard the fire alarm there sounding. This was the appellant's premises. On discovering thick smoke coming from the appellant's flat and hearing the appellant screaming and shouting inside, he called the fire brigade which forced entry to the flat and found the appellant there alone. On examination subsequently fire officers concluded that net curtains, a chair and sofa in the flat had been set alight by matches or a lighter.

12. The appellant was taken to hospital where her behaviour became abusive and she struck out at various equipment before she was arrested for suspected arson with intent and criminal damage also to the hospital equipment.

13. In interview she admitted reckless arson, in that she set fire to the sofa although she could not recall why she had done so. She could not remember setting fire to any other furnishings or damaging any hospital equipment. She stated at the time that she felt her behaviour must have been influenced by her mental ill health and accepted she had also been drinking alcohol.

14. The appellant has two previous convictions, one dating from 1999, for being drunk and disorderly, but more significantly one from 2004. In that year she was convicted for the first time for an offence of arson, namely criminal damage being reckless as to the endangerment of life, again contrary to section 1(2) of the Criminal Damage Act 1971.

For this offence she received a community rehabilitation order. It arose out of her setting fire to the floor of a chalet at Pontins whilst her husband was asleep in the chalet in bed. Alcohol was again involved, with the implication of mental health problems again.

15. The position at the time of sentence

16. At the time of sentence the Judge had before him a pre-sentence report and medical evidence in the shape of a report from Dr John Kent, a consultant forensic psychiatrist.

17. The pre-sentence report set out the circumstances of the previous arson offence, appearing to have been as a result of heavy alcohol use and mental health problems. It referred to the stress under which the appellant had been from both physical and sexual abuse as a child. She had spent significant periods of her childhood in local authority care. She had left school at 16 without qualifications. She had consumed alcohol heavily for a number of years and had spent time in detoxification units and also in psychiatric hospitals.

18. At the time of both the offence in 2004 and the index offence her life-style was said to be chaotic. She was assessed as presenting a considerable risk of self-harm and suicide. She was abusing alcohol and self-harming on a regular basis. The report concluded that there was little that the probation service could offer her. She posed a high risk to the public of harm and the offending was compounded by the use of alcohol and mental health problems.

19. The report of Dr Kent was dated 18th December 2006. He had interviewed the appellant once, whilst she was at HMP New Hall. His professional opinion was that the appellant did not suffer from a mental illness within the meaning of the Mental Heath Act 1983. He did not believe that she had schizophrenia or severe bipolar disorder, rather she had a

personality disorder. He noted that there had been concerns about her mental state, though was satisfied that the appellant was not acutely mentally ill and did not require treatment in a psychiatrist hospital. He did not recommend a Hospital Order as he judged her personality disorder to be untreatable amongst other things. He assessed her to be an unstable, chaotic individual who had not been helped by psychiatric services. In his opinion she presented a significant risk of serious harm to the public.

20. In these circumstances we pause to note that the making of a Hospital Order was not an option open to the Judge on the evidence.

21. In sentencing the appellant the Judge referred to the report of Dr Kent and the serious concern about her potential for further acts of arson in the future. He was satisfied that she was depressed and unwell at the time of the incidents. He made a full one-third reduction for her guilty plea but in the light of the significant risk to members of the public of serious harm occasioned of further offences, he turned to consider the question of dangerousness.

22. The appellant had committed a similar offence in 2004 and as a result the law required him to assume that she posed a risk of arson to the public. He was satisfied that life imprisonment was not appropriate but stated that in his opinion the circumstances did require a sentence of imprisonment for the protection of the public for an indeterminate period. Reducing a starting point of 6 years to 4, to take account of the appellant's guilty plea, the tariff of 2 years was imposed as representing 50% of the 4 year term. It was stressed that due to the nature of the offending and past behaviour this sentence was the only way to protect the public at large. It was not intended to punish the appellant.

23. <u>Developments since sentence</u>

24. Since the sentence and at the heart of this appeal is a considerable amount of further medical information. A fuller psychiatric picture is painted. We are told that the appellant first self harmed when she was only 10 and that her alcohol abuse began when she was between 14 and 16. We are given a detailed chronology of her admissions to mental health units both in-patient and out patient admissions from the age of 18 onwards. She was discharged just one day from a psychiatric unit before the index offence was in fact committed.

25. We have before us three substantive reports. The first such report is from Dr Jens Wiebe. His report is dated 11th June 2012. He was the appellant's responsible clinician from mid 2009 to the end of 2012 at Stockton Hall. In his opinion the appellant had a long-standing diagnosis of emotionally unstable personality disorder, a schizo-affective order and alcohol dependency. His view was that it was very likely that she suffered from a mental disorder at the time of the offence in 2006. He has, by letter, recently endorsed the contents of that report which he has reviewed alongside the report of Dr Lawler, the contents of which he agrees with.

26. The appellant was transferred from Stockton Hall to Waterloo Manor Hospital in October 2012. Dr Stankard in his written a report, dated 1st July 2013, states that the appellant fulfilled the criteria in his opinion for mental disorder, namely suffering from a schizo-affective disorder and a personality disorder. He records the appellant's fluctuating stability in 2013 but her positive progress since then. His professional opinion is that a return to the prison environment for the appellant will significantly increase the risk of deterioration in her mental health and increase in associated risks.

27. Finally, the report of Dr Lawler is dated 12th May 2015. In his opinion the appellant again fulfilled the criteria for mental disorder, namely schizo-affective disorder. She has

a long-standing diagnosis, in Dr Lawler's opinion, of emotionally personality disorder, the schizo-affective disorder and alcohol dependency. His opinion is that it was very likely that she suffered from a mental disorder at the time of the offence in 2006.

28. He stresses the significant and continued improvement of the appellant's long-standing mental disorder between 2009 to date. His view is that her condition is susceptible to successful treatment which would reduce her risk of committing serious offences in the future. He states she has made significant progress in relation to her alcohol intake and has demonstrated good insight.

29. As of today, Dr Lawler's opinion is that a Hospital Order would be the most appropriate disposal. Like Dr Stankard, he is strongly of the view that a return to prison would significantly increase the risk to the appellant's Mental Health Act and jeopardise the substantial therapeutic progress that the appellant has made to date.

30. Grounds of appeal

31. We turn then to the grounds of appeal ably advanced for the appellant by Miss Grahame. It is said in essence that the sentence of imprisonment for public protection imposed in January 2007 was wrong in principle. The most suitable disposal, both then and now, was a Hospital Order, with restrictions being imposed pursuant to section 41 of the Mental Health Act 1983.

32. Three essential grounds are advanced. Firstly, as at 2007 it is said that the applicant suffered from a mental illness, this being the mental disorder of long-standing duration in form of schizo-affective disorder. This disorder is part of a complex overall medical picture intertwining, as it does, with the implication and involvement of alcohol and the personality disorder. The applicant requires treatment for these disorders which were

treatable it is submitted at the time and remain treatable. By reference to the involvement of the alcohol the point is made that it is often involved with disorders of the present type and it can mask symptoms on occasion. Reliance is placed on the individual case of *Colborne* as reported in the recent authority of *R v Vowles* [2015] EWCA Crim 45.

33. Detailed criticisms are made of Dr Kent's report. It is said that he had access to very limited psychiatrist reports, his conclusion that his snapshot of medical records was likely to be representative was highly questionable, particularly as he did not have access to records around the time of the appellant's 2004 conviction. Reliance is placed on the unreliability of the appellant's self reporting, in particular by reference to her denial of any history of auditory hallucinations. It is said in particular as well that one meeting that Dr Kent had with the appellant is inadequate for any sort of proper diagnosis to be made. Indeed Dr Lawler's evidence was that in order to form a proper diagnosis extensive hospitalisation would be required lasting as much as months. Symptoms may take time to emerge. It is submitted that against the overall background of what is now known there must be doubt about the correctness of Dr Kent's opinions.
34. Secondly, it is said that the protection of the public including the regime for deciding release and the regime in place post release is best served by the imposition of a Hospital Order with restrictions. The IPP process for consideration of release is difficult, stressful and often lengthy. There may be an inappropriate return to prison, with negative implications for the appellant and the public. These complications can demotivate and impair progress in treatment.
35. Thirdly, it is said that the sentence imposed was not intended as a punishment to the applicant.

36. Decision

37. We then turn to consider our ruling. The relevant statutory regime relating to the imposition of sentences for imprisonment for the protection of public for an indeterminate period at the time was that contained in the unamended provisions of the Criminal Justice Act 2003, specifically sections 225 and 229.

38. Section 225 in unamended form provided:

> i. "*225 Life sentence or imprisonment for public protection for serious offences.*
>
> ii. *(1)This section applies where—*
> iii. *(a)a person aged 18 or over is convicted of a serious offence committed after the commencement of this section, and*
> iv. *(b)the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences.*"

39. Where life imprisonment is not appropriate, by section 225(3), the court "*must*" impose a sentence of imprisonment for public protection. (The Criminal Justice and Immigration Act 2008 which amended "*must*" to "*may*" was not in force at the time of sentencing.)

40. Section 229 at the material time provided:

> i. "*229 The assessment of dangerousness.*
> ii. *(1)This section applies where—*
> iii. *(a)a person has been convicted of a specified offence, and*
> iv. *(b)it falls to a court to assess under any of sections 225 to 228 whether there is a significant risk to members of the public of serious harm occasioned by the commission by him of further such offences.*"

41. A "*relevant offence*" is defined by section 229(4) as being a "*specified offence*" as defined in section 224 of the Criminal Justice Act 2003.

42. Here, since the appellant's antecedent history included an adult conviction for a specified offence, the Judge was required to assume dangerousness unless the considerations under section 229(3)(a)-(c) rendered such a conclusion unreasonable.

43. In our judgment, the Judge was entitled, if not bound, to adopt the assumption of dangerousness here. There was nothing to displace the presumption in section 229(3) by reference to the nature and circumstances of the offences, any pattern of behaviour, or any other information about the appellant. The previous offending was markedly similar to the offending in 2006 and recent. Even now the medical evidence available does not suggest the absence of a significant risk to members of the public of serious harm occasioned by the commission of further offences by the appellant as at 2007.

44. We consider then what sentencing options the Judge was left with, specifically whether or not the making of a Hospital Order was a possibility even in principle. On its face section 225(3) would make the imposition of a term of imprisonment for public protection mandatory even if the criteria for a Hospital Order were made out.

45. The answer to this conundrum lies in paragraph 38 of Schedule 32 of Criminal Justice Act 2003, which substituted subsection (1)A of section 37 of the Mental Health Act 1983 materially as follows:

    i. *"In section 37 (powers of courts to order hospital admission or guardianship)—*
    ii. *....*
    iii. *(1A)In the case of an offence the sentence for which would otherwise fall to be imposed—*
    iv. *.... (c)under any of sections 225 to 228 of the Criminal Justice Act 2003,*
    v. *nothing in those provisions shall prevent a court from making an order under subsection (1) above for the admission of the offender to a hospital."*

46. A similar carve out exists under the current version of section 37 which again preserves the power to make a Hospital Order by reference to the amended provisions of the Criminal Justice Act 2003.

47. This conclusion is consistent with the remarks of this court in ***R v Turner*** [2015] EWCA Crim 1249. There a sentence of imprisonment for public protection had been imposed

when section 229(3) was in force. Turner, like the appellant, had a previous conviction for a relevant specified offence. Blake J said at this paragraph 53:

i. "*We note that the scheme of the IPP made exemption for this mandatory sentence in the event of a hospital order being appropriate.*"

48. It is also consistent with the decision of this court in *Vowles* where, in similar circumstances, the court accepted that hospital orders were available disposals. We refer for example to the case of *Colborne* (at paragraph 133).

49. We turn then to the facts of this case by reference to the submissions made. We remind ourselves that any case involving reliance on evidence of mental condition not adduced at the time of the original court must involve the most careful scrutiny.

50. Section 37 of the Mental Health Act 1983 provides materially as follows:

i. "*37 Powers of courts to order hospital admission or guardianship.*

ii. *(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,. . . , 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....*

iii. *(2)The conditions referred to in subsection (1) above are that—*

iv. *(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—*

v. *(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]*

vi. *(ii)in the case of an offender who has attained the age of 16 years, the mental disorder is of a nature or degree which warrants his reception into guardianship under this Act; and*

vii. *(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.*"

51. The definition of "*medical treatment*" as at January 2007 and before amendment in late 2008 by the Mental Health Act 2007 was, by section 145 of the Mental Health Act 1983, that it included "*nursing*" and "*care, habilitation and rehabilitation under medical supervision*".

52. Section 41 of the Mental Health Act 1983 provides for the imposition of special restrictions where a Hospital Order is made and where 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.

53. We are of course guided now by the decision in *Vowles*. There it was said that it was important for the sentencing judge to consider all the evidence in the case, and to decide, first, whether the provisions of section 37 were met and secondly, what was the appropriate disposal. The fact that conditions are met does not in anyway mandate a Hospital Order but if the conditions are not met then of course no such order can be considered in the first place. Where the conditions are met the sentencing judge must consider:

    (a) the extent to which the offender needs treatment for the mental disorder from which he or she suffers;

    (b) the extent to which the offending is attributable to the mental disorder;

    (c) the extent to which punishment is required and

(d) the protection of the public including the regime for deciding release and the regime after release.

54. Despite the careful and full submissions of Miss Grahame for the appellant, we are not satisfied that the imposition of the IPP was wrong in principle.

55. The question is whether it has been demonstrated that as at the time of sentencing in January 2007 the appellant was suffering from a mental disorder of a nature or degree which made it appropriate for her to be detained in a hospital for medical treatment and, that a Hospital Order was so obviously the appropriate disposal in all the circumstances that the imposition of the IPP was wrong in principle. The exercise is not to judge the appropriateness of a Hospital Order as at today's date but rather as at January 2007.

56. Dr Lawler, whose assistance we would wish to acknowledge, found this exercise self-evidently difficult, as he very fairly recognised. Many of his opinions are made with the benefit of impermissible hindsight which cannot assist us. By way of example he confirmed that his opinion as to the treatability of the appellant's condition of emotionally unstable personality disorder was made on a basis of events and developments since the appellant's sentence and not judged as at January 2007. Dr Kent's view as at January 2007 was that the appellant’s personality disorder was not treatable.

57. Even if we were to conclude in the appellant's favour that the conditions of section 37 of the Mental Health Act 1983 were made out as at 2007, that is to say that as at 2007 the appellant was suffering from a mental disorder, here a schizo-affective disorder, which made it appropriate for her to be detained in a hospital for medical treatment and that appropriate medical treatment would have been available to her,then we would not conclude that, having regard to all the circumstances, including the nature of the offence and the character and antecedents of the appellant, that the most suitable method of

disposing of the case would have been a Hospital Order.

58. Turning to the *Vowles* questions, Dr Lawler was of the view that the appellant clearly needed treatment for all three of her conditions. She needed careful monitoring and supervision with special support and a managed exit through a staged process was required. The Judge at the time of sentencing commented that his sentence was not intended to punish.

59. However, a key consideration on the facts of the present case is the extent to which the appellant's offending is attributable to her mental disorder of schizo-affective disorder. What was absolutely clear from Dr Lawler's evidence was that the significant driving force in the appellant's offence of 2006 was not the schizo-affective but rather the personality disorder. Her problem solving and coping difficulties lay behind her actions. In his opinion, and in his words, her personality disorder was "*the big problem*". She had difficultly regulating anger and alcohol which also had a material part to play.

60. There was no significant evidence that the appellant's schizo-affective disorder, such as it was in 2006, played any part in her offending then.

61. Dr Lawler, in re-examination, explained that one could not completely separate out the schizo-affective disorder from the personality disorder, the two being intertwined. But the overriding force of his view was clear: he could not evidence any direct contribution of the schizo-affective disorder to the offending in 2006. This evidence was consistent with the thrust of his written report, which in key parts focused only on the appellant's personality disorder. Moreover, Dr Lawler confirmed that in 2007 he could not have answered the question of whether or not the appellant's personality disorder was treatable, at least not without prior extensive hospitalisation of the appellant for as many as much months. This may not have been a practical or realistic option in the sentencing process,

but it is a significant piece of evidence for us to consider when considering whether or not that evidence could found a ground of appeal.

62. In light of this evidence it does not seem to us that a court in 2007 could have concluded that a Hospital Order was necessarily or even at all the appropriate method of disposal. Additionally, we take into account the question, as we must, of the protection of the public, including the regime for deciding release and the regime after release.

63. We refer to the comments of Hughes LJ in *Attorney-General's Reference No 54 of 2011* [2012] Crim App R (S) 106 as to the differences between the IPP regime and the regime for release under a Hospital Order even with restrictions, such comments having been approved expressly in *Vowles* (at paragraph 48).

64. We note through Dr Lawler that the management that would be proposed under a section 41 restriction order would be one with recall provisions. We harbour considerable reservations as to whether or not the public would, as at 2007, have been protected adequately from the risk of violence by the appellant, triggered in particular by the abuse of alcohol, which had played such a large part in the appellant's life and her offending.

65. Dr Lawler stated that monitoring of her use of alcohol would be an integral part of the release plan but at the same time he acknowledged that such a plan and monitoring would be difficult to implement. As we have already noted, the index offence in 2006 was committed by the appellant but one day after her discharge from hospital and committed in circumstances of heavy drinking.

66. In our judgment, as at 2007, the IPP regime could be said to provide a proper release regime whereby the appellant would not be released until the Parole Board deemed it safe and where there would be a tighter and more effective regime to recall the appellant not simply on medical grounds but for breach of any condition.

67. We have borne well in mind the submissions made for the appellant as to the concerns as to her being returned to prison pending the Parole Board decision. Such return is by no means of course inevitable by any stretch of the imagination. We bear in mind indeed in 2012 that the First-tier Tribunal made it clear that it would have had little hesitation in directing the conditional discharge of the patient but for the fact that she had been transferred to hospital under sections 47 and 49 of the Mental Health Act and was not the subject of a Hospital Order under sections 37 and 41.

68. There can be no certainty of course, but we have no doubt that the First-tier Tribunal would bear well in mind all material put before it, including the evidence and information to suggest that the placing of the appellant outside the prison community has, on its face, been nothing but beneficial for the appellant.

69. Putting it another way, we are not in a position to conclude that Dr Kent was unreasonable in reaching the conclusions in 2006 he did. Dr Lawler was loathe to suggest as much. Dr Kent produced a careful seven-page report on the information available to him. It is right that he had only limited access to medical records but he did speak to the consultant forensic psychiatrist at HMP New Hall who assessed the appellant and was of the view she was not currently mentally ill. He took a full account from the appellant which included her unhappy and abused childhood, details of self harm and numerous psychiatric admissions and overdoses. He recorded her abuse of alcohol. At paragraph 4.1 of his report he recorded the appellant drinking on a daily basis four cans of Special Brew, a high percentage by volume lager. She stated it would either calm her down or make her "*kick off*" or "*flip*". She never knew which it would be. Her longest period of abstinence during adult life was when she was prison for 4 weeks. He described the circumstances of the offence as reported to him. He explored the question of auditory

hallucinations. He examined her. He did not believe that she was schizophrenic or suffered from Severe Bipolar Disorder. There was a wealth of evidence to indicate she had a personality disorder which was understandable given her past. She presented a significant risk of serious harm to the public. There might come a time when more acute psychiatric intervention might be required but he did not recommend a Hospital Order on the grounds that she did not suffer from a mental illness and her personality disorder was not treatable.

70. Conclusion

71. For all those reasons, in our judgment, the imposition of the IPP was not wrong in principle when it was imposed in 2007 and we dismiss this appeal.

72. We have no doubt that the First-tier Tribunal and the Parole Board as appropriate will take full account of the appellant's treatment and progress over the years since her sentence and of the careful views of those treating her. But those are matters for them. We are not satisfied that it is for us to interfere with the sentence imposed many years ago on the basis of the medical evidence then available.