

ENGLAND AND WALES / JUDGMENT

Turner v R

Source: caselaw.nationalarchives.gov.uk · Research copy typeset by Esheria. Not court-issued or certified.

Neutral Citation Number: [2015] EWCA Crim 1249 IN THE COURT OF APPEAL (CRIMINAL DIVISION) Case No: 201400170 A7 Royal Courts of Justice Strand, London, WC2A 2LL Date: 17/07/2015 Before : THE RIGHT HONOURABLE LADY JUSTICE MACUR DBE THE HONOURABLE MR JUSTICE BLAKE and THE RECORDER OF LONDON

- ----- Between : Appellant Respondent JENNIFER TURNER
- and - REGINA
- -----
- ----- Miss Claire Wade (for the Appellant Mr Iain Wicks (for the Respondent Hearing dates : 19 June, 2015
- -----

Judgment

The Honourable Mr Justice Blake: 1. 2. 3. 4. 5. 6. On 1 February 2007 at the Crown Court at Stoke this applicant pleaded guilty to two counts of attempted robbery and one count of attempted theft. On 19 March 2007 at the same court she was sentenced by HHJ Styler on the two counts of attempted robbery to a term of imprisonment for public protection with a minimum term of 18 months. The judge probably intended that 88 days spent in custody should count towards the minimum term but in error failed to spell that out. There was no separate penalty imposed on the count of attempted theft. Since October 2008 she has been serving her sentence in a psychiatric hospital to which she was transferred under s.47 Mental Health Act 1983 (MHA). She now applies for leave to appeal out of time against sentence and contends that she should have been sentenced to a hospital order under pursuant to s.37 MHA. Her application has been referred to this court by the Registrar who has made a representation order. For reasons set out below we grant leave. The case has been listed following the decision of this court in *R v Vowles* and other [2015] EWCA Crim 45, EWCA Civ 56; 5 February 2015 that considered the difficult issues that arise when leave to appeal out of time is sought on the basis of fresh psychiatric evidence and it is sought to argue that an indeterminate sentence should be quashed in favour of a hospital order. In *Vowles* the court said at [51] that it is important for the sentencing judge to consider all the evidence in the case and decide first whether the section 37 (2)(a) conditions of the MHA 2003 are met and second what is the appropriate disposal. The fact that the conditions are met does not mandate a hospital order, but if the conditions are not met no such order can be considered.

Where the conditions are met the judge must consider:- the extent to which the offender needs treatment for the mental disorder from which she suffers; the extent to which the offending is attributable to the mental disorder; the extent to which punishment is required; the protection of the public including the regime for deciding release and the regime after release. i) ii) iii) iv) The offences 7. The circumstances of the offences were as follows. Around 1.15 pm on Wednesday 13 December 2006 the applicant entered a branch of Tesco Express in Hartshill, Stoke on Trent, approached the female shop assistant and said in a soft almost mumbled voice "I have got a knife in my pocket. I mean it. I want the money out of the till." 8. 9. 10. The appellant repeated the threat. The shop assistant could not see a knife but was fearful. A male shop assistant was also behind the counter and did not believe that the applicant had a knife. He twice refused to give her any money. The appellant then wandered down the aisle picked up a bottle of wine and started to walk out of the store with it. Two of the store employees followed her and stopped her. She replied "I need a drink". She was brought inside the shop tried to leave again with a bottle of cider and said "You don't understand I need a drink". She then said "I will break this" (referring to the bottle) and "have you". The store manager tried to talk to her and she explained she was unhappy with her life and was having problems at home. The police were called and as the manager was making the call, the applicant took a vegetable peeler out of a drawer and went towards her arms with it, but she was disarmed when the manager grabbed her wrist. She was arrested and interviewed and made no comment and released on police bail. Six days later on Tuesday 19 December the appellant entered a family run corner shop in Stoke. Mr Khokar was serving at the counter. She said "give me the money" in a demanding way but quietly. Mr Khokar thought she was smelt of alcohol and was possibly under the influence of drugs and did not seem "all there." She repeated "give me the money" and added "or I'll stab you". Mr Khokhar said no. She repeated the threat and her arm came over the counter and Mr Khokhar noted that a knife appeared in her palm from up her sleeve. It was a 14 inch pointed bread or kitchen knife. The appellant lunged at him with the knife; it made contact with his clothing but did not penetrate the clothing. She repeated her threat and swung again but this time was off balance and Mr Khokhar grabbed her wrist and disarmed her. She attempted to get free but was not strong enough. When a regular customer came into the shop Mr Khokhar was able to lock the door and call the police. 11. She was again interviewed and made no comment and was remanded in custody until her appearance in court. The information before the sentencing judge 12. 13. At the time of the sentencing hearing the judge had a report from a consultant forensic psychiatrist Dr. Stewart Vaggers, dated 1 February 2007. This was based on an interview with the appellant in prison on 10 January 2007, a telephone conversation with her treating psychiatrist Dr Lovett and other data obtained in the course of January 2007. Dr Lovett indicated her view that the appellant suffers from a personality disorder which was complicated by substance abuse social anxiety and episodes of depression. The family history identified a history of mental health problems. The appellant's father had suffered from long term problems including depression and social anxiety and her second elder sister (Clare) suffered from depression. The appellant disclosed episodes of self harm by drug overdose and cutting herself from around the age of 16 to 17 (1999 to 2000). In 2003 she was assessed and diagnosed with depressive episode accompanied by social anxiety disorder. She was detained under the MHA for 23 days in June 2003 when her care was

transferred to Dr Lovett. 14. 15. 16. 17. In January 2006, the appellant contacted NHS Direct while intoxicated to report that she was suicidal and had a knife. The police attended her home and had to use CS spray to disarm her and this resulted in a court appearance on 11 August 2006 where she admitted affray and was given a community order with a supervision requirement for 2 years. On 27 October 2006 she was admitted to hospital and detained under the MHA for three weeks; this admission was occasioned by her cutting her wrists and feeling low and a failure. She was discharged in mid November 2006 and returned to live with her boyfriend but he became concerned by her behaviour as she was hearing voices telling her to assault people. She was informally admitted to the same mental hospital on 1 December 2006 where she was detained for a few days under the MHA before she was discharged because of her aggressive behaviour. She failed to attend on her probation supervisor on 8 and 15 December. On 13 December the appellant took an overdose of her tranquilising medication, attended an Accident and Emergency Department but decided to leave hospital in order to obtain some alcohol. It was in these circumstances that she committed the first attempted robbery noted above. 18.

18. Dr. Vaggers records her as saying: “I needed a drink because drink takes away the agitation. I went to a garage and told them I had a knife (although I didn’t) and asked for money. They refused so I walked out with a bottle of wine...I didn’t feel like I was in reality ..it was like I was in a dream”. 19. Having been bailed by the police on 13 December, she returned to mental hospital on 16 December and on release on 19 December she committed the second offence of attempted robbery, about which she told Dr Vaggers: “I completely regret having a knife on me. If I had been sober there’s no way I would have done it” She added that she drank alcohol because she was agitated. 20. Dr Vaggers obtained the following information from the applicant’s partner: i. There have been occasions when she has threatened him with a knife when intoxicated. ii. She sometimes drinks alcohol to help her deal with her emotional problems but it tends only to exacerbate them iii. During her current period of remand she has become more settled and grown in confidence. 21. Dr Vaggers’ report reached the following conclusions: i. The appellant was not suffering from any delusions or hallucinations and therefore was not suffering from a psychotic illness. ii. The provisions of the Mental Health Act 1983 have no current relevance. iii. There is a positive history of mental health problems within Ms. Turner’s close family indicating a predisposition to develop mental illness. iv. Dr Lovett has diagnosed her as suffering from social anxiety disorder and harmful use of alcohol in the context of personality problems of an impulsive and emotionally unstable nature which amount to borderline personality disorder.
- v. This formulation of her mental disorder was agreed. vi. At the time of the index offences her maladaptive behaviours were influenced by dis-inhibition caused on one occasion by benzodiazepine medication Diazepam and on the other occasion by alcohol. vii. There is a significant risk of harm to the public and/or to herself should she continue to misuse alcohol as she has done in the past. viii. Her mental disorders and substance misuse are treatable. A condition of psychiatric treatment attached to a community based sentence would enhance the opportunity to safely manage her risks in the community. ix. x. Should she receive a custodial sentence she would remain a vulnerable inmate but she appears to have adjusted

to a degree to the routine of her current location and is responding to the support of the prison mental health services Her risk of suicide would be raised in the immediate context of receiving a custodial sentence that would need to be brought to the attention of the relevant establishment. 22. A pre-sentence report dated 9 March 2007 gave a full account of the appellant's social and medical history. It noted that she had previously been assessed as suffering from emotionally unstable personality disorder with a marked tendency to act impulsively, a significant history of mental health treatment due to repeated acts of self harm. She has a history of binge drinking when her mental health deteriorates and her disorder impacts on her cognitive abilities leading to impulsive behaviour. She was assessed as presenting a high risk of harm to members of the public by reason of her impulsive behaviour and her conduct in the course of the index offences. It was also assessed that her mental health problems and distorted problem solving skills contributed to her offending behaviour. 23. It was noted that she had struggled to cope with the prison environment over the previous three months due to mental health issues, and this had resulted in her attempting suicide on a number of occasions. A recommendation was made for a suspended sentence coupled with probation supervision to address alcohol abuse and mental health issues. 24. 25. 26. The judge faced a difficult sentencing exercise. By reason of her conviction for affray in August 2006, the appellant had a previous conviction for a specified violent offence. She was an adult aged 22 at the time of the sentencing hearing. He was satisfied from all the information before him that she represented a significant risk of causing serious harm to members of the public. In the light of Dr Vaggers' conclusions that the provisions of the MHA had no current relevance, the statutory requisite for a hospital order pursuant to s.37 was absent and not further considered. As the law then stood, a sentence of imprisonment for public protection was mandatory, (see s.225 Criminal Justice Act 2003), once the qualifying conditions were met subject to the court's power to make a hospital order. At the time of Dr Vaggers' report and the date of sentence, the provisions of the Mental Health Act 1983 had not been amended by the Mental Health Act 2007, so pursuant to s.37 (2)(a) and (b) MHA, the court would need to have been satisfied on the evidence of two registered medical practitioners that the offender is suffering from a "mental illness, psychopathic disorder or mental impairment" and that either "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" or "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 other available methods of dealing with him, that the most suitable means of disposing of the case is by means of an order under this section." 27. A personality disorder can be a mental illness or impairment if sufficiently severe in nature. However, as the Court noted in Vowles at [50] (v) summarising expert evidence it received in that case : "Treatment in hospital for those with personality disorders under a hospital and restriction order under s.37/41 of the MHA should generally only be considered for those who also have a mental illness or brain damage. There are two major considerations. First if an order is made under s.37/41 of the MHA, then if the disorder is in the result untreatable, there is a risk that the offender will remain in hospital for an indefinite period,

as the FTT cannot release him if the risk to the public continues. Psychiatrists are therefore concerned to ensure that they are not "stuck" with such an offender. This is a serious risk which psychiatrists are anxious to avoid. Second a range of treatment of those with personality disorders is available in a range of specialist prisons." 28. Following the sentencing hearing in this case, the amendments of the MHA 2007 came into force. It is now sufficient to make a hospital order pursuant to s.37 if "The offender is suffering from a mental disorder of such a nature and degree as to make it appropriate for (her) to be detained in a hospital for medical treatment and appropriate treatment is available".. Fresh Evidence 29. 30. 31. The present application is based on fresh psychiatric evidence detailing the medical history of the appellant subsequent to sentence. In summary in October 2008 after repeated self-harm attempts in prison, the appellant was transferred to the Ardenleigh Medium Secure Psychiatric Unit, Birmingham, following a report written by another forensic psychiatrist Dr Bloye. The transfer was effected by direction of the Secretary of State under s. 47(1) MHA, because at least two registered medical practitioners were of the opinion that "the mental disorder from which the person is suffering is of a nature or degree which makes it appropriate for him to be detained in hospital for medical treatment". It is pertinent to note that in November 2010 the appellant's sister Claire whose propensity to depression was noted in 2007 committed suicide by taking an overdose. This affected the applicant badly as her sister had been a regular visitor to her in hospital and had some insight into her mental health problems. The hospital was unable to authorise her release to attend the funeral because of her disruptive behaviour at the time, but she has subsequently been able to visit her sister's grave. There is before us a psychiatric report of a third forensic psychiatrist Dr Maganty dated 20 August 2013 that provides details of the troubled history of self-harming and other violent and disruptive behaviour throughout her time in prison and mental hospital. In substance Dr Maganty concludes that the scale and persistence of the appellant's mental health problems means that she meets the criteria for a hospital order under s.37 MHA and that in addition a restriction order under s.41 MHA should be made to protect the public from significant harm resulting from the significant risk of the applicant's impulsive acts of aggression associated with her mental disorder and exacerbated by her substance abuse. 32. Dr Scally, another forensic psychiatrist, is of similar opinion for reasons set out in a report dated 21 November 2013 that states: i) The appellant suffers from a personality disorder that is a mental disorder within the MHA as amended. ii) iii) iv) v) The nature of the disorder, her clear history of prolonged self-injurious behaviour, her tendency to act impulsively and current presentation where she continues to self harm indicates that her disorder is of a degree to necessitate inpatient treatment for her own safety as well as the safety of others. Treatment for emotionally unstable personality disorder is primarily psychological with the greatest evidence supporting dialectical behavioural therapy; interventions are aimed at supporting the individual to develop skills to tolerate and manage distress and urges to self harm. Pharmacological treatments are also used to help alleviate distress; special nursing and occupational therapy are also integral. Since admission to Ardenleigh she has been making slow but steady progress with significantly fewer acts of self harm. She is abstinent from alcohol within a controlled environment. It is not envisaged

that the applicant would be psychologically robust enough to return to prison yet and there are concerns about her ability to maintain her own safety in a custodial setting Her assessment differs from Dr Vaggers' 2007 assessment. She accepted that that assessment might have been reasonable on the limited information as to how the applicant was responding in prison but a different perspective arises by reason of the subsequent events. Both Dr Scally and Dr Maganty observe that Dr Vagger's 2007 report was written after the applicant had spent only six weeks on remand, and indeed the interview with her was conducted after only three weeks. They both state that with the benefit of hindsight it can be seen that the mental disorders with which she was first diagnosed in 2003 have proven to be deeper and more long lasting than might have been anticipated. It is common ground between all the medical practitioners who have had responsibility for the applicant that a mental hospital is the appropriate place for her to be treated and has been since at least 2008. The difficulty with the applicant's predicament is that if treatment is successful in mental hospital she will have to return to prison where eventually an assessment of prospects of release on licence will have to be made by the Parole Board. However, the prospects of return to prison adversely affect the prospects of successful response to medical treatment, and the experience of prison by someone with these vulnerabilities may well lead to a relapse in medical condition before any decision on release could be taken. By contrast, if a hospital order were now to be substituted for the IPP imposed in 2007, she would remain in hospital until a panel of the FTT experienced in the assessment of mental patients and restriction orders decided that her mental health no longer posed a risk to the safety of the public. 33. 34. 35. 36. 37. 38. The new evidence is credible and indeed undisputed and not challenged in cross examination. It would if admitted provide a ground for allowing this appeal by setting aside the sentence of IPP and substituting a hospital order with a restriction order. The evidence was not reasonably available at trial; it is based on a longer term assessment of the applicant than was possible for Dr Vaggers to undertake, and in any event there is a significant public interest in receiving it given the predicament in which the applicant finds herself and the fact that she has been treated in mental hospital since 2008. Oral evidence of Dr Scally 39. Dr Scally expanded on her report in oral evidence given to us. She has been the applicant's treating physician since August 2013. Since her transfer to Ardenleigh in October 2008 the applicant has received constant treatment. Which she describes as follows: "She receives a multi disciplinary variety of treatments. She receives several medications, including antidepressant, mood stabilising, anti psychotic and sedative medications. These are aimed to help her with her distressing thoughts and with times that she hears voices. She also receives psychological therapy. This is aimed to help with difficult emotions, learn better problem solving skills and to manage her anxiety in a more helpful way. This is reinforced by intensive specialist nursing intervention of the ward level on a day to day basis. She also benefits from occupational therapy to develop her interests, her sense of self and the sense of her aims and ambitions for the future." 40. She expressed the opinion that the appellant's substance misuse should be linked as a factor of her personality disorder. She told us "In my view her substance misuse, both alcohol and cannabis, can be understood within the features of her emotional unstable personality

disorder. She struggles with difficult emotions and struggles to manage difficult emotions in a helpful, adaptive way and alcohol and substances appears to be a way she used to manage difficult emotions and often patients do describe quite defective ways of managing emotions in the short term. It also can be seen as another way, another example of self destructive behaviour and acting in ways that longer term are self destructive .. In my view, the substance misuse can be understood for being the context of her personality disorder.” And later in evidence she added “I think it would be extremely unlikely that the offending would have occurred if there was no mental disorder. Ms Turner has shown no anti social tendencies, no pro criminal tendencies.” 41. She was of the opinion that a s.37 order coupled with a s.41 restriction order would provide greater protection for the public than a return to her sentence of imprisonment for public protection. As her treatment progressed she would have her case reviewed by the First-tier Tribunal and if suitable would be subject to conditional release in the community with an ability to recall her is she broke the conditions of her release, such as abstinence from drink and drugs. 42. She was asked whether the appellant would be robust enough to return to prison and seek release through the Parole Board process: “I think it would take a very, very long time for Ms Turner to have the resilience to be able to return to prison. It would be much more foreseeable that she would be have the resilience to return to conditions of lesser security and greater dependence, for example supported community living. As I say the threshold will be much higher for return to prison and that will take many, many months if not years.” 43. Commenting on the differences between her assessment and that of Dr Vaggers, she said she would have regarded the appellant’s disorder in 2007 as of sufficient severity to be a mental illness for the purpose of the MHA prior to its amendment in 2007. She told us: “Social anxiety would be counted as a mental illness in of itself probably great enough of an age or degree to have necessitated in-patient treatment.... Social anxiety would have been a mental illness....there would also be the consideration of the emotional unstable personality disorder which would have fallen under the criteria of a psychopathic disorder under the old Act.” She added that the subsequent medical history can now be seen to indicate the severity of the disorders from which she was suffering at the time of sentence: “I think the underlying diagnosis having remained the same. I think what emerged was how resistant to treatment it was and how challenging she would find the prison environment.” Conclusions

44. We have been assisted by detailed written submissions from Ms Wade for the applicant in the grounds of appeal and by Mr Wicks for the CPS in the respondent’s notice. It is common ground that the judge was never able to consider a hospital order in 2007 and the fresh evidence is not simply a fresh attempt to revisit an issue decided at trial and not subsequently challenged by an in time appeal. 45. In the case of *R v O* [2011] Crim 376, the court observed “Any case involving as it does reliance on evidence of mental condition not adduced at the time of the original court appearances must require the most careful scrutiny. That we have sought to give it, though our conclusions can be stated almost summarily. We are satisfied that the appellant met the section 37 criteria at the time of sentencing. Moreover, a sentence can be varied if satisfaction of those criteria only becomes

apparent after sentencing: see R v De Silva (1994) 15 Cr App R(S) 296.”

46. We have given more detailed consideration to the issue to ensure that the fresh evidence goes to the condition and the legal regime applicable at the time of sentence. We are satisfied it does. We now consider each of the Vowles questions as follows. The extent to which the offender needs treatment for the mental disorder from which she suffers; 47. It is clear that the appellant has been receiving treatment and continues to need that treatment. Her condition is treatable and she has been making slow progress but some progress in addressing her disorder. The combination of treatment she receives would not appear to be available in a custodial setting. We are satisfied that she needs the treatment that she has been and continues to receive. The extent to which the offending is attributable to the mental disorder
48. We have been concerned to investigate the extent to which her offending is attributable to the mental disorder as opposed to alcohol abuse. Dr Scally was of the view that her substance abuse was an aspect of her personality disorder. It was not simply a case that alcohol dis-inhibited her but she resorted to alcohol as a result of her problems. There is some support for that view in what the appellant told Dr Vaggers and the assessment of the PSR. She has been alcohol free for some years yet her disorder has continued since December 2006 when she has not any access to alcohol.
49. We therefore conclude that her offending is substantially related to her mental disorder and associated compulsive acts. There is a close proximity between her release from hospital and her attendance at grocery stores to obtain either alcohol or cash with which to buy alcohol. The appellant’s offending since August 2006 all coincided with periods of mental disorder. The extent to which punishment is required 50. 51. The offences of attempted robbery were assessed by the judge to have merited a determinate term of 3 years imprisonment. The second offence had the alarming feature that the appellant had pre equipped herself with a knife, but the threatened use did not deter Mr Khokar from disarming her. In the first offence it is significant that the intended use of the fruit knife seems to have been to harm her arms. She has never previously served a custodial sentence and has now served over eight years in detention in addition to the 88 days spent on remand; equivalent to a 17 year determinate term. Any future assessment by the Parole Board will probably be hampered by her anticipated moves between hospital and prison. The protection of the public including the regime for deciding release and the regime after release. 52. In our judgment the safety of the public is adequately protected by a restriction order and the experience of a panel of the First-tier Tribunal in assessing risks by restricted patients. We conclude this provides a clear route to future release if her response to treatment makes this appropriate.

-
53. We note that the scheme of the IPP made exemption for this mandatory sentence in the event of a hospital order being appropriate. We consider it highly likely that if the option of a hospital order had been available it would have been considered the appropriate sentence had the degree of the disorder been identified at that stage.
54. We accordingly propose to allow this appeal. We quash the sentence of IPP and substitute for it a hospital order with a restriction order pursuant to s.37 and s 41 MHA.
-

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://caselaw.nationalarchives.gov.uk/ewca/crim/2015/1249>

CASE PAGE <https://chat.esheria.ai/case-law/england-and-wales/turner-v-r-2015>

Prepared on 26 October 2026 · Esheria