Unfitness to plead and restraining orders: "a lacuna in the court's armoury"

R v Chinegwundoh [2014] EWCA Crim 2649

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The applicant, C, had been a practising barrister. He claimed "very substantial fees", to which he was not entitled, from a litigant who had been granted a legal aid certificate. The litigant had previously owned an interest in a property in Hackney, and C held a deluded belief that he was entitled to a charge over the property to satisfy the imagined debt. C fraudulently obtained a writ of possession and hired enforcement agents to evict the lawful occupiers, causing them "considerable anguish and distress". C also instructed an estate agency to sell the property, costing them time and money, and causing further distress to the occupants.

C was charged with using a false instrument (namely the fraudulently obtained writ of possession) and fraud. On 14th October 2013, C was found unfit to plead. On 21st October 2013, a hearing took place under s.4A(2) of the Criminal Procedure (Insanity) Act 1964 ("CP(I)A") and a jury found that C had done the acts charged against him. The judge made a supervision order for a period of two years, requiring C "to attend as an out-patient South London Maudsley Hospital under the supervision of Dr Hurn or her appointed colleagues". As C had subjected the occupants of the Hackney property to a "frightening ordeal", the judge also imposed a restraining order until further order, prohibiting C "from contacting, approaching or communicating [*sic*] either directly or indirectly or attempting to do so" the owner and tenants of the property and two other named persons.

C applied for leave to appeal against the jury's findings. He submitted 55 grounds of appeal, all of which were rejected by the single judge. C renewed his application to the full court.

On 10th December 2014, at the commencement of the hearing, C submitted a notice of abandonment. As the notice was not served in advance of the hearing, C could only abandon his application with the Court's permission (CrimPR 65.13(2)(b)). The Court entertained doubts about C's capacity to abandon his application, given that there was no evidence that C was now fit to plead. Further, although the Court was not impressed by any of C's grounds of appeal, staff in the Criminal Appeal Office had identified problems with both the Supervision Order and the Restraining Order. The Court proceeded to hear the application, and appointed counsel to act on C's behalf in accordance with s.4A(2)(b) CP(I)A.

HELD, ALLOWING THE APPEAL IN PART, the supervision order would be quashed and replaced with an order that identified the relevant local social services authority and named a social worker who would supervise the order, as required by sch.1A to the CP(I)A. "Particular care" is required when drafting supervision orders, "for sorting them out on appeal is wasteful of valuable time and resources" (at [18]).

The restraining order would be quashed. Section 5 of the Protection from Harassment Act 1997 permits a restraining order to be made upon conviction, and s.5A permits the making of a restraining order following an acquittal. Following a determination that the accused is unfit to plead, a finding that he did the acts or made the omissions charged against him is neither a conviction nor an

acquittal. Consequently, there was no power to impose a restraining order alongside the supervision order.

Commentary

Section 4A of the CP(I)A provides that, following a determination that the accused is under a disability (i.e. unfit to plead), a jury must decide whether they are satisfied that he did the act or made the omission charged against him as the offence. If the jury finds that the accused did the relevant act or made the relevant omission, the Crown Court must make a hospital order (with or without a restriction order), a supervision order, or an absolute discharge (s 5 of the CP(I)A, as amended). Sch 1A to the CP(I)A provides that a supervision order must specify either the local social services authority or the local justice area in which the supervised person will reside (para 3), and must specify the social worker or probation officer who will supervise the order (para 1). A supervision order may also include a requirement that the accused submits to treatment by or at the direction of a named medical practitioner with a view to the improvement of his mental condition (para 4). In the instant case, the order specified only the medical practitioner who would supervise out-patient treatment; it did not name the supervising authority or supervising officer.

The Court of Appeal substituted a new order, drafted in accordance with sch 1A. Counsel appointed on behalf of the defendant was able to identify a social worker who was prepared to supervise the order. In some cases, difficulties may arise because sch.1A provides that a court "shall not" make a supervision order unless "the supervising officer intended to be named in the order is willing to undertake the supervision" (para 2). The Law Commission recently published *Unfitness to Plead: An Issues Paper* (2 May 2014), in which consultees are invited to consider whether the Crown Court should have the power to compel local social services authorities and local probation boards, or providers of probation services, to accept supervision of an unfit accused (paras 6.11-6.14). In the meantime, if it is not possible to identify a supervising entity and a supervising officer, a supervision order cannot be made.

The inability to impose a restraining order upon an unfit accused is a further "lacuna in the court's armoury" (at [27]). Section 5 of the CP(I)A seeks *"…to treat, rehabilitate and support while, in the most serious cases, providing protection for the public"* (*R v Wells* [2015] EWCA Crim 2, at [3]). In addition to a hospital order, supervision order, or absolute discharge, the Crown Court has the power to impose various ancillary orders upon disposal. For example, the court may make: a Violent Offender Order (Criminal Justice and Immigration Act 2008, s 99); a Foreign Travel Order (Sexual Offences Act, s 116); and/or a Sexual Offences Prevention Order (Sexual Offences Act, s 104) (or a Sexual Harm Prevention Order after 8th March 2015, when s 113 and sch 5 of the of the Anti-social Behaviour, Crime and Policing Act 2014 come into force). If the accused was charged with a sexual offence, he may be subject to the notification requirements in Part 2 of the Sexual Offences Act 2003. The biometric data of an unfit accused may be retained under the same terms as if he had been convicted of the offence (Police and Criminal Evidence Act 1984, s 65B). These statutes specifically state that the court's powers extend to those who are under a disability and have been found to have done the act charged against them.

The Protection from Harassment Act 1997 makes restraining orders available where a person is convicted (s.5) or acquitted (s.5A) of any offence. The Act does not define "conviction" or

“acquittal” to encompass those who are unfit to plead. A finding under s.4A of the CP(I)A that the accused did the relevant act is plainly not a conviction because the accused, being unfit to plead, has not been tried for the offence (see *R v M* [2002] 1 WLR 824 and *R v Wells* [2015] EWCA Crim 2). In the present case, prosecution counsel sought to argue that a finding that an unfit accused did the act is effectively an acquittal. In *R v Mark John Smith* [2012] EWCA Crim 2566 and *R v R(AJ)* [2013] EWCA Crim 591, the Court of Appeal held that a verdict of not guilty by reason of insanity is an acquittal for the purposes of s.5A of the 1997 Act. However, in certain circumstances, an unfit accused who “did the act” may be remitted for trial if his mental health recovers, indicating that such a finding is not an acquittal (*R v R(AJ)* at [13-14] and *Chinegwundoh* at [24]).

The Domestic Violence, Crime and Victims Act 2004 amended the Protection from Harassment Act 1997 to make restraining orders available for those who are convicted or acquitted of any offence. The Act does not cover those who are unfit to plead and have been neither convicted nor acquitted, and this appears to be an anomaly. Where a judge has determined that an accused is unfit to plead and a jury finds that he did the act charged against him, a restraining order is not available, even though “persons under a disability can present risks to others of harassment” (at [27]). Conversely, if the jury are not satisfied that an unfit accused did the relevant act, “they shall return a verdict of acquittal as if… the trial had proceeded to a conclusion” (s 4A(4) of the CP(I)A), and the judge may make a restraining order under s 5A of the 1997 Act. Although the ability to make restraining orders should perhaps be extended to all those who are unfit to plead, the court concluded “that is a power that can only be provided by Parliament…” (at [27]).

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