**Hospital and limitation direction** – *R. v Byrne* [2022] EWCA Crim 1630, unreported, 9 December 2022, CA.

The appellant (age not given/positive good character) had been in a relationship with the victim. Following the end of their relationship, he went to the victim’s house where he strangled and stabbed her, causing her death. Hearing screaming, the victim’s daughter (aged eight or nine) went downstairs. The appellant strangled her too then, when she was unconscious, hit her head on the floor repeatedly. He thought she was dead and placed her body in the bath. He then put the mother’s body in a large suitcase that he had brought with him and threw it into a local river. He went back to the house with a shovel to bury the daughter, but found her alive and feigning sleep in bed. He said “I’d rather go to jail” and then left. Following his arrest, he told the police that he had gone to the house to rescue the daughter from the mother, who he believed was a transgender paedophile, and that, when the daughter came downstairs, he had thought she was a dwarf. The daughter was diagnosed as suffering from post-traumatic stress disorder and was very likely to suffer from mental illness and depression in later life. The appellant was subsequently diagnosed with paranoid schizophrenia, from which he had been suffering at the time of committing the offences, and there was evidence that this had been long-standing and that he had a long history of mental health issues. He had self-medicated with alcohol and cannabis. He pleaded guilty to the manslaughter of the mother by reason of diminished responsibility and the attempted murder of the daughter. He was sentenced to life imprisonment for the manslaughter, with a minimum term of 16 years, with a hospital and limitation direction under section 45A of the *Mental Health Act* 1983 with a restriction order under section 41 without limit of time. A concurrent term of 13-and-a-half years’ imprisonment was imposed in respect of the attempted murder.

The key issue that grounds the appropriate sentence in a case of manslaughter by reason of diminished responsibility is the level of “retained responsibility”. The judge had been entitled to conclude that the appellant’s retained responsibility fell within the high end of medium range. In making that assessment, it was impossible to divorce the implications arising from the attempted murder of the child, committed so shortly in time after the manslaughter. Whilst it was inevitable that the judge would consider a mental health disposal, it was first necessary to consider the importance of a penal element in the sentence, taking into account the appellant’s retained level of responsibility and whether the mental disorder could appropriately be dealt with by custody with a hospital and limitation direction under section 45A. If so, then the judge was required to make such a direction. The penal element (viz the 16-year minimum term) imposed by the judge was not manifestly excessive; it was inevitable that, having regard to the issue of dangerousness, the judge would impose a life sentence pursuant to section 285 of the *Sentencing Act* 2020 (CLW/20/39/22). Further, the nominal sentence of 15 years after trial for the offence of attempted murder was lenient in the circumstances, albeit not unduly so. Although the psychiatric opinion unanimously favoured a hospital and restriction order as opposed to a hybrid order, those opinions were predicated upon the judge finding a low level of retained responsibility for the manslaughter and low culpability for the attempted murder, and furthermore centred upon the ability of the appellant to cope with a custodial setting, prior to his treating clinicians notifying the Secretary of State that he was fit to be transferred to the prison estate. In the circumstances, the differences in the release regime between a section 37/41 order and a section 45A order highlighted in the psychiatric reports did not compel the judge to impose the former rather than the latter. The sentence met the objectives of punishment, rehabilitation and protection of the public in a fair and proportionate way.

**Key cases cited**: Distinguished – *R. v Westwood*, CLW/20/21/2, [2020] EWCA Crim 598, [2020] Crim.L.R. 973, CA.

***Archbold* 2023 references**: 1983 Act, ss.37 and 45A, §§ 5A-1432 and 5A-1416; 2020 Act, s.285, § 5A-844.

COMMENT:

Cases concerning the appropriateness of imposing section 45A hospital and limitation directions continue to trouble the courts. The focus of a section 37 hospital order (with or without restrictions under s.41) is on treatment rather than punishment (although indeterminate detention on a psychiatric ward may feel like punishment to the offender – see Nicola Padfield KC’s commentary at CLW/21/06/17 to *R. v Sowerby* [2020] EWCA Crim 898, [2021] 1 Cr.App.R.(S.) 14, CA), whereas an offender subject to a section 45A hybrid order may be remitted to prison if his mental health improves to the extent that he no longer needs to be treated in hospital. This is the “limitation direction” aspect of the hybrid order, which will automatically be discharged upon the expiry of the sentence release date, although an offender who is still in hospital at that point will remain there for as long as he continues to meet the criteria for detention under the 1983 Act. Where a life sentence is imposed, as in the present case, the limitation direction will be discharged only if and when the Parole Board is satisfied that he is no longer a danger to the public.

In order to determine whether a hybrid order is appropriate, a sentencing judge must assess the offender’s “retained responsibility”. This involves consideration of the role the disorder played in the offender’s behaviour. Writing in the Criminal Law Review, Ailbhe O’Loughlin has identified two strands of appellate authority concerning the balance to be struck between the interests of punishment, the need for treatment and the protection of the public (*Sentencing Mentally Disordered Offenders in England and Wales: Towards a Rights-Based Approach* [2021] Crim.L.R. 98). She contends that cases forming part of the punitive strand interpret *R. v Vowles*; *R. v Barnes*; *R. v Coleman*; *R. v Odiowei*; *R. v Irving*; *R. v McDougall*; *R. (Vowles) v Secretary of State for Justice and another*, CLW/15/11/20, [2015] EWCA Crim 45 & [2015] EWCA Civ 56,[2015] 1 W.L.R. 5131, CA,prescriptively, emphasising the importance of the penal element in sentencing (see, for example, *R. v Graciano* [2015] EWCA Crim 980, unreported, 1 April 2015, CA; *R v Martens* [2015] EWCA Crim 1645, unreported, 21 July 2015, CA; *Sowerby*). Particularly following the Court of Appeal’s attempt to “clarify” *Vowles* in *R. v Edwards (Regina)*; *R. v Knapper*; *R. v Langley*; *R. v Payne*, CLW/18/15/6, [2018] EWCA Crim 595, [2018] 4 W.L.R. 64, the therapeutic strand of cases tends to focus on the importance of treatment and the section 37/41 regime for public protection (e.g. *R. v Ahmed (Saber Mohammed Ali)*, CLW/17/03/6, [2016] EWCA Crim 670, [2017] Crim.L.R. 150, CA; *Westwood*; *R. v Cleland*, CLW/20/29/6,[2020] EWCA Crim 906, [2021] 1 Cr.App.R.(S.) 21, CA; *R. v Nelson*, CLW/21/04/4,[2020] EWCA Crim 1615, [2021] 1 Archbold Review 3, CA; *R. v Crerand*, CLW/22/31/7,[2022] EWCA Crim 962, [2022] 7 Archbold Review 3, CA).

The present case belongs to the punitive strand. All three psychiatrists had strongly advocated a hospital order with restrictions for two main reasons. First, they regarded the defendant’s retained responsibility as minimal. His paranoid and persecutory delusions were “impervious to reason” and, although he may have been able to set them aside at times, there is nothing in the summary of their evidence to suggest they thought he was capable of doing so at the time of the offences. Where there is uncontested psychiatric evidence of diminished responsibility, the Court of Appeal has cautioned against inviting the jury “as lay people, to enter into an essentially psychiatric domain” (*R. v Brennan*, CLW/14/44/1, [2014] EWCA Crim 2387, [2015] 1 W.L.R. 2060, CA,at [71]). However, the question of retained responsibility is for the court and, in this context, the Court of Appeal has emphasised that judges must “carefully consider all the evidence in each case and not … feel circumscribed by the psychiatric opinions” (*Vowles* at[51]), although the Sentencing Council’s guideline on overarching principles: sentencing offenders with mental disorders, developmental disorders, or neurological impairments (CLW/20/28/60) suggests (at para. 13) that departing from expert opinion requires “compelling reasons”.

Secondly, the experts had concerns about management of the appellant’s mental illness in a custodial setting and the consequent risks to both the appellant and the public. Although his mental state had improved significantly with treatment, his hallucinations and delusions were controlled by Clozapine (a medication that can cause serious side effects). He could not be compelled to continue taking Clozapine in prison and non-concordance would result in a rapid deterioration in his mental state. Dr Kennedy’s view was that a return to prison would place the appellant “at considerable risk of self-harm or suicide” and would place other prisoners and staff at risk if his mental health were to deteriorate. In Dr Maganty’s opinion, a prison setting would not be conducive to treatment and the risk to the public would be better managed via a hospital order with restrictions, not least because section 45A orders have “an inferior follow up”. The sentencing guideline requires courts to consider risk and release regimes, but the judgment does not reveal the extent to which this formed part of the evidence or the judge’s deliberations in the instant case.

As long ago as 2007, the Bradley Report highlighted the significant disparity between mental health services for prisoners and mental health services in the community. More recently, the Independent Review of the *Mental Health Act* 1983 revealed that the average time taken to transfer a prisoner to hospital is 100 days, during which time “the prisoner’s health is likely to be deteriorating” (*Modernising the Mental Health Act: Increasing choice, reducing compulsion*, December 2018, p.199). The government has committed to introducing a 28-day time limit for transfers (see Department of Health and Social Care *Reforming the Mental Health Act*,White Paper, August 2021; draft *Mental Health Bill* 2022, cl. 31)but, as the Justice Committee noted (*Mental Health in Prison*,HC 72, 29 September 2021, para. 78), “this will not solve the underlying problem which is the shortage of appropriate secure mental health inpatient facilities”.

The Court of Appeal acknowledged that the sentencing exercise in the present case was “complex”. As one of the psychiatrists explained, “attributing significant culpability to such a disordered and severely ill mind and brain is difficult”, but that is what a section 45A order requires. It seems inevitable that the current regime will continue to produce decisions that are difficult to reconcile.

**Natalie Wortley**