Case No: 200403172 A7

Neutral Citation Number: [2005] EWCA Crim 2077
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM DERBY CROWN COURT
His Honour Judge Waitt

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday, 4th August 2005

Before :

LORD JUSTICE MANCE
MR JUSTICE ELIAS
and
SIR CHARLES MANTELL
(Sitting as Judge of the CACD)

– –

Between :

I.A.	**Appellant**
− and −	
Regina	**Respondent**

– –

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

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MR D WHITEHEAD appeared on behalf of the APPELLANT
MR S LOWNE appeared on behalf of the CROWN

– –

Judgment
As Approved by the Court

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Lord Justice Mance:

1. On 12th January 2004, in the Crown Court at Derby before HHJ Pugsley, the appellant (born on 29th November 1984 and of prior good character) pleaded guilty on re−arraignment, and on 30th April 2004, in the same Crown Court before HHJ Waitt, he was sentenced, as follows: on count 1, rape, to custody for life; on counts 3, 4, 6, 7, 8, 9, 10 and 12, each involving indecent assault on a male, to 8 years custody on each count concurrent inter se and with count 1; and on counts 2, 5 and 11, having an offensive weapon, to 12 months custody on each count concurrent inter se and with count 1. The total sentence was thus custody for life, and the judge made the recommendation that a minimum period of 6 year 9 months be served from the time of sentence before any release.

2. The judge in sentencing explained to the appellant that he passed a life sentence, because he had "no doubt at all" that "you present a very grave danger to young boys and no−one can say when or if you will be safe to be released". He went on:

> "In my judgment you present such risk that there must be a wider view as to when and if you are safe to be released. If you had not suffered from the impairment that you have, then at your age with your lack of previous convictions, an appropriate sentence for all of this offending would have been one of 15 years imprisonment [sic]. But because I cannot say when you will be safe to be released the only sentence that I can properly impose is one of custody for life".

The period of 6 years 9 months from the date of sentence was specified by the judge pursuant to s.82A of the Powers of Criminal Courts (Sentencing) Act 2000. It represented the period after which, having regard to the period of remand in custody prior to sentence, the appellant would have been eligible to be considered for parole under a 15 year sentence. The judge concluded his sentencing remarks by expressing the hope and expectation that the appellant would in fact be detained at Ashley House (a medium secure hospital run by Care Principles Ltd.) until his treatment there was properly concluded, and that "today" arrangements could be made for his return there through a transfer by the Home Secretary under s.47 of the Mental Health Act 1983. But he added that in any event he was "confident that the long−term security of young boys makes it necessary" to pass a sentence of custody for life.

3. The appellant appeals against this sentence by leave of the single judge. Mr Whitehead representing him makes submissions at the following levels. First, he submits that the judge was wrong not to accept the recommendations of the medical experts before him, and to impose a hospital order under s.37(1) of the Mental Health Act 1983, with an indefinite restriction order under s.41(1) of the same Act.

4. Secondly, he submits that, even if detention was appropriate, the judge erred in considering that the case called for custody for life. It is suggested that this sentence was imposed without specific warning to counsel and *R v Hawkins* 12 Cr App R (S)

161 is cited in support of the proposition that counsel should have been given a specific warning in order to be able to address the judge about such a sentence. Thirdly, he submits that, if the case called for custody for life, the judge erred in taking a period of as long as 15 years as the starting point for the calculation of the minimum period to be served under s.82A of the 2000 Act. It is submitted that the sentence was manifestly excessive having regard to the guidelines in *R v Millberry* [2003] 1 CAR 25.

5. The facts in outline and chronological order were these:

(a) Counts 3, 4 and 5 (Indecent assault x 2 and having an offensive weapon): On two occasions between 1st and 31st March 2003 8 year old J was taken to the appellant's den in a graveyard. On the first occasion the appellant lay on top of the boy and kissed him on the cheek. J knew that the appellant had a knife in his back pocket. On the second occasion J was forced back to the graveyard den. The appellant jumped on his back, took his trousers down and rubbed his penis over the boy's bottom whilst forcing his bottom up and down and holding a knife to his throat.

(b) Counts 6, 7, 8 and 9 (Indecent assault x 4): On 30th July 2003 12 year C and 12 year S were playing at a skate park. They ran with the appellant into some trees and bushes at the park. The appellant lay in turn on top of each of them, rubbing his penis over their bottoms as part of some sort of game. The two boys were then taken back to the appellant's home. Whilst in his bedroom the appellant lay on top of them and tried to push his penis into their bottoms.

(c) Count 1 and 2 (Rape and having an offensive weapon): On 4th August 2003 11 year old C was taken to the appellant's graveyard den. With a knife placed at his throat the boy was forced to lay on the ground with his trousers pulled down. The appellant inserted his penis into the boy's bottom and at some stage ejaculated. The boy was told that he would be stabbed if he told anyone. The offence lasted over an hour.

(d) Count 10 and 11 (Indecent assault and having an offensive weapon): Later on the same day 11 year old D was enticed to and shown the appellant's den at the cemetery. Having been threatened with a knife the boy was told to lie down while they played a game. The appellant pulled down his trousers and rubbed his penis over the boy's bottom.

(e) Count 12 (Indecent assault): On 26th August 2003 10 year M was at a local park when the appellant asked him to go round back to talk. After a while the appellant lay on top of the boy before eventually letting him go.

6. In August 2003 the appellant was arrested in connection with the rape offence. Further enquiries led to the allegations of sexual abuse. At first he made no

admissions, but during extensive interviews he made numerous admissions about the offences.

7. The judge had before him medical as well as pre−sentence reports. A consultant forensic psychiatrist, Dr H Boer, examined the appellant on 29th October 2003 and again 28th January 2004, and concluded that he was not under a disability precluding a trial, although he might need additional clear explanations in simple language and assistance with documentation. He appeared to suffer from a mild learning disability, and could be seen as suffering from mental impairment as defined in the Mental Health Act 1983. Dr Boer also suggested, in view of reported second and third person auditory hallucinations, that he suffered from a psychotic disorder, probably schizophrenia, but subsequent psychiatric examinations and reports have discounted the suggestion.

8. After interviews and psychometric tests extending over 8 hours on 13th and 18th November 2003 Dr Rozina Gazard wrote a psychiatric report dated 17th November 2003. She concluded that the appellant had the Pervasive Development Disorder of Autistic Spectrum Disorder combined with a significant learning disability. She explained that people with this disorder frequently suffered from the "egocentrism" which she identified in the appellant, and "may know what is right and wrong but cannot act upon their knowledge or apply it". She also concluded:

> "1. ..× He does not understand the social world, he does not have the intellect to work out problems and he is highly suggestible. Because of these factors in my opinion there are grave concerns about his ability to be fully responsible for his behaviours.
>
> 2. If he is found guilty of the charges ×.., then he is a significant risk to children, and should be considered as unmanagable in the community. ××
>
> 3. The minimal standards of any institution in this case will be the ability to provide IA with the structure, containment and support he requires to accommodate both his Autism and learning disability, while at the same time aiming to address the devIAt sexual nature of his offending behaviour.
>
> 4. I would not expect progress in this area to be easy and any gain to be small and incremental, over a number of years. I cannot estimate a prognosis as the problem is so rare, but in my opinion I am dubious about promoting change in this case. Therefore it is possible that IA may be a risk to children for the foreseeable future. Alternatively when he receives appropriate structure and support in his life combined with meaningful activities then it may be that his sexual interest becomes of minimal importance.

> 5. Should he be found guilty, then, I would respectfully recommend that he be placed in, at least, a Low Secure NHS Unit where his unusual treatment needs identified above can be met."

She referred to sexual abuse which the appellant disclosed that he had himself suffered when aged 14.

9. The appellant's solicitors approached Ashley House, a medium secure hospital run by Care Principle Ltd., to assess the appellant, and in report dated 10th February 2004 Dr Simon Halstead identified a number of *possible* diagnoses, which, in addition to mental retardation, included organic disorder, schizophrenia, autism and psychopathy, but he made clear that he left open whether the appellant actually suffered from all or any of them. He recommended a hospital order with classification of mental impairment.

10. In a report dated 12th February 2004, the probation officer, Jeremy Draper, recorded the appellant as acknowledging the rapes and indecent assaults that he had committed, and as able to empathise "to some degree" with his victims' feelings and as expressing regrets. He referred to the previous psychiatric reports, and, while acknowledging the consultants' recommendation of a hospital order, said:

> "9.The Court will also consider the imposition of a life sentence which in my opinion would be commensurate with the seriousness of these offences. I have grave concerns about the risk that this defendant presents to the public, in particular children and in my opinion, his mental health treatment could and should be accessed within the auspices of a custodial sentence.
>
> 10. Whichever sentences is passed today it is, in my opinion, most important in terms of public protection that IA is not released until he is considered to present no risk to the public. Furthermore, that at that point (if reached) he is subject to as lengthy a period of supervision as possible".

11. Between plea and sentence, the appellant was detained under s.38 of the Mental Health Act in Ashley House. In a further psychiatric report dated 26th April 2004, provided by Dr Juli Crocombe at the appellant's solicitors' request, she reported that, since admission there, the appellant had been very keen to attend the Learning Support Department and worked hard between sessions. Further:

> "IA has commenced individual sessions with our Consultant Clinical Psychologist. During these sessions he engages well and is willing to discuss his offending behaviour and the difficulties with his anger. However, he has marked impairment in his understanding of the impact of his behaviours on others and shows little ability to appreciate the consequences and implications of his actions. These findings

are consistent with the opinions expressed in Dr Rosina Gazard's Independent Psychological Report."

12. Dr Crocombe concluded:

> "4.1 IA is a 19 year old man with a mild level of learning disability (mental impairment) and an Autistic Spectrum Disorder. This mental impairment is associated with both abnormally aggressive and seriously irresponsible behaviour in the form of physical aggression to self and others, verbal aggression, physical aggression towards property and inappropriate sexualised behaviour.
>
> ×..
>
> 4.3 Whilst there have been some initial difficulties following IA's admission to Ashley House, particularly in relation to his interaction with other residents, overall he has settled in well and shown a number of encouraging signs that he will be willing and able to participate in the treatment programme offered at Ashley House and gain benefit from this.
>
> 4.4 Without the necessary treatment, support and supervision, I believe that IA will continue to present a high risk to the safety of other persons, and that there will also be a risk to his own health and safety.
>
> 4.5 In my opinion it would be inappropriate for IA to be given a custodial prison sentence. He would be extremely vulnerable within a normal prison environment and in addition he would not be able to take part in any of the prison treatment programmes due to his learning disability and autistic spectrum disorder. At the point of release from prison, therefore, the level of risk which he presents to the public would not have been reduced and might possibly have increased as a result of the distress he would have experienced whilst in prison."

13. She recommended:

> "5.4 In my opinion, given the serious nature of the offences committed by IA, his long history of difficult and challenging behaviour and the high risk of his committing further serious offences if he were not detained within a secure hospital setting, it would be appropriate for IA to be subject to the special restrictions as set out in Section 41 of the Mental Health Act 1983 in order to protect the public from serious harm. Such restrictions should be without limit of time in light of the fact that in my opinion IA will continue to require high levels of support and supervision for many years into the future."

14. In mitigating on 30th April 2004, Mr Whitehead offered the appellant's apologies and called psychiatric evidence from Dr Simon Halstead, who produced both his own and Dr Crocombes' reports. Dr Halstead gave as his opinion that the appellant "suffers from mild mental retardation, which means that he has a low IQ, impaired intelligence and a delay, a global delay, in development", conditions constituting a mental impairment under the Mental Health Act. He also had Autistic Spectrum Disorder. He considered that the appellant would benefit from a hospital order, which he recommended should be without limit of time. He thought that custody would have a severe impact on the appellant, on his mental state. When previously in custody he had been vulnerable and behaviourally impaired, displaying symptoms suggestive of psychosis, and because of his autistic pathology he would not be able to benefit from punishment and would emerge, in Dr Halsteads' view, essentially unaltered - there would be "no benefit to him or to public safety in a custodial sentence". However, when asked whether the appellant was likely to become safe to be at large unsupervised (if hospitalised), he said:

> "If you ask me ×. to answer that question through my experience, I have to be pessimistic and in the sense that I would never before this court predict a cure. What I would predict, however, is that we could perhaps indefinitely, if required, keep IA safe and keep the public safe, and that may involve close supervision for an indefinite period and that is certainly a possibility in this case, and it would certainly be possible for us to provide that."

15. He explained his preference for a hospital order with restriction, compared to a custodial order with a recommendation for transfer, by saying that "our preference would be very strongly for the hospital order in that it would give us an uncomplicated relationship with the patient". Mr Whitehead then addressed the judge on the basis that there were "two choices here", while encouraging the course recommended by Dr Halstead.

16. Following the sentence of custody for life imposed by the judge, the appellant was returned to HMP YOI Glen Parva, and notified that, as a lifer, he was not suitable to remain there long−term and would be transferred to a lifers−centre, probably "an establishment where a sexual offenders treatment programme can be offered in due time".

17. The appeal having been lodged and leave given by the single judge, the matter first came before the Full Court presided over by May LJ, on 7th December 2004. Not long before that date (in fact in September 2004), the appellant was moved from HMP YOI Glen Parva to HMP YOI Swinfen Hall. Swinfen Hall is again not a hospital, but is a detention centre, about the precise conditions in which the Full Court had no information. The Full Court found this a "very worrying" matter (a view which we share). The Full Court expressed its concern that little or nothing appeared to have been done to effect the transfer which the judge contemplated under s.47, and adjourned the appeal with an invitation to the Secretary of State to consider such a transfer to either Ashley House or to another hospital, Rowan House, which Dr Halstead was now suggesting. It also ordered reports on the facilities at Rowan

House, a report on the appellant from Swinfen Hall and a report from Dr Halstead on all three of these institutions, with his "opinion on the difficulties with a s.47 transfer as opposed to a s.37 order with s.41 restrictions". It concluded its short judgment:

> "The court is very concerned with three things. First, any disposal of this appeal sufficiently and fully protect the public from this appellant for a sufficient time. Second, so far as is consistent with the first, the appellant should receive proper and appropriate treatment. On a lesser but not unimportant matter, the question has been raised by my Lord, Sir Charles Mantell, as to whether it might not be right to consider an application for leave to appeal against the minimum determinate sentence of six years and nine months and I have no doubt that counsel will consider that in the intervening period."

18. The appellant's personal officer, Mr Simpson, made a report in respect of his stay in Swinfen Hall. The report indicated that, since arrival there, the appellant's behaviour had been of an acceptable standard, though he often had to be reminded what was expected of him. He had a good relationship with staff and posed no control problems. He had settled into the wing regime and was coping well. He had been assessed for a sex offenders treatment course ("SOTP") and agreed to attending it. He had recently been assessed by a psychiatrist with a view to a return to a secure hospital, but "until all assessments and appeals are resolved it is not possible to make any long−term sentence plans". This report was accompanied by a medical report dated 20th December 2004 from Dr Ton Polak, medical officer at Glen Parva, who made clear that neither Glen Parva nor Swinfen Hall actually provided a bed in a psychiatric hospital, and that any transfer under s.47 depended on (a) availability of a hospital bed, (b) funding from the appellant's local primary care trust and (c) the issue of a transfer warrant , which he said "In many cases (and this appears to be one of them) ×. means a considerable waiting period during which the prisoner is left in limbo - a situation we regret but are sadly unable to change".

19. Dr Halstead's further report dated 2 February 2005 summarised the appellant's current mental position, on the basis of an interview on 14 December 2004:

> "IA continues to display symptoms of mental disorder. In my opinion he continues to meet the Mental Health Act criteria for mental impairment and also, possibly, mental illness. I do not believe that he is schizophrenic. While he hears voices they are not typical of the auditory hallucinations occurring in schizophrenia.
>
> It is inappropriate for a severely mentally disordered and vulnerable person to be managed in a prison. I continue, therefore, respectfully to recommend a placement in a secure hospital."

20. Dr Halstead said further:

> "In IA's case, his offences stemmed directly from his mental disorder. A core feature of autism is the inability to perceive the feelings of other[s]. Other people are therefore treated as objects. Moreover, he was repeating sexually abusive experiences which he himself had suffered.
>
> The pathology of autism is amenable, at least in part, to treatment and to education. It is not responsive to punishment, which can actually have an opposite effect."

He went on to explain the treatment programme that would be available in hospital and to say that

> "If IA, or any other patient for that matter, were to come to hospital for treatment with a 6 year tariff, he would see most of the other patients leave hospital before he could even begin the most important parts of his treatment programme. Successful treatment within the tariff period would lead only to transfer back to prison.
>
> This approach might be appropriate, for instance, for someone who became acutely psychotic during a prison sentence. He could be transferred to hospital, treated, then returned to prison.
>
> For someone with a life long and permanent disorder such as autism this is entirely inappropriate. The Mental Health Act and the mental health care services are designed to provide life−long security, supervision and treatment for people with such mental disorders.
>
> ×..
>
> [The Mental Health Act] distinguishes treatment from punishment. The former was done in hospital and the latter in prison. There have been pressures to blur this distinction, in other words to treat the mentally disordered in prison and to use hospitals for punishment.
>
> In my view medicine [and psychiatry is a medical discipline] offers a humble, scientific service to mankind. It is well established that medicine cannot inflict punishment. ×..
>
> Furthermore it is my opinion, confirmed over many years of practice, that it is perfectly possible to protect the public without punishing or harming the patient. I would argue, as I have done before, that the health system is better at this than the prison system because we have vastly better risk assessment procedures at our disposal, plus the appropriate legal powers."

21. Dr Anne Jaspers of the Birmingham and Solihill Mental Health NHS Trust saw the appellant on two visits to Swinfen Hall in September and November 2004, and, after discussing his case with Dr Halstead (who she said know the appellant much better than she did), wrote a report dated 31 January 2005, in which she stated her opinion that neither the SOTP at Swinfen Hall nor the staff delivering it were equipped "for someone with IA's range of disabilities and active symptoms of mental illness". He was "inappropriately placed with a prison setting" and "has mental disorders which need treatment in hospital". She said that

> "I understand Ashley House can offer the treatment he needs is he is made subject to a Section 37 Hospital Order. Ashley House has also agreed IA could be admitted there under the provisions of Section 47 should his mental state significantly deteriorate, but Home Office and funding issues mean that Mr Slfrey may not be automatically placed there".

22. In a letter dated 11 February 2005 Care Principles Ltd. set out information about the conditions and treatment available at Rowan House, which provides both medium and high dependency secure accommodation. It said:

> "Levels of supervision of each individual patient are determined by the multidisciplinary team depending on risk assessment and risk management plans. For all restricted patients, access into the community will take place only with the approval of the Home Office after a request has been made by the Responsible Medical Officer of the patient giving detailed reasons of the care plan and why such community exposure would be beneficial to the patient's therapeutic program.
>
> The multidisciplinary clinical team at Rowan House works closely with the referring clinicIAs in order to facilitate patients eventual return to their home areas if it is appropriate. Pre−discharge information detailing the essential service elements required to provide long−term care and durable aftercare services in the community are usually discussed at Section 117 meetings, to which the local community services are invited."

23. A letter dated 7 April 2005 was also written by a Dr Sultan of Linden House, another medium secure hospital run by Care Principles Ltd. Dr Sultan saw the appellant at Swinfen Hall on 23 March 2005, summarised his condition as that of "a 20−year old man who has clearly mild learning disability and Autistic Spectrum Disorder, which has associated with a long history of challenging behaviour, that had escalated to having serious offences in the form of indecent assault and rape". He recommended a hospital order with restriction.

24. The appeal came before us on 28 June 2005, Sir Charles Mantell being again a member of the court. We heard evidence from Dr Halstead which was along the same

lines as his reports. He last saw the appellant on 14 December 2004, but had been in touch with the prison mental health service. The appellant continues to display symptoms of autism and in Dr Halstead's view post traumatic stress syndrome ("PTSD"), related to the appellant's own sexual abuse. Dr Halstead repeated his view that, where mental disorder causes an offence, then the letter and spirit of the Mental Health Act called for a hospital order. Here the appellant's autism had inhibited his ability to perceive the feelings of others, and his PTSD would cause him to inflict on others the same abuse that he had himself suffered, while his autism would also encourage this. The appellant had however shown insight into his disorder and needed treatment. Dr Halstead explained that a transfer to hospital under s.47 was effectively precluded by the length of the minimum tariff period of 6 years 9 months. An important part of any treatment programme would, at least in its later stages, be training in conditions outside the hospital, but that would not be possible during the minimum period. However, Dr Halstead also thought that the appellant's condition would require a substantial period in hospital, and that treatment could take years.

25. Dr Halstead also said that, under a hospital order, if the stage came when his case was considered by the Mental Health Review Tribunal, the Tribunal would consider the risks posed, and if there were risks, then, even in relation to someone who no longer required to be detained for medical reasons, the Tribunal had power to make a conditional or deferred conditional discharge. That was a reference, in the context of a hospital order with a restriction order, to s.73 of the 1983 Act, whereby the Tribunal is obliged to direct an absolute discharge in some circumstances, but may direct a conditional discharge in others. More precisely, under s.73(1), the Tribunal

> "shall direct the absolute discharge of the patient if satisfied−
>
> (a) as to the matters mentioned in paragraph (b)(i) or (ii) of section 72(1) above; and
>
> (b) that it is not appropriate for the patient to remain liable to be recalled to hospital for further treatment."

The matters mentioned in s.72(1)(b)(i) and (ii) are, so far as presently relevant, these:

> "(i) that he is not then suffering from mental illness ×. or mental impairment or from any of those forms of disorder of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment; or
>
> (ii) that is not necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment; ×"

26. The possibility of a conditional order arises under s.73(2), whereby:

> "Where in the case of any such patient as is mentioned in subsection (1) above the tribunal is satisfied as to the matters referred to in paragraph (a) of that subsection but not as to the

> matter referred to in paragraph (b) of that subsection the tribunal shall direct the conditional discharge of the patient."

The power to make a conditional order is thus expressly related to the potential appropriateness of further treatment.

27. Mr Whitehead on behalf of the appellant adopted Dr Halstead's evidence, and submitted that the authorities establish that, where an offender qualifies for a hospital order with restriction, and a hospital place is available, it is wrong in principle to impose a life sentence out of concern that the offender's release should be determined process other than by the Mental Health Review Tribunal. In *R v. Morris* (1961) 45 CAR 185, the court said that this was the general principle "where punishment as such is not intended", while stating that "Of course there may be cases where, although there is a substantial impairment of responsibility, the prisoner is shown on the particular facts of the case nevertheless to have some responsibility for the act he has done which must be punished". In *Morris* however no suitable hospital was shown to be available, so the judge's order of life imprisonment was upheld. In *R v. Howell* (1985) 7 CAR 360 the appellant was extremely dangerous, "suffering from mental illness in the shape of schizophrenia, which is susceptible to treatment, but also from a much more serious personality disorder with devIAt sexual overtones, which is a much more intractable condition ×.". The judge was "so worried about the danger that this man would represent to the public if released that instead of making a hospital order, which he was asked to make and as to which ample evidence existed, ×. he passed a life sentence". The court, presided over by Lord Lane CJ, said:

> "We do not think that the course taken by the judge, although we understand his reasons well, was a proper one. In circumstances such as these, where medical opinions are unanimous and a bed in a secure hospital is available, we think that a hospital order under section 37 of the Act should be made together with a restriction order without limit of time under section 41."

28. That approach was followed 10 days later in *R v. Mbatha* (1985) CAR 373, Lord Lane again presiding over the court. The judge there had identified "a substantial element of criminality in this behaviour", notwithstanding that there was also a direct causal link between the defendant's manic depressive psychosis and the attacks. Such criminality related to the circumstances in which the defendant had discontinued restraining medication. But the Court of Appeal heard evidence of lack in insight and inability to control behaviour which undermined the conclusion regarding "criminality", and on that basis the court applied what it had said in *Howell* .

29. In *R v. Birch* (1989) 11 CAR (S) 202, Mustill LJ, giving the judgment of the court, pointed out that prison might be chosen by a judge as an alternative to hospital either because the offender was dangerous and no suitable secure hospital accommodation was available or because there was an element of culpability in the offence which merited punishment, as might happen where there was no connection between the

mental disorder and the offence or where the offender's responsibility for the offence was reduced but not wholly extinguished.

30. In *R v. Mitchell* [1997] 1 CAR (S) 90 the court endorsed the approach in *Howell* , treating as *per incuriam* the decision in *R. v. Fleming* (1993) 14 CAR (S) 151, where the court had preferred a life sentence on the (mistaken) basis that the decision whether to release would then be for the Home Secretary (when in fact it would be for the discretionary lifer panel, or, now, the Parole Board). It said that "The composition and powers of the discretionary lifer panel and the Mental Health Review Tribunal are closely analogous". In *R v. Hutchinson* [1997] 2 CAR (s) 60, the court again applied the approach of *Howell* and *Mitchell* .

31. However, in *R v. Drew* [2003] UKHL 25; [2004] 1 CAR (S) 8, page 65, the House of Lords examined further the relationship between a life sentence and a hospital order with restrictions in respect of an offender suffering from schizophrenia (who had in fact been transferred to hospital shortly after sentence was passed), in a context where the judge had no option but to pass an automatic life sentence under the Crime (Sentences) Act 1997 s.2 (since replaced by the Powers of Criminal Courts (Sentencing) Act 2000, s.109). The issue was whether an automatic life sentence was compatible with the appellant's rights under the Human Rights Convention. Lord Bingham said in relation to the case before it:

> "16. It may be accepted that a sentence of life imprisonment, passed under section 109 of the 2000 Act, is, in part at least, punitive in purpose and effect. The minimum term specified by the judge to be served before release is imposed as retribution for the crime committed. It may also be accepted as wrong in principle to punish those who are unfit to be tried or who, although fit to be tried, are not responsible for their conduct because of insanity: see, generally, *R v H* [2003] 1 WLR 411; [2003] UKHL1. But the appellant did not claim to be unfit to plead and advanced no defence of insanity. Instead, he pleaded guilty to an offence of which an essential ingredient was an intention to cause grievous bodily harm to another. The Recorder of Cardiff did not regard the appellant as other than criminally culpable. Had he done so he would not have specified a minimum term based on a notional sentence of eight years'. The appellant's mental illness could properly be relied on as mitigating the criminality of his conduct but not as absolving him from all responsibility for it. Mr Davies laid stress on the stigma attaching to a sentence of life imprisonment, which he criticised as unfair in the case of a mentally−disordered defendant such as the appellant. It is of course true that conviction of serious violent crime carries a stigma. But the appellant will have been stigmatised less by the sentence passed upon him than by his voluntary admission of guilt."

32. Lord Bingham continued:

> "17. Section 82 of the 2000 Act imposes additional duties on sentencing courts where offenders appear to be mentally disordered. Save where a custodial sentence is fixed by law (as in cases of murder) or falls to be imposed under section 109, the court must consider the offender's mental condition before imposing a custodial sentence. The humanity and fairness of this requirement are obvious. But it cannot, as a matter of national law, be stigmatised as wrong in principle to pass a sentence of imprisonment on a mentally disordered defendant who is criminally responsible and fit to be tried. This is made clear by the terms of section 37 of the 1983 Act, for even where the conditions in subsection (2)(a)(i) or (ii) are found to be satisfied the court may make a hospital order only if it is also of opinion under subsection (2)(b) that a hospital order is "the most suitable method of disposing of the case". If it is not of that opinion, a sentence of imprisonment may be imposed even on an offender in whose case the conditions in subsection (2)(a)(i) or (ii) are satisfied."

33. Lord Bingham then summarised *Birch* in the same terms that we have done so in paragraph 29 above. At paragraph 19 he said:

> "19. If it were shown that a mentally−disordered defendant was held in prison, that he was there denied medical treatment, available in hospital, which his mental condition required and that he was suffering serious consequences as a result of such denial, he would have grounds for seeking judicial review of the Home Secretary's failure to direct his transfer to hospital under section 47 of the 1983 Act: *Keenan v United Kingdom* (2001) 33 EHRR 913. But this would not be a challenge based on the compatibility of sections 109 and 37 with article 3. Nor is it the ground of challenge which the appellant makes, or could make, in this case, since the Home Secretary exercised his transfer power promptly. ×.."

34. The House endorsed the solution adopted by the Court of Appeal in *R v. Offen* [2001] 1 WLR 253, to avoid the passing of an automatic life sentence on a defendant who no longer presented a danger to the public, and said:

> "21. Interpreted in accordance with *R v Offen* [2001] 1 WLR 253, section 109 does not lack an objectively justifiable protective purpose: "
>
> (1) Defendants sentenced to determinate sentences of imprisonment must be released after serving a specified proportion of their sentences and are subject to recall for a

limited period only. If on release they are still dangerous, they are a source of risk to the public.

(2) Defendants made subject to hospital orders, whether restricted or not, are entitled to release when the medical conditions justifying their original admission cease to be met: *R v London South and South West Region Mental Health Review Tribunal, Ex p Moyle* [2000] Lloyd's Rep Med 143, 150; *R (Von Brandenburg) v East London and The City Mental Health NHS Trust* [2002] QB 235, 248, paragraph 18. Further, they are liable to recall only on medical grounds. They may be a source of danger to the public even though these medical conditions are not met. While it is possible to argue, as Mr Davies did, about the magnitude of this risk, it cannot be said not to exist.

(3) A defendant sentenced to life imprisonment under section 109 is not deprived of all his rights. He may appeal against imposition of the sentence. He may appeal against the minimum term specified by the judge. He is eligible for release on the expiry of that term and is entitled to be released if he is no longer a source of danger to the public. But the decision whether it is safe to release him will be taken by the Parole Board, as an independent body acting judicially, which will not be confined to the medical considerations of which, alone, a Mental Health Review Tribunal may take account, and he is liable to recall indefinitely if he appears to present a danger to the public, the grounds of recall, again, being broader than in the case of a restricted patient. In short, an automatic life sentence affords a measure of control not available under the other available orders."

35. The House did however indicate its hope that thought would be given to extending the power under s.45A of the 1983 Act (in England presently confined to cases of psychopathic disorder) to make a hospital order with a "limitation" restriction under s.41 at the same time as passing a sentence of life imprisonment. It said of the case before it:

> "Had it been open to the Recorder to make an order under section 45A (which it was not, because the appellant was not suffering from psychopathic disorder) it seems likely that he would have done so. This would have avoided the ill effects which the appellant undoubtedly suffered as a result of his confinement in prison. We hope that further thought may be given to exercise of the power conferred by section 45A(10)."

36. Finally, Lord Bingham said this:

> "22. In the course of his argument for the Home Secretary, Mr Perry gently suggested that Court of Appeal decisions generally encouraging the making of hospital orders where the relevant medical criteria were met might, in the absence of adversarial argument, have given less than adequate weight to the differing conditions governing the release and recall of restricted patients as opposed to life sentence prisoners. He instanced authorities such as *R v Howell* (1985) 7 Cr App R (S) 360; *R v Mbatha* (1985) 7 Cr App R (S) 373; *R v Mitchell* [1997] 1 Cr App R (S) 90; *R v Hutchinson* [1997] 2 Cr App R (S) 60. There may be some force in this criticism, and we would accept that these differing conditions are a matter to which sentencing judges and appellate courts should try to give appropriate weight. The difficulties caused to prison managements by the presence and behaviour of those who are subject to serious mental disorder are, however, notorious, and we would need to be persuaded that any significant change in the prevailing practice was desirable."

37. Accordingly, judges are not required to ignore, but should, on the contrary, give some appropriate weight to, such differences as there are between the regime of custody for life, with the Parole Board's role after the expiry of the minimum period, and the regime of a hospital order with indefinite restriction, with the Mental Health Review Tribunal's role under s.73 of the 1983 Act. This does not mean assuming that the latter regime, which has the advantage of guaranteeing hospital treatment, will in any particular case necessarily afford significantly less protection to the public than the former.

38. We turn to consider the judge's decision in the present case in that light. In the course of Dr Halstead's evidence before him, he obtained the doctor's confirmation that consideration of any ultimate release from a hospital order would come "before a Mental Health Review Tribunal, which operates by way of different criteria, though not wholly dissimilar from the Parole Board". In the light of Lord Bingham's observations in paragraph 22 of *Drew* , we do not consider that any criticism can attach to that as a general statement.

39. The question remains whether the judge erred, in law or in principle, in treating this as a case for life custody, in the expectation that the appellant would be transferred to a hospital for treatment, rather than making a hospital order with restriction. Before us, counsel did not deny that, despite the problems faced by the appellant, there was a degree of responsibility in the offending. The judge was, as counsel accepted, concerned with a mild learning disability as well as a condition of Autistic Spectrum Disorder. In addition, on the basis of Dr Halstead's evidence before us, the sexual abuse suffered by the appellant himself when aged around 14 can be viewed as having a continuing traumatic effect involving a form of PTSD. In these circumstances, the doctors have been unanimous in advocating the making of a hospital order with restriction, although we note that the probation officer in his pre−sentence report favoured a custodial sentence.

40. In the grounds of appeal, Mr Whitehead relied on *R v Howells* (1999) 1 Cr App R(S) 360. That was a decision on the custody threshold - whether (under what is now s.79 of the Powers of Criminal Courts (Sentencing) Act 2000) the offence or one or more offences associated with it was "so serious" that only a custodial sentence could be justified, or whether, in the case of a violent or sexual offence, only such a sentence would be adequate to protect the public from serious harm from him. In the present case, apart from the possibility of a hospital order, there could be no doubt that the custody threshold was far passed. As counsel accepted before the judge, the judge was faced with a straight choice, between custody and a hospital order with restriction. Under s.37(2(b) of the 1983 Act, one of the preconditions to making a hospital order is that:

> "(b) the court is of the opinion, having regard to all the circumstances including the nature of the offence, 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."

See also per Lord Bingham in paragraph 17 in *Drew* , cited in paragraph 32 above.

41. Accordingly, the judge was bound to consider which was the more appropriate in the particular circumstances of this case, a custodial sentence or a hospital order with restriction. That involved weighing the factors. On the one hand, this was very serious offending, with serious impact on the victims and their families and in respect of which the appellant cannot be fully excused of all responsibility. On the other, he is someone with diverse and unusual problems, who the doctors unanimously advise would benefit by treatment in a psychiatric hospital. On the one hand, as the history to date shows, a custodial sentence (especially for life) affords the most clear−cut security to the public. On the other hand, it does not by itself guarantee that the appellant will receive the assistance that may enable his problems to be overcome, and (as this case shows) a sentencing judge's hope and expectation that there may be a transfer under s.47 to a hospital for treatment may, for one reason or another, not be realised.

42. In this case, it is, we think, clear that it was not considerations of responsibility or punishment that determined the judge's decision to order custody for life. It was considerations of public safety. He took the view that the appellant was so grave a danger to young boys and presented such risks that a "wider view" needed to be taken as to when he was safe to be released. By that, he clearly meant wider than the view that he thought would be taken by the Mental Health Review Tribunal, looking at the matter under s.73. At the risk of over−simplification, under s.73 the Tribunal must focus on the existence, or the potential risk of recurrence, of any mental impairment making detention in a hospital for appropriate medical treatment necessary for the patient's health or safety or for the protection of other persons. There may, Lord Bingham observed in *Drew* , be cases where a person remains a risk to the public, even though it cannot be said that he or she has now, or is likely to suffer in the future, any such actual or potential mental impairment. In a complex case like the present, where the roots of the appellant's offending exist in an uncertain combination

of factors, there may be some force in the judge's approach, which was to cover all possibilities. However, the judge was bound also to weigh in the balance the appellant's clearly attested psychiatric problems, the benefit that the medical evidence also attested that he would be likely to receive from treatment and the protection of the public, as well as in the long term the rehabilitation of the appellant in society, that could result from a hospital order with restriction. He sought to do so, by expressing his hope and expectation that a hospital order with restriction would, even "today", be achieved. But, as the history shows in the present, there can be a considerable difference between the making of such an order by the court and the imposition of a sentence of custody for life in the hope and expectation of a transfer under s.47 by the Home Secretary (or *de facto* , as we understand, by the Governor of whatever institution the appellant is in, acting under delegated power from the Home Secretary). Because we also understood when the appeal came before us on 28th May 2005 that the difference may have arisen in this case because of the length of the minimum period fixed by the judge, and because we had formed the provisional view that the judge may have fixed too long a minimum period, we adjourned it and the giving of any judgment for a further 21 days, pending enquiry of the Secretary of State for the Home Department regarding the prospects of a transfer to hospital under s.47, if the minimum period were to be reduced to 4 years from the date of sentence. We have not received any response.

43. There is therefore still uncertainty about whether and if so when the appellant would receive the medical treatment in hospital which alone offers any prospect of rehabilitation and ultimately release into the community. The judge sentenced in the hope and expectation that such treatment would be made available from "today", even though he also stated the view that custody for life was "in any event" necessary. The continuing uncertainty about whether and when medical treatment in hospital will be provided, if the present sentence stands, must be weighed in the balance against the factor that was critical for the judge, his concern that the public would not receive the most complete protection under the regime of a hospital order. But, on the evidence before us, the regime of a hospital order with restriction is designed and able to offer very great protection, if necessary indefinite, for the public in respect of the risks posed by this appellant. Further, the evidence suggests that the real risks are, in the case of this particular appellant, associated with conditions in respect of which medical treatment would be appropriate. In these circumstances, we have come to the conclusion that the right order, particularly in circumstances where the judge's own hope and expectation have not been fulfilled and it remains uncertain whether or when they ever would be, is a hospital order with restriction. The appeal will be allowed and the sentences passed on all counts quashed and replaced in each case by a hospital order with indefinite restriction.

44. That conclusion makes it unnecessary for us to address the question whether the judge would have been right to pass a sentence of custody for life in respect of the rape (count 1). The complaint is made that he did not raise this possibility expressly with counsel. But the reports before him and Dr Halstead's recommendation of an indefinite restriction order might be thought to have raised the possibility fairly obviously. Be that as it may, the judge was clearly right to consider that the criteria for custody for life were satisfied. The offending was very serious in nature and extent, and the appellant was someone who was likely to remain a serious danger to

the public, particularly small boys, for an entirely unpredictable period and quite possibly always, with or without treatment. Before us, therefore, there could be no complaint if the sentence stood, bearing in mind that its appropriateness would on any view now have been fully argued.

45. Finally, we should say some words about the minimum period fixed by the judge of 6 years 9 months (that is 15 years less 9 months for time spent on remand in custody). Here, there were repeated sexual assaults on young boys aged between 8 and 12, including one anal rape with ejaculation, and three of these assaults, including the rape, were aggravated by the presence or use of a knife to force submission. Nonetheless, we bear in mind (a) the appellant's youth (18 at the time of the offences, and 19 at sentence), (b) his psychiatric problems, including those stemming from the abuse perpetrated on him some five years before these offences, and their causative relevance to the present offending, as well as (c) his plea of guilty. This was, it appears, a late change of plea, on or very near the date fixed for trial but before any jury was sworn. However, it saved the victims from having to give evidence, and should still have received express credit. It was not taken into account expressly in the judge's sentencing remarks, as it should have been under s.152 of the 2000 Act. We also mention that the appellant's prior good character, though of very limited weight here, especially in the context of a series of assaults. Even if one takes the eight year starting point in *R v. Milberry* [2003] 1 CAR 25, page 396, because the rape was on a child, and increase it notionally (perhaps by as much as 4 years if one were to take the case of an adult defendant), to take into account the aggravating factors (the repeated offences on six different victims and the use of a knife to intimidate), we consider that the mitigating factors which we have identified as (a), (b) and (c) act as significant counter−balancing factors. They lead us to the conclusion that the appropriate sentence to pass in respect of this young offender, aside from the factors justifying a sentence of custody for life, would have been 9−10 years, say 9œ years. On that basis, the appropriate minimum period to specify in the case of a sentence of custody for life would have been 4 years 9 months, less the 9 months served in custody, making a minimum period of 4 years from the date on which the judge passed sentence.

46. For the reasons which we have summarised in paragraph 43 above, the appeal will be allowed and the sentences passed on all counts quashed and replaced in each case by a hospital order with an indefinite restriction order under s.41 of the Mental Health Act 1983.

47. We would, however, repeat the hope expressed by the House of Lords in *R v. Drew* (cf paragraph 35 above), that the power under s.45A of the Mental Health Act 1983 to make a hospital order with a limitation restriction under s.41 at the same time as passing a sentence of imprisonment or custody, should be extended to cases of mental illness or impairment not involving psychopathic disorder. Such an extension would remove or reduce very real difficulties and dilemmas in sentencing which can at present (as this case illustrates) face judges at first instance and on appeal.