SHERIFF APPEAL COURT

[2018] SAC (Crim) 2
SAC/2017/000585/AP

Sheriff Principal M M Stephen QC
Appeal Sheriff P J Braid

OPINION OF THE COURT

delivered by SHERIFF PETER J BRAID

in

APPEAL AGAINST SENTENCE

by

FD

Appellant

against

PROCURATOR FISCAL, LANARK

Respondent

Appellant: Ogg, solicitor advocate; McClure Collins, Glasgow
Respondent: Meehan AD; Crown Agent

9 January 2018

Introduction

[1] The appellant appeals against a compulsion order imposed upon him by the sheriff at Lanark on 7 September 2017, in terms of section 57A of the Criminal Procedure

(Scotland) Act 1995. It is argued that the sheriff erred in concluding that the statutory criteria for the imposition of such an order were met.

Background

[2] On 6 July 2017, the appellant pled not guilty to a charge of contravention of section 5(1) of the Emergency Workers (Scotland) Act 2005, by assaulting, obstructing or hindering a nursing assistant by placing him in a headlock and repeatedly punching him on the head to his injury. That plea was accepted by the Crown in terms of sections 53E and 51A of the Criminal Procedure (Scotland) Act 1995, on the basis that the Crown accepted the appellant's defence in terms of section 51A, that he was unable by reason of mental disorder to appreciate the nature or wrongfulness of his conduct.

[3] At the time of sentence the appellant was detained in the State Hospital at Carstairs, being subject to a compulsory treatment order made under the Mental Health (Care and Treatment) (Scotland) Act 2003 ("the 2003 Act").

[4] Section 57A of the 1995 Act applies to the appellant by virtue of section 57 of that Act, which provides that it applies to a person acquitted under section 51A, references to "offender" in section 57A being treated as references to such a person[1].

[5] Prior to passing sentence, the sheriff obtained four reports, being two reports from a Dr Khan; one from a Dr Billcliff; and one from a mental health officer. Both

[1] For the sake of simplicity, in our discussion of section 57A, we use the term "offender" but we acknowledge that the appellant is not an offender but is a person acquitted under section 51A.

Dr Khan and Dr Billcliff were registered medical practitioners for the purposes of the 2003 Act.

Issues raised by the appeal

[6] Leave to appeal has been granted in relation to two matters:

(a) whether section 57A requires evidence from two medical practitioners expressly to the effect that a compulsion order is necessary;

(b) how the question of necessity is to be approached where there is already a compulsory treatment order in place.

The law

[7] Section 57A, in so far as material, is in the following terms:

"…

(2) If the court is satisfied –

(a) on the written or oral evidence of two medical practitioners, that the conditions mentioned in subsection (3) below are met in respect of the offender; and

(b) that having regard to the matters mentioned in subsection (4) below, it is appropriate, it may … make an order (in this Act referred to as a 'compulsion order') authorising … for the relevant period given by subsection (2A) below, such measures … as may be specified in the order.

…

(3) The conditions referred to in subsection (2)(a) above are –

(a) that the offender has a mental disorder;

(b) that medical treatment which would be likely to

(i) prevent the mental disorder worsening; or
(ii) alleviate any of the symptoms, or effects, of the disorder, is available for the offender;

(c) that if the offender were not provided with such medical treatment there would be a significant risk –

(i) to the health, safety or welfare of the offender; or
(ii) to the safety of any other person; and

(d) that the making of a compulsion order in respect of the offender is necessary.

…

(4) The matters referred to in subsection (2)(b) above are –

(a) the mental health officer's report, prepared in accordance with section 57C of this Act, in respect of the offender;

(b) all the circumstances, including –

(i) the nature of the offence of which the offender was convicted; and
(ii) the antecedents of the offender; and

(c) any alternative means of dealing with the offender."

Submission for the appellant

[8] Counsel for the appellant submitted that the sheriff was not entitled to conclude that the conditions set out in subsection (3) were met in relation to the appellant. There was no issue in relation to criteria mentioned in paragraphs (a), (b) and (c). The issue arose in relation to paragraph (d). The sheriff had reports from two medical

practitioners. In her report dated 31 May 2017, Dr Billcliff stated (at page 7): "[The appellant] meets the ground necessary for the granting of a compulsion order". After going on to deal expressly with the first three criteria, she then said, at page 8 of her report:

> "a hospital based order is necessary given that [the appellant's] psychosis remains only partially treated and his insight is poor. If not detained in hospital it is likely that he would default from medication and follow up with a subsequent increase in the intensity of his psychosis and risk".

Accordingly, submitted Ms Ogg, Dr Billcliff had dealt with necessity to a limited extent but she had not explained why she considered that a compulsion order was necessary.

[9] The second medical practitioner, Dr Khan, in his report dated 24 August 2017, also expressly stated that the appellant met the grounds for the granting of a compulsion order, before stating why:

> "… he has a mental disorder, namely paranoid schizophrenia complicated by a history of polysubstance and opioides misuse. Medical treatment is available for [the appellant] in terms of psychotropic medication together with nursing and psychological therapies. If such treatment were not provided, there is a significant risk to his health, safety and welfare and to the safety of others. Without appropriate treatment, his symptoms are likely to worsen. He has only a limited understanding of his illness and is unlikely to comply with medication and psychiatric outpatient appointments … He remains under conditions of special security that can only be provided in the State Hospital in view of the seriousness of his offending behaviours".

However, Dr Khan had not expressly dealt with the issue of necessity.

[10] Counsel submitted that these reports did not entitle the sheriff to conclude that the condition in subsection (3)(d) was satisfied. In the first place, neither doctor stated in terms that a compulsion order was necessary. Second, and in any event, they did not explain why such an order was necessary standing the existence of the compulsory

treatment order. The sheriff had accepted that neither Dr Billcliff nor Dr Khan dealt expressly with the issue but had observed that both were consultant psychiatrists accredited under section 22 of the 2003 Act and concluded that this entitled him to presume that both had a full working knowledge of the legislation and in particular the criteria for the imposition of a compulsion order. Since both doctors had stated that the appellant met the criteria that must mean that they each were of the view that the necessity criterion was satisfied. The sheriff had gone on to take the view that the decision was a judicial one, not a medical one, and had himself considered the question of necessity in the light of all the circumstances of the case. The sheriff's approach was flawed. There was insufficient material before him to entitle him to conclude that a compulsion order was necessary even if the criterion in subsection (3)(d) was superficially met. The only person who explained why a compulsion order might be necessary was the mental health officer, but his report could not be taken into consideration under subsection (3). The decision as to necessity was properly to be regarded as a mixed judicial and medical one, and without the necessary medical evidence from the doctors, the sheriff simply was not entitled to reach his own view as to necessity. In short, there was no material before him to entitle him to conclude that a compulsion order was necessary.

Submission for the Crown

[11] The advocate depute observed that the first three criteria in subsection (3) all related to medical issues. There was no direct reference to such issues in sub-

paragraph (d). The doctors may have taken from that omission that (d) was not a matter on which they required to comment. There simply had to be sufficient material before the sheriff to entitle him to conclude that the order was necessary. The sheriff had adequately dealt with this at paragraphs 11 and 12 of his report.

Discussion

[12] The correct construction of section 57A is far from straightforward. The provision envisages a two-stage process on the part of the court. First, it has to be satisfied, in terms of subsection (2), on the written or oral evidence of two medical practitioners, that the conditions mentioned in subsection (3) are met in respect of the offender; and also, having regard to the matters mentioned in subsection (4), that it is appropriate, before being entitled to make a compulsion order. The matters mentioned in subsection (4) are the mental health officer's report; all the circumstances including the nature of the offence and the antecedents of the offender; and any alternative means of dealing with the offender. However, the conditions which must be satisfied in subsection (3) include that the making of a compulsion order in respect of the offender is necessary. It is difficult to envisage circumstances in which the court would conclude that the making of the order was necessary, but that, nonetheless, an order was not appropriate. Neither counsel for the appellant nor the advocate depute was able to suggest a realistic scenario where such an outcome might be likely; nonetheless, it is one which the legislature has envisaged.

[13] We also observe that subsection (2) does not give the sheriff a free rein to consider necessity, having regard to such matters as he considers relevant. Rather, he is constrained, by the opening words, to have regard only to the evidence of two medical practitioners in considering the four criteria laid down by subsection (3). The first three criteria, specified in paragraphs (a) to (c) are all clearly medical issues, within the sole province of the doctors. Whereas the advocate depute suggested that sub-paragraph (d) was intended to deal with a non-medical issue, we consider it more likely that the legislature also intended criterion (d) to be a medical, rather than a judicial, question, since it too is a matter upon which the court requires to be satisfied on the evidence of two medical practitioners, and only that evidence. In other words, the test, at that stage of the application of section 57A, is whether there is *medical* opinion (from two doctors) that the making of a compulsion order is necessary. The sheriff, of course, still has a role to play. He must be satisfied on the evidence of two doctors that the order is indeed necessary. It is open to him not to be so satisfied, if he considers for some reason, that the evidence of one or both of the doctors is unreliable or unsound or ought not to be accepted for some other reason, just as he would be entitled not to be satisfied in relation to one of the other criteria. What the sheriff is not entitled to do is to form his own view on any of the criteria (including necessity) without any basis for so doing on the medical evidence before him. If, for example, one of the doctors did not state that an offender suffered from a mental disorder, it would not be open to the sheriff to conclude, from his own examination of the facts and circumstances or from other material, that he was; and the same, we suggest, must apply equally to the criterion of necessity.

[14] Such an approach resolves the apparent tension between the necessity test in subsection (3) and the appropriateness test in subsection (4). At the first stage of the process the court is enquiring whether the evidence of the two medical practitioners is that the order is necessary, rather than whether, in the court's own view, the order is necessary. If the evidence is that the order is necessary then the court will then go on to consider whether to make the order, which it will do if satisfied that it is appropriate to do so having regard to the matters mentioned in subsection (4).

[15] The fact that the question of necessity is essentially a medical question means that, in our view, the medical practitioners are entitled to disregard the existence of a compulsory treatment order. The existence of another order is a matter which bears upon appropriateness rather than necessity. Indeed, were the medical practitioners to express a view that an order was not necessary because of the existence of another order, such as a compulsory treatment order, that would arguably be usurping the role of the sheriff.

[16] We would make three final observations on the construction of subsection (2) and (3). The first is that simply because the medical practitioners must give evidence which entitles the sheriff to be satisfied that the four criteria in paragraphs (a) to (d) are met, does not mean that the practitioners must slavishly follow the language of the Act. The sheriff may, as with all evidence, treat it as a whole and draw inferences therefrom, provided such inferences are justified by what is expressly stated. That said, and this is our second observation, it is patently not enough for the medical practitioners to say that they are satisfied that the criteria are met, without saying more. That would not in our

view provide the sheriff with sufficient material to entitle him to conclude that the criteria in subsection (3) are satisfied. It would be no answer to that to say that the medical practitioners can be presumed to know what the criteria are. They must provide a sufficient basis for the sheriff to conclude that the four criteria are met. Our third observation is that, on this construction, it is not for the sheriff himself to consider necessity by having regard to non-medical factors or considerations. That is, as we have said, a question purely of medical evidence. As soon as the sheriff has accepted that evidence – if he does – then he moves on to consider whether he should make the order having regard to the appropriateness of making the order, under reference to the factors mentioned in subsection (4).

[17] We now return to the sheriff's report. To the extent that he embarked upon the exercise of considering necessity by having regard to matters other than the medical evidence before him, we consider that he did fall into error. In paragraph 10 of his report, he makes clear that he had regard to the circumstances of the offence and to the appellant's antecedents. These are matters which are undoubtedly relevant under subsection (4) when considering appropriateness but are not relevant under subsection (3) where, as we have said, the sheriff must have regard only to the medical evidence and to nothing else. In addition, the sheriff erred to the extent that he concluded that the medical practitioners must be presumed to have considered necessity because they were accredited under section 22 of the 2003 Act and could be taken to be aware of the criteria.

[18] However, it does not follow that the compulsion order was not properly made. As we have said, it is open to the court to have regard to the reports as a whole in order to ascertain what the doctors' view was on the matter of necessity. It then becomes a straightforward requirement that the court consider the medical evidence to establish whether the making of a compulsion order in respect of the offender, was, in the opinion of the doctors, necessary. Medical reports need not be construed as if they were conveyancing documents or commercial contracts. With that in mind, we return to the reports of Dr Billcliff and Dr Khan. Dr Billcliff states on the first page of her report that she has been asked to address the test necessary for the recommendation of a compulsion order. She then recounts the charges and the appellant's personal history before going on to consider his psychiatric and forensic history. After recording his history at some length, she notes that in April 2016 the appellant was placed on a compulsory treatment order before committing the assault which was the subject of the present proceedings in December 2016. She then expresses the opinion that he remains appropriately detained on a compulsory treatment order, and that it remains necessary for him to be detained on a hospital based order in the absence of any viable alternatives at this point in his care. Dr Billcliff then states that the appellant meets the ground (*sic*) necessary for the granting of a compulsion order. After making it clear that the first three criteria in subsection (3) are met, she states that "a hospital based order is necessary given that the appellant's psychosis remains only partially treated and his insight is poor. If not detained in hospital it is likely that he would default from medication and follow up with a subsequent increase in the intensity of his psychosis

and risk … He requires care under conditions of special security that can only be provided in the State Hospital, given the seriousness of his offending history, including a conviction of attempted murder and the nature of the assault in December 2016. He requires further testing in this setting before a consideration can be given to stepping him down to a less secure environment". Dr Khan in his report of 24 August, also states in terms that he is of the opinion that the appellant meets the grounds for the granting of a Compulsion Order before going on to make the comments which we have quoted at paragraph 10 above. He also said that the appellant "remains under conditions of special security that can only be provided in the State Hospital".

[19] Having regard to the passages to which we have drawn attention and reading the reports as a whole, although neither states expressly that the making of a compulsion order is necessary, it can readily be inferred from both reports that the authors were of that view. Both doctors deal with the question of necessity by stating that treatment can only be provided under compulsion in a hospital setting. That amounts to necessity by any other name.

[20] Accordingly, we conclude, albeit for different reasons than he gave, that the sheriff was entitled to proceed on the basis that the conditions specified in subsection (3) were met. The second ground of appeal, thereafter, effectively flies off standing our observations in paragraph 16 above. Having accepted the medical evidence, the sheriff then had to consider appropriateness rather than necessity. That is the stage where he required to consider, among other factors, whether to make a compulsion order standing the fact that there was already in place a compulsory treatment order which

also placed the appellant under a degree of compulsion. This was the stage for the sheriff to take into account the appellant's antecedents and the nature of the acts which had committed, as well as the mental health officer's report (which, as the appellant acknowledged, did support the imposition of a compulsion order). The sheriff's approach in considering those matters, with regard to appropriateness, cannot be faulted. He highlighted certain differences between a compulsory treatment order and a compulsion order, and the appellant does not dispute that there are differences. Whether or not to impose a compulsion order was ultimately a matter for the exercise of the sheriff's discretion and we see no reason to interfere with the manner in which he did so.

[21] Accordingly, the appeal is refused.