HOSPITAL ORDERS – *Baja* [2025] EWCA Crim 967

Importance of factual circumstances and nexus of mental health to offending behaviour

The following is a joint case commentary concerning *R v Baja* [2025] EWCA Crim 967 by Professor Keith Rix and Paramjit Ahluwalia. *Baja* raises important issues in relation to the imposition of hospital orders under s.37 of the Mental Health Act 1983.

This judgment was orally delivered by LJ William Davis who sadly passed away earlier this year, with the written judgment then approved by Thornton J.

Hospital Order quashed by Court of Appeal

i. This is an unusual and troubling case for many reasons. The offender was convicted of rape; yet only sentenced some 13 months post-trial to a hospital order under s.37 of the Mental Health Act 1983 (as amended, the 'MHA.'). His Majesty's Solicitor General applied to refer the sentence as unduly lenient pursuant to s.36 of the Criminal Justice Act 1988. The Court of Appeal quashed the hospital order, finding not only that the sentence had been unduly lenient, but also unusually that the offender had been sentenced on a 'false basis.' The hospital order was substituted with an extended determinate sentence, consisting of 5 years custodial imprisonment and an extended licence period of 3 years.

ii. The test for considering whether a sentence is unduly lenient under *Attorney-General's Reference (no. 4 of 1989)* [1990] 1 WLR 41 is '*where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate*.' The difficulties in *Baja* arguably emanated from a failure to consider the factual circumstances, as well as the lack of a demonstrable connection between the offending and any mental health condition.

Factual background of case

iii. The victim had walked away from the defendant at a party after he had made derogatory comments; he followed the victim outside and whilst she had been crouched down, he ripped her jeans and demanded to know why his friend got to have sex with her when in his words, "*he got nothing*." She shouted at him to stop,

and his response was "*no, it's fine.*" In police interview, the defendant gave an account that no sexual intercourse took place, instead suggesting he had merely consensually touched and kissed the victim. Forensics however revealed DNA deposited on the victim's jeans, which the defendant went on to claim was via secondary transfer, as he had masturbated on a sofa where the victim had been sitting. At trial, the defendant did not give evidence. However, the victim was cross-examined on a separate basis entirely, it being suggested that consensual sexual intercourse had taken place with the defendant. However, post being convicted, the defendant's account of events (set out in pre-sentence and psychiatric reports), reverted back to a claim of limited physical contact without intercourse having taken place.

Unusual features in the case

iv. The evidence given by a psychiatrist in *Baja* included an opinion that the defendant was experiencing manifestations of his psychotic state at the time of the offence; but this was based on nothing more than the fact that he had a psychotic illness which had begun two years previously and that it would have been expected to deteriorate with time. However, the defendant had not outlined any account of the events relating to the victim. The Court of Appeal observed that this was at best problematic and insufficient for the court to be able to decide the extent to which the offending was attributable to the mental disorder.

v. The Judge in this case had not been left with a clear understanding of the release provisions under the MHA, s 37.

vi. One of the experts said that given the uncertainty about the link between the mental illness and the offence, that an order under the MHA, s 45A could be considered but as the distinguishing feature of this sentence under Part III of the Act is punishment in the form of imprisonment, this is not a matter on which an expert should opine.

vii. Although at sentencing this had been a case where the criteria for a s.37 hospital order had been considered to be met, the Court of Appeal found it surprising that a s.41 restriction order was not made – given this was a case where there was a risk of the offender committing further offences if set at large, making it necessary to protect the public from serious harm.

viii. A curious feature of the case is that although the offender showed no evidence of psychosis over the course of the first twelve weeks that he was detained in hospital, there was no change in his medication. It seems surprising that his medication was not withdrawn.

ix. Continuous assessment by the treating clinician in the 12 weeks post the hospital order being imposed demonstrated that the offender did not have a mental disorder that made it appropriate for him to be detained in hospital for treatment. The conclusion of the Court of Appeal was that the defendant was sentenced on a 'false basis.'

Critical learning points from judgment:

x. A Judge needs to consider and apply the principles of *Vowles* [2015] EWCA Crim 45 and *Edwards* [2018] EWCA Crim 395, as well as the Mental Health Sentencing Guideline prior to imposition of a hospital disposal.

A Sentencing Judge needs to make Culpability findings

xi. An important facet within the Mental Health Sentencing Guideline is that culpability will '*only be reduced if there is sufficient connection between the offender's impairment or disorder and the offending behaviour*.'

xii. As highlighted within this Sentencing Guideline, it is the duty of the Sentencing Judge to make a decision upon culpability. Unfortunately in Baja's case, no finding was made by the Judge on culpability. Although expert evidence may well be valuable, a Sentencing Judge is not bound to follow such expert opinion (and where appropriate should set their reasons out for not following that opinion).

xiii. In the Mental Health Sentencing Guideline, there are a series of questions which provide a useful starting point on determining culpability which includes:

- *'At the time of the offence did the offender's impairment or disorder impair their ability:*
  - *to exercise appropriate judgement,*
  - *to make rational choices,*

- *to understand the nature and consequences of their actions?*

- *At the time of the offence, did the offender's impairment or disorder cause them to behave in a disinhibited way?*
- *Are there other factors related to the offender's impairment or disorder which reduce culpability?*
- *Medication. Where an offender was failing to take medication prescribed to them at the time of the offence, the court will need to consider the extent to which that failure was wilful or arose as a result of the offender's lack of insight into their impairment or disorder,*
- *"Self-medication". Where an offender made their impairment or disorder worse by "self-medicating" with alcohol or non-prescribed or illicit drugs at the time of the offence, the court will need to consider the extent to which the offender was aware that would be the effect,*
- *Insight. Courts need to be cautious before concluding that just because an offender has some insight into their impairment or disorder and/or insight into the importance of taking their medication, that insight automatically increases the culpability for the offence. Any insight, and its effect on culpability, is a matter of degree for the court to assess.'*

Lack of nexus to offence

xiv. The difficulty in this case concerning serious sexual offending, was that there simply was no real account by the defendant (nor from the factual circumstances or treatment post sentence) evidencing any connection between the mental health disorder and the offence. Without such a 'nexus' and lack of judicial determination upon such connection, then ultimately the Sentencing Guideline was not adhered to.

xv. A solution in this case could have been the imposition of an interim hospital order under the MHA, s 38. A particular reason why this was suitable was on account of the Sentencing Court not having before it any evidence given by any clinician at the hospital where a bed was to be made available.

xvi. Although notably sentencing had taken more than 12 months post-conviction, there was no requirement for the Judge to make a final determination upon sentence. As the Mental Health Sentencing Guideline highlights '*when requested by clinicians wanting to undertake an inpatient assessment, for offences punishable with imprisonment, courts may wish to consider making an interim hospital order*.'

Punishment required - is a judicial decision

xvii. It is for a Judge to determine the extent to which punishment is required. This was not a matter for which any psychiatrist was entitled to opine.

Protection of public- judicial decision (assisted by information from experts)

xviii. It is for a Judge to determine protection of the public. Psychiatric reports could assist however by ensuring a Judge understood release provisions applicable and potential length of disposals in practice. For example, often offenders detained under s.37 hospital orders are discharged in less than 12 months; that in the first instance the duration of the order is 6 months duration, that during these 6 months the offender can be discharged by their responsible clinician and subsequently they can be discharged upon application to a mental health tribunal or the hospital managers or by the responsible clinician.

xix. An offender having no previous convictions and academic potential was of minimal relevance in such a case; for the defendant presented a high risk of serious harm to women.

Commentary by Professor Keith Rix (Door Tenant at 2 Dr Johnson's Buildings) and Paramjit Ahluwalia (1 Pump Court).

Further reading of interest on above case – see MAEP newsletter:

Professor Keith Rix is an experienced and distinguished consultant Forensic Psychiatrist, who produces the MAEP Expert Healthcare Witness Matters newsletter. This is a resource available on the Royal College of Psychiatrists website

for all healthcare expert witnesses, and is a resource that may be of interest to criminal practitioners ((https://www.rcpsych.ac.uk/improving-care/ccqi/multi-source-feedback/maep/maep-newsletter-resources).