67.9 *General judicial guidance/Step by step guide*

R v Edwards and Others 2018 EWCA Crim 595 para 12 Mental Health Act s 45A could have been better drafted but the position is clear. Section 45A and the judgment in *R v Vowles* 2015, see above, do not provide a 'default' setting of imprisonment, as some have assumed. The sentencing judge should first consider if a Hospital Order may be appropriate under section 37(2)(a). If so, before making such an order, the court must consider all the powers at its disposal including a section 45A order. Consideration of a section 45A order must come before the making of a Hospital Order. This is because a disposal under section 45A includes a penal element and the court must have 'sound reasons' for departing from the usual course of imposing a sentence with a penal element. Sound reasons may include the nature of the offence and the limited nature of any penal element (if imposed) and the fact that the offending was very substantially (albeit not wholly) attributable to the offender's illness. However, the graver the offence and the greater the risk to the public on release of the offender, the greater the emphasis the judge must place upon the protection of the public and the release regime.

para 13 The reason for the court's emphasis on the penal element of any sentence in *R v Vowles* 2015 is to be found in the purposes of sentencing set out in Criminal Justice Act 2003 s 142. They are: a) the punishment of offenders, b) the reduction of crime (including its reduction by deterrence), c) the reform and rehabilitation of offenders, d) the protection of the public, and e) the making of reparation by offenders to persons affected by their offences.

para 14 It follows that, as important as the offender's personal circumstances may be, rehabilitation of offenders is but one of the purposes of sentencing. The punishment of offenders and the protection of the public are also at the heart of the sentencing process. In assessing the seriousness of the offence, Criminal Justice Act 2003 s 143(1) provides that the court must consider the offender's culpability in committing the offence and any harm caused, intended or foreseeable. Hence the structure adopted by the Sentencing Council in the production of its definitive guidelines and the two pillars of sentencing: culpability and harm. Assessing the culpability of an offender who has committed a serious offence but suffers from mental health problems may present a judge with a difficult task.

The steps are:

i) Consider whether a Hospital Order may be appropriate.

ii) If [it is], the judge should then consider all his sentencing options including a section 45A order.

iii) In deciding on the most suitable disposal the judge should remind him or herself of the importance of the penal element in a sentence.

iv) To decide whether a penal element to the sentence is necessary the judge should assess (as best he or she can) the offender's culpability and the harm caused by the offence. The fact that an offender would not have committed the offence but for their mental illness does not necessarily relieve them of all responsibility for their actions.

v) A failure to take prescribed medication is not necessarily a culpable omission; it may be attributable in whole or in part to the offender's mental illness.

vi) If the judge decides to impose a Hospital Order under section 37/41, he or she must explain why a penal element is not appropriate.

vii) The regimes on release of an offender on licence from a section 45A order and for an offender subject to section 37/41 orders are different but the latter do not necessarily offer a greater protection to the public, as may have been assumed in *R v Ahmed* 2016 EWCA Crim 670 and/or or by the parties in the cases before us. Each case turns on its own facts.

viii) and ix) [Not listed. Restatement about the rules for grounds of appeal and fresh evidence.]

67.45a ***Hybrid Orders Release***

R v Thompson and Others 2018 EWCA Crim 639 (Five-judge court) para 5 If an offender, subject to a Hybrid Order (with a determinate or an extended sentence), has been returned to prison as treatment is no longer required, eligibility for release is the same as if he had received the determinate or extended sentence alone. If the offender remains in hospital, the limitation direction (or Restriction Order) expires on the date that the offender would have been released on licence (i.e. directed by the Parole Board in the case of an extended or indeterminate sentence) but he will remain in hospital until considered well enough to be discharged following the normal procedures.

R v Edwards and Others 2018 EWCA Crim 595 The Court stated the guidance in *R v Thompson and Others* 2018 EWCA Crim 639 above and added: *Indeterminate sentences* para 9 If a section 45A patient's health improves such that his responsible clinician or the Tribunal notifies the Secretary of State that he [or she] no longer requires treatment in hospital, the Secretary of State will generally remit the patient to prison under Mental Health Act 1983 s 50(1). On arrival in prison, the section 45A order would cease to have any effect. Release would be considered by the Parole Board in the usual way. para 10 If a section 45A patient has passed their tariff date and the Tribunal then notified the Secretary of State that he is ready for conditional discharge, the Secretary of State could notify the Tribunal that he should be so discharged (Mental Health Act 1983 s 74(2)). In that case, the offender would be subject to mental health supervision and recall in the usual way. However, the Secretary of State would, in practice, refer the offender to the Parole Board.

67.64 ***Appeal with new assessment etc.***

R v Kitchener 2017 EWCA Crim 937 In 2002, D pleaded to attempted murder. He stabbed a stranger, V, in the neck and tried to strangle her. V thought she was going to die but managed to raise the alarm. D walked away and then returned to kick her. D later admitted the attack. He said he was responding to hallucinations and intended to kill and torture V. It was D's 20th birthday and he was of good character. When aged 4, D witnessed a serious assault on his mother by his father. When aged 16, he was sexually abused. A medical report said, a) D did not suffer from any psychotic illness, b) D suffered from a number of psychiatric problems, and c) these problems did not amount to a serious mental illness. The Judge was satisfied that D had an unstable character, presented a serious danger to the public and was likely to commit violent offences in the future. D was sentenced to custody for life with a 4-year 8-month minimum term. In June 2007, D attempted suicide. He was assessed and transferred to Rampton Hospital. Medical reports before the Court said at the time of his sentence, D was suffering from a severe personality disorder. In particular he had 'depressive episodes', emotionally unstable personality disorder and dependent personality disorder. Another report agreed and said the disorder was intimately associated with the offence. Further, a) if D were to return to prison that would cause a deterioration to his condition, b) a personality disorder is difficult to detect in a 20-year-old, and c) it was in the public interest for a Hospital Order to be made. Held. Very considerable caution should be exercised before a Judge decides a Hospital Order is the appropriate disposal where a dangerous offender has committed a very violent crime and the offender is suffering from a personality disorder. The new evidence could not be obtained in 2002. Our task is not to conduct a re-sentencing exercise but to consider whether the sentence was wrong in principle or manifestly excessive. D needs hospital treatment. Prison is counter-productive to the treatment needed, which can only be provided in a hospital setting. That will provide the public with greater public protection by gradually securing D's successful return to the community. We substitute a Hospital Order with a Restrictions Order.