Neutral Citation Number: [2019] EWCA Crim 1248

No: 201801527/B2
IN THE COURT MARTIAL APPEAL COURT

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 5 July 2019

B e f o r e:

LORD JUSTICE DAVIS

MR JUSTICE LEWIS
MR JUSTICE JULIAN KNOWLES

R E G I N A

v

ANDREW REA

Computer Aided Transcript of the Stenograph Notes of Epiq Europe Ltd, Lower Ground, 18-22 Furnival Street, London EC4A 1JS, Tel No: 020 7404 1400 Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

WARNING: Reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

Mr T Wilkins appeared on behalf of the **Appellant**
Lt Colonel B Siddique appeared on behalf of the **Service Prosecuting Authority**

J U D G M E N T
(As Approved by the Court)

1. LORD JUSTICE DAVIS: This is an appeal brought against the appellant's conviction on two counts of assault at the conclusion of a Court Martial on 8 December 2016.

2. The appeal, brought by leave of the single judge, is based on an asserted misdirection in the summing-up of the Assistant Judge Advocate General with regard to what is said to be a cross-admissibility issue. In addition, the appellant applies to adduce fresh evidence from three witnesses, which application has been referred to the Full Court by the single judge.

3. As a result of his convictions the appellant, who was by then a Sergeant, was reduced in rank to Corporal and was also sentenced to 90 days' detention. We were pleased to hear that he has since been re-promoted back to Sergeant. However, as matters stand, these convictions will stand on his record and may or may not have potential adverse consequences for him in his future career.

4. We gained the impression from what we were told that, not unlike a number of convicted defendants, this appellant has a burning sense of grievance at his convictions, he considering that he was innocent of the matters on which he was convicted. Of course, under the system operating in this jurisdiction, decisions on the facts are left to the jury or, in this case, the Board who had heard all the evidence. Ultimately, we have to consider whether or not the convictions are safe by reference to the grounds of appeal which have been argued.

5. As we have indicated, the convictions were as long ago as 8 December 2016. Moreover, the underlying assaults which had been the subject of the charges raised had occurred as

long ago as 22 April 2015. The application for leave to appeal against conviction was only issued in this court on 12 April 2018. That is over 15 months out of time by reference to the rules.

6. So the question has to be asked: how could so long a delay justify the granting of the necessary extension of time to permit this appeal to be brought at all? Notwithstanding the very brief comments made in the grounds and advice on appeal, no proper explanation has ever been given to justify so great a delay.

7. It has been said, in a very recent Gogana affidavit which should have been lodged far earlier than it was and indeed was only lodged on the direction of this court shortly before this hearing, that the appellant instructed his present solicitors in October 2017, with counsel, Mr Wilkins, being instructed shortly thereafter. That of itself is some 10 months after conviction. But even then, it took a further 6 months before the application for permission to appeal was lodged. References are made, without any particular specificity, that there were funding difficulties, that transcripts had to be obtained, enquiries had to be made and there was also said to be pressure of work on the part of counsel. Those considerations may or may not have been involved but they cannot of themselves begin to justify such a delay, taken overall. Furthermore, of the proposed fresh evidence which it is sought to adduce, one of those statements of an expert witness had in fact been obtained in February 2017 before the new solicitors were instructed. So nothing, it would appear, even then had been done to launch an application for permission to appeal at that time.

8. It seems to us that to be very unfortunate that leave to appeal was granted - moreover, granted solely on a point relating to the adequacy of the summing-up which needed no

lengthy investigation at all - by the single judge essentially because the single judge considered that particular point to be arguable. However, the first matter that needed to be considered was whether or not an acceptable explanation for the delay had ever been given and it had not been. With all respect, it is not ordinarily appropriate for a single judge to grant a very lengthy extension of time such as was sought here, in circumstances where no proper explanation for the delay has been given and simply because the single judge considers that one of the grounds raised might be arguable. If the single judge is sufficiently concerned about the safety of the conviction, because the points raised on the proposed appeal might be arguable but there is also the accompanying great delay, the proper course, in the ordinary way is for single judges to refer the entire matter to the Full Court without a single judge granting the necessary extension of time or granting leave to appeal. However, all that being said in this particular case the single judge has granted the necessary extension of time to pursue the first ground of appeal and accordingly, we must and should deal with it.

9. The background facts, in summary, are these. We stress that it is a summary only; we are not going to replicate the entire detail of underlying events.

10. At the relevant time the appellant, who was at the time formally a Corporal but was acting as a Platoon Sergeant in the Royal Regiment of Fusiliers, was based at the Regiment's barracks in Tidsworth in Wiltshire. On 22 April 2015 his company (C Company) were celebrating St George's Day. The following day the Company was due to be assigned to Canada. However, two members of the Company, Fusilier Knight and Fusilier Shaw, were not going to Canada. In the case of Knight, it seems that was because he had not obtained his passport and in the case of Shaw that was apparently on

medical grounds. There was an amount of evidence to indicate that those two Fusiliers were not particularly popular at all within the regiment and, in short, were not considered up to standard as Fusiliers. It is clear enough that a considerable amount of alcohol had been consumed by a number of people that day. At all events there came a time when Knight, in the evening, went to his room to collect an ornamental kukri, he apparently saying that he wanted to clean it or something like that. He then went with his girlfriend, who was there, a nurse called Aisha Goddard, along with Fusilier Shaw to the room of another Fusilier called Booth. There was evidence that a large group gathered outside that room at around 8 o'clock in the evening. Knight was attacked by somebody.

11. It was the prosecution case that the appellant, acting as Platoon Sergeant, then told everyone to leave. It was the prosecution case that the appellant was then on his own in that room with Knight. According to Knight, the appellant then grabbed him by the throat and held him on the bed for some 20 to 30 seconds. That constituted the first charge which the appellant was facing and, in the event, he was acquitted of that. At all events following that particular incident there was no real dispute but that Knight went back to his own room. Ms Goddard was also there and the appellant had also gone to that room.

12. The evidence of Ms Goddard and of Knight was, putting it shortly, to the effect that the appellant then threatened Knight and then told Ms Goddard to go outside the room which she did leaving the appellant and Knight alone in the room. The prosecution case was that the appellant then attacked Knight by punching him. Ms Goddard, and of course she was a nurse, was amongst other things to say that when she came back into the room, there were bruises all over Knight's face. That at all events was the second charge which

the appellant faced and he was convicted on that.

13. As for Fusilier Shaw there was evidence that during the day he had been in effect been ridiculed for being medically downgraded. During the day he had been involved in a physical attack or attacks with others. In particular, there had been involved a fusilier called Thompson. At one stage there was evidence that a punch was thrown to Shaw's face drawing some blood.

14. At all events Shaw returned to his room. The appellant in evidence was to say that he went to Shaw's room on two occasions. According to Shaw, there came a time when Thompson reappeared at his door holding a bar, followed by the appellant. According to Shaw, the appellant then violently attacked him, that is say Shaw, wedging his head between the headboard and the wall and punching him repeatedly, leaving Shaw, according to him in his evidence, a "bloody mess". At all events an amount of blood on the wall and elsewhere in Shaw's room was in due course found. That incident was to constitute the third charge in respect of which the appellant was also convicted.

15. The appellant gave evidence at the Court Martial. The defence case was that on count 1 the appellant had never assaulted Knight as alleged at all. It simply never happened. On count 2 he accepted that he had struck Knight once but that was in self-defence when Knight had come at him in the room holding the kukri. On count 3, the defence case was to the effect that the appellant had never punched Shaw at all and had never wedged his head between the headboard and the wall. The only role that the appellant throughout had had, acting responsibly as Platoon Sergeant, was as a peacemaker. It was said that the only physical contact he had had with Shaw on that occasion was by way of defence of self or another and that was to restrain Shaw by holding him by his

shoulders and pushing him back when, as he saw it, Shaw was about to attack either him, the appellant, or Thompson. So far as the presence of a considerable quantity of the blood in Shaw's room was concerned, that was sought to be explained by the injuries inflicted on Shaw in the previous altercation or altercations.

16. It had in advance of the trial been indicated that Thompson would be a witness called by the defence. Indeed, we gather that Thompson was present at the Court-Martial hearing ready to give evidence. It has been explained by counsel then appearing for the appellant at the Court Martial that, after she had spoken to Thompson, it was considered that he would not be a reliable or satisfactory witness. At all events Thompson was not called to give evidence on behalf of the defence at the Court Martial.

17. On the face of it, all this was a pure matter of fact for the Board to assess by reference to the evidence, they, of course, having to direct themselves by reference to the criminal standard of proof. The summing-up of the Assistant Judge Advocate General was, on the face of it, full and thorough. Certainly no objection was taken to it at the time by the very experienced counsel then appearing for the appellant.

18. As we have said, Mr Wilkins was subsequently instructed late in 2017. By the ground of appeal, which he has been given leave to pursue, he complains that there was a material error in this summing-up rendering the convictions of the appellant unsafe.

19. Part of the evidence had related to Shaw, after the alleged attack on him in his room, contacting Knight and complaining that he had been beaten up by the appellant and Knight also complaining to Shaw, that he, Knight, had also been attacked by the appellant. That, it is said, was also to be put in the context of what had been shortly

stated by the prosecution in the course of its opening speech, that there had been a "pattern" of offending on the part of the appellant in terms of assaulting Fusiliers, on their own, in their rooms, by way of in effect punishment for poor performance. What is complained about is that the judge summing up, so it is said, conveyed the impression that the various incidents were cross admissible; but the judge gave none of the sorts of directions commonly given to the benefit of the defence when issues of cross admissibility arise. In our view, with all respect, this is a complete misreading of the context and of the summing-up itself. Quite simply, no issue of cross admissibility had risen at trial at all. Indeed, we are told that in discussions between the counsel and the Assistant Judge Advocate General before speeches, no one suggested that any cross-admissibility direction of any kind, tailored or otherwise, be given. That seems to us to have been plainly appropriate given the context of this particular case. To introduce considerations of cross-admissibility would not have accorded with what was being alleged and would have been a wholly unnecessary and unjustified distraction.

20. To the contrary, the Assistant Judge Advocate General, in the course of his summing-up, had clearly instructed the Board, very near to the outset of the summing-up, as follows:

    i. "Now there are three counts in this case and you are entitled to consider all the evidence in relation to the charges as it may assist you in coming to your decision but you must focus on each charge separately and decide whether you are sure the prosecution has proved its case on each charge against the defendant.

    ii. Now the evidence is different in relation to each charge so your findings may be the same or they may be different."

21. So there the Assistant Judge Advocate General was specifically giving the Board a separate treatment direction. Mr Wilkins, rather faintly sought to refer to the phrase:

"You are entitled to consider all the evidence in relation to the charges as it may assist you in coming to your decision ..." But that was entirely correct. All the evidence had to be considered. Each individual charge had to be placed into the context of the entire factual scenario.

22. However, Mr Wilkins then sought to complain about a further instruction in this context given by the Assistant Judge Advocate General at a later stage of the summing-up. Complaints had, on the evidence, been made by Fusilier Knight or Shaw to other persons. The judge gave a conventional direction in that regard saying, amongst other things:

    i. "It is not evidence as to what actually happened between Fusilier Shaw and the defendant, however, it is evidence which you are entitled to consider because it might help you decide whether or not Fusilier Shaw has told you the truth ... "

23. The judge then went on immediately to deal with the position about the discussions between Fusilier Shaw and Fusilier Knight. What he said was:

    i. "Now how should you deal with the evidence, if you accept it, of both Fusilier Shaw and Fusilier Knight recalling that the other said that he had been assaulted by the defendant when Fusilier Shaw arrived injured in Fusilier Knight's room. Well, if you conclude that both Fusilier Knight and Fusilier Shaw were close friends you should approach that aspect of their evidence with additional caution, bearing in mind the direction I have given you above. If you conclude they were not then you should just bear in mind that it is not independent evidence as to what has taken place."

24. Although Mr Wilkins sought to criticise that passage by reference to principles of cross admissibility, it is evident that it is nothing to do with cross admissibility at all. What the Judge Advocate General there was dealing with was evidence relating to what is sometimes called recent complaint and which is admissible under the provisions of

section 120 of the Criminal Justice Act 2003. In that particular context the instruction he gave to the Board was wholly unexceptional.

25. Mr Wilkins then rather departed from the way in which he had previously put the case and sought to say that in any event, given the nature of the case, the judge should have given firm instruction to the jury about the dangers of contamination and collusion. Given that the judge had given a separate treatment direction, it is hard to see how anything further needed to be said: the more so when neither Fusilier Knight nor Fusilier Shaw had been cross-examined on the basis that they had colluded together with a view to fabricating allegations against the appellant, which indeed would not have been a very likely scenario given that there were undoubtedly incidents involving the appellant and Knight and then involving the appellant and Shaw.

26. Our overall view is that this ground, even with the variations which Mr Wilkins has sought to put on it this morning, is completely misconceived. The Judge Advocate General's summing-up was entirely appropriate; he had given an appropriate separate treatment direction and the subsequent passages which we have mentioned were entirely proper directions in the context of recent complaint. There is, in our view, no substance in this point, however it is formulated, and so we dismiss this ground of appeal.

27. We then turn to the application made before us for leave to adduce fresh evidence. We would have been minded, by reason of the wholly unacceptable delay alone, to have refused leave to admit this evidence. However, given that the single judge saw fit to grant the extension of time on the other ground raised and given that the point has been argued in detail before us, we should deal with it.

28. It is, of course, fundamental that such fresh evidence can only be permitted to be adduced if it is necessary or expedient in the interests of justice to do so, having regard to the criteria set out in section 28 of the Courts-Martial (Appeal) Act 1968, which corresponds to section 23 of the Criminal Appeal Act 1968.

29. We have considered *de bene esse* the three statements desired to be adduced. Those are statements of a Mr Gregory (formally known as Howe), Mr Whyley and Ms Leak. It should be added that it had been intended that Mr Gregory be present at court today with a view to giving oral evidence if needed. However, for entirely understandable reasons relating to his wife and a forthcoming baby Mr Gregory has not been able to be at court today and we in no way hold that against the appellant or Mr Gregory; thus we have thought it appropriate to proceed in the first instance to consider this application by reference to the witness statements as they stand.

30. Dealing first with the proposed evidence from Mr Whyley and Ms Leak, we think that there could be no basis whatsoever for giving leave for that evidence to be adduced having regard to section 28 of the 1968 Act.

31. So far as Mr Whyley is concerned, his witness statement, which is dated 3 January 2018, on examination is entirely, in the relevant respects, hearsay. It purports to set out what Mr Thompson had subsequently told Mr Whyley, well after the

appellant had been convicted. Mr Whyley himself does not claim to be an eyewitness of any of the events that had occurred on the particular evening in question. Mr Wilkins was wholly unable to explain, by reference to the statutory provisions on hearsay contained in the Criminal Justice Act 2003, how there was any proper basis for allowing hearsay evidence of this kind to be adduced. Moreover, there was not only nothing to indicate that Mr Thompson might be unavailable to give such evidence, as is set out in Mr Whyley's statement, but more than that it will be recalled that the defence had initially proposed to call Mr Thompson at the Court Martial, that Mr Thompson was present at the Court Martial and the tactical decision was then made, for understandable reasons, not to call Mr Thompson. It is wholly unacceptable and indeed wholly unimpressive that it should now be sought to get in Mr Thompson's evidence by way of hearsay only. The court will not permit such a course to be taken; indeed it would be contrary to statute.

32. The evidence of Ms Leak given, it may be noted in February 2017, that is to say shortly after conviction but well before the new solicitors were instructed, also with respect leads nowhere. She is an expert with regard to blood pattern analysis. If evidence of such a kind was thought to be helpful to the defence (and Mr Wilkins argued that it would have been helpful) then there is no reason why it could not have been

adduced at the Court Martial. We rather suspect that to complicate matters by expert evidence of such a kind may have not necessarily have been desirable; but at all events it was to be thought helpful, there is no reason why it could not have been adduced at the hearing. But in any event the statement of Ms Leak leads nowhere. It is quite true that she makes criticism of the asserted inadequacy of the investigation involved at the time. Her own conclusion is such that, as she says, given the severe limited scope for her own scientific investigation, as matters stood, she had seen nothing to support the prosecution case and nothing to support the defence case. So on that view, her evidence could afford no ground for allowing the appeal and it could not meet the requirements of section 28 of the Courts Martial (Appeal) Act 1968.

33. The final statement sought to be relied upon is that of Mr Gregory, formally known as Mr Howe. That was made early in 2018. In his latest statement he was to say that he had been at the barracks that night. It in fact has emerged that for the purposes of the court-martial proceedings, Mr Gregory (formally Mr Howe) had made two statements, one dated 8 July 2015 and the second dated 12 July 2016. Both such statements had been disclosed to the defence as unused material.

34. In the course of those statements, amongst other things,

Mr Howe (as he was then called) had said that in the initial physical altercation between Thompson and Shaw, he had seen several punches and said that, amongst other things, Shaw was "in a bad way, his face was covered in blood". He was to say that he had helped Shaw to his room to help him clean up. So that evidence contained in the disclosed unused material would have been prospectively helpful to the defence as indicating that Shaw had already been very bloody before he went to his room and before the appellant had gone into the room. However, Howe was not called or indeed his evidence not assessed, it seems, by the defence before the court-martial hearing.

35. In his more recent statement, the one made in January 2018, Mr Gregory (as he is now called) gives a far more detailed account of what happened that particular evening. Indeed, the level of detail may be queried given that he is now talking almost two-and-a-half years or more after the assaults as alleged in question. Amongst other things, in this statement Mr Gregory now talks about what he said he had seen of the appellant. He had made no mention of the appellant in his previous statements in 2015 and 2016 at all. He now says that he had seen the appellant talking to Fusilier Shaw in his room and trying to calm things down. Amongst things he said this:

    i. "Cpl Rea, I think stayed in the room for a few minutes and then came out into the corridor. I can state for certain that whilst Cpl Rea was

> in Fus Shaw's room, he did not fight or hit Fus Shaw in any way. As far as I am concerned, Cpl Rea did not touch Fusilier Shaw. I had him in my view the entire time."

36. Pausing there, that in fact is entirely inconsistent with the defence case itself: because the appellant himself had accepted that he had indeed touched Fusilier Shaw by holding him by the shoulders and pushing him down on the bed. Having so stated, Mr Gregory goes on to say that, as far as he recalls, he and the appellant left the corridor at the same time and went back to the party. He says that:

> i. "I am certain that I did not see Cpl Rea strike Fus Shaw in any way."

37. He then goes on to give an explanation as to why he had not mentioned the appellant in his previous statement, he referring to his statement of 8 July 2015. He says:

> i. "This is because I was never asked by the RMP about anything that Cpl Rea may or may not have done. As far as I was concerned, I was simply being interviewed about the fight between Fus Shaw and Fus Thompson."

38. Quite how plausible that is is difficult to assess; and he says nothing about his second statement made in 2016, when he surely must have known that there were proceedings pending

against the appellant.

39. Moreover, all this is to be set in the context of the fact that in his first statement in 2015 Mr Gregory had referred to the incident in the room, saying:

> i. "We took Fus Shaw back to his room he didn't say much... He just wanted to get cleaned up ... A couple of minutes past and I heard the corridor open and I saw Fus Thompson and a few other lads I am not sure who they were trying to get into Fus Shaw's room, we had left the door open as we had entered. Myself and a few others wouldn't let Thompson get to Shaw and we were just trying to calm everything down. Shortly after I decided to go back to the BBQ and carry on drinking as the situation had calmed down."

40. What is said there is very sharply to be contrasted with what he said many, many months later in his latest statement.

41. It seems to us that there is no proper basis for allowing this latest evidence to be adduced. This is evidence which could have been obtained at trial. As we have said, Mr Howe had clearly identified himself as being at Fusilier Shaw's room, at the time in question and had given some account of what he saw and that had been disclosed in the unused material. For whatever reason he was not called to give evidence.

42. Mr Wilkins said: well he should have been and that of itself is a reason for giving permission to adduce the evidence now. That is simply not good enough. People cannot come along

to the Court of Appeal many, many months later and simply assert that a relevant witness should have been called and, as he was not, there should be leave to adduce fresh evidence on an appeal. The system cannot work in that way. Moreover there are significant doubts and discrepancies within this latest statement of Mr Howe; and, as we have said, it is in some respects flatly contrary to the defence own case at trial, when he says that the appellant had never even touched Fusilier Shaw. Self-evidently this statement (and the circumstances in which it came to be obtained have never been properly explained) cannot be assessed as reliable. It does not, in our judgment, meet the criteria of section 28 of the Courts Martial Appeal Act 1968 and we also refuse leave to adduce that evidence as well. In the result therefore, we refuse the application to adduce fresh evidence.

43. We revert to the point that the appellant, who clearly has had an excellent career in the Army, remains very aggrieved at his conviction. We understand that this will be on his record and may have implications for him. However, it is fundamental to the system which works in this jurisdiction that issues of this kind are to be decided either by a jury or, as in this case, by the Board at the Court Martial. The Board here were properly directed in the summing-up. They obviously formed their own view on the evidence. They heard the evidence of the

appellant himself. Clearly they did not accept that. That was a matter for the Board. This Court of Appeal cannot interfere.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Lower Ground, 18-22 Furnival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk