

No: 201701346/C1

IN THE COURTS MARTIAL APPEAL COURT

Royal Courts of Justice

Strand

London, WC2A 2LL

5 July 2019

Before:

Lord Justice Gross  
Mrs Justice McGowan DBE  
Mr Justice Butcher

**Regina  
and  
Neil Gunn**

Mr J Hugheston-Roberts appeared on behalf of the **Applicant**

Mr D Edwards appeared on behalf of the **Service Prosecution Authority**

Lord Justice Gross

On 27 February 2017 at a Court-Martial held in the Military Centre Bulford before Judge McGrigor, Assistant Judge Advocate General, the applicant Neil Christopher Gunn, now aged 35, was convicted of committing a criminal offence, contrary to section 42 of the Armed Forces Act 2006, namely battery, contrary to section 39 of the Criminal Justice Act 1988. On 28 February 2017 he was sentenced to a reduction in rank from Sergeant to Corporal. He applied for leave to appeal and leave was refused by the single judge. He then renewed that application and it came before a different constitution of the full court on 12 June 2018: [2018] EWCA Crim 1384.

On 12 June 2018, that constitution of the full court gave the applicant leave to appeal on ground 1: namely, that the applicant is in the RAF but he was tried by a Court Martial consisting only of Army members. The significance is that the Queen's Regulations for the RAF applied and these suggested that the Board trying the appellant should have been differently constituted, either by having RAF members on the Board or at least one RAF member on the Board.

In granting leave, the full court noted that there were other grounds which it was not persuaded were arguable but that a fresh representative might be able to put in what the court termed "better order". That exercise has been done, or attempted, by Mr Hugheston-Roberts, to whom we are most grateful. We shall come back to those grounds presently.

First, to put the matter in context, a very brief summary of the facts, bearing in mind that we are not dealing with ground 1 today.

On the evening of 15 September 2016 the applicant attended a sports bar at RAF Benson. After the bar closed he continued socialising in the junior ranks' accommodation block in the room of Senior Air Craftsman Loades. The complainant, a Corporal in the RAF Police, attended the room after midnight to request that the music be turned down. The complainant overheard an argument taking place between the appellant and SAC Wasyliw just outside the fire door and approached to intervene. There followed a dispute between the complainant and the applicant. The prosecution case was that the applicant was drunk and was acting aggressively during his argument with SAC Wasyliw. The complainant sought to intervene and told SAC Wasyliw to leave. After that,

the complainant tried to calm the applicant down and realising he was too drunk to listen asked him to return to his accommodation. The applicant refused and became aggressive towards the complainant, such that she began to caution him. At that point the applicant shouted at her, grabbed her by the throat and pushed her backwards. The complainant managed to push the applicant away, who then left the scene.

The applicant denies all that. He submits the allegation of assault was fabricated. He had not made any contact with the complainant. He puts the blame on the complainant whom he says was annoyed at having to attend the room to quieten the music. She then sided with her friend SAC Wasyliw during the argument with the applicant and lost her temper with him. He remained calm and did not touch her. He had been to the sports bar that evening until midnight, after which he went to the room party. He had been drinking but a modest amount. He noticed that another SAC was being a nuisance and the occupant of the room party, SAC Loades, did not want him there. It was at this point that the complainant arrived. She was angry. It was the end of her shift. She was, he says, "fucking tired of it". Alerted by the fact that the other SAC had been playing up and the complainant was angry, the applicant decided to stand with the fire door ajar so he could keep an eye on what was going on and intervene should it be necessary. At that point, SAC Wasyliw started to abuse him about shutting the door. He suggested they move round the corner. He told her he was a Sergeant and this appeared to aggravate SAC Wasyliw who said he should get back to his block and "fuck off". He then said that the complainant arrived and did not appear to do anything about the abuse he was receiving from SAC Wasyliw, so he asked her whether they were friends and she confirmed they were. He challenged her for not dealing properly with the matter. He was not aggressive and did not swear. His hands were by his side. He pursued his enquiry as to why she appeared not to do anything and that was when she shouted "Get back, get off me". She did not administer a caution. She had her notebook and asked for his details.

The issue for the Board was whether they could be sure that the applicant had grabbed the complainant's throat and pushed her chest as alleged.

We turn to the grounds of appeal. Ground 1 has already been mentioned. The key question under ground 1, and it is a question essentially of law, is whether the Court-Martial Board was properly constituted made up as it was of army members with no Royal Air Force representation. As we have already underlined, for that ground the applicant has leave.

There are additional grounds for which the applicant does not have leave. As helpfully summarised by Mr Hugheston-Roberts they are as follows:

1. The character of the complainant.
2. Missing CCTV evidence.
3. A conflict of interest in the conduct of the investigation.
4. The presence of the applicant in junior ranks accommodation.

## Ground 1

In the view we take, ground 1 can be taken shortly today but as we have indicated to counsel we will need to return to it on another day. The difficulty which arises is as follows. The governing statutory provisions are contained in the Armed Forces Act 2006. Section 155 makes provision for the constitution of a Court-Martial and sections 156 and 157 contain further provisions relating to the eligibility of certain categories of officers and warrant officers to be members of the Court-Martial. There is no provision in the statute that the Court-Martial for a service defendant should be composed entirely of or even include lay members from the defendant's own service.

Section 163 of the Armed Forces Act provides that the Secretary of State may make rules with respect to Courts-Martial, including in particular as to the sittings, practice and procedure and constitution of the court. It appears that rules have indeed been made and that they themselves do not make any provision that the Court-Martial for a service defendant must be composed entirely of or include lay members from the defendant's own service. The applicant's case thus hinges on the Queen's Regulations of the Royal Air Force Fifth Edition 1999 Amendment List Number 43. They provide as follows:

“A service defendant will ordinarily be tried by lay members wholly of his own service. However, where a defendant is tried with a co-defendant from a different Service, the lay membership of the court will be a mixture of Service personnel from different services. Each defendant will always have at least one lay member of his own Service on the board...”

Self-evidently then the key question goes to the relationship between the Armed Forces Act and the Queen's Regulations, together with the status of the Queen's Regulations. That is a point which may well have repercussions for cases other than this. While the rival written submissions are helpful as far as they go, there has, with respect, as yet been no proper exploration of this question. We are unwilling to express any view on what we have called the key question until we have before us full argument and materials.

Furthermore, there are case specific factual questions as to knowledge of the constitution of the Board and the applicant's express readiness to proceed in the knowledge that the Board did not contain RAF members which are best considered once the legal framework has been appropriately clarified. If a question of waiver arises it will of course be essential to know the jurisdictional status of such difficulties as there may be with regard to the Queen's Regulations.

Accordingly, our directions on ground 1 are as follows:

1. We adjourn that ground today.
2. We require skeleton arguments. First, from the respondent, whom we shall term the Crown. The Crown's skeleton should be provided by 4.00 pm on Friday 19 July. The reply skeleton should come from the applicant, Mr Hugheston-Roberts, by close of business (4.00 pm) Wednesday 25 July.
3. We should be supplied with supporting authorities and materials. Relevance is very important. We do not want hundreds of pages of irrelevant materials. We do want whatever is relevant on a question of some interest and importance.
4. We will schedule the hearing before the same constitution of this court (barring disaster), for Tuesday 30 July.
5. The estimated length of the hearing is 2 hours, with a reading time of three-quarters of a day in advance.

Those, we think, comprise the directions.

This is not a direction — but it is very important, especially for the Crown, that this matter is fully developed and it may be, with no disrespect to Mr Edwards, that this is a case for Treasury Counsel or whoever stands in that function for the RAF. As we have said, that is expressly without criticism of or disrespect for Mr Edwards.

In due course counsel can tell us if any further directions are needed, but the idea is to have the relevant papers, the proper bundles, the proper skeletons and the proper authorities and materials all in good shape in good time for 30 July.

#### Additional grounds

These suggested grounds can be taken summarily but, with respect, for different reasons. The grounds are, as we have indicated, helpfully set out by Mr Hugheston-Roberts in what we have termed his second skeleton. The first, the character of the complainant, suggests bad faith on her part. The complaint is that because of a justified allegation made by the applicant that the complainant had mislaid or abandoned briefly her personal weapons in Afghanistan, she had in effect a grudge against the applicant which she then pursued with regard to the incident in question in September 2016.

The second additional ground is that the area in which the alleged incident took place was covered by CCTV. However, that CCTV from a time very shortly after the incident proved to be unavailable. To put it neutrally, the applicant would suggest it had been wiped clean. The applicant wished to pursue an investigation of that matter

with the Service Police who were dealing with it.

The third ground goes to the investigation. The complaint here is that the incident was investigated by RAF police personnel from the same police flight as the complainant. That raised a clear risk of a conflict of interest and may, or did, have an impact on the proper conduct of the investigation.

The fourth additional ground is that the Court-Martial Board misunderstood the presence of the applicant in the junior ranks' accommodation. They did that because they came from the army, where such presence would not have been appropriate and misunderstood the Standing Orders for RAF Benson, which did not preclude the applicant's attendance in that accommodation.

In his helpful response to these matters, Mr Edwards in summary said this. The Crown had indeed disclosed the fact that the complainant had a disciplinary finding of guilt relating to the loss of a service weapon while deployed on operations in Afghanistan. Had the matter been raised at the time of the Court-Martial, the Crown would have admitted that there had been such a finding. No evidence was required and in any event the applicant could have given evidence that he had supplied that information. The matter was not however raised at the time and that is attributed by Mr Edwards to a tactical decision having been taken.

Much the same goes for the CCTV evidence. The investigation diary had been disclosed to those representing the applicant and it was clear that the CCTV footage was not available. There is no suggestion, Mr Edwards adds, that it had been wiped clean, but again that was a point that was open to be taken but was not taken at the Court-Martial.

As to the investigation. Again all the facts were clear and yet the point was not advanced.

Finally, so far as the presence of the applicant in the junior ranks accommodation goes, Mr Edwards' short submission is any error, if error there was, did not occur in the Board's reasoning prior to conviction when in fact the matter was greatly correctly stated. If error there was, it came in a passing observation when it came to passing sentence. It was thus irrelevant or immaterial to conviction.

We can put the matter shortly. Suffice it to say we agree with Mr Edwards. In respect of additional grounds 1, 2 and 3 as we have called them, we can see no good reason why, if they were to be advanced, they could not and should not have been raised at the Court-Martial. We can however well understand a tactical decision not to advance them. Had they been advanced and failed they could have had a serious impact for the applicant in the manner in which the Court-Martial viewed the matter. But the underlying material was there and nothing had been held back from the applicant. In any event he had full knowledge of all the matters in question.

As to additional ground 4, any error, if error there was, arose only at the time of sentence. It was wholly immaterial to conviction.

Any appeal relying on the additional grounds would thus be doomed to fail. We refuse the renewed application in respect of additional grounds on 1, 2, 3 and 4.

It follows that we will reconvene on 30 July, but solely to hear the appeal on ground 1.

MR HUGHESTON-ROBERTS: My Lord, thank you very much for that. May I ask this of you, in your Lordships' absence my learned friend and I discussed the representation in this case. He has, in my view, very sensibly taken the indication from your Lordships and the Crown will now be instructing Senior Treasury Counsel.

Lord Justice Gross

We are grateful and I repeat, Mr Edwards, no disrespect.

MR EDWARDS: None taken. I am grateful.

MR HUGHESTON-ROBERTS: My Lord, the situation therefore is simply this and there is no reason why your Lordships would even need to know this. In a matter of 5 or 6 hours I will no longer be in the country until the 19th, the day when the Crown's skeleton must be served. I am away for two weeks.

Lord Justice Gross

So you will be back just in time to read it.

MR HUGHESTON-ROBERTS: I will look forward to it, my Lord, as I sit on the plane I will wait with baited breath, as it were. I am wondering if — the learned Registrar kindly granted legal aid for me to be assisted by a solicitor for the grounds, the new grounds as they are. May I, because of the circumstances of this very unusual case, ask that the representation order for solicitors is extended to assist me on the primary ground? I am not asking to extend to Queen's Counsel at this stage.

Lord Justice Gross

We are struggling a bit, without wishing to be unhelpful. This is a point of law, no disrespect to those sitting behind you, I am very pleased to see them here. In truth, and we are very conscious the work you have done in it, if we were to vary any order it would be more likely to say we will give representation for a silk alone, but we are reluctant to do that given the work you have done, and we have read your skeleton and so we know you are on top of it.

MR HUGHESTON-ROBERTS: My Lord, forgive me for interrupting. I just look at the practicalities of the task that is now ahead of us. We have to put into action in very short order the bundles, the arguments, we are going to have to do all sorts of things.

Lord Justice Gross

Okay, I can see that.

MR HUGHESTON-ROBERTS: As far as the law, yes I can see that falls fairly and squarely on my shoulders.

Lord Justice Gross

As far as preparation for the hearing goes, can we give that — we can extend legal aid for that?

MR HUGHESTON-ROBERTS: My Lord, you can extend legal aid for anything.

Lord Justice Gross

Yes. I would not get carried away.

MR HUGHESTON-ROBERTS: Thank you very much.

Lord Justice Gross

We will extend legal aid, my associate will draft it appropriately, for solicitors to assist.

MR HUGHESTON-ROBERTS: I am very fortunate as I am assisted today by a representative of my solicitors who in fact is a Member of the Bar, so she will be assisting me greatly on this.

Lord Justice Gross

If she would like to do additional work for the same price we would be most grateful.

MR HUGHESTON-ROBERTS: It is nearly all pro bono now, my Lord, in this day and age.

Lord Justice Gross

There we are. That is the assistance. Mr Hugheston-Roberts, I can only leave representation on your side to you. We are not minded at the moment to order Silk. If we did, we would order Silk only and we are reluctant to do that.

MR HUGHESTON-ROBERTS: Speaking openly, if I may my Lord, between now and the hearing for Queen's Counsel to have to be instructed by me and bearing in mind I am going to be away, it is a pointless exercise.

Lord Justice Gross

You may as well stay now.

MR HUGHESTON-ROBERTS: I may as well stay and do it.

Lord Justice Gross

Well, why not?

MR HUGHESTON-ROBERTS: And it is going to be a nice day on 30 July.

Lord Justice Gross

Thank you very much indeed. Anything else? Are the directions clear enough?

MR HUGHESTON-ROBERTS: Thank you, my Lord.

Lord Justice Gross

Please keep to the timetable.

MR HUGHESTON-ROBERTS: Yes, certainly.