NCN: [2019] EWCA Crim 1863
201902205 B2 & 201902206 B2
IN THE COURT MARTIAL APPEAL COURT

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 24 October 2019

B e f o r e:

LORD JUSTICE SIMON

MR JUSTICE WILLIAM DAVIS

and

MRS JUSTICE JEFFORD DBE

R E G I N A

- v -

H & J

Computer Aided Transcript 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 M Bolt appeared on behalf of both Applicants

Mr D Edwards appeared on behalf of the Crown

J U D G M E N T

LORD JUSTICE SIMON:

Introduction

1. This is an application for leave to appeal against a ruling of His Honour Judge Blackett (Judge Advocate General) in the Court Martial sitting at the Military Court Centre, Catterick, made on 4th June 2019.

Jurisdiction

2. The jurisdiction of this court to hear an appeal against a ruling made by a judge advocate in a preliminary proceeding in the Court Martial derives from section 163(3) of the Armed Forces Act 2006, which gives statutory authority to the making of the Court Martial rules and makes provision:

> (i) for appeals –
>
> …
>
> (ii) against any other orders or rulings made in proceedings preliminary to a trial…

3. Part 6 Chapter 1 of the Court Martial Appeal Court Rules 2009 (2009 No.2657) provides for appeals against an order or ruling made in preliminary proceedings of the Court Martial.

4. Under Rule 44, the court has power to: (a) confirm, reverse or vary the order or ruling complained of, and (b) make such orders as to costs as it thinks fit.

The Facts

5. The two applicants are due to stand trial in respect of a charge of committing a criminal offence contrary to section 42 of the Armed Forces Act 2006, namely, conspiracy fraudulently to evade the duty payable on duty-free cigarettes, contrary to section 1 of the Criminal Law Act 1977.

6. The applicants deny the charges and contend that the Crown's case, as served, is insufficient for a board, properly directed, safely to convict them and accordingly should be dismissed: see, for example *R v Galbraith* [1981] Crim LR 648.

7. The applicants applied prior to arraignment for leave to apply to dismiss the case against them and submitted that Rule 26 of the Armed Forces (Court Martial) Rules 2009 (2009 No 2041) ("the 2009 Rules") permitted a judge advocate to apply the provisions of paragraph 2 of Schedule 3 to the Crime and Disorder Act 1998, which applies to cases sent for trial to the Crown Court, to Court Martial proceedings.

The Statutory and Regulatory Regime

8. Section 163(1) of the Armed Forces Act 2006 enables the Secretary of State for Defence to make rules referred to as "Court Martial rules", with respect to Court Martials.

9. Section 163(2), so far as relevant, provides:

> Court Martial rules may … make provision with respect to –
>
> …
>
> (b) trials and other proceedings of the court;
>
> (c) the practice and procedure of the court;
>
> …

10. Rule 2 of the 2009 Rules is an interpretation provision:

> (1) unless otherwise stated, any reference to these Rules to proceedings includes -
>
> (a) preliminary proceedings,
>
> (b) trial proceedings,
>
> …

Preliminary proceedings" are defined as "any proceedings of the court held for the purpose of arraigning a defendant on a charge or giving directions…

11. Rule 25 of the 2009 Rules is headed "Termination of Proceedings" and provides, so far as material:

> (1) The judge advocate must terminate any proceedings to which rule 34 (president of the board) applies if –
>
> (a) the president of the board dies or is otherwise unable to continue to attend the proceedings, and
>
> (b) there is no other lay member of the court who is qualified to be the president of the board.
>
> (2) The judge advocate must terminate any proceedings with lay members if -
>
> (a) a lay member dies or is otherwise unable to continue to attend the proceedings, or
>
> (b) the number of lay members discharged under rule 35(4) (objections to lay members) exceeds the number of waiting members,
>
> and the number of lay members is in consequence reduced below the minimum number.
>
> (3) The judge advocate may terminate any proceedings if he considers it in the interests of justice to do so.
>
> (4) The Judge Advocate General shall terminate proceedings if the judge advocate dies or is otherwise unable to continue to attend the proceedings.
>
> …
>
> (6) The termination of trial or appellate proceedings under this rule shall not bar further trial or appellate proceedings in relation to the same charge or charges.
>
> …

12. Rule 26 is headed "Circumstances not provided for" and is in the following form:

> Subject to any other enactment (including any other provisions of

these Rules), the judge advocate shall ensure that the proceedings are conducted -

(a) in such a way as appears to him most closely to resemble the way in which comparable proceedings of the Crown Court would be conducted in comparable circumstances; and

(b) if he is unable to determine how comparable proceedings of the Crown Court would be conducted in comparable circumstances, in such a way as appears to him to be in the interests of justice.

13. Paragraph 2 of Schedule 3 to the Crime and Disorder Act 1998 ("the 1998 Act") provides:

(1) A person who is sent for trial under section 51 or 51A of this Act on any charge or charges may, at any time –

(a) after he is served with copies of the documents containing the evidence on which the charge or charges are based; and

(b) before he is arraigned …

apply orally or in writing to the Crown Court sitting at the place specified in the notice under section 51D of this Act for the charge, or any of the charges, in the case to be dismissed.

…

The Judge Advocate General's Ruling

14. The Judge Advocate General acknowledged that there was no express power in the Armed Forces Act 2006, or any other legislation relating to the Court Martial, for a judge advocate to dismiss a charge before a Court Martial. The applicants' case was that Rule 26 permitted the "importing" of paragraph 2 of Schedule 3 to the 1998 Act.

15. The applicants had submitted that a defendant in the Service Justice System should be treated no differently to a defendant in the Criminal Justice System unless there were good service reasons for doing so. Where there were no such reasons, the Court Martial should strive to ensure proceedings closely resembled the proceedings in the Crown Court. Rule 26 permitted

the Court Martial to import the dismissal provisions of the 1998 Act. Alternatively, the applicants submitted that a judge advocate could dismiss a case, prior to arraignment, under the general discretion contained in Rule 25(3) on a successful application by the defence that there was insufficient evidence. If the proceedings were to be terminated under Rule 25, counsel for the applicants had invited the court to rule on whether it would amount to an abuse of process for the Crown to attempt to continue proceedings.

16. The Judge Advocate General noted the prosecution submission that the power to dismiss, contained in the Crime and Disorder Act 1998, did not apply to a Court Martial and the Secretary of State had not made any rule that it should. Rule 26 could not be used to permit the reading across of any statutory provision. Parliament had treated the Court Martial and Crown Court differently in many respects, and it would be wrong to use the Court Martial Procedure Rules to subvert the authority of Parliament.

17. Termination of proceedings in the Court Martial were covered by Rule 25. Rule 25(3) granted a judge advocate power to terminate any proceedings if he considered it in the interests of justice to do so; but this did not extend to a power to dismiss proceedings before they had begun; nor was any provision made for a judge advocate to hear an application to dismiss after proceedings were in the Court Martial.

18. Having noted these arguments, the Judge Advocate General ruled that the applicants could not make an application to dismiss prior to arraignment.

19. Rule 26 gave power to a judge advocate to ensure that proceedings were conducted in a certain way. It did not give him the power to create a process which was not contained in the Armed Forces Act 2006. There was no statutory power for the Court Martial to dismiss a charge

before arraignment, as there was in the civilian system. So there were no proceedings relating to dismissal to be conducted. There was no mechanism by which paragraph 2 of Schedule 3 to the Crime and Disorder Act 1998 could be imported into the Court Martial.

20. A judge advocate did have power under Rule 25(3) to terminate proceedings if he considered it in the interests of justice to do so. In rule 2 of the Armed Forces (Court Martial) Rules 2009 "proceedings" includes preliminary, trial, sentencing, variation, appellate, activation and ancillary proceedings. Thus a defendant was able to make a submission under Rule 25(3) at the start of the trial proceedings, and before the board was sworn, that the judge advocate should terminate the trial proceedings. If the judge advocate was persuaded that the prosecution evidence would not be sufficient for the defendant(s) to be properly convicted, he could terminate the trial proceedings if he considered it in the interests of justice to do so. There was no power to terminate trial proceedings until the trial commenced.

21. In the event that the trial proceedings were terminated pursuant to Rule 25, it would not amount to an abuse of process for the Director to attempt to continue proceedings. Rule 25(6) stated that the termination of trial proceedings under Rule 25 would not bar further trial in relation to the same charge or charges.

The Arguments on Appeal

22. Mr Bolt, who appears for the applicants, submitted that the intention of Rule 26 was to treat defendants in the Service Justice System in a similar way to the Criminal Justice System, and that this was particularly important when a Court Martial had to deal with alleged criminal rather than disciplinary offences.

23. In order to justify such a difference, there must be good reason: see, for example *R v*

Thwaites [2010] EWCA Crim 2973 and *R v Blackman* [2014] EWCA Crim 1029. There was no good Service reason for preventing an application to dismiss to be heard, and good reason to permit such an application. To permit weak cases to remain within the Service Justice System when they should be dismissed, disadvantages a defendant and undermines the purpose of the Service Justice System.

24. Mr Bolt submitted that the proceedings are a continuum and that Rule 26 was sufficiently wide to enable a judge advocate to import a process analogous to that in the Crown Court. There was no Service reason for depriving a Service defendant of a right to apply to dismiss, particularly in the light of the fact that, prior to the passing of the Act, there was a means by which a defendant could make an application to dismiss informally to the convening officer prior to arraignment. There is no reason, he submitted, why that right should be assumed to have been implicitly removed by the change in the statutory regime.

25. Mr Edwards, who appears for the Service Prosecuting Authority, submitted that the Service Courts have different roles and procedures. He accepted that there might be a stay as an abuse of process and that this could be imported by Rule 26. But he submitted that the Judge Advocate General was right, essentially for the reasons he gave. To interpret Rule 26 as the applicants argue would be to enable a judge advocate to usurp the role of the legislature if a judge advocate could "import" any legislation. He could, for example, import the Proceeds of Crime Act 2002 or the Road Traffic Act 1988 into the Service Justice System. Furthermore, there are marked and material differences between the Service Justice System and the Criminal Justice System. In the latter, matters can be tried either summarily, either way, or by indictment only. This is reflected in the statutory regime that applies to the Crown Court.

26. There is adequate protection within the Service Justice System where a case is weak or

vexatious: through the termination of proceedings under Rule 25, or a judicial review of a decision to prosecute.

Conclusion

27. We start with Rule 25. These provisions on their face are concerned with difficulties arising in relation to the constitution of the board. Sub-rules (1) and (2) require a judge advocate to terminate proceedings in the circumstances there described. Sub-rule (4) requires the Judge Advocate General to terminate proceedings if the judge advocate dies.

28. Rule 25 must be read *ejusdem generis*: taking its meaning from the context.

29. Sub-rule (3) is a discretionary power which may have to be applied, where the case does not fall specifically within sub-rules (1) and (2), but where it may be in the interests of justice to terminate the proceedings, for example, where there may be uncertainty about the competence or impartiality of a board.

30. The consequences of any of these, essentially administrative decisions, does not bring the proceedings to an end, as is clear from sub-rule (6).

31. In our judgment, the Judge Advocate General fell into error in concluding that Rule 25(3) provided a stand-alone or residuary jurisdiction at the arraignment stage, as both counsel accepted before us.

32. Rule 26 has a different purpose. Subject to any other enactment, the judge advocate should ensure that the Court Martial proceedings are conducted in a way that most closely resembles the way in which comparable proceedings would be conducted in comparable circumstances in

the Crown Court, with the reservation that if he or she is unable to determine how comparable proceedings would be conducted in the Crown Court in comparable circumstances, he or she should conduct the proceedings in such a way as appears to him to be in the interests of justice.

33. The difficulty with the applicants' argument based on importing the provisions of paragraph 2 of Schedule 3 to the 1998 Act is that it is dealing with a different process: section 51 and 51A concern cases which are sent from the magistrates' court to the Crown Court – section 51(adults) and section 51A (children and young persons). In such cases, subject to the magistrates being satisfied that the specified conditions in each section apply to the adult or child, "the court shall send him forthwith to the Crown Court for trial for the offence".

34. There is no longer a residual jurisdiction to test the strength of the prosecution case at a summary hearing, as once there was. That is now done in the Crown Court, by an application under paragraph 2 of Schedule 3.

35. We should note that it may be open to the defence to challenge the sending of the case as an abuse: see the discussion in Archbold 2020, at paragraph 1-30, but in general the magistrates have a duty to send, and abuse arguments and challenges on the basis of the weakness of the prosecution case must be taken in the Crown Court with an application which complies with the Criminal Procedure Rules 9.16(2).

36. The Court Martial procedure is different. There is no summary sending of cases form the magistrates' court to the Court Martial.

37. However, that is not the end of the matter. Because Rule 26 has a saving provision, if the judge advocate is unable to determine how comparable proceedings of the Crown Court would

be conducted in comparable circumstances, he must ensure that the proceedings are conducted in such a way as appears to him to be in the interests of justice.

38. Since Rule 25 does not provide a route to terminate proceedings where it is in the interests of justice to do so, the question is whether Rule 26 provides an answer. In our view it does. There is no Service reason for depriving a Service defendant of his right to apply to dismiss, on the basis that the evidence is insufficient. We can see no reason to assume that such rights as existed (albeit in a different form) should have been removed from Service defendants where an application was justified on the basis of the insufficiency of the evidence.

39. A judge advocate must take into account in preliminary Court Martial proceedings how to conduct those proceedings; and how comparable proceedings would be conducted in comparable circumstances in the Crown Court. The answer is that an application would be made under paragraph 2 of Schedule 3 to the 1998 Act. That provision does not apply to a Court Martial, but a judge advocate must ensure that a comparable process can be conducted in comparable circumstances.

40. Nothing we have said in this judgement should lead to the conclusion that the rules can apply such as to import substantive law into the Court Martial proceedings, such as in the examples given by Mr Edwards. We are concerned with a procedural issue.

41. In these circumstances, we grant leave and reverse the Judge Advocate General's order.

42. Further, we direct that the case be listed before a judge advocate in order to hear the application to dismiss.