

Neutral Citation Number: [2005] EWCA Crim 2750
IN THE COURTS MARTIAL APPEAL COURT
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Monday, 17 October 2005

B e f o r e:

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
(The Right Honourable Sir Igor Judge)

MR JUSTICE RODERICK EVANS

SIR CHARLES MANTELL

REGINA

- v -

ANTHONY APPEYARD

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MR GILBERT BLADES appeared on behalf of **THE APPELLANT**

MR P ROGERS appeared on behalf of **THE ARMY PROSECUTING AUTHORITY**

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

Monday, 17 October 2005

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION:

1. This is the resumed hearing of the appeal by Anthony Appleyard against his conviction at a court martial held in December 2004 at Catterick. On Wednesday of last week, 12 October 2005, we rejected the submission by Mr Gilbert Blades on his behalf that the directions given by the judge advocate on duress were defective. That conclusion was reached in the context of this particular case.
2. We now turn to an argument of some importance to court martials generally. It arises in this way. In the course of the directions given by the Judge Advocate he told the members of the Board in express terms that on retirement they should "try to reach a verdict upon which each one of you is agreed". He went on that when it became possible for a majority verdict to be accepted he would give a further direction.
3. Shortly before the Board retired he returned to this topic. He again directed the Board to try to reach a verdict on which they were all agreed and told them that they should not "worry" about majority verdicts at that stage. In due course, when the court martial re-convened, the judge advocate began by asking whether verdicts had been reached on all charges on which all members were agreed. The presiding officer said that they had.
4. Mr Blades makes the short but stark submission that the convictions should be quashed, notwithstanding that each individual member of the Board was convinced of the appellant's guilt. He says that the directions by the Judge Advocate contravened section 96 of the Army Act 1955. This provides that verdicts of a court martial "shall be determined by a majority of the votes of the members of the court".
1. In his oral submissions this morning Mr Blades pointed out that in one sense the arrangements for court martials in the military sphere were well ahead of section 17 of the Juries Act 1974, which introduced majority verdicts in civilian cases. Mr Blades also sought to draw assistance from the Court Martial Army Rules 1997, rule 70(4) of which provides that the vote of each member of the court should be given in "reverse order of seniority". He suggested that there was a specific purpose for this provision. That was to avoid the risk that junior officers would be influenced, or improperly allow their views to be influenced, by the views of their superior officers whose orders in any other area of military life would be obeyed.
6. On examination we find that the Judge Advocate directed the Board in terms that the vote of the most junior officer should be taken first, with the remaining votes delivered in ascending order of rank. There was, therefore, no misdirection on this point. Moreover, he further expressly directed that the court martial was not like the normal military situation and that in this context the view of each member of the Board was of equal value. In particular it was not for the presiding officer to make the decision. As the Judge Advocate said in unequivocal language, "Everyone's view and opinion is equal". That direction was entirely consistent with the briefing notes provided for the Board. Paragraph 31 of the 2002 edition of the Military Courts Guide provides:

"The President will normally initiate the discussion.... He should ensure that each member gives his opinion on finding in respect of each charge separately, in ascending order of seniority commencing with the junior member."

There is nothing to suggest that this briefing note or the judge advocate's directions were ignored. The paragraph continues:

"A unanimous decision is preferable, but a majority of votes will decide the issue."

That guidance is unequivocal. It is consistent with a recent direction given by His Honour Judge Jeff Blackett, the Judge Advocate General dated 30 November 2004. Practice Memorandum No: 1989 is entitled "Court Martial – Direction as to Unanimity". It reads:

"I do not know whether all judge advocates at present routinely direct

court-martial members to strive to reach a unanimous finding, but if this is not the uniform practice then I wish it to be so with immediate effect."

The memorandum goes on to invite judge advocates to incorporate into their summing-up in each case an appropriately modified form of the specimen direction linked to Criminal Proceedings Consolidation.

7. Without making any formal concessions, Mr Blades was prepared to accept that there may be a good deal of sense in these arrangements. He is concerned, first, that they nevertheless constitute a contravention of section 96, and, second, that while section 96 remains on the statute books, any changes in the practice, however desirable, are matters to which Parliament should attend. He suggests that the Judge Advocate's direction in this case might produce a series of votes by the members of the Board and that if the result of the Board's first vote on each charge were not unanimous, further votes would have to be taken to achieve the unanimity suggested by the Judge Advocate. His written submissions suggest that in any second or subsequent vote the junior officers would be aware of the way in which the senior officers had voted and might be influenced by that knowledge. This would deprive the Court Martial of the essential requirement of impartiality.
8. Although not essential to our decision, we pause to note that Mr Blades' written argument suggests that a junior officer would necessarily seek an acquittal while a more senior one would apparently be convinced of guilt. We do not know how this might work in practice. More important, however, the basic suggestion is not realistic. Any final determinative vote would come after a debate between the members of the Court Martial. It would be a pretty dull officer who would be unable to discern from the debate itself what the views of his colleagues, of whatever rank, would be likely to be and how, when it came to the final determinative vote, they would be likely to vote. That said, after the debate and after listening to the views of all his colleagues, the most junior officer at the Court Martial, and all its other members, too, will and can confidently be expected to vote as directed by conscience. As Lord Bingham of Cornhill observed in R v Spear, Hastie and Boyd and R v Saunby and Others [2003] 1 AC 734, 752, after a speech in which all these issues were fully analysed:

"Officers will appreciate, better than anyone, that to convict and punish those not shown to be guilty is not to promote the interests of good discipline and high morale but to sow the seeds of disaffection and perhaps even mutiny. In the absence of any evidence at all to support it, I could not accept the suggestion that any modern officer would, despite the oath he has taken, exercise his judgment otherwise than independently and impartially or be thought by any reasonable and informed observer to be at risk of doing so."
9. The argument by Mr Blades assumes that the Judge Advocate directed that there should be a series of formal or determinative votes culminating in a unanimous decision. We are unable to accept this premise. We assume that, like any other jury in the course of the debate, the presiding officer, like the foreman of the jury, might, if he or she thought fit, from time to time wish to take soundings to see how any potential votes might be cast. This exercise, if it took place, would not be a series of determinative votes. Thereafter, assuming that the presiding officer decided that a determinative vote should be taken, which, notwithstanding the Judge Advocate's direction, produced not a unanimous but a majority verdict, that would be the verdict which would be returned in due course after a majority direction had been received from the Judge Advocate, or after the presiding officer had sent a written indication to him that the Board was unable to reach the unanimous verdict he had asked them to try to reach. We are all familiar with these processes in the civilian criminal justice system. There is no reason to assume that members of a court martial would be likely to behave differently.
10. In the end, with respect to Mr Blades' written submission, the Human Rights Act and the challenge that the direction given by the Judge Advocate that the Board should "try" to reach a unanimous verdict somehow deprived the court martial and its members of its and their independence and impartiality as a tribunal established by law does not withstand analysis.
11. Our conclusion can be simply expressed. The Judge Advocate had no jurisdiction to refuse to accept a majority verdict from the Board. However, he was entitled to direct the members to seek or try to return a unanimous verdict if they could. That is what he did. A unanimous verdict is, indeed, preferable, if that is the verdict to which each member can conscientiously come. The direction given by the Judge

Advocate did not produce a situation in which a majority of votes in favour of an acquittal (a majority verdict acquittal) would somehow have been rejected or treated as if it could not be returned. The Board would have been likely to have understood from the directions as a whole that if their efforts to reach a unanimous verdict failed, then in due course a majority verdict would be taken. For this purpose it would probably be better practice for any directions given to the Board on this topic to run along lines which expressly acknowledge that in the end the Board is entitled to return a majority verdict, but that it would be preferable for the Board to start its deliberations by seeking if possible to return a unanimous verdict. The directions in this case did not quite echo this suggested language. That said, we can see no justification for interfering with these verdicts and quashing the convictions. Accordingly, these appeals against conviction on this ground, too, are dismissed.

12. We must now turn to issues of sentence. We shall not repeat the essential facts relating to these convictions which are set out in our earlier judgment. We simply record that the appellant was sentenced to 297 days' detention and reduced to the ranks. It was acknowledged by Mr Blades in his helpful submissions on behalf of the appellant that the most serious charge related to the attempts by the appellant to pervert the course of justice. However, he pointed out that the appellant had fourteen years' reckonable service without any previous civil or military charge. The reason for sentence provided by the judge advocate acknowledge that if the three offences relating to the DVDs had stood alone, a small financial penalty would have been appropriate. However, the Board was extremely concerned that a corporal had used his influence to try to persuade a young soldier of 17 years of age to tell lies and to become involved in an attempt to pervert the course of justice. The appellant was in a position of an instructor. He should have been giving guidance to young soldiers. In any event, therefore, his conduct represented a breach of trust to youngsters who might themselves have been put at the risk of criminal proceedings. The Board recognised the factors in mitigation, including the appellant's previous good character, his long-standing ambition to be a soldier and the service he had given, as well as his real personal difficulties at home.
13. The Judge Advocate pointed out that the Board had seriously considered dismissal from the army at that stage, but concluded that a more merciful sentence should be imposed -- one which would not make the appellant unemployed or render his family homeless.
14. Mr Blades submitted that the sentence was excessive. The reduction to the ranks followed from the order of detention, although the judge advocate indicated that, even without the sentence of detention, the appellant's convictions meant that he was no longer fit to be an NCO.
15. We have considered Mr Blades' submission. It seems to us clear that the Board was profoundly concerned not only by the serious offence of attempting to pervert the course of justice, but its potential impact on young soldiers. We share the concerns of the Board. We see no basis for interfering with the sentence.
16. We turn to the second appeal against sentence only, which arose from the appellant's guilty pleas to two offences of indecent assault before a court martial held at Catterick in March 2005. On 4 April the appellant was sentenced to be dismissed from Her Majesty's Service, together with nine months' detention to run consecutively to the sentence imposed on 28 January 2005. We note, in addition, that the financial consequences of these orders would have been very significant. The appeal is brought by leave of the single judge.
17. The facts can be summarised briefly. We note that a written basis of plea was prepared and, as far as we can see, accepted by the prosecution. By the time that the advocate for the prosecution had finished opening the case, it was necessary (and appropriate) for Mr Blades to remind the Court Martial of the existence of that written basis of plea and to invite the members to focus their attention on it.
18. The facts of the case were that the appellant, then still a corporal, worked as an instructor. The complainant was an 18 year old female trainee, to whom the appellant paid an increasing amount of attention. He invited her to go out with him and left messages on her mobile phone for her. From time to time he would call her away from PT and march them back to their accommodation so that they could avoid doing PT which they did not enjoy very much. The appellant was twice the young woman's age.
19. The first charge related to an incident which occurred in Hanger 1 after the complainant had been stood down from PT by the appellant. The agreed basis of plea reads that the two of them were in the hanger

and that when the complainant was walking towards the lavatory the accused walked up behind her saying, "Keep walking. I can't do anything to you because my wife is in the hanger". He continued to follow her. When the coast was clear he grabbed her by the arm and pulled her to a secluded place where they would be out of sight. There he put his arm around her waist, tried to pull her shirt out of her trousers, and kissed her neck. She then made an excuse about seeing another corporal. That was the end of the incident.

20. The second occasion occurred a few days later in similar circumstances. The appellant told an NCO that the complainant was going to police the blocks with him to ensure that only those people with a valid reason to be there had remained in them. According to the complainant, she was reluctant to go into one of the rooms with the appellant who invited her to join him there, to shut the door and to stand beside him at the window to look at the snow. According to the agreed basis of plea, during the course of inspecting several blocks, the appellant touched the complainant several times on her bottom, kissed her lips, cheek and neck and pulled her shirt out of her trousers.
21. The matter was not reported initially because the complainant did not wish to make trouble as she only had a few weeks of training left. The appellant continued to pester her. He invited her to his home when his wife was out. On one occasion he rang her fifteen times while she was unavailable because she was at the cinema. Because she felt that she could not get away from the appellant, the complainant then reported what had happened.
22. In interview the appellant denied the offences, but he pleaded guilty on the agreed basis of plea which we have indicated.
23. The significant criticisms of the sentence advanced by Mr Blades can be summarised briefly. First, and most important, it does not appear that sufficient attention was given to the written basis of plea which was accepted by the prosecution. Second, there was a possible misunderstanding about the impact of evidence about the way in which the complainant was seen to behave at a time when, it was common ground, she would have been inebriated. Mr Blades suggests that it was a legitimate point in mitigation that there was some independent evidence to indicate that the complainant had not then appeared to find that the appellant's advances to her were distasteful or repugnant. Next, he points out that in the scale of these offences this case, which never involved the touching of bare flesh in any intimate part, let alone any contact of the same kind, was to be regarded as at the lower end of significance and therefore a case which would attract the lower end of sentence. Finally, Mr Blades submitted that the sentence for this offence should have been put in the context of the sentence imposed on the appellant following his conviction at the first court martial, and that the totality of sentence included not only the overall length of the period which he would have to serve in custody, but also the significant overall financial damage consequent upon the orders made by the two court martials.
24. We have no doubt that a prison sentence was appropriate for these two offences. The Board would rightly have been concerned for military discipline, morale and recruitment, particularly in the context of efforts to attract young women into the Service. It was necessary to make clear to them, and indeed throughout the Service that, so far as possible, women, and young women in particular, would be protected from unwelcome sexual attention and that those convicted of such offences should expect significant punishment.
25. Reflecting on these considerations and looking at the sentence overall, which Mr Blades rightly invited us to do, we have concluded that we should not interfere with the sentences imposed on the appellant for indecent assault but that, as a matter of totality, we should order that the sentences will run from the date of conviction. To that extent, therefore, this appeal will be allowed.