Neutral Citation Number: [2017] EWCA Crim 325

Case No: 2016/05551/B1 & 2016/05552/B1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON A REFERENCE FROM THE CRIMINAL CASES REVIEW COMMISSION
ON APPEAL FROM A COURT MARTIAL AT BULFORD
THE JUDGE ADVOCATE GENERAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/03/2017

Before:

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
THE VICE PRESIDENT OF THE COURT OF APPEAL CRIMINAL DIVISION
MR JUSTICE OPENSHAW
MR JUSTICE SWEENEY

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Between:

Regina	**Respondent**
- and -	
Alexander Wayne Blackman	**Appellant**

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- -

Jonathan Goldberg QC, **J Israel** and **S Kong** for the **appellant**
Richard Whittam QC and **Katherine Hardcastle** for **the Respondent**

Hearing date: 24 March 2017

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SENTENCE
(subject to editorial corrections)

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The Court:

Introduction

1. On 15 March 2017, we quashed the appellant's conviction for murder. It is not necessary for us to set out the history or the background or the findings we made on the hearing of the appeal against conviction. They are all fully set out in our judgment: [2017] EWCA Crim 190.

2. As the original conviction has been quashed, all the sentences have fallen away. It is therefore necessary for us to sentence the appellant on the basis of the powers available to a Court Martial. On that basis there are two principal issues for us to consider:

    i) The length of the determinate sentence of imprisonment to be served for the offence of manslaughter by reason of diminished responsibility.

    ii) Whether the court should sentence him to be dismissed and, if so, the nature of that sentence.

The determinate sentence to be served

3. As to the length of sentence, there is no Sentencing Council guideline for the offence of manslaughter by reason of diminished responsibility, although the Sentencing Council is in the course of preparing such a guideline. The principles, however, are well established, particularly in the decision of this court in *R v Wood* [2009] EWCA Crim 651, [2010] 1 Cr App R(S) 2. On the basis of that decision, it is necessary for us to consider the following matters:

    i) The relationship of a sentence for manslaughter to the guidance given by Parliament as to a sentence for murder.

    ii) The factors taken into account in our decision in 2014 when this court reduced the minimum term.

    iii) The harm caused by the commission of the offence.

    iv) The culpability of the appellant.

    v) The aggravating and mitigating factors.

    vi) The submission as to whether a reduction should be made for a possible guilty plea.

    We will consider each in turn.

(1) The relationship to the sentence for murder

4. Although there is no express statutory link between the guidance given by Parliament to the courts in Schedule 21 to the Criminal Justice Act 2003 on the appropriate minimum term to be served when a life sentence is passed for murder, it is clear from the decision in *Wood* that there is a link to that Schedule in determining the appropriate sentence for manslaughter. We have to have regard to the level of sentences specified for murder and to the mitigating and aggravating factors to be taken into account. It is important to note that the starting point for the minimum term for murder is 15 years.

5. However there is an important difference between a minimum term specified in Schedule 21 and a determinate sentence. A minimum term is the time that will be served in prison counted in actual years; in contrast, the time served in prison on a determinate sentence is generally half the number of years specified by the court. Thus, for example, the starting point for the minimum term of 15 years for murder is the equivalent of a determinate sentence of 30 years. A minimum term of 30 years is equivalent to a 60 year determinate sentence. Thus, in the present case when considering the minimum term originally imposed by the Court Martial for the offence of murder, namely 10 years, and the reduced minimum term imposed by this court, namely 8 years, these are the equivalent respectively of a 20 and 16 year determinate sentence.

6. Thus, as this is plainly a case for a determinate sentence, the comparison that we make for the purposes of Schedule 21 is with the original sentence which is the equivalent of a determinate sentence of 20 years and the term substituted by this court of 16 years. It would be highly misleading, therefore, to contrast the term that we impose with the minimum term specified as part of the life sentence.

(2) The reduction made in the decision on the appeal in 2014

7. There are two factors set out in the judgment of this court on the earlier appeal given on 22 May 2014, [2014] EWCA Crim 1029, [2015] 1 WLR 1900 which are material because we took these factors into account in reducing the sentence by an equivalent of 4 years:

   i) First we took into account the fact that when the appellant killed the insurgent he acted entirely out of character and was suffering from combat stress disorder. As we said at paragraph 75 of the 2014 judgment:

      > "In assessing the evidence of stress and its affect on [the appellant] we attach particular importance to the evidence in relation to the remoteness of the command post at which [the appellant] had been stationed for 5½ months and the limited contact with those commanding him. His mental welfare had not been assessed in the way which it would ordinarily be assessed by a commanding officer and there is evidence that he was becoming somewhat paranoiac about the Taliban

> gunning for him. Taking into account the whole of the evidence we conclude the combat stress arising from the nature of the insurgency in Afghanistan and the particular matters we have identified as affecting him ought to have been accorded greater weight as a mitigating factor."

ii) Second an additional term by way of deterrence was not required, as we said at paragraph 76 of the 2014 judgment.

(3) The harm caused by the commission of the offence

8. A court is required by Parliament to consider the harm caused by the commission of the offence and the culpability of the offender. In a case of manslaughter the harm caused by the offence is at the highest level, as death has followed from the actions of the appellant. For these purposes death cannot be measured in terms of a short time of likely survival; this was a deliberate killing of a wounded man.

(4) The culpability of the appellant in committing the offence

9. In our judgment of 15 March 2017 we concluded that the adjustment disorder from which the appellant suffered at the time of the killing had led to an abnormality of mental functioning which had substantially impaired:

i) His ability to form a rational judgment about the need to adhere to standards and the moral compass set by HM Armed Forces and putting together the consequences to himself and others of the individual actions he was about to take.

ii) His ability to exercise self-control as he had acted impulsively and not in the way in which he had previously acted to control his emotions.

10. Although the appellant's responsibility is diminished for these reasons, as is evident from the matters we set out in the judgment of 15 March 2017, he still retained a substantial responsibility for the deliberate killing. We consider that the responsibility he retained for the deliberate killing after taking these factors into account was at a medium as opposed to a high level.

(5) Aggravating and mitigating factors

11. The aggravating factors that were clearly present were:

i) The effect of the appellant's actions on the reputation and safety of HM Armed Forces. There can be no doubt that the way in which the appellant acted, knowingly in contravention of the Geneva Conventions, in deliberately killing by shooting an injured insurgent in the circumstances recorded on the video clips as described at paragraphs 17-22 of the judgment of 15 March 2017 has had a material adverse effect on the views many hold about the conduct of HM Armed Forces. The appellant's actions can be used by the insurgency

and others as evidence that the killing of the insurgent was in breach of the values proclaimed for which the International Security Force and HM Armed forces had been sent to Afghanistan.

ii) The vulnerability of the insurgent as he had been seriously wounded and could not defend himself. It matters not that he probably had little time to live. His life was deliberately ended by the appellant.

iii) The decision made to ensure that the killing was not witnessed by the overhead helicopter and thereafter to cover up the evidence of what had happened.

iv) The fact that the appellant used a weapon with which he had been provided may not, in the unusual circumstances of this case, constitute an aggravating factor, but his intention to kill and, even more so, the collusive involvement of other members of the team that he led and who felt intense loyalty towards him, did.

12. The mitigating factors were:

i) The appellant's outstanding service record, together with the very impressive statements that have been placed before us attesting to acts of conspicuous bravery.

ii) The effect on him of the conflict in Afghanistan and the 16 factors we set out in our judgment of 15 March 2017 at paragraph 99. Each of those factors is significant.

iii) His perception of the perceived lack of leadership by Colonel Murchison and Major Fisher, the relevance of which we set out at paragraphs 100-103 of our judgment of 15 March.

iv) The nature of the anticipated further attack on CP Talaanda and the fact that the insurgent had a high explosive grenade which we set out in paragraph 104 of our judgment of 15 March.

(6) The submission on reduction for a possible guilty plea

13. Although the appellant never indicated a willingness to plead guilty to manslaughter during the proceedings at the court martial, and his defence at trial involved a denial of any intention to kill, it was submitted that the appellant should nevertheless be sentenced as if he was entitled to receive the full one third discount for an early guilty plea.

14. Against the background of the appellant's decision, during these proceedings, to accept substitution of a verdict of manslaughter by reason of diminished responsibility (which decision, he reminded us, was described in our judgment of 15 March 2017 as having been "*entirely realistic and sensible*") it was submitted that:

i) If matters had proceeded as they should have done, particularly given the view of the appellant's then lawyers that the case against him for murder was "*overwhelming*", one or more psychiatric reports would have been obtained before trial.

ii) It was inevitable that any such report(s) would have concluded that the appellant had been suffering from an adjustment disorder at the material time which substantially impaired his responsibility.

iii) In that event the appellant would have been given robust advice to plead guilty to manslaughter by reason of diminished responsibility, and would have done so (or indicated an intention to do so).

iv) It was almost inevitable that such a plea would have been accepted.

v) Even if it was not, it was highly likely that the outcome would have been an acquittal on the charge of murder and conviction (by plea or verdict) of manslaughter.

vi) Hence, by whichever route, the appellant would have been entitled to full discount when being sentenced for manslaughter by reason of diminished responsibility – given that the plea would have been tendered or indicated at the first available opportunity after the discovery of the adjustment disorder (the existence of which, both at the time of the killing and during the proceedings below, the appellant was unaware of).

15. In our view these submissions are misconceived. Quite apart from the absence of any plea or any indication of a willingness to plead, we are wholly unpersuaded that matters would have taken the course advocated by Mr Goldberg. As touched on in paragraphs 10, 23, 35, 66 and 67 of our judgment of 15 March 2017:

i) The appellant's defence pursued throughout the trial was that when he shot the insurgent he had believed that the insurgent was dead – i.e. that he had no intention to kill the insurgent or to cause him any serious (or any) bodily harm.

ii) Whilst unbeknown to the appellant he was suffering from the adjustment disorder at the time of the court martial, and lacked insight into his condition, it is very clear that he would not have wanted to advance a psychiatric defence not only because he only knew of PTSD and was not suffering from that, but also because of the stigma and perception of weakness resulting from the running of a psychiatric defence, and (very significantly) the likely end of his career consequent upon any conviction for homicide.

iii) The express confirmation given by the appellant at the outset of the appeal hearing on 7 February 2017 that, if satisfied that that the partial defence of diminished responsibility was established, the court could

and should proceed to substitute a verdict to that effect, upon the basis that the appellant had intended to kill the insurgent, was the first time throughout his prosecution and appeals (despite the strength of the evidence and having long recovered from the adjustment disorder) that the appellant had formally admitted having had that intention.

iv) That was "*an entirely realistic and sensible course to adopt*" because, finally, it accepted that the appellant knew that the insurgent was alive when he shot him, and had intended to kill him - which further undermines, rather than supports, the contention that it would otherwise have been accepted before trial.

An order for dismissal

16. A Court Martial, when it comes to sentence, is in an unusual position as it is empowered as part of the sentence under s.265 of the Armed Forces Act 2006 to dismiss a convicted person or to dismiss the convicted person with disgrace.

17. It was common ground that the court is fully entitled to leave the question of continuation in service for the military authorities. We have very carefully considered whether we should exercise the powers as part of the sentence or leave to the administration of HM Armed Forces the decision whether to discharge the appellant or to allow him to continue to serve. We have considered whether if we order the dismissal of the appellant, that dismissal should be with disgrace.

18. We were told by the appellant's wife that the cruellest punishment that the appellant had considered he had suffered was the dismissal with disgrace. That punishment has fallen away. In the light of the appellant's outstanding service prior to the killing of the insurgent and the finding we have made of diminished responsibility, we accept the submission that there should be no question of dismissal with disgrace.

19. We have carefully considered the guidance on sentencing in the court martial and the relevant guidance for the administration in respect of persons convicted.

20. Although it was submitted that the decision should be left to the military authorities, we are unable to accept that submission.

i) The conviction for the offence of manslaughter remains a very serious matter. As we have set out in paragraph 10 above, the appellant's responsibility is not negated by the acceptance of the psychiatric evidence, but remains substantial.

ii) It is inevitable that his continuation in service is out of the question not only because of the length of the inevitable custodial sentence but also because of the severe damage to the reputation of HM Armed Forces which we have described. This must be so, whatever view is taken of the dispute between Lt Col Lee and Lt Col Murchison (to which we

referered at paragraph 100 of our judgment of 15 March 2017) over the level of support provided to CP Omar, the visits made and the adequacy of the command of Lt Col Murchison and Major Fisher.

Conclusion

21. As we have explained, we had concluded in 2014, taking into account the matters we have set out in paragraph 7 above, that the appropriate sentence in the case of murder was one that would have been the equivalent of a 16 year determinate sentence. Taking into account all the considerations we have set out above, we have concluded that the sentence should be and is:

i) He be dismissed from the service.

ii) He serve a determinate sentence of 7 years, with a direction under s.246 of the Armed Forces Act 2006 that the time on remand in service custody be counted towards sentence.

As with any person sentenced to a determinate term, his release will ordinarily be at the half way point of the sentence.