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[2023] EWCA Crim 1102

IN THE COURT MARTIAL  
APPEAL COURT



CASE NO 202302229/B2

Royal Courts of Justice  
Strand  
London  
WC2A 2LL

Friday 28 July 2023

Before:

THE VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION  
LORD JUSTICE HOLROYDE  
MR JUSTICE GOOSE  
MR JUSTICE MARTIN SPENCER

REX  
V  
ISIMELI GADE SERU

INTERLOCUTORY APPLICATION UNDER S.163(3) ARMED FORCES ACT 2006

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MR J ROSS appeared on behalf of the Applicant  
MR R GREGORY appeared on behalf of the Prosecuting Authority

**J U D G M E N T**

(Approved)

1. THE VICE PRESIDENT: The applicant, Corporal Seru, is charged with two offences of sexual assault against a woman who also serves in the Army. We shall refer to her as the complainant. She is entitled to the lifelong protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly during her lifetime, no matter may be included in any publication if it is likely to lead members of the public to identify her as the victim of these offences.
2. The charges arise out of events on 13 November 2022. The applicant is alleged to have touched the complainant sexually against her will in two incidents a short time apart. He denies the allegations. When interviewed under caution following his arrest on 5 January 2023 he put forward his account of the relevant events. It is unnecessary to say anything more about the facts of the allegations.
3. On 15 February 2023 the applicant was charged with the two offences. He first appeared before a Court Martial on 19 April 2023. He pleaded not guilty to both charges and the case was adjourned for trial on 12 June 2023.
4. On 11 May 2023 the applicant served his defence statement, in which he accepted that he had met the complainant on the day in question but denied any sexual contact with her.
5. On 22 May 2023 Captain Slee, an Officer of the Service Prosecuting Authority ("SPA"), sent an email to both the Court Martial and the applicant's legal representatives. It said:

"Please note that the Crown does not intend to proceed with taking this matter to trial and will be offering no evidence at the FCMH on Thursday 1 June 2023. The trial that is currently listed for 12 to 13 June 2023 can therefore be taken out of the list."

6. Presumably as a result of that email, a hearing was listed on 1 June 2023 with a view to

the SPA formally offering no evidence against the applicant.

7. The SPA operates a Victim's Right to Review Policy. The complainant, learning of the indication that no evidence would be offered, sought a review of that decision. In the result, at the hearing on 1 June 2023 Captain Slee indicated to the Court Martial that the SPA would continue with the prosecution. She applied for an adjournment so that further consideration could be given to the case. An adjournment of one day was allowed.
8. When the case came back before the Court Martial on 2 June, the court was informed that Captain Slee had had no authority to send the email of 22 May 2023. The SPA, represented on that occasion as today by Mr Gregory, informed the court that the complainant had exercised her right of review; the Director of Service Prosecutions had reviewed the case and, having applied the full code test, had found that there was a both a realistic prospect of conviction and a service interest in prosecution. The decision to offer no evidence had therefore been reversed.
9. At that hearing it was contended on behalf of the applicant that continuation of the prosecution would be an abuse of the process and that the proceedings should accordingly be stayed. Submissions on that point were however adjourned until the start of the trial.
10. On 13 June 2023 Mr Ross, then as now representing the applicant, submitted that the proceedings should be stayed as an abuse of the process. Mr Gregory opposed that submission.
11. Assistant Judge Advocate General McGrigor noted the submissions on behalf of the applicant that the indication of discontinuance was final and irrevocable, and that it would bring the administration of justice into disrepute if an indication of discontinuance could subsequently be reversed by the SPA. He also noted the submissions on behalf of

the SPA that the email of 22 May had been sent in error by a junior prosecuting officer whose view of the case had not been approved by an officer of appropriate seniority, and that the indication in that email of an intention to discontinue the prosecution should not be equated with the formal offering of no evidence.

12. The Assistant Judge Advocate General considered the SPA Victim's Right to Review Policy, the CPS Victim's Right to Review Policy and case law which had been cited to him. He stated that the effect of the SPA policy was that a decision to offer no evidence could be reversed. He held that only the formal offering of no evidence, and the consequent entering of a not guilty verdict, could result in a complete bar on the continuance of the prosecution. He accepted the submission that the applicant could not be expected to inquire whether the prosecuting advocate had authority to proceed in a particular way, but nonetheless held that the email of 22 May was no more than an indication of intention and not a final irrevocable decision. He concluded as follows:

"I am also satisfied that victims of crime, the public in general and the military specifically in this case have a legitimate expectation that those who commit offences will be brought to justice. That expectation cannot be overruled by a defendant's belief that they will not now be prosecuted, including as in this case where the defendant has been told a prosecution will be stopped.

I am therefore satisfied to the necessary high criminal standard that the defendant's application has no merit and it is therefore dismissed."

13. Thus the application to stay the proceedings as an abuse failed. The prosecution was, however, then adjourned because the applicant wished to bring the present application to this court pursuant to rule 27 of the Court-Martial Appeal Court Rules 2009. His notice of appeal was served some 14 days out of time. Mr Ross frankly accepts responsibility

for the delay in commencing the appeal and explains that it was due to an error as to the relevant time limit and to intense pressure of other work.

14. The applications for an extension of time and for leave to appeal against the Assistant Judge Advocate General's ruling have been referred to the full court by the Registrar.
15. By rule 44 of the Court Martial Appeal Rules 2009 this court has power to confirm, reverse or vary the ruling complained of and make such order as to costs as we think fit.
16. Three grounds of appeal are put forward on behalf of the applicant. It is submitted first that the Assistant Judge Advocate General erred in his judgment; secondly, that too much emphasis was placed on the Crown Prosecution Service website rather than giving the words of paragraph 17 of the SPA Victim's Right to Review Policy their natural meaning, and thirdly, that the judge erred in not distinguishing between the communications of a civilian CPS employee to members of the public being prosecuted, and the communications of a Captain of the British Army, with the authority of the Service Prosecuting Authority, to a soldier in that army.
17. In his submissions on behalf of the applicant, Mr Ross submits that those serving in the armed forces should be able to have confidence in the integrity of decisions made and communicated by the SPA, since otherwise they cannot have confidence in the fairness with which military discipline is enforced. With that in mind, Mr Ross draws a distinction between a communication by a CPS employee to a member of the public who faces prosecution and a communication by an officer in the Services to a serviceman. In his challenge to the decision of the Assistant Judge Advocate General, he relies on the decision in R v Bloomfield [1997] 1 Cr.App.R 135. He also relies on the decision of the High Court in an extradition appeal, Barber v The Administrator of the Sovereign Base Areas [2021] EWHC 2858 Admin.

18. We shall return to the case of R v Bloomfield shortly. In relation to the case of Barber we say at once that the facts and circumstances of that case, in which a decision taken in 1998 not to prosecute had been reversed nearly two decades later in 2017, are so far removed from the present case, and the legal issues so different, that we derive no assistance from it in this appeal.
19. On behalf of the respondent, Mr Gregory submits that the Assistant Judge Advocate General was entitled and correct to reach the decision he did. He focuses upon the feature of the case that although an email had been sent expressing an intention to offer no evidence, the court was not at any stage formally notified that no evidence was being offered and nor did the court enter any verdict. On the contrary, as we have noted, the first pronouncement to the court on this topic was on 1 June 2023, when it was clearly stated that the prosecution would be pursued.
20. We are grateful to both counsel for their helpful submissions, and in particular for the assistance they have given to the court this morning in answering the many questions posed of each of them. Having reflected on the submissions and the issues in this case, our analysis is as follows.
21. In R v Killick [2012] 1 Cr.App.R 10, the facts were that the CPS informed the accused that no further action would be taken against him in respect of allegations relating to a number of complainants. The complainants sought a review of that decision. A decision was then taken to pursue the prosecution. The trial judge rejected a submission that the proceedings should be stayed as an abuse of the process, and the accused was ultimately convicted of a number of offences. He appealed to this court contending that the trial judge had been wrong to refuse to stay the proceedings.
22. This court dismissed his appeal. The court referred in its judgment to a number of earlier

cases, including R v Bloomfield in which the defendant had been told by prosecuting counsel in court that no evidence would be offered. At page 143 of its judgment in that case, the court had said:

"The statement of the prosecution that they would offer no evidence at the next hearing was not merely a statement made to the defendant or to his legal representative. It was made coram iudice, in the presence of the judge. It seems to us that whether or not there was prejudice, it would bring the administration of justice into disrepute if the Crown Prosecution Service were able to treat the court as if it were at its beck and call, free to tell it one day that it was not going to prosecute and another day that it was."

23. The court in Killick went on to agree with and approve what had been said by this court in R v Abu Hamza [2007] QB 659 at paragraph 54:

"... it is not likely to constitute an abuse of process to proceed with a prosecution unless (i) there has been an unequivocal representation by those with the conduct of the investigation or prosecution of a case that the defendant will not be prosecuted and (ii) that the defendant has acted on that representation to his detriment. Even then, if facts come to light which were not known when the representation was made, these may justify proceeding with the prosecution despite the representation."

24. The SPA Victim's Right to Review Policy issued in August 2022 states at paragraph 2 that it gives effect to the principles reflected in R v Killick and in a later EU Directive. The policy gives a right to any victim, as defined for the purposes of the policy, to seek a review of a decision to offer no evidence in all proceedings. Such a request triggers a review of the evidence and of the public, including service, interest. The review is carried out by a lawyer with no previous involvement in the case. Paragraphs 16 and 17 of the policy, on which Mr Ross relies, state as follows:

"16. The outcome of the review process should be communicated

to the victim in every case within the time limits set out below. If the original decision is not upheld then the available remedy depends on the nature of the qualifying decision. In cases where the qualifying decision was 'not to charge' then it may be possible to bring proceedings if the original decision is found, on review, to be wrong. The same applies in cases where the qualifying decision was 'to discontinue' all proceedings or to leave all proceedings to 'lie on file'.

17. However, there is no such remedy available in cases where the qualifying decision was 'to offer no evidence', or a direction barring further proceedings. This is because such decisions are final proceedings cannot be reinstated and redress in these circumstances is limited to an explanation and apology. It is important to note that, although the case cannot be recommenced, the quality and thoroughness of the review undertaken will be no less than a review undertaken for any other category of case. The important issue being addressed in these cases is whether the original case decision was wrong."

25. As was observed in the course of argument, the reference in paragraph 17 of that policy to a situation in which "proceedings cannot be reinstated" may be thought to convey the clear implication that the relevant decision relates to proceedings which have been formally concluded, rather than to proceedings in which an intention to conclude them has been notified.
26. Applying the principles set out in the case law to the present case, the following considerations are in our view important. First, as we have noted, the applicant was charged in February 2023. For three months he knew that he faced those charges which related to events which had occurred as recently as November 2022. He was able to serve his defence statement setting out his case. He was expecting, and no doubt prepared, to stand trial in mid-June 2023.
27. Secondly, the email of 22 May 2023 was a clear representation of an intention that no evidence would be offered. It was no doubt welcome to the applicant. However, only 10 days passed before he was informed that the decision had been taken in error and that he



would be prosecuted. The disappointment which he no doubt felt at that revised decision was no more than disappointment. It is not and could not be suggested that he suffered any prejudice in the preparation or presentation of his defence, nor is it suggested that he in any way acted to his detriment.

28. Thirdly, it follows that this cannot be a case in which continuation of a prosecution is an abuse of the process of the court because the accused cannot have a fair trial. This is commonly referred to as "limb one abuse".

29. Fourthly, nor in our view can it even arguably be a case of "limb two abuse", that is to say a case in which it would be an affront to the conscience of the court for the accused to be prosecuted. The email of 22 May was sent by a junior officer of the SPA who did not in fact have authority to send it. Her decision was the subject of a request by the complainant for review. The review was carried out with commendable speed by the Director of Service Prosecutions. The Director's decision that the evidence was such as to give a reasonable prospect of conviction and that prosecution was in the public interest is not in itself challenged. Nor could it be: the complainant's statement, if accepted as accurate and reliable by the tribunal of fact, is capable of proving the legal ingredients of the offences charged. It is plainly in the public and service interest that her allegations, and the applicant's denial of them, should be considered at a trial.

30. Fifthly, it is well known to all criminal legal representatives that decisions not to prosecute, whether in the services or in civilian life, may be the subject of a request for review by those who can for this purpose be regarded as a victim. Such a right of review inevitably carries with it the prospect that an intention not to prosecute will be reversed. It is of course highly regrettable that the email of 22 May was sent without awaiting the outcome of the review. But it was, as the Assistant Judge Advocate General rightly held,

no more than an indication of intent. It was not a binding commitment such as would have been made if the SPA had formally offered no evidence at a court hearing and the court had entered not guilty verdicts. We emphasise that in this case, although the initial decision of an intention to offer no evidence had been communicated both to the applicant and to the court, the proceedings had not reached the stage of a formal offering of no evidence before the court, still less the entering by the court of not guilty verdicts.

31. Finally, we would add that we are unable to accept the submission that the service context of this case invests the email of 22nd May with an enhanced status. The service context of a prosecution can, of course, often be highly relevant to proceedings both at first instance and on appeal. But in this case we cannot see that it makes any significant difference. True it is that the applicant, being subject to military discipline, should be able to rely on the decisions of the SPA. But the complainant is equally entitled to rely on such decisions. Regrettable though it is that the email of 22 May was sent in error, the Assistant Judge Advocate General was entitled, and in our view correct, to find that the disappointment caused to the applicant by that mistake and its speedy reversal should not outweigh the rights of the complainant and the public interest in this prosecution.
32. If we had felt the grounds of appeal to have merit we would have been willing to grant the necessary extension of time. As it is, no purpose will be served by our doing so because we are satisfied that an appeal cannot succeed.
33. Accordingly, the applications to extend time and for leave to appeal fail and are refused.
34. Gentlemen, we agreed that we should return to the question of whether reporting restrictions, in addition to the Sexual Offences (Amendment) Act restriction, may be necessary. Mr Gregory, you may be able to assist us. When is it likely the case will be tried?

35. MR GREGORY: My Lord, I was fixing a case in the Courts Martial - you appreciate we only have two court buildings in this country and so it is a fairly small jurisdiction. I suspect we are looking at September.
36. THE VICE PRESIDENT: That will be a trial before the Court-Martial with a military jury?
37. MR GREGORY: Correct, termed a Board. In cases of this nature there are a Board of six people.
38. THE VICE PRESIDENT: So the question really is whether there is any risk of prejudice to the administration of justice in those proceedings.
39. MR GREGORY: For my purposes I cannot see that there is. This ruling is a fairly narrow issue. It is highly unlikely that any members of the Board, with the greatest of respect to your Lordships, are likely to be reading judgments emanating from this building, and so I do not have any strong submissions with regards to reporting restrictions beyond the standard restriction the court may make.
40. THE VICE PRESIDENT: Thank you. It is a disappointment to find that our pronouncements are not the staple diet of bedside reading, but there it is. Yes, Mr Ross?
41. MR ROSS: My Lord, with respect I also have no submissions.
42. THE VICE PRESIDENT: Thank you both. Your respective positions really coincide with our provisional view. This is very far removed from a situation in which for example following an appeal against conviction in a civilian case there may be a high profile retrial with a danger of publicity of the appeal in some way impacting upon the fairness of that prospective retrial. So for the avoidance of doubt we have put in place the reporting restriction in relation to the complainant's identity but no other reporting restrictions.

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

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