

WARNING: the reporting restrictions mentioned in para 2 of the judgment apply to the contents transcribed in this document, as the case concerned a sexual offence. 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.

This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

IN THE COURT OF APPEAL
COURT MARTIAL APPEAL COURT



CASE NO 202103971/B1
[2023] EWCA Crim 201

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 2 February 2023

Before:

THE VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
(LORD JUSTICE HOLROYDE)

MRS JUSTICE FARBEY DBE

MR JUSTICE COTTER
(Sitting as a Judge of the CACD)

REX

v

MARTIN ANTHONY TONEY

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)

MR D CLARK appeared on behalf of the Applicant.
MR R GREGORY appeared on behalf of the Respondent.

J U D G M E N T

(Approved)

THE VICE-PRESIDENT:

1. The applicant, Martin Toney, was convicted by a Court Martial of an offence of sexual assault. He was sentenced to a community order of 18 months with 120 hours of unpaid work and ordered to be dismissed from the Service. His application for leave to appeal against conviction was refused by the single judge. It is now renewed to the Full Court.
2. The victim of the offence, a female officer to whom we shall refer as "C", 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 this offence.
3. For present purposes the facts giving rise to the conviction can be very briefly stated. In December 2012 both the applicant and C took part in an Army ski training programme in Norway. The applicant was the senior officer present. A social event was held to mark the end of the programme. At the end of the event C went to the applicant to say "goodnight". Her evidence was that the applicant asked for a goodnight kiss. She moved to kiss his cheek but the applicant turned his head, kissed her on the lips and groped her buttocks through her dress. The applicant denied that he had kissed C and denied that he had touched or groped her bottom. It was not in dispute that if the applicant had done what was alleged, he was guilty of the offence charged. The issue in the case was therefore factual.
4. C immediately reported what had happened to a female friend who was also on the training programme. She did not, however, make any formal complaint until 2021, when she reported the incident to the Service Prosecution Authority ("SPA") after reading that the applicant had been accused by another woman of sexual assault during an

Army skiing championship, and had been acquitted by a Court Martial. The prosecution did not seek to adduce any evidence about that other allegation, and neither counsel at trial made any reference to C's reason for contacting the SPA when she did.

5. The applicant was tried before a Court Martial at Catterick on 30 November 2021. Assistant Judge Advocate General Legard sat with a Board comprising a President and four members. Each of the five members of the Board was of equal or superior rank to the applicant. We are told that that is standard practice, though in some cases one member of the Board may be one rank lower than the accused.
6. In advance of the trial, and in accordance with the usual procedures of the SPA, the prospective members of the Board, and an additional prospective member who would be retained until the start of the trial in case he was for any reason needed, were sent a number of documents.
7. First, they were sent a questionnaire which, for obvious reasons, enquired whether the prospective member knew either the accused or any of the persons who might be called to give evidence. They were also sent two booklets, Volumes 1 and 2, of guidance for those taking part in a Court Martial. The second of those volumes, "A Guide for Court Members", contained information as to the duties and responsibilities of those serving as members of a Board. One section, devoted to improper knowledge of the case, said in plain terms that a member of a Board must not attempt to discover any details about the case. It also drew attention to the potentially serious consequences which might follow if anyone disobeyed that instruction, for example, because a trial might have to be stopped or a verdict later quashed. Each prospective member was required to sign a declaration that he had read and understood both volumes, and understood his duties and responsibilities. That, again, was in accordance with standard procedure. Each member

of the prospective Board duly signed and returned the declaration.

8. At the start of proceedings, a further enquiry was made to confirm that no prospective member had any knowledge of the defendant. That confirmation having been given, the waiting member was released.
9. No complaint is made about the terms of the directions of law which Judge Legard gave to the Board at trial. At the outset, he gave initial directions which included three passages which we must mention.
10. In the first, the judge told the Board that they were the judges of fact and must listen to the evidence, watch and assess the witnesses and determine which witnesses they could rely upon and which witnesses they could not. He continued:

"... and your task in which each of you has just sworn an oath or a solemn affirmation, is to come to a verdict on the facts and the evidence that you have heard, seen or read in this courtroom."

11. The judge went on to say this:

"Now one other matter I want to talk to you about. Some of you may be aware of various policy statements that have emanated from the Chief of General Staff, the Defence Secretary and so forth in connection with the place of women in the Armed Services and specifically the need to ensure that the working environment is safe for one and all. You may be or may not be aware of that. Well, you must put those matters, even if you are aware of them, to one side, okay, not to allow them to influence your assessment of the evidence or in time your deliberations and you must simply concentrate on the evidence. Try the case in accordance with the evidence that you hear, see or read in the confines of this courtroom and upon that alone, okay?"

12. Further directions given by the judge at that early stage of the trial included a firm

instruction not to engage in any research in the case, whether via Google or Facebook or anything of that sort. The judge explained the reasons for that instruction, and concluded this passage of his directions by emphasising the importance of the members leaving the internet well alone. He added:

"And despite my direction, if one of you was to come into the retiring room armed with information that you had gleaned from the internet or otherwise, then the other four of you are under a duty to bring that to my attention, okay? It is that important. That is an individual duty and you do not have to discuss it with anyone else, you just bring it straight to my attention."

13. The judge went on to emphasise the importance of his directions and of the need to follow them, referring to the fact that in civilian courts a juror who breached similar directions could get into very serious trouble. He told the members of the Board that they were in the same position as a juror and, if they did breach the directions he had given, they too could face serious consequences which could include a criminal record. Finally, the judge emphasised:

"... none of you will be reported on for your conduct or performance in this trial, nor will it feature in any way as part of your Confidential Reporting process. You are all independent free agents, okay, and you have sworn an oath and an affirmation to try the case on the evidence. That is the important bit."

14. The directions given to the members of the Board after the evidence had been heard included a further direction to consider the evidence dispassionately, not to allow any feelings of sympathy to influence their verdict and not to be concerned about any consequences which might flow from their verdict. The judge also directed the Board to consider whether the delay had caused any disadvantage to the applicant in putting

forward his defence and, if so, to take that into account in deciding whether the prosecution had proved their case.

15. The Board found the applicant guilty. The judge subsequently imposed the sentence to which we have referred.
16. The grounds of appeal, originally drafted by trial counsel and today amplified orally by Mr Clark, contend that the applicant did not have a fair trial, in particular because there was a real danger of bias on the part of the Board, and that the conviction is consequently unsafe.
17. Before the trial began, counsel for the applicant had raised with the judge a concern arising from a recent House of Commons report and from talks recently given by the Secretary of State for Defence and the Chief of General Staff concerning women in the Army. The theme, counsel said, was that everyone involved in the Army must make it a better place for women to be. He observed that each member of the Board was a senior or middle manager in the Army which, he submitted:

"... does not look like the fairest of tribunals for the trial of a case of a senior officer charged with a sexual assault on a junior rank at the moment..."

He invited the judge to give a clear direction emphasising the burden and standard of proof. He did not formally object to any member of the Board, and he did not in the course of the trial invite the judge to add to or vary any of the directions of law which had been given.

18. It is submitted now by Mr Clark that those in senior positions in the Army were required to implement the policy against sexual harassment and to set an example; that that policy was of particular prominence and importance in the months leading up to this trial; that

there was a real and obvious risk that the Board would accept C's evidence simply because it fitted the current theme; that the composition of the Board therefore appeared neither independent nor impartial; and that the applicant's Article 6 right to a fair trial was accordingly infringed. It is further submitted that the burden on senior officers to set an example would reduce the ability of the Board to give due weight either to the applicant's good character or to the difficulties caused to the defence by the delay in reporting the incident. Mr Clark placed particular stress on the timing of this trial, coming as it did during the period when, as we have indicated, there was much discussion about the position of women in the Armed Forces.

19. A further ground of appeal is raised on the basis of the enquiry made of prospective members of the Board in advance of trial as to whether they had any prior knowledge of the applicant. It had originally been submitted that the Board were given no specific directions, such as would be given to a jury in the civilian court, not to carry out any research into the applicant. That point has not been pursued, having regard to the relevant passage of the directions to which we have referred. It is, however, submitted that, if any member of the Board had entered the applicant's name into an internet search engine, he would very quickly have been able to find a newspaper report of the applicant's acquittal in 2021. Notwithstanding that that would be a report of an acquittal rather than a conviction, Mr Clark submits that it would be seriously prejudicial to the applicant's case. He suggests that it is "inconceivable" that no member of the Board either had some prior knowledge of the applicant or had made, or made during the trial, some form of internet research which would have revealed damaging information. Mr Clark also emphasises the significance of the passage of time between the alleged incident and the report of it. He points out in particular that over the course of his

career, the applicant had attended many similar skiing events, and therefore was under a particular difficulty in remembering any detail at all of what had happened on this particular occasion.

20. For the respondent Mr Gregory, who also appeared below, submits that the Board was properly constituted and was not objected to. He has assisted us with the nature and extent of the pre-trial enquiries which are made of prospective Board members, and has emphasised that one of the contrasts between the Court Martial and the civilian court is that members of a Board attend as a matter of duty, having been ordered to do so. He also emphasises that those who enlist in His Majesty's Service accept that, with few exceptions, any disciplinary matter or criminal charge will be tried by the Court Martial and therefore by persons drawn from within the Armed Services.
21. Mr Gregory further submits that there is no reason to believe that the Board failed to follow the directions given by the judge. He suggests it would be a misconception to equate the Army's wish to eliminate sexual harassment within the Service with a perceived need to convict an officer accused of such an offence against a junior rank.
22. Having reflected on the submissions of counsel, for which we are grateful, we have reached the following conclusions.
23. We have no doubt that the applicant was tried by a Board properly composed in accordance with the Armed Forces (Court Martial) Rules 2009. By rule 29 of those Rules, this trial required a Board of at least five lay members. By rule 34(1), at least one of those members must be qualified to be the President. By rule 34(3), one of the requirements for qualification as President is to be of superior rank to the accused. By rule 34(7), where two or more of the members are so qualified, the most senior of them shall be the President of the Board. That last sub-rule plainly contemplates that the

Board may include more than one person who is superior in rank to the defendant, and we see nothing in the rules to prohibit a Board comprised entirely of such persons. As we have indicated, we understand from counsel that the standard practice and procedure involves a Board generally being composed of persons equal or superior in rank to the accused, with perhaps one member of a rank below. The rationale, it is said, is in order to avoid any perceived duty to acquit a more senior serviceman. That being the standard practice, it seems to us, and is accepted by Mr Clark, that the Board which acquitted the applicant in the 2021 trial would have been composed in a similar way.

24. A consequence of the normal practice and procedure is, of course, that the Board trying a senior officer such as the applicant, himself under a duty to set an example to junior ranks, will comprise officers who are likely to hold managerial responsibilities. We are, however, unable to accept that that fact gives rise to an appearance of bias. The likelihood that members of the Board would have managerial responsibilities does not carry with it any actual or perceived risk that they would fail to comply with the directions of law given to them by the judge. Nor would a current emphasis, by no means unique to the Army, on seeking to stop sexual harassment in the workplace carry with it any actual or perceived risk that senior officers would decide their verdict on the basis of a desire to pursue that aim rather than on the basis of the evidence. We respectfully adopt the analogy drawn by the single judge when refusing leave to appeal on the papers:

"Being a member of a modern workplace where sexual harassment is prohibited does not render a juror unfit to sit on a jury where such allegations may be in issue."

25. The familiar test set out by the House of Lords in Porter v Magill [2001] UKHL 67, requires us to consider whether a fair-minded and informed observer would conclude that there was a real possibility or real danger (the two being the same) that the tribunal was biased. We do not accept that such an observer, knowing that the Board was composed in accordance with the Rules and in accordance with usual practice, would conclude that there was a real risk that the senior officers who were members of the Board would ignore, or be unable to follow, the clear directions they were given.
26. We are also unable to accept the submission that it was inevitable, or at any rate likely, that one or more members of the Board would either know something about the applicant or conduct some research into him. The purpose of the pre-trial enquiry was to eliminate any risk of that happening. The questionnaire to which we have referred asked specifically whether a prospective member had any knowledge of the applicant, and at the very outset of the trial that enquiry was repeated. The booklets which each prospective member was required to confirm he had read and understood spelt out, amongst other things, the duty not to conduct any independent research. The directions given by the judge to which we have referred made clear the duty of the members to try the case in accordance with the evidence adduced during the trial and nothing else. We see no basis on which it could be suggested that any member of the Board went behind those clear instructions and directions.
27. For those reasons, notwithstanding Mr Clark's endeavours on behalf of the applicant, we are satisfied that there is no arguable ground on which it could be said that this conviction is unsafe. The renewed application is accordingly refused.
28. THE VICE-PRESIDENT: Mr Clark, was there something else you wanted to raise?
29. MR CLARK: There is. I would need permission but in my note I indicate I would like

to pursue an application for permission to appeal sentence out of time. I can do it very briefly --

30. THE VICE-PRESIDENT: No, I am afraid not, because as is well known there is a procedure to be followed, and an important part of that procedure is that when Notice of Appeal is given the application for leave to appeal, whether it be in relation to conviction or sentence, goes before a single judge. That simply has not happened. To the best of our knowledge there is even now no Form NG indicating an application for leave to appeal against sentence. Leave to appeal against sentence is wholly distinct from leave to appeal against conviction: a separate application is required. I am afraid, Mr Clark, it simply has not been done. We do not at present see any reason why this applicant should be permitted simply to bypass the proper procedure - including, as it does, the important filter of the single judge - and make belated submissions directly to this Court.

31. MR CLARK: I have heard that; I will have to consider the position. Thank you very much.

32. THE VICE-PRESIDENT: I make it clear Mr Clark that what we have just said does not mean that an application cannot be made for an extension of time and for leave to appeal against sentence. All we are saying is that the proper process must be followed. I am afraid we see no reason, in the circumstances of this case, why we should indulge an attempt, with respect, to bypass that procedure altogether.

33. MR CLARK: It may be described as "an attempt" and I accept that.

34. THE VICE-PRESIDENT: Thank you very much.

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

Lower Ground, 18-22 Furnival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk