Neutral Citation Number: [2009] EWCA Crim 1261

Case No: 2008/06941 A7

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CENTRAL CRIMINAL COURT
MR JUSTICE RODERICK EVANS

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/06/2009

Before :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
MR JUSTICE COLLINS
and
MR JUSTICE OWEN

- -

Between :

R
- v -
Daniel James

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- -

Mr C. Nicholls QC for the Appellant
Miss S. Whitehouse for the Prosecution

Hearing dates : 11th June 2009

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Approved Judgment

The Lord Chief Justice of England and Wales:

1. Daniel James is 46 years old. He was born in Iran, and came to the United Kingdom as a teenager. In 1986 he became a British citizen, and so he held both British and Iranian nationality. In 1987 he joined Territorial Army and signed the Official Secrets Act. In March 2006 he was sent to serve in Afghanistan as an interpreter with the British forces attached to the International Security Assistance Force (ISAF). From May 2006 he acted as an interpreter for General Richards, the Commanding Officer of ISAF who was based in Kabul. His role was to act as interpreter at meetings and to translate documents and speeches. He did not have direct access to the most sensitive of General Richards' work but he was in a unique position to overhear operational and strategic information.

2. To begin with his conduct was satisfactory, but before long there was a decline in the standards of discipline. He was dissatisfied with his rank of corporal, and felt that he should have been promoted. That was the background to the offence of which he was convicted on 5th November 2008 in the Central Criminal Court before Roderick Evans J, that on 2nd November 2006, for a purpose prejudicial to the safety or interests of the State, he communicated to another person information that was calculated to be or might or was intended to be directly or indirectly useful to an enemy. On 28 November he was sentenced to 10 years' imprisonment, and an appropriate order was made under section 240 of the Criminal Justice Act 2003.

3. The jury failed to reach verdicts on two further courts in the indictment, collecting documents useful to an enemy, and wilful misconduct in a public office. The prosecution did not seek a re-trial on those counts. They were ordered to remain on the file on the usual terms. As Roderick Evans J observed, and we endorse, the sentence to be imposed on the appellant was required properly to reflect the true criminality and culpability of the single offence of which he was convicted.

4. The crucial feature of this particular conviction is that the appellant was trusted to work in a highly sensitive environment, while serving abroad in the context of an active and continuing armed conflict which involved this country, the men and women who serve in its armed forces, and this country's allies. That context provides the significant aggravating feature of the offence.

5. The appellant met the Iranian Military Attaché in Afghanistan, probably at the Iranian Embassy in August 2006, while he was on duty with General Richards. In September he began an email contact with the Military Attaché, which lasted until December when he was arrested. There were also some mobile telephone communications between the two men. At first the contact appeared to be merely courtesy contact. However, on 2nd November 2006 an email from the appellant to the Military Attaché included a number of observations such as "I have got a computer for you, the one you told me", "I have taken 7 more pictures from those whose job is black", "In the North Iran/Iraq border they are setting up a military camp. All the ground forces are there. Take care of that side. I don't know the exact situation, but it is possible that it is close to a city called Alamara". "I have taken a copy of my own passport", "About my friend who saw you (about buying) he is waiting for the Defence Minister to sign

it and then he will come to you" and finally "Many thanks. Any other work that you may have, I am at your service".

6. The appellant believed that the information that he was giving to the Military Attaché would be useful to him and that he would be pleased to receive it. The information in the email exchanges was imprecise and general, and the evidence suggested that the references in the emails did not, of themselves, provide any great cause for concern. Their author appeared to have a rather exaggerated sense of his own importance, and in the result no actual damage to operations was caused by the emails. However the fact of the communications caused actual damage to relationships between the various forces serving with NATO as well as with the Government of Afghanistan, and his activities undermined the role and position of the United Kingdom Armed Forces. There was, of course, the potential for very serious damage to the safety and operation of United Kingdom and Allied forces if the appellant's activities had not been detected. As it was, he was arrested on 19 December 2006. When interviewed he made no comment.

7. In his sentencing remarks Roderick Evans J carefully explained his approach to the facts disclosed in the evidence. It was not suggested on the appellant's behalf that his assessment was inaccurate or unfair to the appellant. The judge concluded that the appellant intended that the information he passed to the Military Attaché would be useful to an enemy. When he sent the email on 2nd November he had already formed a clandestine relationship with the Military Attaché, who was a senior representative of the Iranian Authorities in Afghanistan and would have become the appellant's handler or point of contact. The judge accepted that the first approach had been made by the Iranians to the appellant, choosing him because of his responsibilities as interpreter to the Commanding Officer of ISAF. As he had direct personal access to him and was present at meetings where topics of great sensitivity were discussed, he was in a unique position to assist the Military Attaché. In addition he would be susceptible to any such approach. First, he was of dual Iranian and British nationality, second, he had become disenchanted with the army, and third, his narcissistic personality, which gave him a grossly inflated idea of his own importance and abilities, made him that much more susceptible to the approach. The judge accepted that there was some force in the suggestion made on the appellant's behalf that he was obviously unsuited to the position in which he found himself.

8. The judge examined the damage caused by the email communication. He recognised that the relationship with the handler was in its infancy, that the appellant was offering services rather than being tasked, and that there was no direct damage to operations as a result. However the judge was concerned about the "immense" potential for serious harm which the appellant's activities involved. The fact of his relationship with his Iranian contact had damaged trust between NATO and the Afghan Government and had the potential of inhibiting the sharing of information and intelligence between allies. The gravest part of the offence was the fact that it occurred while the appellant was serving in a war zone. The further aggravation was his belief at the time that the Iranians were supporting those in Iraq who were attacking British and American forces serving there.

9. The judge concluded that a deterrent sentence was required, and there could in any event be no discount for a guilty plea.

10. The argument in support of the appeal begins with the premise that the maximum sentence for the offence of which the appellant was convicted is 14 years' imprisonment. From there Mr Colin Nicholls QC submitted on behalf of the appellant that the count of which he was convicted was not the most serious offence with which he was charged. He developed the submission that the offence of communicating information alleged in count 1 was not nearly as serious as the allegation in count 2 that the appellant collected information of a high degree of sensitivity. He challenged the suggestion advanced by the prosecution when explaining why the Crown would not seek a re-trial on counts 2 and 3, that count 1 was the most serious count. Mr Nicholls invited us to consider what level of sentence would have been appropriate if the appellant had been convicted on count 2 alone. He drew attention to a number of sentencing decisions, and focussed particular attention on *R v Smith* [1996] 1 CAR(S) 202 where the sentence for communicating information was reduced to 5½ years' imprisonment, while the longer consecutive sentence for collecting information was unchanged.

11. Turning to the specific circumstances of the offence Mr Nicholls emphasised that there was no evidence that the lives of any British soldiers was put at risk by the activities of the appellant, and that there were a number of significant mitigating features which taken in the entire circumstances of the case demonstrated that the appellant was not a "professional" spy.

12. Our attention has been drawn to three sentencing decisions where, inevitably, the facts are different, and in any event and unusually, they span a period over 25 years from today. What is striking about these sentences is that they address the issue of totality, and that consecutive sentences were thought appropriate where the total effect of concurrent sentences would have been an insufficient punishment.

13. *Prime* [1983] 5 CAR (S) 127 underlines the importance of deterrence as an essential ingredient of the sentencing decision in a case where information of value to a foreign power was or was intended to be disclosed "it is much better that spying should never start than that spies should subsequently confess". Here, of course, there was no confession. The necessity for deterrence was identified in this observation by Lawton LJ:

> "Anyone, particularly those in the Armed Services and Government Service who is tempted, whether by money, threats of blackmail or ideology, to communicate sensitive information to a potential enemy, should have in mind what happened to this applicant. This is particularly so nowadays when, because of the developments in the gathering and storing of information by electronic means, those in comparatively lowly positions often have access to material which could endanger the security of the state if it got into the wrong hands."

14. *Schulze and Schulze* [1986] 8 CAR (S) 463 involved foreign nationals present in this country in order to carry out spying activities, who were arrested before they had in fact collected or communicated any damaging information. They were sentenced to 10 years' imprisonment. Although no harm was done, the sentences were upheld. It

was an aggravating feature that they had come to this country for the purposes of spying: on the other hand, unlike the present appellant, they were not traitors.

15. *R v Smith*, referred to earlier in this judgment, did indeed involve an element of treachery. The appellant was employed at a research centre which involved Government defence contracts, and over a period of about 22 months, he communicated technical information to agents of a foreign intelligence service. He was sentenced to a total of 25 years' imprisonment. The sentence was reduced to 20 years' imprisonment.

16. *Smith's* security rating was relatively low. However he received at least £20,000 for communicating material and the court believed that the material must have been of value. That said, the sentence had to reflect the fact that such material as was disclosed had not endangered the lives of British subjects. Significantly, and by way of postscript to the judgment, the court emphasised the need for deterrent sentences. Lord Taylor CJ underlined that:

> "Anyone who is prepared to betray his country must expect that he will receive a long sentence. It makes no difference that there may be variations in the political situation worldwide, or in the existence or non-existence of the Cold War, or any other possible source of war or threat to the United Kingdom in the future. Treachery is treachery. It must be deterred and it must be punished."

17. Having considered these authorities we shall assume for the purposes of Mr Nicholls' argument that in this case the act of communication which actually took place was, as he argues, a lesser act than the acts of collection of information for the purposes of onward transmission alleged in count 2. We shall simply record that in our judgment if the appellant had been convicted on both counts the court might well have had to consider consecutive sentences to reflect his culpability.

18. We repeat and endorse the observations of Lord Taylor CJ in relation to any case where a member of the Armed Forces, however junior, serving abroad in a theatre of military operations, chooses to disclose information to anyone which may be of use, directly or indirectly, to an enemy of this country or prejudicial to the interest and safety his colleagues and companions serving in a war zone and at daily risk of death or serious injury. The element of intended betrayal of serving colleagues makes this a very serious offence indeed. Fortunately, cases like these are very rare. When they do occur, there must be no doubt that even if the information disclosed is not proved to have caused any actual damage, and was brought to a halt before any such damage may have occurred, the deterrent element in the sentence is absolutely fundamental. In fact although no individual serving soldier was directly affected by the appellant's activities, they did have a direct impact on the military relationships between NATO forces and the Afghan Government, and this alone might well have made the task of serving soldiers lengthier and more hazardous.

19. The court has a duty to those members of the Armed Forces risking life and health and safety through loyal service to the interests of this country to provide such protection as can be provided in the fortunately very rare cases indeed of possible treachery from those working alongside them and who are treated as trusted

colleagues. The sentence imposed after the trial in this case was not manifestly excessive. In our judgment it properly reflected the deterrent element which necessarily must govern every sentencing decision in cases of treachery.

20. For these reasons this appeal against sentence was dismissed.