



JUDICIARY OF
ENGLAND AND WALES

Alexander Blackman

In the Court Martial Appeal Court

Judgment

21st December 2016

Lord Thomas of Cwmgiedd CJ and Sweeney J :

1. The court has before it this afternoon three applications. First an application for directions, secondly an application for bail and thirdly an application that a video recording be released. It is necessary first briefly to summarise the background.
2. On 15 September 2011, during the course of the deployment of Her Majesty's Armed Forces to Afghanistan, insurgents attacked a command post occupied by the Royal Marines. One of the insurgents was located in an open field and fired on by a helicopter called on to assist. The unit under the command of the appellant was ordered to undertake a battle damage assessment. It was assumed at the forward operating patrol base that the insurgent had died of his injuries.
3. About a year later, consequent on an investigation on an unrelated matter, the Military Police found video recordings of the incident. As a result of that the appellant and a number of others were charged with murder. A court martial commenced at Burford on 23 October 2013. On 8 November 2013 the court martial found the appellant guilty of murder. He was sentenced to life imprisonment with a minimum term of 10 years.
4. On 22 May 2014 this court dismissed his appeal against conviction on the grounds then advanced, namely that the features of the court martial system were incompatible with Article 6 of the European Convention on Human Rights. The court also heard an appeal against the sentence imposed by the court martial. The court reduced the minimum term to 8 years.
5. In September 2015 a new legal team was instructed to advise and report to the appellant on what further steps should be taken. That team duly reported. On 16 December 2015 the Criminal Cases Review Commission were sent an application comprising seven lever arch files, including fresh evidence, correspondence and transcripts, together consisting of over 1,000 pages of submissions and supporting documents. The Criminal Cases Review Commission conducted an inquiry.
6. Although the Criminal Cases Review Commission announced earlier in December 2016 that they were going to refer the matter to the Court of Appeal, their 70 page report was not signed until 15 December 2016 when it was provided to the court.
7. On 16 December 2016 the court heard an application for bail and, as set out in its judgment of that date, adjourned the matter until today, Wednesday, 21 December so that the court could know what position the Crown intended to take.

The issues on the appeal

8. It is, we think, necessary first to set out the issues which arise on the appeal in respect of which an application for leave is going to be made and the grounds referred to the court by the Criminal Cases Review Commission.
9. In a note submitted to the court last night, Mr Goldberg QC on behalf of the appellant helpfully set out the full range of the issues on which an appeal will be brought, that is to say:
 - i) The conviction for murder should be quashed and a conviction for manslaughter by reason of diminished responsibility should be substituted; or a retrial ordered.
 - ii) The failure of the court martial to leave for consideration by the Board the verdict of unlawful act manslaughter.
 - iii) The incompetence of the former defence team.
 - iv) Loss of control manslaughter.
 - v) The new evidence of a pathologist in relation to the deceased insurgent's apparent condition when he was shot.
 - vi) The improper cross-examination by the Crown of the appellant.
10. The first three of these grounds had been referred by the Criminal Cases Review Commission. The last three grounds are those which the appellant wishes to seek leave to advance on appeal.
11. At the last hearing the court indicated that it appeared to it that the central issue on the matters referred by the Criminal Cases Review Commission related to the appellant's state of mind. It might be possible for the court to deal with the issues relating to that as they appeared within a self-contained compass first, and in the event the appeal was allowed on grounds relating to that, there would be no need to deal with the other matters which might take considerably longer.
12. It is now proposed on behalf of the appellant very helpfully by Mr Goldberg QC that the court should deal with the issue of diminished responsibility first as the evidence lies within a narrow compass. The Crown assents to this course.

The position of the Crown

13. In the period since Friday, 16 December and today, the Crown has clarified its position as follows:
 - i) It does not object to the admissibility of the psychiatric reports from eminent psychiatrists and does not intend to obtain a psychiatric report itself.
 - ii) It considers that there is an issue on the question as to whether the mental condition set out in the new psychiatric reports amounts to a

mental disorder within the terms of the legislation and in any event whether it is such as to impair substantially the appellant's responsibility for the killing.

iii) It has requested that two of the experts, Professor Greenberg and Dr Joseph be made available for cross-examination which is estimated to take a total of 2½ hours.

14. The appellant seeks leave if necessary to call evidence from Dr Orr and to ask the court to rely on reports relating to conditions in which HM Forces were deployed in Afghanistan.

The court's determination of the process to be followed

15. It seems to us that the interests of justice are best served in this case by ordering that the appeal on the issue of whether the conviction for murder should be quashed and a verdict of manslaughter either substituted or a fresh trial be ordered on that basis should be heard first, leaving to one side the other grounds of the appeal pending the court's determination of that point. This is a practice that the court has followed in at least one case where, for reasons of cost, delay and other considerations, the issues in an appeal are severable and a great saving of time and public expenditure can be pursued in such a manner that does not in any way prejudice the appellant's rights. In the present case we are entirely satisfied that proceeding to hear the appeal on the issue of diminished responsibility is in the overwhelming interests of justice as it enables this issue to be determined without in any way prejudicing the other grounds of appeal or grounds for application for leave to appeal which the appellant may wish to present to the court in due course. We direct that:

i) By 17 January 2017 the Crown formulates for the three psychiatrists the areas of evidence on which it seeks further evidence, if so advised, with liberty to apply. The appellant consider the questions by 19 January 2017 and a meeting of experts takes place as soon as possible thereafter.

ii) Evidence from the three psychiatrists be heard; this can be given by videolink.

iii) The documentary evidence relating to conditions in Afghanistan be agreed or, if not agreed, the court be informed no later than 17 January 2017.

16. The court will direct that steps be taken immediately to ascertain the availability of all the witnesses and will fix a hearing that will take place either at the end of January or as early as possible in February. It considers it prudent to allow a time of 1½ days. The court has considered the position of Mr Perry QC, but does not consider in all the circumstances that it would be in the interests of justice to delay the hearing of the appeal until he is available in March.

17. Having made those directions we turn to the question of bail.

The question of bail

18. It is the practice of the Court of Appeal Criminal Division and the Court Martial Appeal Court only to grant bail in exceptional circumstances. Those circumstances are normally where the merits of the case are overwhelming or the applicant will otherwise have served his sentence before the appeal can be heard: the authority for this is contained in *R v Watton* (1978) 68 Cr App R 293.
19. It is clear from the stance taken on behalf of the Crown that although it accepts the psychiatric evidence, subject to further examination of the witnesses, it takes the position that it is contesting the appeal and in particular contesting the issue of diminished responsibility.
20. Mr Goldberg QC submits that this is an exceptional case, both as to the circumstances of the crime and as to the appellant. He emphasises the appellant's otherwise exemplary service, the fact that he was given bail prior to trial, the fact he was allowed to handle weapons with live ammunition while on bail, the strength of his case on appeal, the risk he might have to serve longer in prison than the court orders on the appeal and the exceptional sureties that have agreed to stand for him. He also emphasises the appellant has been a model prisoner, that he has a job to go to and that his wife, a woman of strong character, can be relied on to exert control over him. He would bear with fortitude a return to prison.
21. The Crown does not object to unconditional bail. It leaves the question to the court.
22. The court recognises that the prosecution of the appellant for murder and his subsequent conviction for murder were unprecedented. However, this remains a case where, on the evidence called before the court martial, there was no arguable basis upon which the conviction could be contested. Despite the powerful new psychiatric and other evidence, the question of whether a verdict of diminished responsibility should be substituted or a re-trial ordered is a matter of dispute on the part of the Crown. In those circumstances the court cannot say that the merits of the appeal are overwhelming, nor can it say that there is any other basis upon which it could take the exceptional course of allowing bail in circumstances where it is able so substantially to expedite the appeal. Nor can the court say at this time on the evidence available to it that the sentence that the court would impose is clearly less than that part of the current sentence which has been served. It must be recalled that the 8 year minimum term is the equivalent of a 16 year determinate sentence. The sentencing of a person convicted of manslaughter by reason of diminished responsibility will be a very difficult sentencing exercise but the court cannot on the evidence before it today say that the sentence would definitely be less than twice the time which will have been served by the time the appeal is heard, namely 6 years and 8 months.
23. The practice of the court is always to expedite appeals, rather than release on bail. The court, despite the unprecedented nature of this case, bearing in mind the seriousness of the crime of murder of which the appellant has been convicted and the lesser, though extremely serious offence, which he seeks to have substituted can see no basis for departing from what is that practice.

24. The court would like to make clear that it has acted as rapidly as possible, hearing the first application within 24 hours of the reference having been received from the Criminal Cases Review Commission and it has made the determination to hear the appeal in January or February 2017 within a week of the reference from the CCRC.
25. We therefore refuse bail.

The release of the video of the shooting and reporting restrictions

26. The BBC have renewed the application made that the court should release the video of the incident. The Judge Advocate General ruled at the conclusion of the court martial that the video clip should not be released. This court concluded on 17 December 2013 in a decision reported at [2013] EWCA Crim 2367 that the evidence before the Judge Advocate General submitted by the Ministry of Defence entitled him to reach the decision he did and the court could not see any basis for setting that order aside.
27. Both the appellant and the Crown contend that this issue should not be determined until after the hearing of the appeal. It is argued on behalf of the BBC that the matter should be determined today or, in any event, prior to the hearing of the appeal.
28. Some three years have elapsed since the Judge Advocate General made his decision and this court affirmed that decision. It is possible that the evidential position may have changed. Furthermore, the way in which the appeal is conducted and what is released into the public domain during the conduct of the appeal is a matter that needs decision in advance of the appeal. It seems to the court that the proper course to take is to adjourn this application until any evidence relied on by the Ministry of Defence and any response by the appellant is served; the matter must then be fully argued prior to the hearing of the appeal. For the same reason, the court will allow the judgment that we are now giving to be reported but continues the reporting restrictions that it imposed on the last occasion until further order. That is because there remains the possibility that the Court of Appeal may, on the evidence presently available to it, determine that it should be for a further court martial (or even possibly a jury) to determine the issue of diminished responsibility and the issue of reporting restrictions is intimately connected with the issues in relation to the video clip. That is the position that both the Crown and the appellant have adopted.
29. It is plain that the time of the hearing of the appeal is when the interest will be greatest in the present appeal and therefore we can see no disadvantage to anyone in postponing all these very complex issues for determination at a date to be fixed well in advance of the appeal so that the precious time of the court to determine whether the appellant is guilty of murder is not spent on other matters.