NCN: [2020] EWCA Crim 1297
IN THE COURT MARTIAL APPEAL COURT

Case No: 2018/04144/B3

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 6th October 2020

LORD JUSTICE DAVIS

MR JUSTICE JEREMY BAKER

MR JUSTICE HOLGATE

R E G I N A

- v –

CHRISTIAN FRANCIS McINTYRE

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The Appellant did not appear and was not represented

Mr J Polnay appeared on behalf of the Secretary of State for Defence

Captain J Farrant RN appeared on behalf of the Service Prosecuting Authority

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J U D G M E N T

Tuesday 6th October 2020

LORD JUSTICE DAVIS:

1. This is an appeal against a sentence imposed at a Court Martial. The appeal follows a reference under section 34 of the Court Martial Appeals Act 1968 by the Secretary of State for Defence, and thus is to be treated as an appeal against sentence by the person convicted. The appeal is based solely on a technical jurisdictional point by reference to certain provisions of the Armed Forces Act 2006.

2. The Service Prosecuting Authority was represented before us by Captain Farrant RN. The Secretary of State was represented before us by Mr Polnay. We are grateful to them for their helpful written and oral arguments. Neither of them had appeared in the proceedings below.

3. The appellant, Mr McIntyre, was represented by counsel below, but has not been represented before us. Shortly before the hearing today, he had made a request for an adjournment of today's hearing. He said, amongst other things, that he was now contemplating (although it would be very much out of time) appealing against his conviction. This court declined to adjourn the matter. Furthermore, we were informed this morning by Captain Farrant that Mr McIntyre had requested anonymity for the purposes of today's hearing, but that application must also be declined. This is an open court matter and he has no entitlement to the anonymity, which he seeks.

4. The background facts can be shortly stated and are as follows. The appellant was at the relevant time a corporal in the Army Reserve. On 12th June 2016, he had been returning from training with his unit. It is not totally clear from the papers whether all were in uniform, although most probably they were. At all events, their coach stopped at a service station in Exeter. The Company Sergeant Major, Warrant Officer Lovell, approached the appellant who was at a fast food outlet. He told the appellant to get a move on and to return to the coach immediately, whereas the appellant thought that they had, or should have, been given more time. It appears that in the past relations between the appellant and Warrant Officer Lovell may not have been of the best. Be that as it may, the appellant followed Warrant Officer Lovell and said words to the effect "Can we have a word? I do not like the way you have just spoken to me", and persisted in saying that. Warrant Officer Lovell replied "Not now". The two ended up face to face, within inches of each other, and the appellant then head-butted Warrant Officer Lovell, who fell to the ground, bleeding from his nose. This all took place in the presence of other members of the unit. Warrant Officer Lovell was taken to hospital with swelling to his nose.

5. There were various disputes at the hearing as to precisely what had occurred between the two and how each of them had behaved, but there was no dispute that the appellant had head-butted Warrant Officer Lovell and had caused him injury. In essence, the defence case was that the appellant had acted in self-defence, whereas the prosecution said that he had become angry and, in effect, had lost his temper and lashed out at Warrant Officer Lovell. At all events, on the evidence as placed before them, the Panel's decision was that they had been made sure of the appellant's guilt.

6. It is clear that the Panel gave full weight to the mitigation advanced and indeed indicated that there were reasons for circumstances of some leniency. All the same, it was considered necessary, given the military context, that there be a sentence of service detention, which was fixed at a period of 30 days. In addition, the appellant was reduced to the rank of lance corporal.

7. We have been told that, subsequently, after serving the relevant part of his period of

detention and after completing the period of his service, which we gather was in the region of 12 years, the appellant has since chosen to leave the Army Reserve.

8. On the face of it, there is nothing whatsoever excessive about this sentence. It may possibly be the case that in a civilian context an offence of this kind, committed by someone without any previous relevant convictions (which is the position of the appellant), might perhaps not have attracted a custodial sentence. But, of course, what happened here took place in a military context. It was a very serious matter that the appellant should have struck a superior, having disobeyed an instruction by him, and moreover should have done so in the presence of others from his unit. In no way can the sentence imposed be described as excessive. Indeed, it was not even severe. It could no doubt properly have perhaps been somewhat longer in terms of detention, and indeed a sentence also might have required him to be at least reduced to the ranks, if not dismissed from the army.

9. However, that is not the point of this appeal. It is nothing to do with whether or not the sentence was excessive. Indeed, the appellant has never lodged grounds of appeal seeking to challenge the sentence as excessive. The position which arises is purely jurisdictional.

10. In underlying terms, the offence with which the appellant was charged by reference to section 42 of the Armed Forces Act 2006 was an offence of battery. Battery is an offence listed in Part 1 of Schedule 1 to the Armed Forces Act 2006, for which a summary hearing is available. By sections 52 and 53 of the Armed Forces Act 2006, such a summary hearing, if there is one, is to take place before a defendant's commanding officer.

11. However, in the present case, at such a hearing the appellant elected for Court Martial trial instead, as he was entitled to do, under section 129 of the Armed Forces Act 2006. But by reason of the provisions of section 165 and paragraph 6 of Schedule 3A to that Act, the sentencing powers of the Court Martial are limited in such circumstances, that is to say where the accuse has elected for trial by Court Martial, to the sentence available on a summary trial. Then, by sections 132 and 133 of the Armed Forces Act 2006, such a sentence is limited, that is to say in a case where a commanding officer has heard the matter summarily, in terms of service detention to 28 days for a person of or below the rank of leading rate, lance corporal or lance bombardier, or corporal in the air forces.

12. The provisions do, it is true, under section 133, allow for an increase by the appropriate higher authority of the powers of punishment to a maximum of 90 days' service detention. Such an increase was granted, or purportedly granted, by Brigadier Bowder as higher authority in this case on 30th January 2017. However, what that higher authority did not purport to do, or could do, was to increase the period of detention for persons above the specified ranks of leading rate, etc. In the present case, the appellant was a full corporal in the Army Reserve. Accordingly, in such circumstances, a period of service detention was not available to the commanding officer on a summary trial.

13. If a situation such as this occurs and an accused is of a rank higher than leading rate and so on, then the appropriate course, if a period of service detention is contemplated as a significant possibility, would appear to be to refer the matter to the Director of Service Prosecutions before any summary trial is undertaken, by reference to the provisions of section 123(2)(e) of the Armed Forces Act 2006. Had that been done, it was common ground before us, that the jurisdictional limits on the powers of the Court Martial as to service detention would have been removed. But in the present case, as will be gathered, that did not happen.

14. Unfortunately, the correct position was not communicated to the Deputy Judge Advocate General at the hearing – and this, moreover, notwithstanding that he had on occasion raised

reservations as to the point. No criticism can attach to the court in such circumstances where it was not correctly apprised of the true legal position or of the sentencing limitations available to the Court Martial in the circumstances which had taken place.

15. In all such circumstances, this court has no option but to quash the sentence in so far as it imposed service detention of 30 days. Quite simply, the Panel of the Court Martial had no jurisdiction to pass such a sentence. However, we add that there was and is no jurisdictional limitation on the reduction of the appellant's rank to that of lance corporal.

16. The question then is: what sentence is to be substituted? On the one hand, the appellant had received a sentence otherwise richly justified because, as we have said, he had struck a superior, had disobeyed an instruction, and had done so in the presence of others from his unit. The sentence, as we have indicated, could indeed be regarded as a lenient one, although it is right to emphasise that the Panel explained fully why it had reached that conclusion, giving full weight to the powerful mitigation that was available to the appellant. On the other hand, the fact is that the appellant has received a sentence of service detention when he should not have been sentenced to detention at all because of the jurisdictional problems.

17. Overall, and bearing in mind the gravity of the appellant's conduct, we consider that the right course in all the circumstances is to quash, as we must, the service detention element of the sentence. Having regard to all the circumstances, we will retain the sentence in so far as it made a reduction of the appellant's rank to the rank of lance corporal. We also think it appropriate that he be made subject to a severe reprimand.

18. Finally, we add that this case can be taken to stand as a salutary reminder that where an accused is above the rank specified in section 132 of the Armed Forces Act 2006, careful consideration always needs to be given as to whether the matter in question should be referred to the Director of Service Prosecutions before any summary hearing takes place.
