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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday 18th June 2019

B e f o r e:

LORD JUSTICE HOLROYDE

MRS JUSTICE SIMLER DBE

MR JUSTICE WILLIAM DAVIS

IN THE COURT MARTIAL APPEAL COURT

R E G I N A

v

LEE ASHWORTH

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Ms L Morell appeared on behalf of the **Applicant**
Mr D Edwards appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

1. **LORD JUSTICE HOLROYDE**: Lee Ashworth pleaded guilty before a Court Martial to an offence contrary to section 42 of the Armed Forces Act 2006 of committing a criminal offence, namely using racially aggravated threatening, abusive or insulting words or behaviour, causing fear or provocation of violence, contrary to section 31(1)(a) of the Crime and Disorder Act 1998. On 12th March 2019 he was sentenced to 90 days' detention and ordered to be reduced to the ranks. His application for leave to appeal against that sentence has been referred to the Full Court by the Registrar.

2. The applicant is now aged 34. He joined the Army as a boy soldier at the age of 16. In July 2018 he was serving as a Sergeant in the 1st Rifles regiment, attached to the British Army Training Unit in Kenya.

3. The offence was committed on the night of 20th/21st July 2018. The applicant and another sergeant were drinking in a bar which was out of bounds to Army personnel. At around 11.15 pm they were asked to leave by a uniformed Army patrol which included Lance Corporal Muteti, who was born in Kenya and is black. They said they would leave when they had finished their drinks. At around 3.30 am the patrol returned, following a report from the security staff at the bar to the effect that the two men were still in the bar and had become troublesome. When the patrol entered the premises, the applicant quickly went into the toilets. His colleague agreed to leave the bar and did so. The applicant was brought out of the toilets by a member of the security staff and Lance Corporal Muteti asked him to leave the premises. Instead of doing so, the applicant became aggressive, standing very close to Lance Corporal Muteti and threatening to "knock him out". Lance Corporal Muteti feared that he would be struck. Another member of the patrol, a white sergeant, intervened and asked the applicant to leave. As the Judge Advocate summarised matters in his sentencing remarks:

    i. "... you said you would but you then told Lance Corporal Muteti that he was 'a fucking Kenyan' who should not be telling you what to do, and, most significantly, you were leaving the bar only because a white man had told you to and you would not allow 'a fucking Kenyan' to tell you how to behave."

4. Lance Corporal Muteti subsequently made a statement in which he said that the applicant's words and conduct made him feel worthless.

5. When first interviewed under caution about this incident the applicant denied any racist conduct. He was charged in January 2019. At his first appearance before the Court Martial, at a stage when he had no legal representation, it was expected that there would be a contested trial. However, he pleaded guilty to the offence on 19th February 2019.

6. The applicant has a number of previous convictions before civilian courts. Between

2003 and 2010 he had been sentenced on seven occasions for a total of nine offences, in which excessive consumption of alcohol seems to have been a common theme. In 2004 he was fined a substantial sum for an offence of using racially aggravated threatening words or behaviour.

7. At the sentencing hearing, the Court Martial was assisted by a pre-sentence report and by evidence from Major Cox, who commands the company in which the applicant was serving.

8. The pre-sentence report recorded that the applicant, whose memory of the incident had been clouded by the quantity of alcohol he had drunk, had been "mortified" to learn of what he had said and done. He felt astonished that he could have behaved in such a way, saying that it was his third deployment to Kenya and he had always worked well with the local people. He said that he had apologised to Lance Corporal Muteti the following day and had shaken his hand. He told the probation officer that he acknowledged the link between alcohol and his offending and had approached a welfare unit for assistance.

9. Major Cox in his evidence referred to the applicant's good service record, which includes service in a number of other countries, and spoke of the operational difficulties which would be caused if the applicant lost his rank. He indicated that the unit in which the applicant was serving had comparatively few sergeants with a similar level of relevant experience and that the applicant could not quickly be replaced.

10. In submissions to the court, reference was made to the Sentencing Council's Definitive Guideline to magistrates courts for the basic and racially aggravated versions of offences contrary to section 4 of the Public Order Act. The prosecution advocate outlined the sentencing options which were available and in doing so made reference to the possibility of a suspended sentence. The experienced advocate representing the applicant pointed in particular to the financial consequences for the applicant and his family of a reduction to the ranks. The written material before the court martial included a standard form which shows, amongst other things, the differing levels of annual pay for the various ranks of non-commissioned officer and the gross annual loss consequent upon a reduction from one of those ranks to another.

11. In his sentencing remarks the Judge Advocate indicated that the threatening behaviour, even absent racial aggravation, would fall into the middle category of offences under the guideline for the basic offence. The basic offence was aggravated by the applicant's previous convictions and by a number of other factors: the applicant had disregarded an earlier instruction to leave the premises and was heavily intoxicated, and Lance Corporal Muteti had been in a position similar to that of a police officer trying to deal with a difficult situation in a bar.

12. The court then went on to consider the element of racial aggravation and concluded that in this case it was significant. The Judge Advocate said that this was not simply a case of drunken abuse:

    i. "This was calculated, considered and demeaning racist behaviour which you spelt out to the victim in front of other local people from that same country, significantly using the words 'fucking Kenyan' and making it clear to Lance Corporal Muteti 'I am not leaving the bar because you told me to, I am leaving because a white man told me to'. It seems to us that what you did is more serious than many cases of this type which involved swearing or abuse at police officers in the heat of the moment."

13. The court concluded that a civilian court dealing with such an offence would probably have imposed a sentence of between 3 and 6 months' imprisonment, which would inevitably have resulted in discharge from the service. The aggravating factors relating to the service context of the case were the applicant's rank being higher than that of his victim, the fact that he was in a bar which was out of bounds and was thus setting a bad example to junior soldiers, and the adverse effect on the reputation of the British Army in a host country.

14. The court recognised a number of mitigating factors: the applicant's many years of good service, his considerable operational experience, the reports and references which the court had read, the operational consequences of which Major Cox had spoken, and the financial consequences for the applicant and his family.

15. Even without the racial aggravation, the court concluded, the sentence would have involved a short period of detention and reduction by one rank. When the racial aggravation was taken into account, the case came close to being so serious that dismissal was necessary in order to reinforce the message that racism has no place in the British Army. The court indicated that such a sanction would have followed if the applicant had been convicted after a trial. As it was, the serious penalty of reduction to the ranks was necessary as part of the sentence. The court recognised that that was a significant punishment, both in itself and in its financial consequences, but said:

    i. "We do not consider it appropriate for anyone who behaved in the way you did in those circumstances to hold any rank and therefore reduction by anything less than to private soldier is inappropriate."

16. The court therefore passed the sentence to which we have referred.

17. Two grounds of appeal have been advanced on behalf of the applicant and opposed on behalf of the respondent. We are grateful to Ms Morell for the applicant and Mr Edwards for the respondent for their helpful written and oral submissions.

18. First, whilst no complaint is made about the length of the custodial sentence, it is submitted that the order for 90 days' detention should have been suspended. Ms Morell refers in this regard to paragraph 3.4.11 of the Judge Advocate General's Guidance on Sentencing in the Court Martial, which lists a number of factors which may be relevant to a decision to suspend. She submits that four of the factors identified in that list are present in this case. She relies on the passage of time between the offence and the proceedings, during which period the applicant continued to perform his duties well. She relies on the fact that the applicant had quickly apologised to his victim, thereby showing remorse, to the fact that the offence did not involve actual violence and to the operational importance of the applicant's retaining his rank.

19. Secondly, Ms Morell submits that insufficient consideration had been given, before reducing the applicant to the ranks, to the likelihood of his potentially regaining some rank, to the timescale of his doing so or to the level of the financial consequences. Paragraph 3.6.5 of the guidance notes that the three services differ in the time taken for someone who has been reduced in rank to regain his former rank, and states:

    i. "The court should consider the specific regulations in relation to regaining rank in the offender's Service before sentencing him. The court needs to be aware of the likelihood of the offender regaining some or any rank and the probable timescale."

20. Ms Morell has helpfully set out figures on the premise that it would realistically take about six years before the applicant could hope to recover his former rank. The overall financial loss during that period would be of the order of at least £37,000.

21. In her oral submissions amplifying the written grounds of appeal, Ms Morell emphasises that, whilst the grounds of appeal challenge individual aspects of the sentence, her overall submission is that the total sentence was manifestly excessive. Had the court given proper consideration to suspension of the custodial term, and had the court been provided with and given appropriate consideration to the details of the losses consequent upon reduction of the rank, she submits that the overall sentence would have been less severe than it was and that the sentence in fact imposed was manifestly excessive.

22. In his brief oral submissions on behalf of the respondent, Mr Edwards has emphasised the specialist nature of the Court Martial and has indicated that the financial information provided on the standard form would have given the members of the court sufficient information to enable them, using their experience, to form a view as to the full consequences of reduction to the ranks.

23. In reflecting on these submissions we have borne very much in mind that the applicant has served his country well over many years, that there was, and is, much to be said to his credit, and that the sentence has heavy consequences for him and his family. We are not,

however, persuaded that there is any ground on which the sentence can be challenged. We remind ourselves that the Court Martial is a specialist tribunal and particular respect must be given to its judgments as to the significance of the military context of an offence and as to the implications for the service, as well as for the individual offender, of imposing particular sentences.

24. As to the first ground of appeal, we can see no basis on which it could be argued that the court martial was wrong in principle to impose a sentence of immediate detention. The approach by which the court assessed the necessity for and the appropriate length of a custodial term is not and cannot be criticised. It does not appear to have been specifically argued before the Court Martial that there were cogent reasons to suspend the sentence. In our view none of the matters now relied upon carries significant weight. In particular, we do not think it arguable that there was any delay in the proceedings which could be said to be of such significance as to be relevant to a decision to suspend.

25. In any event, it is clear from the sentencing remarks as a whole ,and from the passages which we have quoted in particular, that the court regarded this offence as so serious that nothing less than immediate custody would be sufficient. In our judgment the court was undoubtedly entitled to reach that conclusion. Indeed we find it difficult to see what other conclusion could have been reached.

26. As to the second ground of appeal, we accept that no very detailed submissions were made about the matters now raised. The advocate then representing the applicant was nonetheless able to make submissions, at least in general terms, about the consequences of reduction to the ranks and about the fact that significant financial consequences would be suffered. The court had the written details to which we have referred of the differences in gross annual pay between the various ranks and clearly recognised that it was imposing a significant penalty. Paragraph 3.6.2 of the guidance indicates that the important question when considering a penalty of reduction in the ranks is whether the offender has demonstrated that he is unfit to hold his present rank. The Court Martial made its answer to that question very clear in the passage which we have quoted, and it is apparent from that answer that the court regarded a reduction in rank as unavoidably necessary whatever the financial and other consequences. We therefore do not see any basis on which it could be argued that the court should have called for further details before imposing that sanction.

27. Moreover, this was a case in which, as the court said, the applicant came close to being dismissed from the service. Like the Court Martial, we recognise that reduction to the ranks has heavy consequences; but this was a disgraceful incident, in which a fellow soldier doing his duty was publicly humiliated on grounds of his race and the reputation and standing of the British Army in that community was harmed. We cannot think that an enquiry into the precise financial details or the precise timetable of any potential promotion to a higher rank would or should have led the Court Martial to any different

conclusion.

28. We accept that the applicant quickly was and remains remorseful for what he had done, and we hope that he will continue to give good service to the Army as he has done for many years in the past. For the reasons we have given, however, there is no ground on which it could be argued that the sentence was either wrong in principle or manifestly excessive in length. This application accordingly fails and is refused.

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