IN THE COURTS MARTIAL
APPEAL COURT
CASE NO 2019 02913 B5

Neutral Citation Number: [2020] EWCA Crim 1677

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday 2 December 2020

Before:

LORD JUSTICE HOLROYDE
MR JUSTICE PICKEN
MR JUSTICE HENSHAW

REGINA
v
PAUL HENDERSON
(LANCE CORPORAL)

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MR E VICKERS QC appeared on behalf of the Applicant
MR D EDWARDS appeared on behalf of the Service Prosecuting Authority

J U D G M E N T

1. LORD JUSTICE HOLROYDE: On 25 March 2015 this applicant pleaded guilty before a Court Martial to nineteen offences which he had committed when serving as a Territorial Army Reservist holding the rank of Lance Corporal in an Engineer Regiment. Each was an offence contrary to section 42 of the Armed Forces Act 2006 of committing a criminal offence between 17 May 2011 and 22 December 2011. Sixteen of those criminal offences were offences of possessing an indecent photograph of a child, contrary to section 160(1) of the Criminal Justice Act 1988. The remaining three were offences of possession of an extreme pornographic image, contrary to section 63 of the Criminal Justice and Immigration Act 2008. In all, the charges related to 126 moving indecent images of children and 38 extreme pornographic movies stored on three devices: an Advent computer tower, an Iomega hard drive and a WD Elements hard drive.
2. On 27 April 2015, the applicant was sentenced on each charge to a Service Community Order for 2 years and was made subject to a Sexual Harm Prevention Order. He was also ordered to be dismissed from the Service.
3. Following refusal by the single judge, the applicant now renews to the full court his application for an extension of time of well over 4 years to apply for leave to appeal against his convictions.
4. For present purposes, the relevant facts can be stated very briefly. In 2011 the applicant was deployed to Afghanistan. Whilst he was serving there a fellow soldier borrowed his hard drive and found the imagery on it. The titles of some of the movies made it obvious that they were indecent images of children. The extreme pornographic movies showed adults having sexual intercourse with animals.
5. In the investigation which followed, other devices were seized from the applicant's property in Afghanistan and from his home in Scotland. Analysis showed that the imagery had been downloaded in 2009 on to the Advent tower and subsequently transferred, first to the Iomega hard drive and then to the WD Elements hard drive. There was no evidence that any of the imagery had been transferred to the applicant's laptop, which he had with him in Afghanistan. None of the imagery had been viewed since 2009.
6. The applicant was arrested on 23 December 2011 and interviewed in 2012. He denied downloading or viewing any of the imagery, which he said was contrary to his Christian values and beliefs. He said that someone must have downloaded the imagery without his knowledge. He identified his friend Sean Walsh as the person likely to have done so. He explained the transfer of images from one device to another by saying that when he bought new hardware, he simply copied everything across to the new device.
7. At a hearing on 9 October 2013 there was discussion of the application of military law to the applicant at times when he was not serving as a reservist. The prosecution explained that the dates covered by the charges represented the period between the applicant's deployment and his arrest. The applicant was arraigned and pleaded not guilty to what were then six charges. These were in effect rolled-up charges, which were later split into the nineteen charges to which we have referred.
8. Further preliminary hearings took place on 9 December 2013 and 13 January 2014. At the latter, the defence indicated that a report would be obtained from an expert witness. The prosecution were directed to serve by 31 January 2014 a log of the applicant's movements as a reservist, the obvious purpose of which was to assist the defence expert

to consider whether relevant downloading had taken place at times when it could not have been done by the applicant.

9. The defence expert witness, Dr Wallis, provided a report on 23 April 2014.
10. Further prosecution evidence and exhibits were then served in mid-May 2014.
11. In October 2014, the applicant's trial began. It continued for several days, before being abandoned because further computer examination was found to be necessary.
12. In January 2015, a detailed assessment was made of the applicant's dyslexia, a condition which had first been identified in 2004. It was recommended that the applicant be assessed to see whether he suffered from autistic spectrum disorder.
13. The second trial was due to begin on 20 April 2015. Dr Wallis provided a further report dated 17 March 2015 which included an analysis of the times and dates of the relevant downloads. The report was not helpful to the applicant's defence, and if used at court would be likely to strengthen the prosecution case.
14. The applicant was thereafter advised in conference by his then counsel and solicitor. He reflected on their advice over the weekend and took the opportunity to speak to members of his family and to his church elders.
15. At a hearing on 25 March 2015 he applied to be rearraigned and pleaded guilty to the nineteen charges which we have summarised. It should be noted that in relation to charge 5, which alleged possession of eleven extreme pornographic images stored on the Advent tower, the applicant pleaded "guilty in respect of two images". His counsel later gave this explanation for that qualified plea:

    i. "... there are nine images that were downloaded at a time when the defendant was at work and his work sheets demonstrate that. And your Honour will know that in fact another person was interviewed under caution also in respect of these matters and it is the defendant's mitigation that he was, in effect, led into this. And I do not think that is likely to be contentious. But as far as that charge is concerned, there is that caveat, but otherwise he accepts the Crown's case as it is put."

16. The applicant was sentenced on 27 April 2015. At that hearing the prosecutor applied for an order that the various devices seized from the applicant should be forfeit and destroyed. It is not entirely clear whether that order was in fact made; but even if it was, it was not acted upon, and we understand that all the devices remain in the possession of the Service police.
17. The applicant's then counsel put forward testimonials from a number of persons, who all describe the applicant's offending as entirely out of character. Counsel reiterated the submission that the applicant had been led, through what he had regarded as friendship, in a direction he would not otherwise have gone, and that "left to his own devices" he might never have got involved in the offending. It was acknowledged that that was not the defence which had been run at the aborted trial, but counsel submitted it was consistent with what was said about the applicant in the testimonials.
18. Later in his plea in mitigation, counsel submitted in terms that the applicant's friend (by whom he meant Walsh) had shown the applicant what was on the internet. The applicant had viewed it and it had thereafter simply remained on his computer. The

applicant was sentenced as we have indicated.

19. In the five-and-a-half years which have passed since then we understand that the applicant had made complaints about his former legal representatives to the Legal Ombudsman and the Scottish Legal Complaints Commission. Those complaints were rejected. He has requested the prosecuting authority and the police to investigate Sean Walsh. Police Scotland have done so, and have taken no action against Mr Walsh in relation to the relevant downloads, though we understand that Mr Walsh has been convicted of offences relating to his fraudulent obtaining of goods by ordering them in the applicant's name and using the applicant's bank account details. The applicant and his wife have also made extensive inquiries and obtained statements from potential witnesses. They challenge Dr Wallis's expertise and refer to material showing him in an unflattering light.
20. The applicant's lengthy statement asserts that he was placed under improper and oppressive pressure by his former representatives to plead guilty. He gave no explanation in that statement of how it came about that counsel at the sentencing hearing mitigated in the terms to which we have referred. We have been told today that counsel had no instructions to mitigate on that basis. We are also told that a criticism of counsel's conduct in this respect was one of the matters about which the applicant complained to the Legal Ombudsman, but the complaint was dismissed.
21. A further expert witness, Mr Lindley, has been instructed by the applicant's new legal representatives and has provided an initial report. Mr Lindley says that Dr Wallis's work was inadequate, and in some respects flawed, and that further examination and analysis of the computer evidence is necessary. He acknowledges that it is not usually possible, by computer forensic techniques alone, to say who was operating a device at a particular time. He adds that if the dates and items of relevant downloads and other activities are correctly reported by Dr Wallis and by the prosecution's expert witness, then the applicant has evidence of an alibi for many such sessions.
22. Mr Vickers QC, for whose careful submissions on the applicant's behalf we are grateful, submits that no definitive grounds of appeal can properly be drafted until the expert witness has been able to complete all the examinations and analyses which he wishes to make.
23. Proposed grounds of appeal have been outlined to the effect that the reports of Dr Wallis were inaccurate and misleading; that the legal representatives consequently gave advice which was based on an incorrect evidential foundation and would have given different advice if accurate and comprehensive expert evidence had been available; that evidence is now available to support the applicant's case that Walsh downloaded the imagery; and that there is no reliable evidence proving that the applicant knowingly had the imagery in his possession.
24. In view of the criticisms which he makes of his former representatives, the applicant has been invited to waive privilege but has not done so. Mr Vickers suggests that a waiver of privilege was given in relation to the Legal Ombudsman complaint and would carry over to these proceedings. We doubt whether that is correct, but in any event, it does not explain why waiver has not been given specifically in these proceedings. Nor has any contact been made with the former legal representatives, in accordance with the principles stated in McCook [2014] EWCA Crim 374.
25. Mr Vickers submits that it would be premature to take such steps before further expert

evidence is available. He submits that it would not be proper for him to draft grounds based on a criticism of the former representatives when it may be that they acted reasonably on the basis of the expert evidence then available to them.

26. We entirely understand why Mr Vickers takes that view. It is, however, apparent from the lengthy statements of the applicant and his wife that strong criticisms are made by them of the former representatives which do not depend on computer analysis. We are aware in general terms that the criticisms are rejected by the former representatives because we have seen a letter to that effect in connection with the complaint to the Legal Ombudsman. We do not, however, have the details of any response by the former representative.
27. The applicant asks this court to give directions requiring the respondent to make the computer devices or complete copies of them available to Mr Lindley for examination and to set a timetable for subsequent steps in this application.
28. In a Respondent's Notice and in his brief oral submissions Mr Edwards on behalf of the respondent, to whom we are also grateful, submits that the applicant entered unequivocal guilty pleas after receiving legal advice and expert evidence. No step was taken to delay those pleas in the light of the dyslexia assessment or the recommendation for consideration of possible autistic spectrum disorder. No application has subsequently been made to vacate the pleas. It is submitted that the proposed grounds of appeal are speculative and that no reason has been shown why Mr Lindley should be allowed access to the original exhibits. The respondent has for that reason declined to facilitate any further examination, whilst making clear that it would of course do so if the court so directs.
29. It goes without saying that a delay of well over four years requires cogent explanation before this court could grant the necessary extension of time. Before considering that point further, however, and before considering whether further directions could serve any useful purpose, we must reflect upon the overall merits of the proposed grounds of appeal. That is necessary because, whilst we understand Mr Vickers' wish to deal with matters sequentially, the applicant must, in our view, show that the proposed further examinations may realistically assist in the perfecting of grounds of appeal and are not merely speculative.
30. A guilty plea does not deprive this court of its jurisdiction to allow an appeal against conviction if the conviction is unsafe. However, the fact that a defendant has pleaded guilty is, of course, highly relevant. In Asiedu [2015] 2 Cr App R 8 at paragraph 19, Lord Hughes, giving the judgment of the court, stated the general principle as follows:

    i. "A defendant who pleads guilty is making a formal admission in open court that he is guilty of the offence. He may of course by a written basis of plea limit his admissions to only some of the facts alleged by the Crown, so long as he is admitting facts which constitute the offence, and Asiedu did so here. But ordinarily, once he has admitted such facts by an unambiguous and deliberately intended plea of guilty, there cannot then be an appeal against his conviction, for the simple reason that there is nothing unsafe about a conviction based on the defendant's own voluntary confession in open court. A defendant will not normally be

> permitted in this court to say that he has changed his mind and now wishes to deny what he has previously thus admitted in the Crown Court."

31. It is not suggested that any different principle applies in the Courts Martial or in the Courts Martial Appeal Court.
32. Lord Hughes went on to identify certain exceptions to that general principle: where the plea is equivocal or unintended; where the plea is compelled as a matter of law by an adverse ruling by a trial judge; and where there is a legal obstacle to the defendant being tried for the offence.
33. A further exception to the general principle is that a conviction may be unsafe if a guilty plea was entered on the basis of inappropriate legal advice. However, as Boal (1992) 95 Cr App R 272 at page 278 makes clear, the setting aside of a conviction on such a basis is a most exceptional course, which will only be taken if the legal advice has deprived the defendant of a defence which would quite probably have succeeded and the court concludes that a clear injustice has been done.
34. In addition to those exceptions, a conviction following a guilty plea may be regarded as unsafe on the basis of fresh evidence admitted pursuant to section 23 of the Criminal Appeal Act 1968. Section 23(1) gives this court power to receive fresh evidence if the court thinks it necessary or expedient in the interests of justice to do so. Section 23(2) requires the court, in considering whether to receive any evidence, to have regard in particular to four matters, including whether there is a reasonable explanation for the failure to adduce the evidence in the proceedings below.
35. In our judgment this applicant cannot rely on any of the exceptions to the general principle. He knows whether he had or had not downloaded any or all of the imagery or had knowingly been in possession of it after someone else had downloaded it. At the first trial he put forward the defence that he had never been in possession of any of the images. He could have maintained that defence at the second trial, but instead pleaded guilty.
36. We recognise, of course, that a defendant who faces charges which may result in a prison sentence, and which may be less likely to do so if the mitigation of a guilty plea is available to him, will sometimes have a very difficult decision to make. Having received advice about the apparent strength of the evidence against him and having had an opportunity to reflect on that advice and discuss matters with his family and religious advisers, the applicant entered pleas which were unequivocal and which included, in relation to charge 5, a specific limitation on the extent of the offending which he admitted. His complaint now is not that he was given advice which was wrong in law, or was misled about the availability in law of a defence which would quite probably have succeeded. He knew that on his account of the matter he had a defence. It is said on his behalf that he only saw the Wallis report during the conference and did not have a proper opportunity to consider it in detail before making his decision as to pleas. But even if that is correct, it does not alter his knowledge of the facts or his knowledge that his account provided him with a defence. He made a choice to plead guilty, even though he maintained his denial of guilt. By doing so he admitted the facts on which the charges were based, with the result, as Lord Hughes said in Asiedu at paragraph 32, that:

i. "... the evidence that they are true then comes from himself, whatever may be the other evidence advanced by the Crown."

37. As to possible fresh evidence, we recognise that the applicant seeks directions to assist him in gathering evidence which he hopes may assist his case. He faces, however, what in our view is an insuperable obstacle. The evidence which he hopes he may be able to obtain is evidence which could have been obtained at the time of his trial, and there is, in our judgment, no basis on which the criteria stated in section 23 of the 1968 Act could ever be satisfied. This is not a case in which some new material has only just come to light or in which some new scientific discovery has been made which casts doubt on previous evidence. The devices were seized about nine years ago. The applicant, through his legal representatives, obtained expert evidence in 2015 about the matters which he now wishes to reexplore. He complains that the expert witness in fact lacked expertise, that the expert witness misunderstood some key facts, and that subsequent investigation has cast doubt on the witness's reliability. But the reality of the case is that, on the applicant's account, he always knew that he had not downloaded the imagery and that someone else must have done so, and he put forward a prime suspect in that regard. On his account, he knew that when the Advent tower was first purchased it was, for a period of many months, loaned to Walsh and not used by the applicant at all. He could have contested the trial and challenged the prosecution evidence. He could have sought an opportunity to engage a different expert witness. We bear in mind his complaints that he was effectively railroaded away from these courses of action by the pressure put upon him by his then representatives. In the absence of any waiver of privilege, however, we cannot give any significant weight to these complaints.
38. It is important to remember that the applicant pleaded guilty to offences of possession of the imagery in 2011, not to offences of downloading it two years earlier. Mr Lindley's report indicates that he is unlikely to challenge Dr Wallis's findings as to the dates and times of the downloads and other relevant computer activity. It is not suggested that further expert analysis would enable Mr Lindley to say for sure who carried out the relevant downloads. That could only ever be a matter of direct evidence by the applicant and/or of inference from the totality of the evidence, including as to the respective movements of the applicant and of Walsh, and as to the likelihood that one rather than the other was carrying out other computer activity around the time of the downloads. But even if further expert evidence might be able to show that some or all was downloaded at times when the applicant could not personally have carried out that operation, the issue of whether the applicant was knowingly in possession of it in 2011 would turn on his own evidence.
39. In those circumstances, we agree with the single judge that there is no ground on which it could be argued that the convictions, based as they are on the applicant's guilty pleas, are unsafe. It follows that no purpose would be served by our granting an extension of time. We therefore need say no more about the merits of that application, and only observe that we are far from persuaded that an adequate explanation has been given for the very long period of delay before commencing an appeal. It also follows that no purpose would be served by our giving the directions which Mr Vickers seeks.
40. For those reasons, grateful though we are to Mr Vickers for his submissions, the applications fail and are refused.

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

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