Neutral Citation No. [2023] EWHC 242 (SCCO)

Case No: 30219612

SCCO Reference: SC-2022-CRI-000023

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London, WC2A 2LL
Date: 16 January 2023

Before:

COSTS JUDGE LEONARD

R
v
TREWIN

Judgment on Appeal under Regulation 29 of the Criminal Legal Aid (Remuneration) Regulations 2013
Appellant: Mr. Jollyon Robertson Counsel)

This Appeal has been dismissed for the reasons set out below.

COSTS JUDGE LEONARD

1. The Appellant represented Rifleman Kieran Trewin ("the Defendant") in the Bulford Court Martial Centre.

2. The Defendant was tried for Conduct Prejudicial to Good Order and Service Discipline, contrary to S19(1) of the Armed Forces Act 2006; Battery, contrary to S39 of the Criminal Justice Act; and Disgraceful Conduct of an Indecent Kind, contrary to S23(1) of the Armed Forces Act 2006. He was found guilty and sentenced to a total of 12 months' detention and dismissal from the forces.

3. Legal Aid had been granted to the Defendant under the Armed Forces Criminal Legal Aid Scheme with effect from 6 March 2021. The Appellant is remunerated for representing the Defendant under the Advocates' Graduated Fee provisions at Schedule 1 to the Criminal Legal Aid (Remuneration) Regulations 2013, in the same way as if the Appellant had represented the Defendant in the Crown Court.

4. One of the criteria for determining the Graduated Fee payable to the Appellant is the "banding" of the offence for which the Defendant was indicted. Bands are set out in the AGFS Banding Document published by the Legal Aid Agency.

5. There is no specific provision for Disgraceful Conduct in the AGFS Banding Document, and it is generally treated as falling within Band 17.1 "Standard Cases", broadly defined as those cases not falling under the specified categories of offence.

6. The Appellant argues that he should be remunerated by reference to band 5.2, adult sexual assault. He accepts that the Defendant was not charged with a sexual offence per se, but that, he says, ignores the reality of the case. The incident was overtly sexual. It involved an initiation ceremony in which the Defendant slapped another man's penis, held another man's penis with finger and thumb in a masturbatory action and moved another man's foreskin back. This all took place whilst the victims were each standing naked on a chair, and whilst being required to talk about their sexual exploits with their girlfriends.

7. Charging Disgraceful Conduct, rather than sexual assault, was says the Appellant the easier option for the Service Prosecuting Authority ("SPA"). The Judge Advocate observed that the Defendant was not charged with any sexual offence, but also, says the Appellant (referring to a trial transcript which I do not have) made it clear that the reason for this was in order to avoid the legal necessity of proving lack of reasonable belief in consent:

> "None of the soldiers consented to what was happening, but we accept the Prosecuting Authority's view that there may well have been an issue with proving to the high standard required that you did not reasonably believe that they were consenting, and that you may have thought that they were going along with it".

8. The fact that the SPA charged the Defendant with Disgraceful Conduct rather than sexual assault, thus avoiding an extra legal "hurdle", did not, says the Appellant, make the complaints any less sexual in their nature. In civilian courts the Defendant would have been charged with sexual assault. It would not have been open to the Prosecution to indict for Disgraceful Conduct.

9. The Judge Advocate General's "Guidance on Sentencing in the Courts Martial" says this about the offence of Disgraceful Conduct of an Indecent Kind:

> "The object of the section is to preserve proper standards of decency within the Services, and to prevent personnel from bringing the Services into disrepute by publicly or openly behaving in an indecent manner or with cruelty including to animals. Conduct charged under this section may also include an element of abuse of rank or superior position. The type of offence often charged is "indecent" (such as indecent exposure or indecent words) particularly towards female personnel. This offence is not intended and not adequate to deal with the situation where a sexual assault has been carried out on an unwilling victim; only provided such a case is charged as a sexual offence can the victim be legally protected by the Court and the offender be sentenced properly."

10. This, says the Appellant, falls short of the acts complained of in the Defendant's case.

11. From the documentation filed by the Appellant it would seem that the Judge Advocate also made these observations:

> "Although not charged as sexual assault… they are so similar in my judgement with regard to sexual offences that I think that those victims of those three offences… should be given anonymity in the press …"

12. On sentencing:

> "We make it clear that we are not sentencing you for a sexual assault; you are not charged with sexual assault offences. None of the soldiers gave consent to what happened but we accept the Prosecuting Authority's view that there may well have been an issue with proving to the high standard required that you did not reasonably believe that they were consenting and that you may have thought that they were going along with it. But it is nonetheless a disgraceful initiate ceremony…
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> This was disgraceful conduct of an indecent nature. It is a military offence, there are no civilian guidelines, and again we remind ourselves that these are not offences of sexual assault and therefore there is no analogous guideline from the Sentencing Council. The Judge Advocate General's guideline with regard to offences of disgraceful conduct of an indecent nature are that a start point in our deliberations should be a sentence of detention in military custody for nine months with a range from six to twelve months and that would be for one offence…"

13. The Appellant argues that although the Judge Advocate was obliged to make it clear that the Defendant was not being sentenced for a sexual offence, this does not detract from the fact that the sexual nature of the offences had to be taken into account as part of the sentencing process.

14. The sentence that was passed was, says the Appellant, similar to that which would have been passed had the charge had been a straight sexual assault. The Judge Advocate stated that the "sentencing exercise is not straightforward", and that the most serious offences were the touching of the two different men's penises, so the Appellant argues that it is artificial to consider that this case was not similar to a sexual offence.

Conclusions

15. This Appeal seems to me to be similar to many banding appeals, in that it relies upon an argument to the effect that although a defendant was indicted with a particular offence, the nature of the offence and/or the circumstances were such as to justify in the treatment of the offence, for banding purposes, as a more serious one.

16. In my view, as I have said on previous such occasions, the banding system does not confer that discretion upon me. It might well be that the Appellant could have been charged with sexual assault, or that in a civilian context he would have been charged with sexual assault, but he was not.

17. Evidently the SPA stopped short of doing so because it was concerned that it could not prove to the requisite standard that the Defendant did not reasonably believe that his victims consented. There is nothing innately unusual about the prosecution in any given case choosing not to indict for a more serious offence which might be difficult to prove. Evidently the Judge Advocate agreed with the SPA's approach, and he was careful in his sentencing remarks to make it clear that he was not sentencing the Defendant for sexual assault.

18. That there was a sexual element in the conduct of which the Defendant was convicted; that the court accepted that his victims did not consent to his conduct; that these were aggravating factors rendering the offence more serious than otherwise would have been the case; and that all of that was taken into account when sentencing, is also evident. It may well be that the Defendant received a sentence consistent with a conviction for sexual assault, but it remains the case that he was not charged with, convicted of, or sentenced for sexual assault.

19. For those reasons, I agree with the Determining Officer that this case should properly be treated as falling within band 17.1. The appeal must be dismissed.