Neutral Citation Number: [2019] EWCA Crim 1470

Case No: 201701346C1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM COURT MARSHALL APPEAL COURT
HIS HONOUR JUDGE JAG

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/09/2019

Before :

LORD JUSTICE GROSS
MRS JUSTICE MCGOWAN
and
MR JUSTICE BUTCHER

- -

Between :

Neil Christopher Gunn	**Appellant**
- and -	
Service Prosecuting Authority	**Respondent**

- -
- -

J HUGHESTON-ROBERTS (instructed by **Blackfords**) for the **Appellant**
S.WHITEHOUSE QC (instructed by **Service Prosecuting Authority**) for the **Respondent**

Hearing dates : 30 July 2019

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Approved Judgment

Lord Justice Gross :

INTRODUCTION

1. Is a Court Martial trying a member of the Royal Air Force ("RAF") properly constituted if the Board of lay members comprises only Army personnel and no RAF personnel? The Appellant invites the answer of "no"; the Respondent submits that the answer is "yes". That is the principal issue on this appeal ("the Jurisdiction Issue").

2. On 27 February 2017, at a Court Martial held in the Military Court Centre Bulford (Judge McGrigor, Assistant Judge Advocate General), the Appellant, now aged 37, was convicted of committing a criminal offence contrary to s.42 of the *Armed Forces Act 2006* ("the AFA 2006"), namely Battery, contrary to s.39 of the *Criminal Justice Act 1988*.

3. On 28 February 2017, the Appellant was sentenced to a reduction in rank from Sergeant to Corporal.

4. On 12 June 2018, a different constitution of the Full Court ([2018] EWCA Crim 1384), granted the Appellant leave to appeal on a single ground, the Jurisdiction Issue. As expressed by Hallett LJ VP CACD, giving the judgment of the Court (at [1]):

> "….The first ground advanced relates to the constitution of the Board. Mr Gunn serves in the RAF yet he was tried by an Army Board. We are troubled by the interplay between the Queen's Regulations for the RAF as to the constitution of the Board and the provisions of the Armed Forces Act. The Regulations suggest that the Board that tried Mr Gunn should have been differently constituted, including at least one representative from his service. We appreciate that the Regulations do not have the force of primary legislation but it is not clear to us…..what force they do have…."

5. The Appellant had other grounds which he wished to advance but the Court was not then persuaded (at [2]) that they were arguable; a fresh representative (Mr Hugheston-Roberts was not yet instructed) might put those grounds in better order so that they could be adjudicated upon.

6. Against this background, the matter came back to this Court and was heard by the present constitution on 5 July 2019: [2019] EWCA Crim 1238. The nature of the underlying incident was there summarised (at [5] – [7]) and no more need be said of it here. In the event, this Court refused the Appellant's renewed application for leave to appeal on the other grounds (set out at [9]). Most importantly for present purposes, we gave directions for the hearing of the Jurisdiction Issue and it is that Issue which has comprised the principal issue now heard by us and which is dealt with in this judgment.

7. We are grateful to both counsel for their assistance: Mr Hugheston-Roberts, for the Appellant, who appeared before this constitution of the Court at the 5 July hearing and at this hearing, and Ms Whitehouse QC, for the Respondent, who was instructed

with our encouragement following the previous hearing and who has only appeared at this hearing.

LEGAL FRAMEWORK

8. Courts Martial have a long history. A helpful summary is furnished in *Rant On The Court Martial And Service Law* (3rd ed.), HHJ Jeff Blackett, Judge Advocate General ("JAG") of the Armed Forces, at paras. 1.19 – 1.20:

> "A Single System of Service Law
>
> Until the seventeenth century, the enforcement of naval and military discipline in the Royal Navy and British Army was a matter flowing from the prerogative power of the Crown and the necessity for and legality of these powers were never questioned. From then until 1881, a series of Mutiny Acts began to codify some military offences, and to impose some statutory structures and requirements upon Court Martial. In 1866 the first Naval Discipline Act was passed and that was followed by the first Army Act in 1881. These Acts fully codified naval and military offences and the constitution and rules of Court Martial, partly within the statutes themselves and partly by the first sets of Rules of Procedure. The RAF adopted the Army system when it was established at the end of the First World War and these systems survived more or less intact until the mid-1950s….
>
> The most significant changes flowed from the *Armed Forces Act 1996*, which responded to the expected fundamental criticisms of the fairness of the trial process by the European Court of Human Right (ECtHR)….most importantly the control of the proceedings at trial was acknowledged to have moved formally from the Service president to the independent judge advocate, whose control of proceedings guaranteed their independence and impartiality."

9. More recently still and directly pertinent to this appeal, *Rant* deals with the constitution and composition of the "Standing Court Martial" as follows (at para. 1.30):

> "Until the *Armed Forces Act 2006* came into force Court Martial were *ad hoc* tribunals which had to be convened and dissolved on each occasion. Under s.154 of the Act 'the Court Martial' is established as a standing court which may sit anywhere in the world. It consists of a judge (….. 'the judge advocate'), who presides over the proceedings, and at least three or five lay members, depending on the seriousness of the charges…… The Act provides for mixed boards – that is comprising of officers or warrant officers from all three Services – but as a matter of practice the boards normally comprise officers and warrant officers from the same Service as

> the defendant. The most senior member of the board is automatically appointed as the 'president of the board'."

10. The *Air Force Constitution Act 1917* ("the AFCA 1917") established the RAF. By s.2(1), the AFCA (which remains in force) delegated to the Sovereign "…by order signified under the hand of a Secretary of State" the power to make orders "with respect to the government, discipline, pay, allowances and pensions" of the RAF. S.8(1) of the AFCA established the "Air Council" for the purpose "of the administration of matters" relating to the RAF "and to the defence of the realm by air". As already foreshadowed, the Army Act was, *mutatis mutandis,* applied to the RAF (by s.12(1), AFCA).

11. The *Air Force Act 1955* ("the AFA 1955", since repealed) made provision for the constitution of general and district courts-martial. Notably, the president was to be an RAF officer and the board was to be comprised of RAF officers or warrant officers.

12. The *Defence (Transfer of Functions) Act 1964* ("the 1964 Defence Act"), provided for the establishment of a "Defence Council" (s.1(1)(b)) and for the statutory functions of (*inter alia*) the Air Council to be transferred to the Defence Council. It will be appreciated that this measure was part of the creation of a single Ministry of Defence ("MoD"), replacing the individual Service Ministries, described in *Mountbatten*, by Philip Ziegler (1985), esp. in chapter 47, "The Reorganization of Defence", at pp. 608 *et seq*.

13. We turn next to the *Explanatory Notes to the AFA 2006* ("the Explanatory Notes"). At para. 15, the Explanatory Notes refer to the MoD Strategic Defence Review 1998 which "recognised the importance of joint operations by the armed forces and put 'jointery' at the centre of the defence planning process". It also concluded that combining the three Service Discipline Acts into a single Act would better support the Armed Forces.

14. The Explanatory Notes state (at [16]) that the main purpose of the AFA 2006:

> "….is to replace the three separate systems of service law with a single, harmonised system governing all members of the armed forces…."

Furthermore, as summarised by the Explanatory Notes (at [19]), the AFA 2006 provided for certain single-service offices and organisations to be replaced by tri-service equivalents:

> " - the appointment of the Director Service Prosecutions to replace the existing three single-service prosecuting authorities;
>
> - a standing court called the Court martial, to replace the current courts-martial which are set up for each case;
>
> ……
>
> - the merger of the two offices of Judge Advocate General and Judge Advocate of the Fleet….. "

15. Ss. 154-157 of the AFA 2006 deal with the Court Martial and provide for it to consist of a judge advocate and at least three but not more than five other persons ("lay members"). Provision is further made as to the qualification of officers and warrant officers for membership of the Court Martial. Of first importance for present purposes, these qualifications hinge on service in "any of Her Majesty's forces" – there is no reference to the single Service provisions such as those encountered in the AFA 1955 (an Act, in the event, repealed by Schedule 17 of the AFA 2006).

16. S.163 of the AFA 2006 empowers the Secretary of State to make rules ("the Court Martial Rules") with respect to the Court Martial. Such rules were indeed made and are to be found in *The Armed Forces (Court Martial) Rules 2009* ("the Court Martial Rules"), which, although dealing with the constitution of the Court Martial, contain no requirement that the lay members should be from the same Service as the defendant.

17. Though originally (in respect of the Royal Navy and the Army) founded on the prerogative power of the Crown, the *Queen's Regulations*, as already indicated, now comprise a species of delegated legislation. In the case of the RAF, the Queen's Regulations for the RAF, 5th edition 1999 ("the QR"), are made pursuant to s.2(1) of the AFCA 1917 and are, by further Order, amended, revoked or varied by the Defence Council. Para. (4) of the QR as currently in force (and post-dating the AFA 2006) is in these terms:

> "[1] A Service defendant will ordinarily be tried by lay members of wholly his own service. [2] However, where a defendant is tried with a co-defendant from a different Service, the lay membership of the court will be a mixture of Service personnel from different Services. [3] Each defendant will always have at least one lay member of his own Service on the board…."
>
> (Sentence numbers added.)

The Manual of Service Law (JSP 830, Chapter 28, para. 13, "the Manual") repeats the QR and is in the same terms as para. (4) of the QR.

THE RIVAL CASES

18. For the *Appellant*, Mr Hugheston-Roberts founded himself firmly on para. (4) of the QR. This provision lent detail to the more general provisions of the AFA 2006, which were not self-sufficient. He submitted that the QR had plainly not been repealed by the AFA 2006 – had that been the case, there would have been no good reason for their constant updating nor for the like provision in the Manual. The QR were more than mere guidance; at the very least, the QR comprised a species of delegated legislation, so that breach of the QR was akin to breach of the *Criminal Procedure Rules*. In the present case, the composition of the Board – entirely Army, with no representatives from the RAF – constituted a breach of a specific, mandatory, provision of the QR, affording protection to the individual service man facing criminal justice. The mistaken acquiescence by the Appellant's former counsel ought not to preclude him from challenging the safety of the conviction. There had been prejudice to the Appellant flowing from the composition of the Court Martial; the

Army members of the Board had not understood the RAF rules which did not prohibit the Appellant's presence in the "junior ranks' accommodation": see, the previous judgment of this Court at [20].

19. For the *Respondent*, Ms Whitehouse QC's overall submission was that the AFA 2006 and the Court Martial Rules prevailed over the QR; accordingly, a defendant may be tried by a Board consisting of lay members from a different Service; in any event, the Appellant's conviction was safe. Ms Whitehouse developed her overall submission under four headings:

    i) The primary legislation contained in the AFA 2006 did not prohibit mixed Boards or Boards drawing their lay members from a Service other than the defendant's.

    ii) The QR could be viewed as not incompatible with the AFA 2006. If so, the Appellant's case fell away. Sentence [1] of para. (4) of the QR provided that a Service defendant would "ordinarily" be tried by lay members drawn from his own Service; that provision was not *mandatory* in all cases, nor did it mean that a Court Martial Board would be invalid if its composition was not drawn solely from the same Service as the defendant. Ms Whitehouse accepted, indeed averred, that the normal practice would be for a service man to be tried by lay members drawn from his own Service.

    iii) If there was a conflict between the primary legislation contained in the AFA 2006 and the QR, then the primary legislation (passed by Parliament) took precedence over the QR, comprising, as the latter did, regulations issued or amended from time to time by the Defence Council.

    iv) In any event, the Court Martial proceedings here had not been a nullity (even if the Board had been improperly constituted) and the Appellant's conviction was not unsafe.

DISCUSSION

20. We begin with the status of the QR and have no doubt that they are a species of delegated or subordinate legislation. We agree with the observation of Rix LJ in *Khan v Royal Air Force Summary Appeal Court* [2004] EWHC 2230 (Admin), at [53], that the QR "...plainly have the status of law, being a form of delegated legislation…" - while recognising that the context of that decision was far removed from that of the present case.

21. We have not overlooked the reference in *Halsbury*, vol. 3, para. 306, fn. 1, to the QR being considered as "primary legislation under the Human Rights Act 1998 ("the HRA"): see s. 21(1)(f)(ii). It is plain, however, that this reference is confined to the particular purposes of the HRA (with which we are not concerned) and the passage in *Halsbury* is to be read accordingly. On any view, the QR do not comprise primary legislation either generally or for the purposes of the present case.

22. The QR clearly remain in force; Mr Hugheston-Roberts was correct to contend that they have not been repealed. They remain in force, however, as subordinate or

delegated legislation. As such, the QR must give way to the primary legislation contained in the AFA 2006, *if and in the event of* a conflict between them.

23. Accordingly, the question which next arises is the interrelationship between ss. 154 *et seq* of the AFA 2006 and para. (4) of the QR.

24. The import of ss. 154-157 of the AFA 2006 is straightforward. We agree with Ms Whitehouse that these provisions of primary legislation permit and do not prohibit mixed Boards or Boards drawing their lay members from a Service other than the defendant's. They comprise a pointer to the tri-service emphasis embodied in the Act itself, in the 1964 Defence Act and the work of the Defence Council – now charged with making amendments to the QR.

25. Turning to the construction of para. (4) of the QR, we approach it by way of the individual numbered sentences, before standing back to consider the relationship between the paragraph as a whole and the AFA 2006.

26. In our judgment, sentence [1] means what it says. "Ordinarily" a Service defendant will be tried by lay members drawn wholly from his own Service; so, in the case of a RAF defendant, the members of the Board will "ordinarily" be wholly comprised of RAF officers or warrant officers. The sentence thus conforms to the usual – and obviously sensible - practice as described by Ms Whitehouse and in *Rant* (at para. 1.30). But "ordinarily" does not mean "invariably" and we are unable to construe this sentence as containing a *mandatory* rule which *must* be followed in all cases. Still less does sentence [1] mean that a Board not comprised from the same Service as the defendant is invalidly constituted and lacks jurisdiction to proceed; sentence [1] does not say so and there is no foundation for any such implication.

27. Sentence [2] concerns cases where a defendant is tried together with a co-defendant from a different Service. That is not this case but to be confident of the meaning of sentence [1], that sentence cannot be considered in isolation from the remainder of para. (4).

28. Sentence [2] begins with the word "However". We do not read that word as meaning that the practice in sentence [1] is invariable in all cases save for those falling within sentence [2]. Instead, we think that "However" leaves sentence [1] untouched but serves to introduce a different regime for cases within sentence [2].

29. The intent of sentence [2] is plain; where there are defendants from more than one Service, sentence [2] guards against the danger (real or apparent, it matters not) of Service partisanship by providing for the Board to be comprised of "a mixture of Service personnel from different Services".

30. In our view and on its natural meaning, sentence [3] relates back to sentence [2] only – and not to sentence [1]. The wording "Each defendant" is readily applicable to sentence [2], where there will necessarily be more than one defendant; it is, however, inapplicable to sentence [1] which deals with a single defendant. So too, as to the remaining wording of sentence [3]. Only a single Service can be contemplated under sentence [1]. By contrast, more than one Service will be involved in cases within sentence [2]. In the context of sentence [2], the provision in sentence [3] that "Each

defendant will always have at least one lay member of his own Service on the board" is readily intelligible.

31. The question which is not straightforward is whether sentences [2] and [3] in combination ("will be" and "will always") give rise to a *mandatory* rule that in the case of defendants drawn from different Services, there must be at least one lay member from each of the defendants' own Service on the Board. We can certainly appreciate the attraction of such a rule in the interests of fairness or perceived fairness – when defendants from different Services are tried together. If, however, the provisions of sentences [2] and [3] as to the composition of the Board are mandatory, then a further question arises as to the consequences of a breach of those provisions. Does it mean that in the case of multiple defendants drawn from different Services, a Court Martial constituted other than in accordance with the requirements of sentences [2] and [3] – albeit within the permissive ambit of ss. 154 – 157 of the AFA 2006 - is invalidly constituted and lacks jurisdiction to proceed?

32. These questions as to sentences [2] and [3] do not arise for decision in the present case and we express no view as to how they should be answered. We do, however, draw them (via Ms Whitehouse and those instructing her) to the attention of the Defence Council, which may wish to act to clarify the position before a case does arise where a decision is necessary.

33. It suffices for present purposes to say that whatever the answer to those questions, we are satisfied that they do not impact on the view to be taken of sentence [1]. Our reasons are these:

    i) Sentence [1] on the one hand and sentences [2] and [3] on the other, are differently worded. Even assuming that sentences [2] and [3] give rise to mandatory rules, there is no equivalent mandatory wording in sentence [1].

    ii) The particular mischief at which sentences [2] and [3] are aimed (real or apparent service partisanship) is obvious and acute. Fairness may demand a special rule in such cases.

    iii) By contrast, read in the light of the statutory steer from the 1964 Defence Act and the AFA 2006, there is insufficient reason to *prohibit* a departure from the usual or ordinary practice under sentence [1]. For example, in an appropriate case (where no specialist Service knowledge is required) the need for timely Court Martial proceedings may outweigh the desirability of following the ordinary same Service practice under sentence [1], without casting doubt on the fairness of the proceedings.

34. Informed by but standing back from the detail of para. (4) of the QR, we would express the relationship between the AFA 2006 and that paragraph as follows:

    i) The primary legislation, contained in the AFA 2006, is permissive and does not prohibit Court Martial boards being comprised of suitably qualified officers and warrant officers drawn from *any* Service. This is in keeping with the tri-service philosophy of the AFA 2006 (even if the word "jointery" is perhaps unfortunate) and the legislation which preceded it, notably the 1964

Defence Act. That approach carries with it inherent flexibility, which would be constrained by a same, single, Service requirement.

ii) That said, the *usual practice*, embodied in sentence [1] of para. (4) of the QR is that a defendant will be tried by lay members of his own Service. That this should *ordinarily* be the mode of trial is eminently sensible; *ordinarily*, why should it be anything else? However, sentence [1] does not contain an invariable or mandatory rule, still less a rule with jurisdictional implications for the Court Martial, if breached.

iii) On this footing, ss.154 – 157 of the AFA 2006 and sentence [1] of para. (4) of the QR are not incompatible. The usual practice, set out in sentence [1] is comfortably accommodated within the broader ambit of the AFA 2006.

35. This conclusion is fatal to the Appellant's case on the appeal. At the outset of this judgment, the Jurisdiction Issue posed the question whether the RAF Appellant's Court Martial was properly constituted by a Board comprised of Army personnel. The answer to that question is "yes". For the reasons given, sentence [1] of para. (4) of the QR does not require an answer of "no"; nor is there any conflict between sentence [1] and the AFA 2006.

36. As already indicated, there is greater potential for conflict between sentences [2] and [3] of para. (4) of the QR and the provisions of AFA 2006 but the resolution of any such conflict does not arise for decision on this appeal. In this regard, the Defence Council may wish to act to ensure clarity for the future.

37. It follows that, without more, the appeal must be dismissed. The constitution of the Court Martial did not disclose a breach of sentence [1] of para. (4) of the QR. For the avoidance of doubt, this conclusion does not and is not intended to undermine the usual practice of a Service defendant being tried by lay members drawn from his own Service. But that which is desirable and ordinarily the case is not necessarily mandatory – and is not mandatory here.

38. If necessary to go further, then, on the facts of this individual case, we are satisfied both that the Court Martial was not incorrectly constituted and that, even if it was, the Appellant's conviction was in any event not unsafe.

i) At the initial hearing on 10 January 2017, the Appellant was offered a Court Martial with an RAF Board but the date was not convenient for the Appellant's then counsel, who declined it in the knowledge that the Court Martial would proceed before an Army Board. We can see no good reason, on the facts of this case, why that decision of the Appellant's then counsel should now be reopened.

ii) The central issue at the Court Martial was one of the simplest fact – was a Battery proved against the Appellant to the criminal standard? This issue required no specialist knowledge whatever, in stark contrast to a case where such knowledge might be required (e.g., as to the technical details of aircraft or vessels) and where the advantages of the usual practice are eminently apparent. An Army Board was as well qualified to try this Court Martial as an RAF Board.

iii) With respect to the submissions advanced on his behalf to the contrary, the Appellant sustained no prejudice at all. As explained in our previous decision (at [26]), the question of the Appellant's presence in the junior ranks' accommodation did not feature at all in the Board's consideration prior to conviction.

39. For these reasons too, specific to the facts of the present case, the appeal must be dismissed.