Neutral Citation Number: [2019] EWCA Crim 149

Case No: 201802292 B3

IN THE COURT MARTIAL APPEAL COURT
ON APPEAL FROM MILITARY COURT CENTRE COLCHESTER
Judge Advocate General HHJ Blackett
2017CM03730

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/02/2019

Before:

THE RIGHT HONOURABLE THE LORD BURNETT OF MALDON
LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE HONOURABLE MRS JUSTICE CHEEMA-GRUBB
and
THE HONOURABLE MR JUSTICE MARTIN SPENCER

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Between:

STEVEN CHEESEMAN	**Appellant**
- and -	
REGINA	**Respondent**

- -
- -

Mr Peter Glenser QC and Ms Puneet Rai (instructed by **Lewis Cherry Limited**) for the **Appellant**
Mr David Edwards and Colonel R Allen
(of the **Service Prosecution Authority**) for the **Respondent**

Hearing dates: 7 February 2019

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Approved Judgment

The Lord Burnett of Maldon CJ:

1. On 24 March 2017 the appellant, Corporal Steven Cheeseman, stabbed and injured a fellow serviceman, Lance Corporal Lindley, in the room occupied by the appellant in single living accommodation provided to servicemen by the Army. He was prosecuted for attempted murder. He denied any intention to kill but, more widely, his defence was one of self-defence. On 4 May 2018 at a court martial in the Military Court Centre, Colchester presided over by the Judge Advocate-General, the Board convicted the appellant of wounding with intent to do grievous bodily harm. He was acquitted of attempted murder. This is his appeal against conviction.

2. The appellant sought to rely upon what is colloquially described as the "householder defence" introduced by way of amendment into section 76 of the Criminal Justice and Immigration Act 2008 ("the 2008 Act") by the Crime and Courts Act 2013.

3. The judge ruled that the householder defence applied only to cases where the person injured as a result of the use of self-defence was an intruder, rather than somebody who had entered the premises lawfully but thereafter become a trespasser. Moreover, he ruled that there was no evidence that the defendant believed that Lance Corporal Lindley was a trespasser.

The Statutory Provision

4. Section 76 of the 2008 Act provides a definition of "reasonable force" for all purposes associated with a defence of self-defence. As originally enacted, the purpose of the provision was to clarify the common law. But the amendments wrought in 2013 changed the law as it applied in "householder cases". Section 76 provides:

> "(1) This section applies where in proceedings for an offence—
>
> (a) an issue arises as to whether a person charged with the offence ("D") is entitled to rely on a defence within subsection (2), and
>
> (b) the question arises whether the degree of force used by D against a person ("V") was reasonable in the circumstances.
>
> (2) The defences are—
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> (a) the common law defence of self-defence;
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> (aa) the common law defence of defence of property; and
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> (b) the defences provided by section 3(1) of the Criminal Law Act 1967 or section 3(1) of the Criminal Law Act (Northern Ireland) 1967 (use of force in prevention of crime or making arrest).
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> (3) The question whether the degree of force used by D was reasonable in the circumstances is to be decided by reference to the circumstances as D believed them to be, and subsections (4) to (8) also apply in connection with deciding that question.

(4) If D claims to have held a particular belief as regards the existence of any circumstances—

(a) the reasonableness or otherwise of that belief is relevant to the question whether D genuinely held it; but

(b) if it is determined that D did genuinely hold it, D is entitled to rely on it for the purposes of subsection (3), whether or not—

(i) it was mistaken, or

(ii) (if it was mistaken) the mistake was a reasonable one to have made.

(5) But subsection (4)(b) does not enable D to rely on any mistaken belief attributable to intoxication that was voluntarily induced.

(5A) In a householder case, the degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was grossly disproportionate in those circumstances.

(6) In a case other than a householder case, the degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was disproportionate in those circumstances.

(6A) In deciding the question mentioned in subsection (3), a possibility that D could have retreated is to be considered (so far as relevant) as a factor to be taken into account, rather than as giving rise to a duty to retreat.

(7) In deciding the question mentioned in subsection (3) the following considerations are to be taken into account (so far as relevant in the circumstances of the case)—

(a) that a person acting for a legitimate purpose may not be able to weigh to a nicety the exact measure of any necessary action; and

(b) that evidence of a person's having only done what the person honestly and instinctively thought was necessary for a legitimate purpose constitutes strong evidence that only reasonable action was taken by that person for that purpose.

(8) [Subsections (6A) and (7) are not to be read as preventing other matters from being taken into account where they are relevant to deciding the question mentioned in subsection (3).

(8A) For the purposes of this section "a householder case" is a case where—

(a) the defence concerned is the common law defence of self-defence,

(b) the force concerned is force used by D while in or partly in a building, or part of a building, that is a dwelling or is forces accommodation (or is both),

(c) D is not a trespasser at the time the force is used, and

(d) at that time D believed V to be in, or entering, the building or part as a trespasser.

(8B) Where—

(a) a part of a building is a dwelling where D dwells,

(b) another part of the building is a place of work for D or another person who dwells in the first part, and

(c) that other part is internally accessible from the first part, that other part, and any internal means of access between the two parts, are each treated for the purposes of subsection (8A) as a part of a building that is a dwelling.

(8C) Where—

(a) a part of a building is forces accommodation that is living or sleeping accommodation for D,

(b) another part of the building is a place of work for D or another person for whom the first part is living or sleeping accommodation, and

(c) that other part is internally accessible from the first part, that other part, and any internal means of access between the two parts, are each treated for the purposes of subsection (8A) as a part of a building that is forces accommodation.

(8D) Subsections (4) and (5) apply for the purposes of subsection (8A)(d) as they apply for the purposes of subsection (3).

(8E) The fact that a person derives title from a trespasser, or has the permission of a trespasser, does not prevent the person from being a trespasser for the purposes of subsection (8A).

(8F) In subsections (8A) to (8C)—

"building" includes a vehicle or vessel, and

> "forces accommodation" means service living accommodation for the purposes of Part 3 of the Armed Forces Act 2006 by virtue of section 96(1)(a) or (b) of that Act.
>
> (9) This section, except so far as making different provision for householder cases, is intended to clarify the operation of the existing defences mentioned in subsection (2).
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> (10) In this section—
>
> (a) "legitimate purpose" means—
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> (i) the purpose of self-defence under the common law,
>
> [(ia) the purpose of defence of property under the common law, or]
>
> (ii) the prevention of crime or effecting or assisting in the lawful arrest of persons mentioned in the provisions referred to in subsection (2)(b);
>
> (b) references to self-defence include acting in defence of another person; and
>
> (c) references to the degree of force used are to the type and amount of force used." (emphasis added)

5. This appeal is concerned in particular with subsections 5A and 8A.

The Facts

6. The appellant and Lance Corporal Lindley were both stationed at Alexander Barracks, Dhekelia Garrison in Cyprus. During the morning of 25 March 2017 Lance Corporal Lindley entered the appellant's room with the appellant's consent. They both remained in the room drinking and chatting until about 12:20. The appellant then went to get some lunch leaving Lance Corporal Lindley in his room. Both men were intoxicated. The appellant returned to his room at about 13:00. By this time, Lance Corporal Lindley had locked himself inside. For reasons which are not material to this appeal, Lance Corporal Lindley was not only drunk but also agitated and disturbed. The appellant heard Lance Corporal Lindley trashing his room. He banged repeatedly on the door shouting words to the effect of "you had better not be smashing up my stuff or I'll kill you". The Board was later expressly to find that those words were not meant literally. Be that as it may, Lance Corporal Lindley eventually opened the door and the confrontation which resulted in Lance Corporal Lindley being stabbed repeatedly followed. The Board was to find that the appellant did not arm himself with a knife before entering the room but picked it up once he was in there. The appellant's room had indeed been trashed and many of his personal belongings broken by Lance Corporal Lindley.

7. The appellant's case was that he acted in self-defence at all times. His account was that Lance Corporal Lindley, a very large man, had attacked him and that he believed that if he did not defend himself Lance Corporal Lindley would very likely kill him.

8. It was argued on behalf of the appellant by Mr Glenser QC, who appeared below as he does before us on behalf of the appellant, that the householder defence was available because, first, the incident occurred in the appellant's room in forces' accommodation; and secondly, the appellant instructed Lance Corporal Lindley to leave his room which he failed to do with the consequence that the appellant believed him to be a trespasser.

9. This is not a classic householder defence case where someone encounters an intruder in their home or is confronted by someone who has broken in. This appeal raises three issues:

   i) Was the judge correct to rule that the householder defence is not available in cases where the injured person entered a building lawfully, but thereafter became a trespasser?

   ii) Was there evidence upon which the Board could conclude that the appellant believed Lance Corporal Lindley to be a trespasser?

   iii) In any event, is the conviction safe?

Discussion

10. It was common ground, and the judge accepted, that sub paragraphs (a) to (c) of section 76(8A) were satisfied. The defence concerned was self-defence; the force was used in a building that was a dwelling or forces' accommodation (or both); and the appellant was not a trespasser at the time he used force. The focus of argument before the judge was on the scope of subsection 8A(d), namely, whether at the time the appellant believed Lance Corporal Lindley "to be in, or entering, the building or part as a trespasser."

11. Mr Glenser submits that section 76(8A)(d) is not concerned only with cases in which a defendant believes that someone has entered as a trespasser, in other words not only with intruder cases. He submits that the language of the statute is absolutely clear. The relevant belief is that a defendant believes the other person to be in the building as a trespasser, or entering the building as a trespasser. In short, he submits that there is no warrant in the language adopted by Parliament for the construction placed on the subsection by the learned judge.

12. In our view, that submission is correct. Mr Edwards, who appeared on behalf of the respondent before us, did not press an argument to the contrary. In a case where the injured person was in the building concerned at the time of the incident, the question under section 76(8A)(d) is whether the defendant believed that he or she was in the building as a trespasser.

13. In the everyday application of the criminal law, there is a well-known statutory provision that does require a defendant to have entered a building or part of a building as a trespasser as an ingredient of an offence. That is the offence of burglary contrary to section 9 of the Theft Act 1968.

14. Of course, the principal concern of parliament in introducing the householder defence was to provide enhanced protection to householders confronted by intruders but the provisions were not limited to such cases.

15. It is apparent from reading the full transcripts of what occurred at the Court Martial that focus on two particular authorities, and the language used in the judgments, led to the erroneous interpretation. The first is *R (Denby Collins) v Secretary of State for Justice* [2016] EWHC 33 (Admin); [2016] QB 862 and the second *R v Steven Jason Ray* [2017] EWCA Crim 1391; [2018] QB 948.

16. The cases concerned the application of the householder defence but did not involve the question with which we are concerned. *Collins* was a classic intruder case, with a householder confronted at 3 o'clock in the morning by someone who had broken into his home. In *Ray* the householder was awoken by banging on her door. On opening to the door, her former partner burst uninvited into the house. The issue with which those cases was concerned was the relationship between the concepts of "grossly disproportionate" in subsection 5A, "disproportionate" in subsection 6 and "reasonable". It is clear that subsection 5A disables a defendant from relying upon the householder defence if the force used by him was grossly disproportionate to the circumstances. *Collins* was a challenge by way of judicial review to a decision not to prosecute. The Divisional Court (Sir Brian Leveson P and Cranston J) concluded that taken together, subsections 5A and 6 did not lead to the conclusion that any degree of force which was less than grossly disproportionate was necessarily reasonable for the purposes of the householder defence. They concluded that the question whether the degree of force used had been reasonable would depend on the particular facts and circumstances of the case. The statute allowed for the possibility for a jury to conclude that the force used was disproportionate but nonetheless reasonable in all the circumstances. In para. 20 of his judgment the President gave guidance to trial judges on how to approach the householder defence:

> "20. Thus, section 76(5A), read together with section 76(3) and the common law on self-defence, requires two separate questions to be put to the jury in a householder case. Presuming that the defendant genuinely believed that it was necessary to use force to defend himself, these are:
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> (i) Was the degree of force the defendant used grossly disproportionate in the circumstances as he believed them to be? If the answer is "yes", he cannot avail himself of self-defence. If "no", then:
>
> (ii) Was the degree of force the defendant used nevertheless reasonable in the circumstances he believed them to be? If it was reasonable, he has a defence. If it was unreasonable, he does not."

17. The same question arose in *Ray* following conviction in a trial where the judge adopted the approach suggested in *Collins*. The argument advanced on behalf of the appellant was that *Collins* was wrong. Parliament had intended that if the jury was satisfied that the use of force was not, or may not have been, grossly disproportionate, then the degree of force used must in law be regarded as reasonable.

18. That argument was rejected. The heart of the reasoning of the court is set out between paragraph 23 and 29 of the judgment of Lord Thomas of Cwmgiedd CJ:

> "23. In our view the interpretation placed in the *Collins* case on the householder's defence under section 76 of the 2008 Act as amended by the 2013 Act was correct.
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> 24. Once the jury have determined the circumstances as the defendant believed them to be, the issue, under section 76(3), for the jury is (as it always has been at common law) whether, in those circumstances, the degree of force used was reasonable.
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> 25. In determining the question of whether the degree of force used is reasonable, in a householder case, the effect of section 76(5A) is that the jury must first determine whether it was grossly disproportionate. If it was, the degree of force was not reasonable and the defence of self-defence is not made out.
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> 26. If the degree of force was not grossly disproportionate, then the effect of section 76(5A) is that the jury must consider whether that degree of force was reasonable taking into account all the circumstances of the case as the defendant believed them to be. The use of disproportionate force which is short of grossly disproportionate is not, on the wording of the section, of itself necessarily the use of reasonable force. The jury are in such a case, whether the defendant is a householder, entitled to form the view, taking into account all the other circumstances (as the defendant believed them to be), that the degree of force used was either reasonable or not reasonable.
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> 27. The terms of the 2013 Act have therefore, in a householder case, slightly refined the common law in that a degree of force used that is disproportionate may nevertheless be reasonable.
>
> 28. As subsection (6) makes clear, in a non-householder case the position is different; in such a case the degree of force used is not to be regarded as reasonable if it was disproportionate.
>
> 29. Thus in our judgment the amendments to section 76 put the householder relying on self-defence in a position different from all others relying on the defence. This is clear on the language of the Act. But it is narrow and not of the wide ranging effect for which the defendant contended. We accordingly reject the contention that provided the degree of force used by a householder is not grossly disproportionate then it is necessarily reasonable."

19. In the course of his judgment Lord Thomas quoted from extracts of Hansard recording the passage of the amendments through Parliament. He considered that those passages were consistent with the interpretation arrived at in *Collins* and *Ray*. The ministers whose speeches were referred to consistently referred to "intruders" in the explanation of the householder defence. It was that use of language which persuaded the judge to limit the ambit of the defence in the way he did. With respect, that was to take the

paradigm example of the circumstances covered by the householder defence as defining its limits in a way which cannot be accommodated within the statutory language.

20. Subsection 8A(d) is concerned with the belief of the defendant whether the person concerned was in, or entering, the building or part as a trespasser, not a belief whether the person entered the building as a trespasser.

21. In most cases where the householder defence is engaged the question whether the defendant believed the person concerned to be in the building as a trespasser will cause no difficulty. That is simply because the defence will most frequently arise in the context of an intruder. In other cases, of which this is an example, it would be unnecessary for a jury (or Board in a Court Martial) to wrestle with questions of property law and the niceties of whether someone who started as an invitee became a trespasser. The defence is not directly concerned with the question whether someone was or was not a trespasser but rather the defendant's belief. No doubt, the clearer it is that someone was a trespasser the more readily a jury will not be troubled by the issue whether the defendant did or did not hold the belief.

22. On the facts which underlie this appeal, it is clear that Lance Corporal Lindley became a trespasser at least when he started to damage the appellant's room and belongings. But the appellant did not understand that to be the case and would not, on that account, have believed Lance Corporal Lindley to be a trespasser. His case was that he understood him to be a trespasser when he, the appellant, demanded that Lance Corporal Lindley leave the room, but he failed to do so. The use of the language of "trespass" in a judge's direction would be likely to confuse without some simple elaboration. The question is whether the defendant believed that the person concerned had no right or business to be in the building, or was there without authority, at the time of the violent incident.

23. On the first issue, we conclude that the judge erred.

24. The judge ruled that there was, in any event, no evidence to raise the question whether the appellant believed Lance Corporal Lindley to be a trespasser. Mr Glenser respectfully submits that the judge overlooked a part of the appellant's evidence. In the course of his evidence in chief the appellant said that he had demanded that Lance Corporal Lindley leave his room, but the demand was ignored. Mr Edwards, who did not appear below, confirms that evidence to that effect was given by the appellant in the course of examination-in-chief. He points to the note provided by the prosecuting trial advocate which suggests that the appellant rowed back from that during cross-examination. Moreover, it was a detail he did not mention in the course of interview. Nonetheless, submits Mr Glenser, the judge erred in suggesting that there was no evidence which could support the householder defence. In those circumstances he should have left it to the fact-finding body, namely the Board, just as a judge in the Crown Court would leave that question to the jury.

25. We accept that the evidence of the appellant's belief that Lance Corporal Lindley was in his room as a trespasser was relatively thin. Nonetheless, we conclude that had the judge interpreted the statutory provision in accordance with its meaning, the householder defence should have been left to the Board.

26. These conclusions give rise to the third issue, whether the conviction is nonetheless safe. We conclude that it is.

27. The sentencing remarks at a Court Martial are delivered by the Judge Advocate. Whilst the Judge Advocate does not take part in the deliberation of the Board in determining guilt or innocence, the Board and the Judge Advocate determine sentence. That enables the Judge Advocate concerned to pronounce sentence in the sure knowledge of the underlying findings of fact made by the Board.

28. In our judgment, it is abundantly clear from the sentencing remarks in this case that the Board was satisfied that the appellant did not genuinely believe that it was necessary to use force to defend himself. That is the starting point for consideration of self-defence.

29. In the sentencing remarks the Judge Advocate General said this:

> "You heard smashing noises coming from inside and you hammered on the door, demanding that Lance Corporal Lindley let you in. … The door could not be opened from the outside and eventually Lance Corporal Lindley opened the door and let you in. You saw that your room had been absolutely smashed to pieces and you lost your temper. At some stage you picked up a kitchen knife. … It was in your hand and you stabbed Lance Corporal Lindley a number of times in the shoulder, neck and chest area. … You said that he attacked you and threw you around the room like a rag doll and you genuinely feared for your life so you used the knife in self-defence because you thought he was going to pick it up and use it against you. … There is no doubt that there was a significant amount of provocation from Lindley but the Board rejected your reassertion that you acted in self-defence. Their conclusion is that you completely lost control of yourself in your drunken state because of what Lindley had done to your room. Indeed, you were heard to shout through the door before it was open that if Lindley was smashing your room, you would kill him. That demonstrated a state of mind. The Board did not believe that you meant that literally and they concluded that you did not intend to kill him. … You stopped when you realised the enormity of your actions and your anger began to subside."

30. Mr Glenser submits that the language used by the Judge Advocate-General does not exclude the possibility that the Board accepted that the defendant acted in self-defence, but went over the top in using force which was unreasonable. We are unable to accept that submission. The Board clearly considered that the appellant had been significantly provoked, a proposition with which we entirely agree, but it rejected self-defence completely. We are fortified in that conclusion by the extensive discussion in the sentencing remarks which follow of the aggravating and mitigating factors. It would have been a powerful mitigating factor had this been one of those cases of a genuine belief in the need to defend oneself accompanied by force which was unreasonable. But there is no sign of that in the sentencing remarks as clearly there would have been if that was the approach of the Board.

31. For these reasons we are satisfied that the conviction is safe. At the end of the hearing we announced our decision that the appeal was dismissed. These are our reasons for coming to the conclusion that the conviction is safe despite the error of law and consequent misdirection which we have identified.