

Neutral Citation Number: [2005] EWCA Crim 2400
In The Courts Martial Appeal Court

No: 200500383/C5

Royal Courts of Justice
Strand
London, WC2

Friday, 29th July 2005

B E F O R E:

Lord Justice Keene

Mr Justice Newman

Mr Justice Moses

R E G I N A

-v-

GARRY GLENN B

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(Official Shorthand Writers to the Court)

Mr J W Mason appeared on behalf of the CROWN

J U D G M E N T
(As approved by the Court)

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1. MR JUSTICE NEWMAN: This applicant renews his application for permission to appeal against conviction and sentence at a district court martial where he was convicted of one charge of indecent assault on a male person. On 11th November 2004 he was sentenced to be reduced to the rank of sapper and to undergo detention for 56 days. It was ordered that he should be placed on the Sex Offenders Register and to comply with the provisions of that Act's notification requirements for five years.
2. As to conviction, its safety is challenged on the ground that the activity known as "giving someone a wedgy" was not inherently indecent and amounted only to horseplay. It was common ground that on the occasion of the alleged offence horseplay was taking place. Giving someone a wedgy involves grabbing hold of the waistband of boxer shorts and pulling them up so that they rise between the cheeks of the backside. The complainant, a 17-year old recruit, alleged that more than that had happened, in that the applicant had placed his hand inside his jeans and shorts at the rear and had slipped his hand between the cheeks of his bottom.
3. The judge advocate directed the members of the court that horseplay, giving a wedgy, would not be an assault in the circumstances of the case. He made it plain that the case was that the action of the applicant went beyond that. It was a hostile act to which the complainant had not consented. He went on to direct them that they had to decide whether putting a hand down the crack between the cheeks of someone's backside was something which was capable of being indecent.
4. In our judgment, there can be no doubt that the members of the court understood that unless they were satisfied that something more than horseplay had occurred there was no case. As to putting a hand down the complainant's boxer shorts, as had been alleged, in our judgment it was plainly action which was capable of being indecent. For these reasons, the one ground upon which the applicant had sought to complain about the safety of the conviction is misplaced. Application for leave to appeal against conviction is therefore dismissed.
5. As to sentence, it was accepted that the offence must be viewed at the lower end of the scale of offending of this nature. Nevertheless there are factors which, in our judgment, are important. It was said that the complainant, being under 18 and a young soldier at the start of his military career, whereas by contrast the applicant was aged 32 and held a more serious rank, meant the offence had to be viewed seriously. The judge advocate had in mind that a message should go out to the effect that those who abuse their seniority in the army over younger members must be punished severely to mark out the seriousness of what they have done. It has to be said that the applicant has never accepted, according to the pre-sentence report, that he was doing anything other than engaging in horseplay, a matter which impacted upon the question, in our judgment, of the long term risk that he presented. Being a junior NCO he had responsibility in respect of young recruits and on these facts it was proper and appropriate that regard should be had to the suitability of him continuing to work with young soldiers.

6. That said, there were positive character references. He was given due credit for matters of personal mitigation, including the fact that he had been in the service for 14 years without a previous blot on his good character.
7. Having considered these factors, we are satisfied, and agree with the single judge, that the sentence could be seen as being severe, but, in our judgment, it cannot be characterised as manifestly excessive. We would draw attention, in particular, to the short guide to sentencing in the *Services Justice System* at paragraph 19 under the heading *Indecency and Sexual Misconduct*, where it states that less serious sexual offences may result in sentences of service detention rather than imprisonment. The importance of the distinction between service detention and imprisonment is the former permits the offender to be retained in the service. The distinction is not only pertinent to the sentence application, but is also relevant to a final point which has been raised by the Registrar in respect of the notification requirements. Before passing to that, we should state that, having regard to the matters we have set out, we are satisfied that the sentence was not manifestly excessive. Therefore permission is refused in respect of sentence.
8. The matter to which the Registrar has drawn attention goes to section 82 of the Sexual Offences Act 2003 in which a person sentenced to imprisonment for six months or less is subject to the notification requirement for a period of seven years. The structure of section 82 demonstrates that the length of period during which a person is subject to the notification requirements of the section is set according to the character and effect of the disposal which the court makes, namely the sentence of the court. The type of disposals appear in the table, which effectively forms part of the substantive part of section 82, draw distinctions as follows: imprisonment according to varying length, a hospital order subject to a restriction order, a hospital order without a restriction order, a caution and conditional discharge. For each of those differing disposals periods of notification are prescribed. The all embracing roll-up provision, or description, of disposal is described as a person of any other description, namely a person who has been disposed of in accordance with another manner of disposal. We are satisfied, looking at section 82, that it is plain from that that there is, although not stated expressly, a distinction to be drawn between imprisonment and any other disposal, of which service detention is but an example. But although there is no specific reference in section 82 to service detention, there is, indeed, a reference in section 81(3)(b) where both expressions are used and which confirms, and indeed makes it beyond argument, that the legislation contemplates a distinction to be drawn between service detention and imprisonment.
9. For those reasons, in cases where service detention is the form of disposal adopted by the court martial, in our judgment the person is a person of any other description within the meaning of section 82 and the notification period therefore is five years beginning with the relevant date.