

IN THE HIGH COURT OF JUSTICE

NO: CO/3880/1999

QUEEN'S BENCH DIVISION

CROWN OFFICE LIST

Royal Courts of Justice
Strand
London WC2

24th July 2000

B e f o r e:

MR JUSTICE BLOFELD

R e g i n a

-v-

THE ARMY BOARD OF THE DEFENCE COUNCIL

EX PARTE D.B.

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Smith Bernal Reporting Limited,
190 Fleet Street, London EC4A 2AG
Telephone No: 202 7421 4040 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)

MR A CRANBROOK and MR G BLADES [solicitor advocate] (instructed by Wilkin,
Chapman Epton and Blades, Lincoln LN2 1DR) appeared on behalf of the Applicant
MR H KEITH (instructed by Treasury Solicitors, London SW1H 9JS) appeared on behalf of
the Respondent

J U D G M E N T
(As approved by the Court)
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1. MR JUSTICE BLOFELD: At all material times this applicant, DB, was a captain in the REME. He was commissioned in August 1992 and promoted to the rank of captain in August 1997. In May 1996 he was in post as engineering officer for the 3rd Regiment AAC Worksop REME. He was involved among other things in teaching grown up cadets.

2. The facts are not in dispute. They are these. One or more of the cadets had met a woman, who I shall refer to as X, on a date prior to 27th May. He had learnt that she might in certain circumstances be prepared to allow some sexual favours. There is no indication that DB knew anything about this at all before the evening of 27th May. That evening he went to the Royal Oak, a public house near where he was stationed. He consumed a certain amount of alcohol, sufficient at any rate to impair his judgment.

3. As the facts that I am about to relate will indicate that he was in due course interviewed, I will proceed to take the facts from now on from the contents of his police interviews which were not in dispute at his trial and are not in dispute now.

4. He saw some of the cadets at that public house. In the course of conversation he gathered that some of them and this woman, X, proposed to have some form of group sex later on that evening. At some stage he asked if he could join in and he was told that he could. He then describes how later on that evening they returned to the camp (if that is the right word to describe where he was stationed) and she and some five or so men met in the room there where there is a sauna. There she allowed the men to touch portions of her unclad anatomy and in their presence she performed oral sex on one of the men, not this applicant. She then spoke, saying that he urinated in her mouth and was greatly displeased. However, she continued with some form of sexual conduct.

5. After a period they went upstairs to a bedroom. In that bedroom clothes were taken off and sexual advances were made towards her. He cannot remember the precise sequence of events. He accepts that each had sexual intercourse with her with penetration and that she masturbated them. He said that he never ejaculated while having sexual

intercourse with her and he does not think anyone did. He said that there were difficulties with many of them in getting an erection sufficient to have sexual intercourse. He considered that was due partly to the amount of alcohol they had consumed and partly to the situation with a number of males and one female. He was asked if she appeared to be enjoying herself and said:

“I would say yes. She was not screaming for joy but she wasn’t saying anything to the contrary.”

6. It was not until several months later that X made a complaint of rape to the police. Consequently it must be remembered that the details of these interviews were not made when the matter was really fresh in his mind and allowance must be made for that. In due course he and five others stood their trial at Oxford Crown Court for rape. At the close of the prosecution case the Crown Court judge ruled that they should be acquitted. That acquittal took place on 10th October 1997.

7. The papers were then submitted to the APA, The Army Prosecuting Authority, a wholly independent body set up to consider prosecutions of serving personnel in the army. They determined on a date preceding 26th January 1998 that no proceedings should be brought by way of court martial against DB. Their powers were limited. Section 134 of the Army Act 1955 (1) states:

“Where a person subject to military law --

(a) has been tried for an offence by a competent civil court ...”

(aa), (b) and (c) are not relevant. I continue the quotation:

“he shall not be liable in respect of that offence to be tried by court martial ...”

8. Mr Cranbrook, who appears with Mr Blades for the applicant, has drawn the Court’s attention to section 133 which deals with the situation where a person has first being tried by court martial. In those circumstances the relevant portion of section 133(1) reads:

“A civil court shall be debarred from trying him subsequently for an offence substantially the same as that offence ...”

9. It will be noted that the phraseology is different. In my view nothing turns on that in this case.

10. Nevertheless, arising out of his behaviour that night in the bedroom, Mr Cranbrook submits, convincingly, that it was perfectly possible for a disciplinary charge to be brought

against him under section 64 of the Act. That reads:

“Every officer subject to military law who behaves in a scandalous manner unbecoming the character of an officer shall on conviction by court martial be liable to dismissal from her HM Service with or without disgrace.”

11. Mr Cranbrook submits that the words “be liable to dismissal” should not be construed as “shall be dismissed”. That matter does not fall for decision in this case. I think it, however, likely that the word “liable” governs the words “with or without disgrace” so the only penalty that section appears to be contemplating on a finding of scandalous conduct is dismissal. Mr Cranbrook submits that the proper approach, if the army wished to continue proceedings against DB after his acquittal at Oxford Crown Court, was by way of a court martial facing a charge under section 64. He has also submitted that there may be some other section that might be appropriate but he submits that that is the most obviously appropriate section.

12. Returning to the history. On 26th January 1998 the APA communicated to Headquarters Land Command their decision that no proceedings should be brought by way of trial by court martial against DB for his involvement in the incidents which took place in May 1996.

13. Headquarters Land Command then appointed a commanding officer, Lieutenant Colonel Bowman. It reads as follows:

“The commanding officer The School of Electronic and Aeronautical Engineering Regiment is hereby appointed Commanding Officer for administrative action under Army Administrative and General Instructions Volume 1 Chapter 62 of the under named.”

14. Consequently Colonel Bowman had in turn to consider the Army General Administrative Instructions. I turn to them. 62.031 reads:

“This Instruction deals with administrative action in respect of misconduct by officers. In this Instruction the term ‘misconduct’ is to be considered as meaning any form of conduct unbecoming of an officer.”

The remaining part of that paragraph is irrelevant to this case.

62.035, the appropriate part of that reads:

“As a fundamental principle administrative action may not be sought as an alternative to appropriate and effective disciplinary action ...”

62.037 reads:

“The Board are not a ‘tribunal of fact’ and cannot be put in a position whereby they are required to ‘try’ a case. Their role is to decide whether any administrative action should be taken against an officer where misconduct has been proved or admitted.”

I have taken into account paragraphs 62.048 but do not propose to quote it. I turn to 62.050:

“Misconduct where Disciplinary Action has not been taken. Other circumstances which may warrant an approach to the Army Board are:

a. When an officer has committed misconduct which, even though it may not be an offence in civil or military law, nevertheless reflects adversely on his integrity or reputation as an officer, or which damages his proper relationship with members of the Armed Force. (Examples of some such cases are at Appendix 1 to Annex C to this Chapter).”

15. I turn to those examples of that annex. I note that it is headed:

“The table below provides examples of the type of award made against officers for common misconduct offences. The table is intended as a guideline only.”

4, where the appropriate penalty as a guideline is “called upon to resign or to retire”, deals with a number of different offences. It then deals at f with indecency. G:

Any incident which brings the Service into public disrepute or scandal.”

16. So there is nothing that is directly analogous to what happened in this case.

17. Carrying on with the history, on 7th April 1999 Lieutenant Colonel Bowman raised an administrative report in respect of DB recommending that he be invited to resign his commission. DB had been asked to make representations.

18. On 9th July 1998 in a lengthy document headed “without prejudice” the applicant put forward all matters that he wished Lieutenant Colonel Bowman to take into account. They ranged over a large number of subjects. Mr Cranbrook has expressly refused to take any point that is contained in that particular document. The applicant subsequently revised that document and resubmitted it. The revisions are minor and there is no need to refer to it further in this judgment.

19. Lieutenant Colonel Bowman took this document into account in making his decision

that he be invited to resign his commission and he forwarded it to the appropriate body. In due course it ended up in front of the Army Board, who would also have had it available to consider when deciding the matter themselves. The Army Board after a series of steps received these submissions on 29th March 1999. On 25th August they called upon the applicant to resign.

20. It is clear that the applicant took legal advice because it was on 27th September 1999 that he made application for permission to bring proceedings for judicial review. Those proceedings were granted by Hidden J on 22nd November 1999. The relief sought was a quashing order in respect of the decision of the Army Board calling upon the first applicant to resign his commission. (At that stage I should pause and say there were three applicants. The second and third, for reasons wholly unconnected with this matter, are not now pursuing their relief). That was notified by letter dated 7th September 1999, taking effect on 29th September 1999.

21. Mr Keith, for the respondent, submits with some considerable force that the way that relief is sought precludes this Court from dealing with the crucial point upon which Mr Cranbrook relies. However, if I considered that there was merit in Mr Cranbrook's submissions, so that his lay client, DB, was entitled to relief, I feel confident that after a short adjournment he could recast his application for relief so that justice could be done.

22. Briefly Mr Keith's submission is this, that as there is no application to quash the submission by Lieutenant Colonel Bowman of his letter, nor indeed of his earlier decision to proceed by way of administrative action, it is not now open to the applicant to submit as he does that this matter should never have been dealt with by way of administrative action but should have been dealt with by disciplinary action, namely by court martial.

23. I turn to the merits. It follows that Mr Cranbrook accepts that, on the face of it, if this matter went to a court martial there would be matters which would raise a triable issue that DB had behaved in a scandalous manner unbecoming to the character of an officer. Mr Cranbrook submits that if he had been proceeded with by way of court martial those representing him could have put forward arguments and submissions. That might well have persuaded the court martial that DB had not in fact behaved in a scandalous manner unbecoming of the character of an officer. He submits that by choosing to proceed administratively DB has been deprived of that and consequently that is unfair. He does not submit that there is no evidence that DB behaved in a scandalous manner unbecoming to

the character of an officer. It follows that he does not submit that DB's action on 26th May 1996 were not capable as being conduct unbecoming of an officer.

24. Mr Cranbrook faces a number of difficulties. In the first place it must be remembered that the actual evidence of "misconduct" was not in dispute. It was based entirely on his interviews. Consequently although it would certainly have been possible for any advocate at a court martial on his behalf to put forward mitigating circumstances, it would have been impossible for them to have argued successfully about the actual conduct itself. The furthest they could possibly have gone would have been to emphasise, no doubt, the drink he had taken, the time of the evening or night that this took place, the presence of the people, the nature of the people present, i.e. that they were all either officers or cadets except for the woman, and matters of that kind, but as to the fundamental conduct there was no dispute.

25. Secondly, it must be remembered in that dealing with this by way of administrative action not only was it open to DB to say anything he wished to say so that it could be considered, he was not inhibited in any way in the information he put forward to Lieutenant Colonel Bowman, as his letter and amended letter show.

26. Further, as Mr Keith has submitted, this case falls fairly and squarely within paragraph 62.050 of the Army General Administrative Instructions.

27. Next, Mr Cranbrook submits that the decision not to proceed with a court martial but to proceed with administrative action was taken by the wrong body. But on analysis, I think he agrees that that point was not well taken. It is clear that the APA are wholly independent of the Army Board and Lieutenant Colonel Bowman, so that point falls to the ground.

28. I have come to the conclusion that in the circumstances of this case this matter was properly dealt with and fully dealt with. I have come to the conclusion that after his acquittal the matter was referred to the APA properly. They properly decided not to bring administrative proceedings. They informed the Headquarters at Land Command of that decision. Headquarters properly appointed a commanding officer then to look into the lesser matter as to whether or not administrative action should be taken. After all it must not be forgotten that "scandalous" and "unbecoming", the two crucial words, are not synonymous, "unbecoming" connotes a lesser form of misbehaviour than does the word "scandalous". I am satisfied that in this particular case the appropriate members of the

army approached this matter properly. They made the correct decisions. Consequently there are no grounds for granting him the relief as sought or any other relief if it had been necessary to consider any amendment. Consequently I dismiss this application.

29. MR KEITH: Would your Lordship forgive me if I refer to two small corrections, which was that in the penultimate paragraph of your Lordship's judgment you stated that Headquarters appointed an officer to consider whether disciplinary action should be taken, it is of course administrative action.

30. And your Lordship, this is the fault of the Bar, referred to the fact at the very start of the judgment that the applicant was suspended. Could I clarify that in fact the applicant was only suspended after his acquittal in the Crown Court for the reasons --

31. MR JUSTICE BLOFELD: I will try to remember to alter that when I get the draft judgment.

32. MR KEITH: I would also make an application for costs in the circumstances in the light of your Lordship's judgment.

33. MR JUSTICE BLOFELD: Yes. Is he legally aid?

34. MR CRANBROOK: My Lord, he is.

35. MR JUSTICE BLOFELD: I am told that we do not have a legal aid certificate on the file.

36. MR CRANBROOK: I have certainly seen one, my Lord.

37. MR JUSTICE BLOFELD: If Mr Blades has one it can be handed in. (Handed).

38. MR BLADES: If I could have it back.

39. MR JUSTICE BLOFELD: Are you satisfied? I am going to leave my associate and you to deal with it afterwards. I really do not get involved if I can. Usual legal aid order. The only thing that I think I am bound to say, because presumably you want legal aid taxation, is you may certainly have legal aid taxation. The only thing is clearly Mr Blades, as well as being your junior, is presumably instructing you.

40. MR CRANBROOK: My Lord, that is right.

41. MR JUSTICE BLOFELD: It would seem to me entirely proper for him to have such remuneration as he should have as your instructing solicitor, but in a case like this I cannot really see that it would be appropriate for me to say legal aid taxation on the basis of two advocates, but I would certainly hear you.

42. MR CRANBROOK: My Lord, I would accept that.

43. MR JUSTICE BLOFELD: That is no discourtesy to you, Mr Blades. I am delighted to see you and it may have been that you would jump to your feet, but as you did not I think I have to protect the Legal Aid Fund. Do not go away thinking I am criticising because I am not at all.

44. MR BLADES: My Lord, no.