

IN THE COURTS MARTIAL APPEAL COURT  
CRIMINAL DIVISION

Royal Courts of Justice  
The Strand  
London  
WC2A 2LL  
Friday 17 November 2006

B e f o r e:  
Lady Justice Hallett  
Mr Justice Tugendhat  
and  
Sir Richard Curtis

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**R E G I N A**  
**- v -**  
**BERNARD ALEXANDER GEMMELL**

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**Mr Norris** appeared on behalf of **The Appellant**  
**Mr R Milne** appeared on behalf of **The Crown**

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

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Friday 17 November 2006

**LADY JUSTICE HALLETT:** I will ask Sir Richard Curtis to give the judgment of the court.

**SIR RICHARD CURTIS:**

1. Bernard Alexander Gemmell is aged 46. At all times relevant to these proceedings he was a serving non-commissioned officer in the Royal Air Force. This is his appeal with the leave of the single judge against conviction and sentence following a District Court Martial hearing at Colchester presided over by Assistant Judge Advocate General Seymour on 22 March 2006. The offence charged was of assault occasioning actual bodily harm to a fellow non-commissioned officer in the Sergeants' Mess when both were off duty.

2. The background to this appeal is that on 30 April 2005 the appellant and Warrant Officer Class II Walsh were in the Mess at RAF Wyton, part of the Royal Air Force Station at Brampton. They had both had far too much to drink on any view of the evidence. Warrant Officer Walsh went to the lavatory. On return he said that he felt a blow. He described in detail how that happened and that he was held on the floor for a long time before the police and the ambulance service arrived. The issue at the Court Martial was self-defence.

3. Walsh's injuries were bruising around both eyes, particularly the right eye. There was also bruising around the left forearm with a small abrasion and pain on neck movements. He was unconscious for periods of various severity due to drink taken or possibly concussion. The photographs show no serious injuries. There are none to the right side of the face, which is where Walsh said that the first contact had landed.

4. Walsh's account was that long after 1.30am he emerged from the lavatory and the first thing he could speak to was feeling a blow to the right side of his head. He fell over to the left. He was unable to say much more than that. He conceded that he might at some stage have made contact with furniture and been hurt by that. He went on to say, "The next thing I was on my knees, being pushed hard three or four times. My left arm was pushed up my back and my face was slammed into the floor. My left leg was pushed up". He described how his assailant shouted aggressively at him in a Scots accent and also shouted into a mobile telephone. He had no

idea how these events had started. He had been drinking at lunch time and in the evening and had drunk more than his usual five to six pints. He admitted to drinking eight pints of Guinness in the evening. All he could say was that he could not remember making any aggressive or insulting remarks that evening. That does not square wholly with page 32 of the transcript of the telephone call that was made by the appellant.

5. It is equally clear that the appellant was affected by drink. He was rude and aggressive to the police officers who arrived at the scene at 5.30am (summing-up page 39). He deserves no credit for his behaviour which was clearly due to drink. As it happens, Walsh was also said by the ambulance staff and the police to be confused and angry, and he tried to leave the ambulance when he was put into it by the medical staff.

6. The appellant's account is that he, too, did not remember what had started the trouble. He denied punching Walsh but recollected holding him down lest he (the appellant) was attacked. He said that there were no injuries to his hands such as might be caused by punching. This was supported by a defence witness called Bradley. All he did was to hold Walsh down for a substantial time because Walsh threatened him and was aggressive. It was not disputed that he used his mobile telephone to call an ambulance. That call is recorded and a transcript of it was before the court-martial.

7. In the course of the trial the prosecution appear to have set great store by a piece of evidence when Royal Military Police Constable Richards arrived in the Mess. Also present was Royal Military Police Constable Scott. They both say that the appellant went over to the recumbent Walsh and said, "Sorry, mate, I didn't mean to hit you". Scott made a note of those words and then wrote "or words to that effect". There is no dispute that the appellant, who has a Scots accent, spoke at the time in a slurred way due to drink taken. In our view nothing in what he was alleged by the two police officers to have said supports the view that he was admitting the matter in issue in the case, namely unlawful conduct in his dealings with Walsh. We remain somewhat puzzled as to why the Crown concentrated on this point to the extent they did in the course of the case.

8. At the end of all the evidence a submission was made by the defence of no case to answer on the basis that, since the prosecution were not able to establish how the trouble started, there was insufficient evidence to be left

to the members of the court. That submission was roundly rejected by the Assistant Judge Advocate General, who took the view that it was a matter for the members of the court.

9. In addition to whether the case should have been stopped at the end of the evidence, there are two problems with the summing-up. Although it was legally correct, it did not in our view sufficiently and properly analyse the two aspects of the case which were advanced by the prosecution as evidence on which the court could find that the defence of self-defence was wrong. First, the Assistant Judge Advocate General had to deal with the issue of "Sorry, mate, I didn't mean to hit you". He said at page 26 of his summing-up:

"Now of course the prosecution say that that effectively is an admission of guilt or a confession of some sort. It is highly relevant in the circumstances because they say that this is precisely what was going on. They say actually that Walsh was never the aggressor here and it was clearly [the appellant] who was the aggressor and in any event, even if you are unsure about how all this began, the very fact that [the appellant] was holding Walsh down for such a long period indicates the true state of affairs here. And here you have an admission by [the appellant] effectively saying, apologising to Walsh on the ground that he had hit him and that is, say the prosecution, really encapsulates the whole thing. So that, if you like, Members of the Court, could be a confession of guilt. So it is obviously very important."

In our view, on the particular facts in this case, that was a misdirection. It is not saved by what follows at page 27. The Assistant Judge Advocate General was under a duty in our view to make it absolutely clear to the members of the court that the words "Sorry, mate, I didn't mean to hit you" were, in the context of this case, completely neutral. They should have looked at the other evidence in order to help them reach the appropriate verdict.

10. The second problem arises out of the alternative way that the prosecution put their case. This was dealt with by the Assistant Judge Advocate General at page 30 of his summing-up when he said:

"The prosecution say, they say well, in fact, the evidence is that it was Walsh that was struck and not acting aggressively and in any event, they say thereafter, and this is shown by the way in which the accused himself behaved, he was clearly using disproportionate force, was [the appellant] because he held him [Walsh] down, he was banging his head against the ground. You remember the evidence that Walsh gives about what happened when he was on the ground and so on.

So what the prosecution say is that even if he [the appellant] thought he was acting in self-defence to begin with, whatever the situation was at the beginning, he quite clearly used disproportionate force later on and acted wholly unreasonably."

In our judgment that clearly refers to the period of time that the appellant held (as he admitted) Walsh down. The Assistant Judge Advocate General returned to this matter at page 39. He began by reminding the court that there was other evidence from another police officer that the appellant had come towards the Royal Air Force Police, when Walsh was still lying on the ground following their arrival, and said "I did that to him". He indicated Walsh lying on the floor. That caused the officer to arrest him. At page 39 the Assistant Judge Advocate directed the members of the court as follows:

"So, Member of the Court, there you have, of course, another remark, according to this police officer, when he [the appellant] said 'I did that to him [Walsh]'. But remember, Members of the Court, that there is no issue that [the appellant] was restraining him on the ground. [The appellant] says that at all times he was acting in self-defence. I do not think it is suggested that that particular comment amounts to a confession of any sort. It is the remark made to the RAF policeman which is what is significant in this case."

11. A transcript of the 999 call was made available to the court martial, and is available to us. It shows the frequent use of bad language and drunken observations by both the appellant and by Walsh. There are passages at pages 3, 4, 5, 6 and 7, which include interjections by Walsh (whose observations are annotated as "MV"). That evidence related to the secondary case which was advanced. It was also of application to the issue in the case. Any fair reading of the transcript (particularly at page 4) shows,

rightly or wrongly, that the appellant believed that, at the time he was making that 999 call, Walsh was trying to kill him and would certainly use violence on him if he could escape the appellant's grip from where he was being held on the ground. The Assistant Judge Advocate General referred in general terms to the transcript and left it to the members of the court, if they wished, to hear the recording again. There was no attempt at analysis of any part of the transcript. Nor was there any attempt to relate it to his remarks at pages 30 and 39, with which we have dealt, nor to the defence point that from the beginning the appellant had acted in self-defence. He should have done so, in our view. That is a second, and justified, ground of complaint by the appellant.

12. We take the view that this was not the strongest of cases in the beginning. It was word against word. Such evidence as there was (and we refer to the transcript of the 999 call) supported the appellant's account. Both the complainant and the appellant were drunk. In our view there was no sufficient evidence of unlawful conduct by the appellant shown on the facts of the case. It follows that we consider that this case should have been stopped at the end of the evidence by the Assistant Judge Advocate General on the grounds that a case was not made out. In addition, since we are charged with the duty of considering the safety of the conviction, we have looked at the summing-up. It was defective in two important particulars and there was a total failure to analyse the transcript of the telephone call which was an important plank in the defence. It follows that we cannot possibly say that the conviction is safe. It will be quashed and this appeal will be allowed.

**MR MILNE:** My Lady, the Crown will not seek a retrial in this case. May I respectfully remind you of section 19 of the Court Martial Appeal Act and of what your Ladyship and your Lordships must be satisfied. The Appeal Court have the power to quash the conviction and to make an order authorising the appellant to be retried at a Court Martial. The court shall only exercise that power if it appears to the court that the interests of justice require that an order under this section should be made. I do not invite you to make an order.

**LADY JUSTICE HALLETT:** Thank you very much, Mr Milne. Thank you for your help.