

**Neutral Citation Number: [2017] EWCA Crim 709**

**No: 201601640/B2**

**IN THE COURT MARTIAL APPEAL COURT**  
**CRIMINAL DIVISION**

Royal Courts of Justice

Strand

London, WC2A 2LL

Tuesday, 9 May 2017

**B e f o r e:**

**VICE-PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)**

**(LADY JUSTICE HALLETT)**

**MRS JUSTICE CHEEMA-GRUBB DBE**

**MR JUSTICE LAVENDER**

**R E G I N A**

**v**

**"L"**

Computer Aided Transcript of the Stenograph Notes of  
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(Official Shorthand Writers to the Court)

**Mr R Scott** appeared on behalf of the **Appellant**

**Colonel D Phillips** appeared on behalf of the **Crown**

**J U D G M E N T**

(Approved)

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1. VICE PRESIDENT: There are reporting restrictions in place prohibiting the identification of the appellant.
2. On 11th February 2016 the appellant, who was at the time a Royal Military Policeman, was tried by Court Martial on one charge of battery, contrary to section 39 of the Criminal Justice Act 1988 and was convicted. On 11th March 2016 he was sentenced by the Board to be reduced to the ranks, dismissed from the service and to serve 60 days' detention. He has leave to argue that the sentence passed, in particular his dismissal from the service, was excessive.

#### Facts

3. During the afternoon of 1st April 2015 the appellant, the victim, Corporal Hirons and other members of their RMP Unit had enjoyed a sports afternoon at a bowling alley in Aldershot. Both the appellant and the victim drank substantial amounts of alcohol. They returned to the RMP accommodation during the early evening and they continued to drink. At about 1930 hours a Lance Corporal Stanton saw the appellant banging on Corporal Hirons' door in an aggressive manner. There was an exchange of words culminating in the appellant punching Corporal Hirons. Corporal Hirons had little memory of what happened but Corporal Foreman was in her room when she heard a disturbance and went to assist. She saw Corporal Hirons sitting on the floor near the bathroom with the appellant standing over him. The appellant punched him three times in the face. Corporal Foreman restrained the appellant from punching the victim a fourth time and ushered him from the room. The appellant then left the scene.
4. Corporal Hirons was examined at hospital where he was seen to have sustained a partial thickness laceration above his right eyebrow, (closed with three steri strips), bruising over his left cheek and a superficial laceration of his left lower lip. The appellant was examined the next day at the garrison medical centre where he complained of pain to his left cheekbone. The area was found to be tender and a bruise 1 centimetre in diameter noted over the point of maximum tenderness. He was treated with simple pain relief. On 7th April 2015 photographs were taken of bruising to his chest which had developed in the intervening period.
5. In interview, the appellant stated that his recollection of events was limited because of the amount he had to drink. He could not remember why he entered the victim's room or the detail of what happened. He did recall that when he was in Corporal Hirons' bathroom the victim said: "Get out you Fenian bastard" and immediately punched him to the left side of the face. There followed an exchange of blows, after which Corporal Hirons ended up on the floor and the appellant left the room. The comment "you Fenian bastard" was said to be particularly provocative because that the appellant is a Roman Catholic from Northern Ireland who, despite the potential consequences to him and his family, had the courage to join the British Army.
6. A pre-sentence report was prepared upon the appellant. The author proposed the imposition of a fine and/or severe reprimand or a reprimand. The reprimand would

have the effect of delaying his career progression but would mean he could remain in the RMP. An additional option was a Service Compensation Order.

### Sentencing hearing

7. The Board heard from the appellant's Regimental Sergeant Major in person. He stated in clear terms that given the appellant's exemplary record, albeit of relatively short duration (four years) and his service record in the RMP, he wished to retain his services. The Board was also presented with a supportive written character reference from a Senior Officer who noted a soldier can only serve in the RMP at the rank of Lance Corporal or above and accordingly, any reduction in the ranks would have a significantly adverse impact on his career as a military policeman.
8. In the Court Martial Guidance on sentencing, which we assume was before the Board, at 5.2 it states:

"The Court Martial ... must 'have

regard' to any relevant sentencing guidelines issued by the Sentencing Council

(formerly the Sentencing Guidelines Council) when sentencing an offender for a criminal conduct offence [s 259]. The court may depart from those guidelines if in its opinion, the departure is justified by any features of Service life or of the

Service disciplinary system that are relevant to the case. The guidance below for each offence includes a framework which may provide the court with a

justification for departing from the SC guidelines, but where there are no Service-specific aggravating features or mitigating factors the court should be guided by the guidelines."

The guidance also reminds the Board of the principles relevant to sentencing in a military context at 2.6. The principles are:

"The Court Martial, like any other criminal court, is reminded by the judge that any

sentence passed is required to be in accordance with sentencing principles, and be

proportionate by reference to its main purposes [s 237]:

- the punishment of offenders;
- the maintenance of discipline;

- the reduction of Service offences and other crime (including reduction by deterrence);
- the reform and rehabilitation of offenders;
- the protection of the public; and
- the making of reparation by offenders to persons affected by their offences."

Additionally at 2.7 a Board must take into account the best interests of the service because "the whole Services justice system is designed to underpin the operational effectiveness of the Armed Forces."

9. Offences of violence are dealt with at 5.9, under the heading:

"Offences of Violence (e.g. Assault, Battery, ABH, GBH, Wounding)."

The entry points suggested are:

ABH where no weapon is used –

- minor injury such as bruising – detention of 90 - 120 days
- more serious but not permanent injury – detention of 6 - 12 months."

No reference is made to dismissal, unlike the guidance on offences of dishonesty.

The entry points do not cover offences of battery as such. Mr Phillips, who appeared on behalf of the Service Prosecuting Authority before us this morning, suggested that this may be because and (*sic*) offence of battery would not normally be referred to a Court Martial. The appellant's case may have been sent to a Board because of his position as a Royal Military Policeman and his rank of Lance Corporal.

The Sentencing Council Guideline on Assault for a category 1 offence, of greater harm and higher culpability, provides a starting point of a high level community order and a range of a low level community order to 26 weeks' custody and for a category 2 offence of greater harm and lower culpability or lesser harm and higher culpability a starting point of a medium level community order range of Band A fine to high level community order.

### Appeal

10. Mr Scott, who now appears for the appellant, accepted, as he must, that the military context is very important. The Board must bear in mind service policy considerations in relation to offences of violence generally and the prevalence of violence fuelled by excessive alcohol. Sentences will usually contain an element of deterrence.

Furthermore, the offence was aggravated by the facts that the attack was on a fellow serviceman and in his private living accommodation.

11. However, as important as the military context is, the civilian Sentencing Council Guideline is still relevant. The Court Martial Guidance states in express terms that regard must be had to it. Mr Scott criticised the Judge Advocate for refusing to consider the guideline despite the defence advocates attempts to persuade him of their relevance. The transcript reads as follows:

"MS BROWN: I do have a copy of the relevant guidelines from the Sentencing Guidelines Council. If you would like to see a copy --

JUDGE ADVOCATE: This is just such a different case.

MS BROWN: Absolutely.

JUDGE ADVOCATE: The issue you are going to be trying to persuade us, I anticipate, is not to dismiss.

MS BROWN: Absolutely.

JUDGE ADVOCATE: Reality is that we must be seriously considering that and the guidelines, I do not think, are going to help us.

MS BROWN: No.

JUDGE ADVOCATE: But the difficulty you have, frankly, I do not need to tell you this, and I am sure you have told your client this, is that, as Mr Mountfield [Regimental Sergeant Major] has just said, police officers are trusted. They are given rank and powers.

MS BROWN: Absolutely.

JUDGE ADVOCATE: Unfortunately, when something goes wrong and they behave in the way that your client did, consequences follow."

12. There was no further reference to the Sentencing Council Guideline and to the relevant category of offence during the course of the hearing or in the reasons given for sentence.
13. Mr Scott complains that the Judge Advocate's remarks indicate an assumption that the Board was bound to impose an order for dismissal from the service because the appellant was a military policeman but the case of [R v Robinson](#) [2014] EWCA Crim 1601 established that dismissal is not inevitable. Robinson was a military policeman who assaulted a member of the public going about their lawful business and providing a public service. Yet this court, quashed the order to dismiss him from the service.
14. The facts of [Robinson](#) were said to be more serious than the present. Here, the assault was by one serving soldier on another and the appellant may well have been provoked.

The Board rejected that he was called a "Fenian bastard" but there was evidence that the appellant asked the victim: "What did you call me?". This suggests something insulting had been said.

15. The mitigation in Robinson was similar to the mitigation advanced on the appellant's behalf. In both cases the appellants were of previous good character and the Regimental Sergeant Major spoke highly of them. This appellant has an exemplary record within the military and his performance, under the pressure of the investigation and these proceedings, was described as "impeccable".
16. Using the Sentencing Council guideline for assault, Mr Scott placed the offence at its worst in category 2 based on greater harm (the sustained or repeated assault) and lower culpability. Had the Board been referred to the guideline and the case of Robinson, it may have passed a sentence that punished the appellant but permitted him to continue in the Army, if that is what his commanding officer decided should happen. Even without the order for dismissal, by reducing him to the ranks, his career in the military police would be over.
17. Mr Scott invited us to quash the entire sentence and substitute a severe reprimand coupled with a financial penalty and a Service Compensation Order.

#### Conclusions

18. We are acutely conscious of the relevant principles to be applied to sentencing in a military context. We recognise the importance of maintaining discipline, the importance of deterring drunken, loutish behaviour and the importance of maintaining the higher standards expected of the Royal Military Police. However, the Court Martial Guidance is explicit: regard should be had to the Sentencing Council guideline. Had this offence been committed in a civilian context by a man of previous good character, the assault guideline indicates it is highly unlikely he would have received a custodial sentence. Had he been sentenced for assault occasioning bodily harm and had he not been a military policeman, the Court Martial Guidance indicates detention for 90 – 120 days. Both sets of guidance were relevant to the sentencing exercise.
19. In our view, and with respect to the Judge Advocate, the sentencing process was flawed in a number of respects. First, both the 'entry points' from the Court Martial Guidance and the Sentencing Council Guideline on Assault should have been put before the Board so that they could assess the level of sentence appropriate generally in the military and in a civilian context. Second, the Judge Advocate should have attempted to categorise the offence within the guideline to give the Board as much assistance as possible. Third, any departure from the guidance should have been explained. Fourth, the Board should not have proceeded on the basis that dismissal from the service was virtually inevitable, solely because the appellant was a Military Policeman.
20. We shall, therefore, consider the sentence afresh. We have borne in mind both sets of guidance. Even if we accept the proposition that the offence of battery committed by a military policeman was so serious it merited detention, the consequences of the overall sentence passed, in our view, are out of all proportion to the offence. This was one

incident in an otherwise unblemished career, albeit an unpleasant incident of drunken violence committed by a man of whom much higher standards were rightly expected.

21. The appellant has already served 60 days' detention. He desperately wishes to remain in the Army and has lived under what for him has been an enormous cloud for over a year. We are satisfied that the appropriate course would be for us to allow the appeal, to quash the order of detention and the order for dismissal and reduction to the ranks and to impose in their stead a severe reprimand. We think it entirely appropriate that the military should decide this young man's future.
22. We emphasise that had the appellant not served the 60 days' detention we would have imposed a financial penalty and/or a compensation order. To that extent therefore the appeal succeeds.