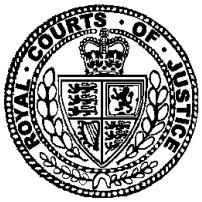

Neutral Citation Number: [2014] EWCA Crim 1029

Case No: 2014/00049/B5

IN THE COURTS MARTIAL APPEAL COURT
ON APPEAL FROM A COURT MARTIAL AT BULFORD

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/05/2014

Before:

LORD CHIEF JUSTICE OF ENGLAND AND WALES
PRESIDENT OF THE QUEEN'S BENCH DIVISION
and
VICE-PRESIDENT OF COURT OF APPEAL, CRIMINAL DIVISION

- -

Between :

Regina	**Respondent**
- and -	
Alexander Wayne Blackman	**Appellant**
-and-	
Secretary of State for Defence	**Intervener**

- -
- -

Anthony C Berry QC and Peter Glenser for the **Appellant**
Lt Col David Phillips for the **Respondent**
Philip Havers QC for the **Intervener**

Hearing date: 10 April 2014

- -

Approved Judgment

Lord Thomas of Cwmgiedd, CJ:

Background

The events of 15 September 2011

1. In 2001 HM Armed Forces were deployed, as part of the International Security Assistance Force, to Afghanistan. During that deployment they became engaged in operation Herrick - combating the insurgency in Helmand Province in southern Afghanistan. The main British base was at Camp Bastion, near the provincial capital, Lashkar Gah. HM Forces established a Forward Operating or Patrol Base at Shazad in South Western Helmand. Under the control of that base there were other posts including one at Command Post (CP) Taalanda and CP Omar. A watch was kept for insurgents over this area by a camera on a balloon above the base at Shazad which was referred to as a "persistent ground surveillance system" (PGSS).

2. On 15 September 2011 insurgents attacked CP Taalanda using small arms fire. The operations room at Shazad observed through the PGSS two persons believed to be armed insurgents in the region of CP Taalanda. An Apache helicopter from Camp Bastion was called in; one of the insurgents was located in an open field. The helicopter opened fire and fired a total of 139 30mm rounds at that insurgent. Those watching the operation, including the pilot and those at Shazad, thought that he could not have survived.

3. The unit at CP Omar was a patrol of Royal Marines under the command of the appellant who then held the rank of Acting Colour Sergeant; he had been deployed to Afghanistan in March 2011. Under him were a patrol of marines, including Corporal Watson (referred to as Marine B at the Court Martial) and Marine Hammond (referred to as Marine C). They were ordered on the afternoon of 15 September 2011 to undertake what was called a battle damage assessment, that is to say to see what the effect of the helicopter's attack had been and to report what they had found.

4. The patrol located the insurgent. It recovered his AK 47, two magazines and a hand grenade. It was assumed at Shazad that the insurgent had died of injuries inflicted by the gunfire from the helicopter.

5. In October 2011 the appellant completed his duty in Afghanistan.

The discovery in September 2012 of a recording of the events

6. In September 2012, during an investigation into an unrelated matter, the military police found on a computer a video recording of the incident that had taken place on 15 September 2011. Investigations showed this had been taken by a camera mounted on the helmet of Corporal Watson.

7. As a result, on 13 October 2012 the appellant, Corporal Watson and Marine Hammond and two other marines known as Marine D and Marine E were charged by the Service Prosecution Authority with murder, contrary to s.42 of the Armed Forces Act 2006. That section makes it an offence if a person in the armed forces does an act that is punishable by the law of England and Wales or, if done in England and Wales, would be so punishable. The offence of murder or manslaughter committed by a

British citizen is punishable by the law of England and Wales wherever committed: see *R v Page* [1954] 1 QB 170.

The Court Martial

8. The appellant and the four other marines were then brought before a Court Martial. Prior to arraignment the proceedings were discontinued against Marines D and E. The trial commenced at Bulford on 23 October 2013. The President was a Lieutenant Colonel in the Royal Marines, the Judge Advocate was the Judge Advocate General and the six other members comprised two other marine officers, three Royal Naval officers and a Royal Naval Warrant Officer.

9. On 8 November 2013 the Court Martial found the appellant guilty of murder but acquitted Corporal Watson and Marine Hammond. On 6 December 2013 the Court Martial sentenced the appellant to life imprisonment with a minimum term of 10 years less time in custody, a reduction to the ranks and dismissal with disgrace from the Armed Forces.

10. On 17 December 2013 this court and a Divisional Court of the Queen's Bench Division heard an appeal and judicial review in respect of the orders for anonymity made by the Judge Advocate General: see [2013] EWCA Crim 2367. In this appeal, the appellant appeals against his conviction and sentence.

THE APPEAL AGAINST CONVICTION

The features of the Court Martial System

11. As we have set out, the crime of murder by a British citizen is an offence against the law of England and Wales wherever committed. The appellant could therefore have been tried in a civilian court (as has happened in at least one case arising from the operations of HM Armed Forces in Iraq). However the decision was made that the appellant and the other marines should be prosecuted under the Court Martial system.

12. In recent years the system of justice for criminal offences administered by the Courts Martial has been brought closer to the system of justice for criminal offences administered by the courts; Rule 26 of the Armed Forces (Court Martial) Rules 2009 (the Rules) gives added force to this. There are two differences material to this appeal: first the way in which the Court Martial reaches its decision on guilt and innocence and second the composition of the body that decides on sentence.

13. The two material differences between the system of justice administered in the courts and the system of justice administered by the Courts Martial are set out in s.155 and s.160 of the Armed Forces Act 2006 and the Rules.

    i) Under s.155 a Court Martial comprises a Judge Advocate and between at least three but no more than seven other persons known as lay members. The Act proscribes the qualification for those other members who are officers or warrant officers. The Rules make detailed provision as to the number that is required in certain proceedings.

    ii) Under s.160,

> "(1) Subject to the following provisions of this section, the finding of the Court Martial on a charge, and any sentence passed by it, must be determined by a majority of the votes of the members of the court.
>
> (2) The Judge Advocate is not entitled to vote on the finding.
>
> (3) In the case of inequality of votes on the finding the court must acquit the defendant.
>
> (4) In the case of inequality of votes on sentence, the Judge Advocate has a casting vote."

14. In the courts there are mandatory provisions as to the majority required for conviction. If there are not less than 11 jurors at the time of verdict, the majority for conviction must be 10. If there are 10 jurors at the time of verdict, 9 of them must be agreed upon it. (See Section 17 of the Juries Act 1974). The judge alone decides on sentence.

15. It is important, however, to note that the standard directions given by a Judge Advocate to the members of the Court Martial who will decide on guilt or innocence is that they must strive to be unanimous.

The contentions of the parties

16. It was the appellant's contention that it is a fundamental feature of the system of criminal justice in England and Wales, emblematic of a democracy, that those facing serious criminal charges are entitled to be tried before 12 members of the public and can only be convicted by a majority of at least 10 of the 12, (or a reduced number in the circumstances to which we have referred in the preceding paragraph).

    i) This was a right that could be traced back to at least 1168; unanimity was required from at least 1367 (see *Devlin: Trial by Jury*, 1956, page 48). For a period during World War II, the Administration of Justice (Emergency Provisions) Act 1939 authorised trials with only seven jurors for criminal cases other than murder or treason, for which twelve jurors were still required. Verdicts had to be unanimous.

    ii) A change was made only in 1967 where by s.13 of the Criminal Justice Act 1967 majority verdicts were allowed. Where there was a finding of guilt, the vote had to be stated in open court. By the Practice Directions, CPD Trial 39K and CPD Trial 39 Q 1 - Q9, strict requirements are set out as to the procedure to be followed in relation to verdicts by juries.

    iii) Although in the Magistrates' Courts conviction can be by simple majority of the lay magistrates, the offences are less serious and, unlike the lay members of a Court Martial, Magistrates receive training in law.

    iv) A simple majority conviction is said to be inherently unsafe because it demonstrates sufficient doubt to defeat the criminal standard of proof.

Reliance was placed on a passage in *Trial by Jury* by Sir Patrick Devlin at page 56:

> "The criminal verdict is premised upon the absence of reasonable doubt. If there were a dissenting minority of a third or a quarter that would of itself suggest to the popular mind the existence of a reasonable doubt and might impair public confidence in the criminal verdict."

v) Reliance was also placed upon a passage in the third edition of *Rant on the Court Martial and Service Law* (edited by the present Judge Advocate General) at paragraph 5.126:

> "An undisclosed simple majority decision in a serious case where the defendant is at risk of a significant custodial sentence might be perceived as being inherently unsafe, since the outcome rests on a knife edge. … This provision is a legacy from the past, which represents a significant weakness in the Service justice system and a striking contrast with the much more secure arrangements in the Crown Court. When there is legislative opportunity the law should be changed to require either a unanimous verdict, as, for example, is the case in the Court Martial system in other Commonwealth countries such as New Zealand or at least a significant and disclosed majority."

vi) Furthermore Rule 109(3) of the Armed Forces (Court Martial) Rules 2009 requires the lay members who are serving officers to give their votes on the finding in ascending order of rank and seniority. This is apparently to preclude the influence of seniority within the discussion.

vii) It therefore followed that the position of a citizen subject to the Court Martial system was afforded much less protection than a citizen before the courts and, although it did not violate Article 6 of the Convention on Human Rights *per se*, it violated Article 14 of the Convention.

The court should therefore declare s.160(1) of the Armed Forces Act 2006 incompatible with the Convention rights under s.4 of the Human Rights Act 1968.

17. The Ministry of Defence who were given leave to intervene on this issue had a short answer to these submissions. This court was bound by *R v Twaite* [2010] EWCA Crim 2973. Moreover the decision of the Strasbourg Court in *Engel and Others v The Netherlands* (Application No. 5100/71, decision 8 June 1976) demonstrated that s.160(1) was entirely compatible with the appellant's human rights.

Our conclusion

18. In *R v Twaite* the Judge Advocate General had referred to this court the question as to whether a finding of guilt by simple majority for a serious offence deprived a defendant of his right to a fair trial under Article 6 and whether, in the circumstances, s.160(1) of the Armed Forces Act 2006 was incompatible with the Convention. In the

judgment, given by Lord Judge CJ, this court set out the case law which had subjected the Court Martial system in England and Wales to rigorous scrutiny. The court concluded at paragraphs 24 to 29 that the provision for a majority verdict set out in s.160(1) of the 2006 Act was entirely compatible with the Convention.

19. The court went on to hold at the request of counsel for the Secretary of State for Defence, Mr Philip Havers QC, that it was inappropriate for the Judge Advocate in a Court Martial to ask the question as to whether the verdict was unanimous or by majority. The court held that, consistent with the system in the courts, no question should be asked as to whether the acquittal had been by majority or not. At paragraph 33 of its decision it concluded, in reliance on the decision in *Cooper v UK* [2004] 30 EHRR 2 (paragraphs 121 and 39) and the terms of s.160 of the 2006 Act, that it was neither necessary nor appropriate to seek to discover whether a conviction was by a majority or was unanimous. The court therefore held at paragraph 34 that there were no circumstances in which the way the individual members of the court had voted should be revealed.

20. Although no argument under Article 14 was put forward before the court in *Twaite*, we are bound by that decision. The argument under Article 14 makes no difference for three reasons.

21. First, it is well recognised that under the changes that have been made to the Court Martial system in the United Kingdom, that system now ensures a trial that is fair and compatible with Article 6.

22. Second, when the Strasbourg Court reviewed the system of military discipline in *Engel*, it concluded at paragraph 92, with regard to Article 14, that the distinctions between the courts and Courts Martial were justified by the differences between the conditions of military and civil life. They could not be taken as amounting to discrimination against members of the armed forces. The great advantage of reaching a decision by majority is that it avoids "a hung jury". There are good reasons why, in a system of military justice, it is necessary to avoid "a hung jury" for the ordinary run of offences.

23. Third, as is evident from an article by Professor Leib entitled *A Comparison of Criminal Jury Decision Rules in Democratic Countries*, [2008] Ohio State Journal of Criminal Law 629, requirements differ widely between legal systems as to whether unanimity is required and, if it is not, what the majority should be. In *Taxquet v Belgium* (Application No. 926/05) the court recognised the diversity of the different systems of jury trial at paragraphs 83 to 92 of its judgment. It cannot be said that there is anything objectionable about a system that decides guilt or innocence by simple majority.

24. We therefore conclude that even if Article 14 is engaged, there was no discrimination.

Observations

25. It may be helpful to add three concluding observations.

26. First, it will always be open to Parliament to change the requirements of s.160, as the Judge Advocate General himself has suggested, to bring the position into line with the

position in the courts, either for all offences or more serious offences. That is a matter for Parliament.

27. Second, the issue as to whether the court should announce the majority, if a conviction is by majority, is a matter that could probably be dealt with under the Court Martial Rules made under s.13 of the Act. That is a matter for the Secretary of State for Defence.

28. Third, it appears on the information provided to us that no question was raised at the outset of these proceedings as to whether it was appropriate for the appellant to be tried by Court Martial or by a court. As we have observed at paragraph 6, a British citizen can be tried in a court in England and Wales for a murder, wherever committed. The question as to whether proceedings should be before a court or a Court Martial is governed by a protocol between the Director of Service Prosecutions, the Director of Public Prosecutions and the Ministry of Defence made in September and October 2011. The principles set out in the protocol were approved by the Attorney General for England and Wales and by the Ministry of Justice.

29. The protocol makes it clear that where there are overlapping jurisdictions between the Court Martial system of justice and the system of justice in the courts, it is for the Director of Pubic Prosecutions to decide whether a person should be subject to military justice or be subject to trial in the courts. Paragraphs 2.1 to 2.4 set out the considerations that are to be applied.

30. In the case of prosecutions for murder committed overseas by members of HM Armed Forces, careful consideration should be given to the question of which is the more appropriate system, bearing in mind the requirement in the court for a specified majority and any relevance in such a case of the experience of the members of the board that comprises the Court Martial as compared with the court system which gives the responsibility for sentence to the judge alone.

THE APPEAL AGAINST SENTENCE

The circumstances of the murder of the insurgent

31. It is necessary to set out the circumstances in which the unknown insurgent was killed. These are clear both from the findings made by the Court Martial when sentencing the appellant and from the video recording made by Corporal Watson.

32. The Court Martial made, as set out in its reasons for its decision on sentence, a number of grave findings against the appellant as to the deliberate nature of the murder:

> "[The insurgent] had been seriously wounded having been engaged lawfully by an Apache helicopter and when [the appellant] found him he was no longer a threat. Having removed his AK47, magazines and a grenade [the appellant] caused him to be moved to a place where [the appellant] wanted to be out of sight of [the] operational headquarters at Shahzad so that, to quote what [the appellant] said, "PGSS can't see what we are doing to him".

> He was handled in a robust manner by those under [the appellant's]command clearly causing him additional pain and [the appellant] did nothing to stop them from treating him in that way. When out of view of the PGSS [the appellant] failed to ensure he was given appropriate medical treatment quickly and then ordered those giving him some first aid to stop.
>
> When [the appellant was] sure the Apache helicopter was out of sight, [the appellant] calmly discharged a 9 millimetre round into his chest from close range. [The appellant's] suggestion that [he] thought the insurgent was dead when [he] discharged the firearms lacks any credibility and was clearly made up after [he] had been charged with murder in an effort to concoct a defence. It was rejected by the Board.
>
> Although the insurgent may have died from his wounds sustained in the engagement by the Apache [the appellant] gave him no chance of survival. [The appellant] intended to kill him and that shot certainly hastened his death.
>
> [The appellant] then told [his] patrol they were not to say anything about what had just happened and [the appellant] acknowledged what [he] had done by saying [he] had just broken the Geneva Convention. The tone of calmness of [his] voice as [he] commented after [he] had shot him were matter of fact and in that respect they were chilling."

33. Those grave findings were made by the Court Martial having heard the evidence. There is sufficient support from the video (which we have seen) and the transcript of the video that preclude us in any way from going behind those findings.

The career and character of the appellant

34. The appellant had joined the Royal Marines five years after leaving school. By 2013 he had spent 15 years in the Royal Marines. Lieutenant Colonel Chapman, his commanding officer, set out in a letter written to the Court Martial after conviction and prior to sentence, that the appellant had risen to the rank of Sergeant by dint of his exceptional qualities. He had completed six operational tours of duty in Northern Ireland, Iraq and Afghanistan. He had won a reputation as a talented and capable soldier and senior Non-Commissioned Officer in the Marines. The service records written after his return from Afghanistan and before September 2012, indicate that he had been regarded as having been an outstanding commander of his post.

35. As a consequence, he was recommended for promotion to Colour Sergeant, having been an acting Colour Sergeant. Lieutenant Colonel Chapman was confident he would have been promoted to become a Company Sergeant Major and might have obtained further promotion. Although in the period between the charge and the Court Martial the appellant had faced very considerable difficulties, he had carried out training of the highest standard for the next generation of Royal Marines, particularly in the use of heavy weapons.

The medical evidence and the effect of stress

36. The appellant's defence had been that he considered the insurgent was dead when he discharged the 9 millimetre round. No psychiatric evidence was before the Court Martial during that part of the proceedings which led to the appellant's conviction.

37. However, Dr Michael Orr, an experienced consultant psychiatrist, provided a report for the purpose of sentence. His examination of the appellant was on 22 November 2013, more than two years after the incident. He concluded, despite that time interval, that there was evidence of accumulated frustration with some aspects of his past and recent military experience. Secondly there was the likelihood that his resilience had been compromised, first, by a reactivation of his bereavement reaction following his father's death and, secondly, by the emergence of some symptoms of a combat stress disorder characterised by paranoid interpretations of combat situations whilst on patrol and the increasing intensity with which the appellant had taken this as a personal matter. The appellant had told Dr Orr that whereas patrols sent out by him under the command of corporals had got off lightly, the patrols he led were involved in contact and he was shot at. He had become a "little paranoid" that the insurgents were "gunning specifically" for him.

38. Dr Orr pointed out that combat stress disorder could result in misconduct stress behaviour. Such behaviour was not the sole province of poorly trained or undisciplined soldiers, but could be committed by good or heroic soldiers under significant combat stress.

39. At our specific request, enquiries were made about steps that were taken by those commanding HM Armed Forces to address the obvious problems of stress in combatting an insurgency of the kind for which HM Armed Forces had been deployed to Afghanistan and in particular in relation to operation Herrick. It is apparent from the information supplied to us that the appellant received training in how to deal with stress during his pre-deployment training; this included a Trauma Risk Identification and Management briefing. We were told that he would not have received any further training in the 5½ months in which he was deployed to CP Omar. It was his commander's responsibility to check on his mental welfare. However, given the remote and austere nature of the terrain with which HM Armed Forces had to contend in that part of Helmand Province and the dangers inherent in moving around the area, contact with his commander was limited.

40. This was, in our view, a very unfortunate circumstance. It was not possible two years after the killing of the insurgent to diagnose whether the appellant was in fact suffering from combat stress disorder, but the circumstances to which we have referred may have meant that any combat stress disorder was undetected.

The aggravating factors found by the Court Martial

41. The Court Martial found four aggravating factors.

42. First, although there was not a significant degree of planning or pre-meditation, it was clear from what was recorded on the video that the appellant decided, shortly after he had disarmed the insurgent, that he was going to do something to him which he did

not want to be seen by his superiors in headquarters. Secondly, the insurgent was seriously wounded and therefore particularly vulnerable.

43. Third, the appellant's actions put at risk the lives of other British service personnel because his actions would be used to radicalise others and encourage them both to fight the British forces and to act more brutally towards them in retribution or reprisal. Fourth, he was in charge of the patrol and it was incumbent upon him to set the standards. He had abused his position of trust by involving the other members of the patrol in covering up what had been done and lying on his behalf.

Mitigating factors

44. The Court Martial found three mitigating factors.

45. First, there was provocation. The cumulative effect of lethal military activity had had an obvious effect. The appellant was also affected by stories that the Taliban had hung a British serviceman's severed limb in a tree. The appellant was in no doubt that the victim of the murder was an insurgent who had been firing at CP Taalanda moments before he was wounded.

46. Second, the appellant was subject to the stress of operations: this was his sixth operational tour and his second to Afghanistan in under 14 years of service. The constant pressure was enhanced by the reduction of available men in his command, so he had often to undertake more patrols and place his men in danger more often. The Court Martial also accepted the psychiatric evidence (to which we have referred) that it was likely that he was suffering to some degree from combat stress disorder. However, it noted that thousands of other service personnel had experienced the same or similar stresses, yet they had exercised self discipline and had acted both properly and humanely. The appellant had not.

47. Thirdly, there was personal mitigation, particularly his previous good character, his excellent record of service and the effect upon him of the death of his father.

The sentence imposed by the Court Martial

48. The sentence of imprisonment for life was an inevitable consequence of the conviction for murder. When approaching the question of the minimum term that the appellant must serve before being eligible to be considered for parole, after an analysis of Schedule 21 of the Criminal Justice Act 2003 (CJA 2003), the Court Martial took a starting point of 15 years. It then took into account the aggravating and mitigating factors which we have set out. It stated its view that there must be a message of deterrence; war crimes, murder or crimes against humanity whilst on operations had to be dealt with severely; the international community needed to be reassured that allegations of serious crime would be dealt with transparently and appropriately.

49. It considered, however, that looking at the unique circumstances of the case, the minimum term should be 10 years.

The contentions of the appellant

50. Three principal points were advanced.

51. First, the Court Martial was wrong in its judgment as to the second aggravating factor - the insurgent's vulnerability. The insurgent's vulnerability was not the sort of vulnerability envisaged by paragraph 10 (b) of Schedule 21 to the CJA 2003 which referred expressly to the victims' particular vulnerability "because of age or disability". The insurgent's vulnerability was not related to his age, disability or any similar characteristic. His vulnerability should have been considered within the full context of the situation where he had attacked the appellant's colleagues. It should not have constituted further aggravation.

52. Second, the Court Martial was wrong in finding that the appellant and those under his command were not under any immediate threat. Steps had to be taken to mitigate the threat by disarming and moving the insurgent. The patrol remained in hostile territory and knew further insurgents were in the immediate vicinity.

53. Third, there were further substantial mitigating factors to which the Court Martial had not paid sufficient regard, particularly that the appellant perceived that the war had turned personal and that he felt particularly targeted by local insurgents and therefore additionally responsible for the safety of those under his command. He was displaying the symptoms of combat stress disorder and his general resilience may have been compromised by the death of his father immediately before his deployment to Afghanistan.

54. It was also submitted that the financial effect upon the appellant had not been given sufficient weight. Although he would receive a preserved pension payable at the age of 60, the financial loss to him by not being able to continue his career was significant. It had been calculated by the military authorities that, if he had served for the further six years which he was entitled to serve, he would have received total pay of £232,000 and his pension and lump sum would have been enhanced by a further £175,000.

55. The Court Martial had not given sufficient weight to these factors and the minimum term ought to have been significantly less.

Comparable cases

56. Despite extensive enquiries that have been made, there were no really comparable authorities from our own or any other jurisdiction.

57. The sentences imposed on members of the British Armed Forces who had been convicted of murder whilst serving in Northern Ireland were of little assistance; the circumstances were very different.

58. There were three cases of assault arising out of the operations of HM Armed Forces in Iraq and Afghanistan:

    i) In February 2005 three non-commissioned officers pleaded guilty to or were convicted of offences against Iraqis who had looted a food distribution camp in May 2003 after the Coalition occupation of Iraq. The offences included assaults contrary to s.39 of the Offences Against the Person Act 1861 (the 1861 Act) (including tying an Iraqi to a fork lift truck) and the taking of trophy photographs in relation to the assaults, some of which included sexual

indignities. Each was sentenced to imprisonment; the most senior was sentenced to 18 months imprisonment and dismissed; the one who had tied the looter to a fork lift truck to amuse himself as a calculated act of cruelty was sentenced to two years imprisonment and dismissed. There was an earlier related case to which it is not necessary to refer.

ii) In April 2007 a non-commissioned officer was sentenced after an earlier plea of guilty to the offence of inhuman treatment in relation to the death of Baha Mousa in Iraq in May 2003. He was acquitted of manslaughter. The other defendants were acquitted of the charges against them. He was sentenced to 12 months imprisonment.

iii) In March 2009 an officer and non-commissioned officer were sentenced for a deliberate assault causing actual bodily harm contrary to s.47 of the 1861 Act on an Afghan suspected of planting an improvised explosive device. The court took what it recognised was the exceptional course of not sentencing them to imprisonment, but dismissing them; it did so in part because the officer had admitted his guilt and expressed remorse and in part because the financial effect of dismissal was severe to both.

59. We were referred to two decisions in Canada.

i) In *R v Brown (Elvin Kyle)* the defendant had been convicted on a count of manslaughter arising out of operations of the Canadian armed forces in Somalia in 1993. A 16 year old Somali male had been captured while attempting to infiltrate one of the Canadian compounds. He was placed in the custody of the section in which the defendant served. Over the course of the ensuing two and a half to three hours the prisoner was severely and brutally beaten. By midnight he was dead. The case against the appellant was that he had been present when his immediate superior, a corporal, had beaten the detained Somali and he had at an early stage punched the deceased and kicked him twice in the leg. The corporal had attempted suicide and was unfit to stand trial. The defendant was convicted and sentenced to 5 years imprisonment. The defendant's appeal against conviction was rejected by the Court Martial Appeal Court of Canada on 6 January 1995. The Crown also sought leave to appeal against sentence on the basis that the sentence of five years imposed by the Court Martial was too low, given the objective gravity of the offence of manslaughter and the offence of torture. The Court Martial Appeal Court concluded that although at first blush it considered that the sentence of five years was "inordinately low", it would dismiss the Crown's appeal.

> "Under military law it is the Court Martial itself composed of lay officers which pronounces the sentence. The sentence, like the finding of guilt which preceded it, is known to the world only by its result. The members of the court are not asked for and may not give any reasons to support the sentence which they impose."

As the Court Martial had given no reasons, the Court Martial Appeal Court concluded that it was possible to see that the sentence could be supported on

the basis that the Court Martial had found him guilty only of hitting the prisoner and kicking him at an early stage of the ordeal and had rejected any theory of guilt based on the accused being an accomplice of his superior. As that was a view open to the Court Martial and it may have sentenced on that basis, the Crown's appeal could not succeed.

ii) In *R v Captain Semrau* (2010), the defendant, when assigned to mentor the commander of an Afghan army patrol in 2008, had come upon a wounded and unarmed insurgent and had shot him. He was acquitted by the panel of second degree murder and attempted murder at a Court Martial, but found guilty of behaving in a disgraceful manner. The findings of fact were:

> "The situation on the ground at the time seemed relatively calm although the potential for danger is omnipresent in such combat operations. After a brief examination of the insurgent, the [Afghan National Army] commander moved to the position of the dead insurgent in the next cornfield. You also went to the location of the second insurgent and then you returned to the location of the first insurgent so that your fire team partner could photograph the insurgent for intelligence purposes. Once the photographs had been taken, you shot the insurgent.
>
> It was evident that the insurgent was unarmed … The nature and extent of the insurgent's wounds were described by numerous witnesses during the trial. Four witnesses testified he was alive when they observed him…..
>
> You explained to members of your team you felt that you had to shoot the insurgent because of his condition. You told [the Afghan Commander] that you wanted to help the Afghan insurgent. Your actions might have been motivated by an honest belief that you were doing the right thing; nonetheless you committed a serious breach of discipline."

The judge concluded that the panel must have concluded the insurgent was alive when he was shot by the officer and that the officer deliberately shot him, but that there was no premeditation. The judge referred to two US Court Martials (to which we refer below) and found that in relation to Captain Maynulet, the circumstances bore a certain degree of similarity and the decision was of some use. The judge concluded that the defendant had been convicted only on the charge of disgraceful conduct in shooting the insurgent; he had been acquitted of murder and had therefore to be sentenced on the basis of the much less serious offence. The judge also took into account the fact that the defendant had acted out of character. The defendant was sentenced to dismissal from the army with disgrace.

60. The two US cases were:

i) *US v Capt Maynulet* (appeal against conviction to the US Court of Appeal for the Armed Forces, transcript 3 March 2010). In Iraq, the officer shot a driver of a suspected "High Value Target" who had been severely wounded. There was medical evidence he would not survive. The officer, on his account, shot him to "put him out of his misery". He was convicted in 2005 of assault with

intent to commit voluntary manslaughter and sentenced to be dismissed from the US armed forces.

ii) *US v Staff Sgt Horne.* He shot a severely wounded 16 year old Iraqi. In 2004 he pleaded guilty to unpremeditated murder on the basis that he had shot the Iraqi to "put him out of his misery". He was sentenced to 3 years imprisonment and a dishonourable discharge. His sentence was reduced to one year by a senior officer.

61. The only other case drawn to our attention was a Court Martial during the Boer War where officers were accused of murdering a wounded Boer prisoner. The reports of the trial and the antiquity of the decision make it of no assistance.

Our conclusion

62. We must proceed on the basis that the appellant was convicted of murder. His case is quite different from the Canadian case (Semrau) and US cases to which we have referred at paragraphs 59.ii) and 60 respectively. A court must proceed to sentence only on the basis of the crime of which the defendant has been convicted.

63. We consider that the Court Martial was correct to use Schedule 21 to the CJA 2003 as providing a degree of guidance on sentencing for a murder occurring in circumstances which Parliament had not contemplated when enacting the Schedule. It was therefore right to base the starting point for the minimum term on a period of 15 years; this was the lowest of the starting points for which Parliament has provided for murder by an adult. It was then necessary to consider the aggravating and mitigating features for which the schedule provided a more limited degree of assistance.

The aggravating features

64. First of the aggravating features were the circumstances of the shooting as found proved by the Court Martial. These included four deliberate acts. These were, first, the appellant's decision to stop first aid; second, the appellant's order to move the insurgent to a place where what he intended to do would not be seen; third, the discharge of the round into the insurgent's chest; and fourth, the instruction to the patrol to say nothing about what had happened. We do not view the insurgent's vulnerability as adding anything material to these four acts.

65. We cannot accept the submission, in connection with the circumstances of the shooting, that the fact that the patrol was under threat from others has any real bearing on the finding of the Court Martial that there was no threat from the wounded Afghan insurgent. We accept, of course, that the patrol was certainly at risk from other insurgents and that if the Afghan insurgent had attempted to shoot or in any way injure the appellant or those under his command, he would have been lawfully entitled under the rules of engagement to return the fire with equal force. However, that was not the position. It is evident from the findings of the Court Martial and from the video that there was no threat from the wounded Afghan insurgent. He was plainly very seriously injured and had been disarmed. True it may be that there may have been other insurgents in the vicinity, but that played no causative effect in the appellant's decision to fire at the wounded insurgent and kill him.

66. The second aggravating feature was the deliberate involvement by the appellant of soldiers who looked to him for leadership in a dishonest cover up of what had happened and the construction of the account that the insurgent was already dead. This is to be contrasted with the appellant's statement on the video that he had broken the Geneva Convention.

67. Third was the appellant's failure to follow, both personally as a soldier and, furthermore, as the person in command of the patrol, the standards of conduct which represented the values for which HM Forces had been sent to Afghanistan. This aggravating feature encompassed the use which the insurgency might make of the killing of one of the insurgents in breach of the values proclaimed by the International Security Assistance Force and HM Armed Forces.

The mitigating factors:

68. The first mitigating factor was that the appellant had an outstanding service record.

69. Second were the effects on him from the nature of the conflict in Afghanistan and the command he exercised. Most serious was the effect of stress upon the appellant.

70. It is, in our view, self-evident that armed forces sent to a foreign and hostile land to combat an insurgency will be placed under much greater stress than armed forces sent to fight a regular army. There is the obvious difficulty that it is often not possible in a population that may be largely hostile or intimidated by the insurgents to detect the identity of the insurgents who shoot at regular troops of HM Armed Forces, plant improvised explosive devices or commit other clandestine actions.

71. In addition there was the clear perception amongst HM Armed Forces that the insurgents in Afghanistan committed severe atrocities upon British soldiers; it matters not that some may contend that that was not the case. It was the perception that was material. The effect of this on the appellant can be viewed as either an additional stress factor or (as the Court Martial found) a cause of provocation.

72. In addition to the considerable stress of dealing with an insurgency in such conditions, it is very clear that significant further stress must have been placed upon the appellant because the remote location of his command post to which we have referred in paragraph 39 above meant that he was not seen regularly by those more senior to him. He had therefore little face to face contact with those commanding him and they could not assess the effect of these conditions upon him. Although training is important, it is difficult to see how such training can be sufficient in the absence of regular visits by a senior commanding officer to talk face to face and to observe the effects on those exercising command under him.

73. We turn next to the argument that the financial losses that will be suffered by the appellant can provide any further mitigation. As we have set out at paragraph 54, the appellant will receive his accrued pension. True it is that he will not receive the pay or pensions he may have earned if he had continued in the service, but in that respect he is in no different position from any other person who loses his employment as a result of conviction for a serious offence. Little further mitigation is provided by this factor.

Conclusion

74. As we have stated, the Court Martial was correct in its view that the starting point for the minimum term to be served by the appellant was 15 years because he had been convicted of murder. The Court Martial was also correct in its decision that a very substantial reduction was required from that starting point. As is apparent from what we have set out, we consider, taking into account the operational experience of members of the Court Martial, that the analysis of the aggravating and mitigating factors was in most respects substantially in accord with the analysis we have carried out, save in two significant respects.

75. On all the evidence before us it is clear that in the events surrounding the murder of the insurgent the appellant acted entirely out of character and was suffering from combat stress disorder. It is very unfortunate that the only medical evidence before the Court Martial and before us was obtained over 2 years after the murder. We have accorded particular attention to the view of the Court Martial that thousands of other service personnel experienced the same or similar stresses and still acted properly and humanely. However, in assessing the evidence of stress and its effect on the appellant, we attach particular importance to the evidence in relation to the remoteness of the command post at which the appellant had been stationed for 5½ months and the limited contact with those commanding him. His mental welfare had not been assessed in the way in which it would ordinarily be assessed by a commanding officer and there is evidence that he was becoming somewhat paranoiac about the Taliban's "gunning" for him. Taking into account the whole of the evidence, we conclude that combat stress arising from the nature of the insurgency in Afghanistan and the particular matters we have identified as affecting him ought to have been accorded greater weight as a mitigating factor.

76. Moreover, the particular circumstances did not require an additional term by way of deterrence to the sentence as the Court Martial found. The open and very public way in which the proceedings were conducted overall, the worldwide publicity given to the appellant's conviction, the life sentence imposed on him and the significant minimum term he must in any event serve before any consideration of parole will be sufficient deterrence.

77. On that basis we have therefore concluded that although he remains subject to a sentence of imprisonment for life, the minimum term which he must serve before being considered for parole should be reduced to 8 years. His release will then depend on the Parole Board and, even thereafter, he will remain subject to the terms of the conditions of his licence. To that extent and to that extent only is this appeal allowed.