

Regina

v

Marines A, B and C

and

The Media

Applicant

and

The Ministry of Defence

Interested Party

Ruling on application for access to DVD footage

Introduction

1. I have been asked by those representing the Media to release a DVD which has been shown in open court and constitutes a significant part of the prosecution evidence in this case.

2. The DVD contains six video clips taken from a head camera worn by Marine B on 15 September 2011. Five of those clips were played in open court on the first day of this trial and have been viewed by members of the public and the media who were in court. The sixth clip is of no evidential value. Some of their contents have been described in articles written in the media and by television reporters. After playing the video clips Mr Perry QC informed the court that work was being undertaken to obscure the identities of the persons depicted on the video by pixilation so that the DVD could be released to the media last Friday. Subsequently Mr Perry informed the court that those instructing him had informed him that the DVD should not be released.

3. Today the media, represented by Miss Kissin have sought an order from me to enable the media to have access to the DVD. That submission has been resisted by Mr Glasgow who represents the MOD. The Prosecution has taken a neutral position. The Defendants object. May I say at the outset how grateful I am to all Counsel for their assistance both through written skeletons which I received this morning and oral submissions which have enabled me to make what is a very difficult decision of great public importance and interest.

4. The Court Martial Rules are silent on the issue of non party access to evidence shown in open court and Mr Glasgow has urged me to determine the application in accordance with Part 5 of the Criminal Procedure Rules 2013. I am content to adopt

that approach and am enabled so to do under the Armed Forces (Court Martial) Rules 2009 Rule 26. That Rule specifies that where circumstances are not provided for in the Court Martial rules the judge advocate shall ensure that proceedings are conducted in such a way as appears to him most closely to resemble the way in which comparable proceedings of the Crown Court would be conducted in comparable circumstances and (I paraphrase) if there are not comparable circumstances, in such a way as appears to him to be in the interests of justice.

The Law

5. All parties agree that the default position is that any material presented in open court should be made available to the media. The leading case on this principle is: R (Guardian News and Media Ltd) v City of Westminster Magistrates Court and The Government of the USA¹

6. At the very start of the judgment Toulson LJ said: “Open justice. The words express a principle at the heart of our system of justice and vital to the rule of law. The rule of law is a fine concept but fine words butter no parsnips. How is the rule of law itself to be policed? It is an age old question. Quis custodiet ipsos custodies – who will guard the guards themselves? In a democracy, where power depends on the consent of the people governed, the answer must lie in the transparency of the legal process. Open justice lets in the light and allows the public to scrutinise the workings of the law, for better or for worse.”

7. At paragraph 85 of the judgment he continued: “In a case where documents have been placed before a judge and referred to in the course of proceedings, in my judgment the default position should be that access should be permitted on the open justice principle; and where access is sought for a proper journalistic purpose, the case for allowing it will be particularly strong..... The court has to carry out a proportionality exercise which will be fact specific. Central to the court’s evaluation will be the purpose of the open justice principle, the potential value of the material in advancing that purpose and, conversely, any risk of harm which access to the documents may cause to the legitimate interests of others.”

8. Later in a consenting judgment Lord Neuberger MR said that this principle applies to all exhibits in a case, not just documents. He referred to the document: “Publicity and the Criminal Justice System Protocol for working together: Chief Police Officers, Chief Crown Prosecutors and the Media².” That provides that the aim of the CPS (and for these purposes that should also apply to the Service Prosecuting Authority) is to ensure that the principle of open justice is maintained – that justice is done and seen to be done – while at the same time balancing the rights of defendants to a fair trial with any likely consequences for victims or their families and witnesses occasioned by the release of prosecution material to the media.

9. That document provides a list of prosecution material which has been relied upon by the Crown in court and which should normally be released to the media. That

¹ [2012] EWCA Civ 420

² <http://www.cps.gov.uk/publications/agencies/mediaprotocol.html#a02>

list includes CCTV footage and video footage. Part 5 of the Criminal Procedure Rules 2013 have adopted the principles of the Westminster Magistrates Court case.

10. I myself, as the Judge Advocate General, have issued guidance to the Court Martial in Collected Memoranda 11 in which I stated: The overriding objective is to provide an open and accountable prosecution process, by ensuring that the media have access to all relevant material wherever possible, and at the earliest opportunity.”

11. So, as I said, the starting point for me in this case in the Court Martial is that the principle of open justice requires that the evidence shown in open court should be released to the media provided it is sought for proper journalistic purpose. However if release of such material may cause harm to the legitimate interests of others, then the court has to carry out a proportionality exercise which will be fact specific. In so doing I must have regard to ECHR Article 10 which guarantees the right to impart and receive information and Article 2 which guarantees the right to life. In simple terms, I must balance the risk of members of the Armed Forces being killed if the DVD is released against the right of the press to have access to and publish information.

Evidence and Submissions

12. Mr Paul Mott, deputy head of the Research, Information and Communications Unit in the office of Security and counter-terrorism in the Home Office is an expert in how terrorist groups communicate and the impact that this has on the process of radicalising individuals and persuading them to carry out terrorist attacks. He has provided written and oral testimony about previous cases where published material have led to terrorist attacks and made an assessment of the potential threat to life as a result of dissemination of Royal Marines film footage. I do not need to rehearse all of his written evidence because all parties have copies.

13. He said that he was certain that this material if released will be used to radicalise others and incite acts of violence. The video footage has significant radicalising potential which would be a gift to terrorist organisations as it would play on the central narrative about nature of western forces occupation. Having viewed the videos he said that he had seen nothing which surpasses it in terms of radicalisation material. He concluded that if this were released to the media it would present a real and immediate risk to safety and lives of service personnel. It would be used by a range of terrorist groups as soon as they can – and they would have target young audiences in UK, its propaganda value being very effective.

14. Mr Mott cited three examples where attacks were made by terrorists who later admitted they had been inspired by material released into the public domain. He said there were others which he could not cite because of their classification. He also referred to the killing of Fusilier Rigby at Woolwich in May 2013 in which the extremists responsible suggested this was in retaliation for British forces murdering Muslims in Afghanistan. Subsequently the terrorist group al-Shabaab has released a film entitled “Woolwich Attack: It’s an eye for an eye.”

15. Mr Glasgow emphasised the assertions made by Mr Mott and said submitted that the risk that terrorists will carry out revenge attacks against British and other

western Service personnel was real and immediate. In those circumstances the court exceptionally ought not to allow access to it.

16. Miss Kissin submitted that the risk is not sufficiently real and cogent. She said there is already sufficient material in the public domain to be used to radicalise potential terrorists and there is no cogent evidence that the release of this additional material would increase the risk. The MOD has not demonstrated that British service personnel may be killed if this DVD is released. She said that the legal test which I must apply is a high one. The presumption is that the material will be released and it is not enough to prevent it on the basis of an assertion that something might happen.

17. She also suggested that the press are subject themselves to restriction of taste and decency and will be subject to any order I make. They cannot be responsible for the use made by others down the line. She submitted that the killing of Fusilier Rigby is highly emotional but it should not be used as justification for preventing the publication of this video.

18. In short Miss Kissin submitted that the DVD should be released unless the MOD can demonstrate that a real and immediate threat to life of British service personnel will be caused by its publication. She submitted that the MOD and Home Office had not done that.

Decision

19. Having listened to the evidence of Mr Mott, and indeed applying common sense, I have no doubt that if this DVD were released to the media it would be distributed widely, it would find its way to all forms of social media and it would be broadcast nationally and internationally. I also have no doubt that if released there is a very high risk that it would be used as propaganda material by terrorist organisations in order to radicalise others and be exploited by terrorist organisations to incite individuals to carry out terrorist attacks. In this I rely on Mr Mott's expert assessment which has not been gainsaid by any other evidence. His assessment is that the release of this DVD will generate significant feelings of anger and revenge among certain people and will incite attacks on British service personnel at home and abroad. I suspect that this would be in the form of increased insurgent activity in theatre or the deliberate targeting of off-duty Service personnel overseas and in this country.

20. It is, of course, difficult for me or in fact anyone else in court to gauge the level of this risk and I must rely on the expert. However, following the unprovoked and random murder of Lee Rigby common sense dictates that there would be a risk and it may be a significant risk.

21. I have carried out a proportionality exercise based on the facts as I understand them to be, assessing the potential value of the material in advancing the purpose of open justice against the risk of harm which access to the DVD may cause to the legitimate interests of others. In doing so I considered whether the DVD could be released under strict conditions which involve pixilation and careful editing with an order limiting distribution. However, in my view – and the view shared by Mr Mott – none of those measures would ameliorate the general risk because the essential part of the DVD and some of the dialogue contained therein would have to remain for the

DVD to be of any journalistic use. Further once published it would be impossible to stop further distribution in defiance of any order I might make. Once the genie escaped from the bottle it would be impossible to control or put it back in.

22. In balancing the need for open justice against this risk I am fortified by the fact that the principle of open justice will not be compromised in this case if the DVD is not released. It has been played in open court where it has been watched by members of the public and the media. It has been described in written reports and on television reports, and there can be no suggestion that the prosecution case and the material upon which it relies are not crystal clear. Its release may be for proper journalistic purposes by those represented here, but it would also be used for sensationalist purposes by others and propaganda purposes by terrorist groups. More importantly its release will increase the threat of harm to British service personnel. I am not prepared to make an order which may lead to the injury or death of a single member of the British Armed Forces and in making this decision I have erred on the side of safety.

23. This is to some extent breaking new ground because the courts which have dealt with this before have dealt with much less dramatic circumstances. The principle of open justice is immutable, but it must be subject to exceptions particularly when dealing with threats posed by terrorist organisations which repeatedly attempt to radicalise people whom they can incite to commit atrocities.

24. In short, therefore, my view is the principle of open justice can be satisfied, and has been satisfied, by the DVD being played in open court where it has been observed by journalists and reported upon quite properly. Releasing it for unrestricted public consumption would expose British service personnel to increased risk of harm unnecessarily. Mr Mott says that the risk is real and immediate and I accept that assessment. I am not prepared to ignore his very stark warning to put the lives of British service personnel at risk.

25. I therefore rule that the DVD is not to be released to the media.

HHJ Jeff Blakett
Judge Advocate General

28 October 2013