

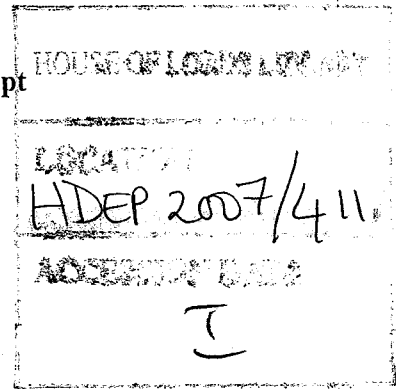
R v Payne -- Sentencing Hearing Transcript

Monday, 30th April 2007

(10.40 am)

Discussion

(In the absence of the President and Members of the Court)



JUDGE ADVOCATE: I have come into court to deal with a point of law. If it is not point of law then the Board should be here as well.

MR OWEN: My Lord, yes. It is a short point and unlike many previous applications in this case it is by consent. The position is this: if the Board wish to conduct a Newton hearing in the light --

JUDGE ADVOCATE: I do not know the answer to that yet. What I propose is when the Board is fully here -- I think one of them or whatever has mistaken the time but will be here before 12 noon at least, so I have not had an opportunity to discuss with the Board what our provisional view of the need for a Newton hearing is.

MR OWEN: Yes.

JUDGE ADVOCATE: It may be that when I next come into court I will come into court with the Board and I will be saying to you -- I do not know yet -- but I may be saying "Our provisional view is X, Y and Z but that leads to ..." whatever it does.

MR OWEN: Yes.

JUDGE ADVOCATE: You may then like a short time to consider what your position is and whether a Newton hearing is necessary. I suspect that it will depend on what I am saying to you about broadly the level of seriousness of the case, whether there is provisionally in our view any gratuitous cruelty, whether in our provisional view the level of violence on occasions or whatever it is was more serious than your client is prepared to admit.

MR OWEN: Yes.

JUDGE ADVOCATE: I will be saying things like that, I expect, to give you an opportunity to consider whether there should be a Newton hearing.

MR OWEN: Yes.

JUDGE ADVOCATE: It may be that you will be able to say "No, it is not necessary".

MR OWEN: Certainly. I am grateful because an obvious difficulty in this particular case -- but I suspect it would arise in almost all cases of this charge of inhuman treatment of detainees -- that the gravity of the case is enormously broad. At one end

JUDGE ADVOCATE: There is not a precedent, is there, that helps us?

MR OWEN: No, there is not.

JUDGE ADVOCATE: On the one hand one is looking at what you say and one is also looking at the individual and the individual's particular part in the crime.

MR OWEN: Yes. Because one can take a view that the incident was itself a serious one, but that the culpability of one individual means that it can be treated exceptionally or --

JUDGE ADVOCATE: Absolutely, absolutely.

MR OWEN: -- at the lower end of the scale.

JUDGE ADVOCATE: I have seen the pre-sentence report which I know the Board will certainly have read by the time I speak to them.

MR OWEN: Yes.

JUDGE ADVOCATE: I see what is said in paragraph 16. Of course there is a word there which -- the word that appears immediately before "sentence" -- which of course can be construed in different ways.

MR OWEN: Yes, indeed. I make no bones about it: if the Board were to be considering a custodial sentence I would ask that it be suspended in the circumstances of this case.

JUDGE ADVOCATE: Right.

MR OWEN: But then there are other alternative punishments within the army --

JUDGE ADVOCATE: I am not going to express any view because I am not sitting on my own on sentence.

MR OWEN: No.

JUDGE ADVOCATE: I have said that to warn you as to what the likely approach is.

MR OWEN: Yes. My Lord, on the assumption then that -- if it is to be necessary for me to call evidence then one of the witness who I would wish to call is a Mr Niall Greenwood. He used to be a Major Greenwood. Could I hand up a copy of the statement that we have from him?

JUDGE ADVOCATE: All right.

MR OWEN: I will show it to my learned friends --

JUDGE ADVOCATE: I suppose I am allowed to see this? I imagine so.

MR OWEN: Yes.

JUDGE ADVOCATE: I see Mr May nodding.

MR OWEN: The position is that this gentlemen when he was Major Greenwood was seconded to the Media Operations Department. He it was who was the officer in charge of the three young men who gave evidence, Hughes, Riley and Betteridge.

If Hughes' evidence becomes of importance on the issue of gratuitous cruelty for example the question is -- as I cross-examined Mr Hughes at the time -- whether he had a motive to exaggerate what he saw, i.e. reporting events after the death of Mr Musa was known with a view to getting himself out of Iraq. This evidence touches on that issue because this man knew Hughes, Riley and Betteridge -- certainly Riley and Betteridge well and had a view about Mr Hughes. The difficulty we have is this: he now works for the MOD and there are difficulties in him coming to give evidence at Bulford today or, I gather, tomorrow. He can however be at the end of a TV link and therefore his evidence could be received by video --

JUDGE ADVOCATE: That would be very unusual, would it not, for a witness who is within the jurisdiction?

MR OWEN: Yes, it would be.

JUDGE ADVOCATE: Unless he is ill or --

MR OWEN: There are difficulties, if I can put it in that way.

JUDGE ADVOCATE: I know you are putting it very generally.

MR OWEN: The point is my learned friend does not have any objection to it and in the circumstances is willing to consent to this application.

JUDGE ADVOCATE: All right.

MR OWEN: So, if we do need him, that would be the application.

JUDGE ADVOCATE: Well, as you consent, Mr May, there is no problem is there?

MR MAY: I am looking at the timeframe really and trying to assist. It may well be that normally no sufficient foundation would have been laid but I am agreeing to speed things up.

JUDGE ADVOCATE: All right. It would not then be right, would it -- I think I can speak entirely openly -- for me to say "I refuse the application"? It would not make sense, would it?

MR MAY: Not really, my Lord.

JUDGE ADVOCATE: All right, then I grant the application. I have not read the statement but there we are.

MR MAY: My Lord, I have not read it either. My friend will give me a copy in a moment. In relation to the statement of course your Lordship will see that -- and indeed needs to see it -- in order to rule as you just has on this application.

JUDGE ADVOCATE: I had better just read it formally.

MR MAY: My Lord, yes. The rest of the Board know, with respect, that this is not agreed evidence and if it is being called as a factual witness they should not have that statement.

JUDGE ADVOCATE: Absolutely. Let me just read it and perhaps you might read it as I am reading it.

MR MAY: Thank you. (Pause)

JUDGE ADVOCATE: Being quite frank, it does not take the matter very much further.

MR OWEN: It does not take it much further but it takes it a little further, I submit. At least it provides the context, the evidential support, for the line of questioning I pursued with Mr Hughes.

JUDGE ADVOCATE: Certainly. So that was the only point?

MR OWEN: Yes.

MR MAY: My Lord, may I just mention -- because I may have looked a little blank when your Lordship was referring to the pre-sentence report and a word that appears apparently -- my Lord, we have not yet seen the pre-sentence report. That is why I was looking a little blank.

JUDGE ADVOCATE: Right. I will see you before very long, I hope.

(10.53 am) (A short break) (12.03 pm)

(In the presence of the President and Members of the Court)

JUDGE ADVOCATE: It may help counsel if we indicate our provisional views.

MR OWEN: Yes.

JUDGE ADVOCATE: We propose to sentence Corporal Payne on his basis of plea but with additions arising principally from the evidence of Senior Aircraftsman Hughes whose evidence we broadly and provisionally accept. As to gratuitous cruelty, our provisional view is that the choir was conducted by real kicks causing real pain to detainees and that must have happened on a number of occasions. From time to time, there was a treating of detainees with excessive violence, in particular the detainee called "Grandad", Kifah, whom Corporal Payne punched and kicked. As to the level of violence, our provisional view is that there was a kicking of Grandad in the kidneys and an appearing to kick Baha Musa in the groin. Corporal Payne can to some extent rely on superior orders as mitigation but not in relation to the matters we have mentioned. Clearly there is some truth in the allegation that Corporal Payne led junior ranks by example into treating detainees with unnecessary violence.

We treat the case provisionally against Corporal Payne more as one of isolated incidents of unnecessary violence, rather than a prolonged pattern of unlawful and extreme violence. We do not find that there was deliberate eye gouging. The same applies to the application of martial arts as well as the method of giving water.

As to continuing conditioning on the Monday afternoon after all the detainees had been tactically questioned, we are not satisfied that Corporal Payne can properly be blamed for this, having regard to the role played by Colour Sergeant Livesey and Sergeant Smulski as well as the absence of any order that conditioning should cease.

The choir plainly took place on Sunday as well as the Monday. We do not believe that we can safely rely on the evidence of any of the Roger's multiple witnesses

and that applies with the greatest force to the evidence of Cooper and MacKenzie.

Corporal Payne treated Baha Musa with some violence but it is impossible on the evidence to say what the true extent of it was. Corporal Payne caused the two rib fractures near the spine in the course of restraining Baha Musa. There is no reliable evidence, we find provisionally, that he caused any other fractures or indeed serious injuries to Baha Musa. Thus it is a question for Corporal Payne as to whether a Newton hearing is required. If he maintains his present stance as set out in his basis of plea then a Newton hearing is required; if he is prepared to accept that there was some gratuitous cruelty, as we have provisionally indicated, and that the level of

violence was higher than he has been prepared to accept, particularly in relation to Grandad as we have also provisionally indicated, then a Newton hearing will not

be required. We have noticed the words that appear in the pre-sentence report in paragraph 15 --

MR OWEN: Yes.

JUDGE ADVOCATE: -- in the first sentence. The word that appears before "sentence" of course, depending on situations and individuals, may mean many different things to many different people. We do not have in mind -- I think we can say properly -- a very long sentence.

MR OWEN: My Lord, that is of course very helpful.

JUDGE ADVOCATE: If you need a moment to consider --

MR OWEN: Yes, obviously I do need to discuss it with Corporal Payne. It is difficult to give an indication. I would have thought it is unlikely to be much longer than 20 minutes to half an hour, but it may take that time. It is obviously an important decision that we need to take. Obviously, we have anticipated various permutations of

fact-finding from the Board and my Lord. If I could have a short period of time?

JUDGE ADVOCATE: Shall we say 12.30, is that all right?

MR OWEN: Thank you.

JUDGE ADVOCATE: 12.30 then, thank you.

(12.10 pm) (A short break) (1.00 pm)

(In the presence of the President and Members of the Court)

JUDGE ADVOCATE: Yes, Mr Owen.

MR OWEN: My Lord, may I thank you and the Board for giving me an extra half an hour. As you may understand it is not the most straightforward of decisions that had to be addressed. The position, my Lord and members of the Board, is this: I do not propose to call Corporal Payne --

JUDGE ADVOCATE: Thank you.

MR OWEN: -- on a Newton hearing to give evidence. I will make submission to you orally --

JUDGE ADVOCATE: Thank you.

MR OWEN: -- in mitigation and make clear our position on the findings which you have indicated.

JUDGE ADVOCATE: Yes.

MR OWEN: But I do not propose to call Corporal Payne.

JUDGE ADVOCATE: You do not propose to call this witness either, I take it?

MR OWEN: No, I don't. I was wondering whether the Board would have lunch

first and I would address you after lunch in one session.

JUDGE ADVOCATE: I thought we would have lunch first.

MR OWEN: I may be a little time.

JUDGE ADVOCATE: But we are likely to conclude today?

MR OWEN: Yes.

JUDGE ADVOCATE: Right.

MR OWEN: Just there is an error in paragraph 5 of the pre-sentence report. Have all the members of the Board had the pre-sentence report?

JUDGE ADVOCATE: Yes.

MR OWEN: The last sentence of paragraph 5, it may have struck the Board as slightly odd. The probation officer has misunderstood what Corporal Payne had said.

JUDGE ADVOCATE: Yes, I thought that was odd.

MR OWEN: He had never suggested that these injuries were caused during tactical questioning. She has obviously misunderstood it. His case was and is that the majority of the injuries were caused by the Rodgers' multiple while he was not on duty, but not tactical questioning.

JUDGE ADVOCATE: Yes. In the 24 hours leading up to the death of Baha Musa.

MR OWEN: Yes.

JUDGE ADVOCATE: I follow that.

MR OWEN: But, my Lord, I will address you then in full later on.

JUDGE ADVOCATE: We will then sit to hear you at 2 o'clock.

MR OWEN: I am grateful.

(1.03 pm) (The short adjournment) (2.00 pm)

(In the presence of the President and Members of the Court)

JUDGE ADVOCATE: Please be seated. I think it falls to you, Mr May, to speak first.

MR MAY: My Lord, it does, save that it had always been agreed between us that if it came to presenting the antecedents under Rule 76(2), Colonel Eble would deal with that.

JUDGE ADVOCATE: Thank you.

LIEUTENANT COLONEL EBLE: Your Lordship, copies of the documents have been provided during the luncheon adjournment to all of the members so I simply deal with the information for the Court-martial Rule 76(2) of the Court-martial (Army) Rules 1997, which reads as follows:

"24841881 Corporal Payne of the 2nd Battalion The Duke of Lancaster's Regiment was enlisted on 5th June 1988. He is serving on an S-type engagement. He was born on 9th September 1970."

You will note that there is a reference to a gap in service between 23rd November 2000 and 10th May 2001. He is married and has three children dependent upon him.

There are details of pay, terminal benefits and future pensions attached and I will deal with those in a few moments if I may, your Lordship.

JUDGE ADVOCATE: Thank you.

LIEUTENANT COLONEL EBLE: His reckonable service towards discharge or transfer to the reserve is 18 years and 66 days as at today's date. He is entitled to the following decorations and awards: the General Service Medal 1962 with Northern Ireland clasp, NATO medal with Former Yugoslavia clasp, and Accumulated Campaign Service Medal and, finally, The Queen's Jubilee Medal. There are no acts of gallantry or distinguished conduct recorded in his conduct sheet.

He holds the substantive rank of corporal with seniority from 30th June 2000.

Turning to the second page: he has not spent any period in military custody and he is not now under sentence. There are no entries in his conduct sheet recorded.

In relation to the Commanding Officer's views of Corporal Payne, could I ask you to turn to the third page, paragraph 13. I should indicate that the Commanding Officer is presently on operations in Op TELIC but his position remains as it did on 7th March

2007. This is the view of Lieutenant Colonel Kenyon, the accused's Commanding Officer: he says he does not wish to retain the accused in his unit.

There is on the next page some matters included. Your Lordship, I do not propose to read those out.

JUDGE ADVOCATE: Thank you.

LIEUTENANT COLONEL EBLE: If I can then draw your Lordship and the Court's attention to the statement of a serviceman's monthly pay and compulsory deductions.

There are a number of figures set out but for your Lordship's assistance 0.90 is the total monthly gross pay. If I can ask you to move to the final two pages in the handout which relate to the consequences of either reduction in rank or discharge or dismissal by this court.

JUDGE ADVOCATE: Yes.

LIEUTENANT COLONEL EBLE: In relation to salary, the total loss were -- this is the penultimate page, Mr President and Members of the Court -- in relation to the consequences for Corporal Payne of dismissal or discharge it would be ,312.45 so far as salary is concerned. That is the quantifiable figure for the three years and 180 days he has yet to serve of his 22 years' engagement.

JUDGE ADVOCATE: Thank you.

LIEUTENANT COLONEL EBLE: As far as pension is concerned, there is a total loss of ,900. That is calculated from the annual pension and gratuity that would be applicable at the end of his 22 years. The headline figure therefore for the court: quantifiable loss on discharge would be ,847.45. For the Members of the Board, there are figures set out at the bottom which will assist you as far as what would be available to Corporal Payne were he discharged or dismissed by this court. Do you wish me to read those figures out, your Lordship?

JUDGE ADVOCATE: That is the resettlement grant?

LIEUTENANT COLONEL EBLE: That is right.

JUDGE ADVOCATE: Yes, please.

LIEUTENANT COLONEL EBLE: He would receive the following if discharged now: a resettlement grant of 7 and there would be a preserved pension payable at age 60, on 9th September 2030, a terminal grant of three times his annual pension. That is 5.85 with an annual pension of 1.95.

JUDGE ADVOCATE: So if he were dismissed of service now he would lose almost ,000?

LIEUTENANT COLONEL EBLE: Precisely, your Lordship.

JUDGE ADVOCATE: Thank you.

LIEUTENANT COLONEL EBLE: In relation to the various permutations as far as reduction in rank are concerned, they are set out on the last page. They are slightly more complicated because it relates to reduction of one rank and two ranks. Do you wish me to read all of those matters out, your Lordship?

JUDGE ADVOCATE: I think not, thank you.

LIEUTENANT COLONEL EBLE: Unless I can assist the court further?

JUDGE ADVOCATE: Thank you very much. That was very clear.

MR MAY: May I mention that this should become an exhibit? I am afraid I do not have the next number sequentially, unless one starts again with different exhibits for this hearing as A, B, C, but this should certainly be the next exhibit.

JUDGE ADVOCATE: I think this could be exhibit A in these proceedings.

MR MAY: Certainly, my Lord. As long as it is made clear for future reference.

JUDGE ADVOCATE: Yes, thank you.

MR MAY: Then the pre-sentence report would become exhibit B.

JUDGE ADVOCATE: I am grateful. Yes, Mr Owen.

MR OWEN: My Lord, before I address you with submissions in mitigation there are three very short character witness who I wish to call. Arrangements have been made for them to give evidence by videolink -

JUDGE ADVOCATE: All right.

MR OWEN: -- and hopefully the technology will achieve what we want. The first witness is Lieutenant Colonel Beatson, who is standing by.

JUDGE ADVOCATE: Thank you. I think that Corporal Payne is entitled to the Iraq Medal as well, is he not?

LIEUTENANT COLONEL EBLE: The Court are absolutely right. I am sorry, I had not realised looking at the document but that is absolutely right.

JUDGE ADVOCATE: So we can add that. And I am grateful to the colonel.

LIEUTENANT COLONEL EBLE: I do apologise.

JUDGE ADVOCATE: Thank you.

(2.10 pm)

LIEUTENANT COLONEL BEATSON (sworn) Examination-in-chief by MR OWEN

JUDGE ADVOCATE: Thank you very much, if you would like to sit down. He probably cannot hear me.

MR OWEN: Colonel, would you give your full name and rank to the Board,

A. Certainly, I just heard that question so you might have to speak a little louder. My name is Lieutenant Colonel Richard James Beatson.

Q. Thank you very much. I am asking questions on behalf of Corporal Payne. I am his barrister. I suspect there may not be any other people asking you questions but if there are they will identify themselves to you. Are you able to hear me?

A. Understood. I can, but may I again please just ask you to speak a little louder.

Q. Is that any better?

A. Much better, thank you.

Q. Thank you. Colonel, you have been called to give evidence before the Board today as a character witness for Corporal Payne who, as you know, has pleaded guilty to a charge of inhuman treatment in relation to events in Iraq in September 2003. You are aware of that, are you not?

A. I am.

Q. I just want to ask you then some questions based on your knowledge of him over a number of years. First of all, how long have you known Corporal Payne?

A. I would say for approximately 12 to 15 years, although very much since he was in my company when I was a company commander I would say the last ten years pretty well.

Q. And in which Regiment was that?

A. That was in the First Battalion The Queen's Lancashire Regiment as was.

Q. Yes. In which different theaters and environments did you have him under your command?

A. Both operational and non-operational, but geographically in Germany, United Kingdom -- including Northern Ireland there -- and also on exercise in Canada.

Q. Thank you. Now, obviously Commanding Officers get to know soldiers under their command to a greater or lesser extent. How would you describe your knowledge of Corporal Payne?

A. My first comment if I may is I was never his Commanding Officer, I was his Officer Commanding -- semantics, I am afraid -- but I did get to know him very well not only through soldiering but also through sport because both he and I were members of the Battalion rugby union and league team. So I feel that I got to know him both as a soldier and as a person.

Q. Yes, I was going to ask you that. Clearly playing rugby with him a lot you would have had opportunities to meet him socially as well as his officer commanding?

A. Correct.

Q. How would you assess Corporal Payne in the round? What would your view of him be?

A. Corporal Payne is what I think most people would describe as a tough infantry soldier in all respects. A man who gave me the impression of being entirely professional and very committed and, once given direction, I had the trust that he would do as I asked him or instructed him to do. He had a habit of giving it his all, sometimes needed steering, but he was a man who had my trust.

Q. What about on the rugby field?

A. A very hard committed man whose commitment often belied -- maybe "lack of skill" might be unkind to him, but his ball-handling skill was certainly more than made up for in his enthusiasm.

Q. I understand that in all of his years playing rugby he has never been sent off or involved in any violent incidents. Is that your impression or recollection of him?

A. Certainly whenever I was playing with Corporal Payne he was never sent off or, so far as I can remember, was disciplined. A good hard tough player.

Q. Thank you. In Northern Ireland, I think he worked under your direct command on a six-month tour in south Armagh; is that right?

A. That is correct. I was the Officer Commanding at Crossmaglen and he was one of my full corporals operating within one of my multiples commanded by a Sergeant Dean. And the pair of them made an extremely effective and competent team.

Q. Again I was going to say: in terms of that tour, he performed well at all times, is that right?

A. He did. It was a particularly odd tour because it came at the time of foot and mouth and there was very little actual patrolling we could do. So there was a danger of boredom or repetition setting into our programmes but Corporal Payne always remained pretty much focused, very effective when he was operating isolated from me and retained my confidence throughout.

Q. Finally this: in the light of that clearly -- and your knowledge of the offence to which he has now pleaded guilty -- is that something which has come as a surprise to you?

A. It has. I mean, the whole incident clearly is unsatisfactory. Corporal Payne clearly has admitted some degree of guilt. I think that is testament or some

credit to him. If anything from my opinion -- and I stress it is my opinion -- it is perhaps Corporal Payne being a tough soldier and perhaps not sufficient guidance or control. But Corporal Payne appears to have held his hand up and that is the sort of man I expect he would be.

Q. Again, of course the decision is for others, but based on your personal experience of him and your knowledge of him, is he a soldier you would like to continue to be able to command?

A. I would certainly -- if I was a company commander I would certainly have Corporal Payne in my company.

Q. Thank you very much, Colonel. Those are all the questions I have. There may or may not be further questions.

A. Of course.

MR MAY: No questions.

JUDGE ADVOCATE: That is it, no further questions.

MR OWEN: There are no further questions. Thank you very much, Colonel.

JUDGE ADVOCATE: Thank you, sir, you are free to go.

A. Thank you. Thank you very much.

(The witness is released)

MR OWEN: My Lord, the next witness is in fact Sergeant Dean who has been referred to by Colonel Beatson. Again, some short evidence from him --

JUDGE ADVOCATE: Thank you.

MR OWEN: -- wherever he may be.

(2.19 pm)

EDWARD DEAN (sworn)

Examination-in-chief by MR OWEN

MR OWEN: Sergeant Dean, can you hear me?

A. Yes, sir.

Q. My name is Owen and I am counsel for Corporal Payne. You are giving evidence today before the Board as a character witness for Corporal Payne. Do you understand?

A. Yes, sir.

Q. We have just heard some evidence from your former officer commanding, Colonel Beatson. He has explained his knowledge of Corporal Payne. How long have you known him?

A. I've known Corporal Payne for nearly 20 years, sir.

Q. That goes beyond his time in the army and your time in the army, is that right?

A. No, sir. I am coming up to 22 years now.

Q. I am sorry, I was not doing the maths correctly. Yes. So that coincides in a sense with both of your time in the army?

A. Yes, sir.

Q. You have been in the army almost the same amount of time?

A. Yes, sir.

Q. Have you kept in regular contact with him over that 20 years?

A. Yes. First off what we used to do is we used to play rugby a lot together at home and for the Battalion. Then later on in time we actually started working together in B Company.

Q. Yes.

A. Around about 1991/92.

Q. So rugby first and then working together at B Company in 1 Queen's Lancashire Regiment?

A. Yes, sir.

Q. Have you been on various tours of duty with him?

A. Yes. I was actually a multiple commander in Crossmaglen where Corporal Payne was my 2IC in the tower where he used to do all the administration, look after all the troops as I was up in the tower all day from eight in the morning until roughly eight at night. He used to monitor the troops downstairs. He used to sort out all my admin, (inaudible) all the food, all the day-to-day running within the tower.

Q. How would you assess his qualities?

A. Well, I found Corporal Payne to be a very good, fair, honest. Anything I asked him to do he went ahead and did it without any complaining. I got no problems with Corporal Payne.

Q. After that tour in Crossmaglen, did you continue to work with him?

A. Well, before we went to Crossmaglen I was a Provost Sergeant. We actually worked together in the guard room before and after the six-month tour at Crossmaglen where he was --

Q. Carry on, I interrupted you.

A. Where he was actually my Provost Corporal as I was Provost Sergeant.

Q. I was going to say, so he worked with you as a Provost Corporal under you both in Crossmaglen and subsequently?

A. No, before Crossmaglen. Then we both moved to A Company of the First Battalion to do a six month tour in Crossmaglen and then we then moved back to the guard room after the six-month tour to take up post back in the guard room again.

Q. Back in Catterick?

A. Yes.

Q. It follows from that that you were able to see the way he related to soldiers who were undergoing detention?

A. Yes.

Q. And, again, how would you assess his qualities, the way in which he carried out that job?

A. Again, no problems whatsoever. Whenever I was away he always moved up, take over control of the guard room. He was always first -- if anybody was going to be away, he was the first one to take over the shifts. There was no problems whatsoever with Corporal Payne in the guard room. I got no complaints from anybody who was in custody. He got on great with everybody who was actually in custody.

Q. Was he a cheerful person to work with, good-natured?

A. Yes, he is. Like I said, there was no complaints from either side, from any of my staff or from any of the people in custody at all.

Q. Thank you.

Finally this: you referred to playing rugby with him, is that something you have done consistently over the years?

A. Yes, it is, sir.

Q. Based on that, what qualities would you say Corporal Don Payne has?

A. As in?

Q. As in rugby. The kind of thing you learn about someone when you are playing rugby with them over the years; what you learn about someone as a man as opposed to someone you are just working with?

A. With Corporal Payne, like I say we have known each other nearly 20 years. We have always been together. We have always been in the same team. I do get on quite well with Corporal Payne and never had any problems with him. He has always been cheerful, always been helpful, whenever I have had any need for any help he has always been the first to offer it to me.

Q. Thank you very much, Sergeant Dean. Those are the only questions I have. There may be no further questions but --

JUDGE ADVOCATE: No further questions.

MR OWEN: Thank you very much, those are the only matters we need to ask you about.

A. Thank you, sir.

(The witness is released)

MR OWEN: Lastly the witness is a civilian witness, a Mr Kieran Pavey.

My Lord --

JUDGE ADVOCATE: Perhaps if you read his statement, if you have one?

MR OWEN: I could hand in a character reference.

JUDGE ADVOCATE: You could perhaps read it.

MR OWEN: Yes, my Lord, I will do that. In the light of the two previous witnesses perhaps the Board have a flavour of Don Payne, Corporal Payne, from that. This is a statement from a Mr Kieran Pavey. He is a Deputy Head Teacher at the Tow Law Millennium Primary School which is in County Durham. As I say, he is a Deputy Head Teacher. He says: "I have known Donald Payne in the capacity of a member of Richmondshire Rugby Club for approximately four years ...

(Statement of KIERAN PAVEY read) for the daily running of the club."

JUDGE ADVOCATE: He has now arrived.

MR OWEN: My Lord, since he is here, perhaps I ought to have him called --

JUDGE ADVOCATE: Yes.

MR OWEN: -- and he can give it live.

(2.28 pm)

KIERAN PAVEY (sworn)

Examination-in-chief by MR OWEN

MR OWEN: Mr Pavey, my name is Tim Owen and I am counsel for Corporal Payne. I am asking you a few very brief questions as a character witness. Do you understand?

A. I do.



Q. Your occupation, please?

A. I am a deputy head teacher.

Q. Is that a primary school up in County Durham?

A. That is right, yes.

Q. You have known Corporal Payne I think for some four years; is that right?

A. Yes, yes. Just over four years now.

Q. That is through the fact that both of you play rugby for Richmondshire Rugby Club?

A. That is correct.

Q. Therefore you have seen him as a player and also got to know him socially?

A. That is correct.

Q. Do you know him as a family man?

A. Yes, I know him as a family man and his wife Sandra I know very well.

Q. So you have met the family and you know the children as well?

A. Yes, I do.

Q. How would you assess his attitude to them, their importance to him?

A. Very loving, very caring. He tries to provide as best he can for them.

Q. What about as a player and his contribution on the pitch and then off the pitch socially; his role in the rugby club?

A. Yes. I have known him -- I was First League Captain of the club for two years and I knew him as a player, selected him as a player on his ability as well as on his attitude. Off the pitch I've -- you know, he is always helpful around the rugby club to clear up afterwards, to help dole out food to oppositions who have come to play at our club and also, outside of that, in the local pubs around Richmondshire and on rugby tours as well.

Q. What about his conduct on the pitch and off the pitch?

A. Always -- always very competitive but always within the bounds of the game.

Q. Have you ever known him to lose his temper, fight, be sent off, that kind of thing?

A. Not to my knowledge, no.

Q. And socially again, out and about in pubs and clubs, that kind of thing?

A. Socially always very -- very lively but just like anybody else and never into any trouble at all.

Q. Mr Pavey, thank you very much for coming along. Those are the only questions I need to ask you. Unless there are any others?

JUDGE ADVOCATE: No further questions.

MR OWEN: Thank you, Mr Pavey.

A. Thank you.

JUDGE ADVOCATE: Thank you for coming.

(The witness is released)

JUDGE ADVOCATE: Yes.

MR OWEN: My Lord, that is the evidence.

JUDGE ADVOCATE: Thank you.

MR OWEN: That is the character evidence I propose to call.

(2.31 pm)

Submissions by MR OWEN on behalf of CORPORAL DONALD PAYNE

MR OWEN: So, my Lord, Mr President and gentlemen, this court-martial took some three years to commence and it lasted some seven months. At the end of that lengthy protracted process a single man, Corporal Don Payne, appears before you today to be sentenced for his part in an incident which obviously brought pain and suffering to that group of Iraqi detainees and obviously caused a good deal of damage to the reputation of the British Army. But in the light of what we all know about what occurred, and perhaps just as importantly for the future how it was able to occur, there is, I suggest, something a little distasteful about the sight of Don Payne standing here alone before you as the man -- the only man -- to be singled out for punishment for this sorry episode. Right from the outset -- I mean from the outset of this court-martial process -- the prosecution in the form of Mr Bevan as he opened his case accepted, indeed it was his case, that the principal cause of the ill-treatment of the Iraqis was the conditioning process which Corporal Payne was in effect required to implement.

I quoted when I opened the case -- and I know you have all had a chance to look through a different number of documents -- may I just quote what I said when I opened Corporal Payne's case to you all those months ago? I said on his behalf:

^day9 25/9 I do at this stage ask to you bear in mind over the forthcoming weeks ^ ^

a fundamental difficulty, fundamental unfairness, at the heart of the Crown's case. Mr Bevan appears to accept the prolonged use of stress positions will inevitably cause severe pain and suffering and the only way you can persuade a man to maintain such a position for any length of time is by force or by the threat of force. Indeed in his opening statement Mr Bevan had said it was mainly the conditioning that led to the beatings. This is because the Iraqis could not physically maintain the stress positions for a prolonged period and I said on Corporal Payne's behalf I agreed with Mr Bevan that of course the prolonged use of conditioning would lead to the use of force. That was the Iraqis." I said that Mr Bevan also appeared to accept that in doing what he did, in terms of maintaining the conditioning process, Corporal Payne was doing something which was known of and indeed approved by his superiors. I said it was not the Crown's case, never has been, that Corporal Payne all of a sudden woke up on the morning of 14th September and invented this procedure, this standard operating procedures as it had by then become. I said simply at this stage -- i.e. at the opening

of the case for Corporal Payne -- it required only a moment's thought to appreciate in the context of the task of guarding detainees that for junior soldiers such Corporal Payne an order to fulfill acts which when prolonged will inevitably require force to achieve the desired outcome is almost bound to result in breaches of humanitarian law. As I finally posed -- or repeated the question which Mr Bevan himself had posed when dealing with Major Peebles -- how is a soldier to ensure a non-compliant detainee maintains the stress position without the threat of and/or the use of violence? The answer is he cannot."^^ More recently, when closing for the Crown in the

case against Major Peebles, Mr Bevan said this, and I am just quoting from his closing speech: "^^cked What happened in this case should never have been allowed to happen. It happened in essence, in the Crown's submission, because the conditioning process which in fact he ordered [he being Major Peebles although of course there were others above him] to be imposed upon his own admission at 1630 hours that day [on a Sunday] was not adequately monitored/supervised by him. The fact remains that that process was allowed to continue for up to 36 hours until

the death of Baha Musa. No order was ever given by him [Major Peebles] to stop that conditioning process at any time." And I say to you now, in mitigation on Corporal Payne's behalf, can it really be doubted but that the conditioning regime itself created the kind of unhealthy climate in which the abuse of these civilian detainees took place? Unless very clear rules are set and enforced from the top downwards, rules which ensure that detainees are treated decently at all times, the danger surely is that untrained guards -- and I include here Corporal Payne, trained, yes, as an RP soldier but not trained in the way one would expect to deal with the

circumstances Corporal Payne was faced with in Basra with civilian detainees in the wholly inadequate facilities that existed there, and subject to the so-called conditioning regime. The danger, surely, in that environment is that inadequately trained soldiers will regard what is in fact unlawful as acceptable and it is that slippery slope which is really the danger which has been set out or made clear in this case. That is, I suggest, plainly what occurred over that 36-hour period. The fact -- and in the indication that my Lord gave of the provisional view that you collectively had reached -- the fact that Corporal Payne was not himself personally responsible for the conditioning regime but instead someone who was required to impose it -- as I say without proper training or understanding of humanitarian law as it applied to these men arrested in Operation Salerno -- that fact I submit provides him with very, very significant mitigation, and it enables you, I submit, to deal with Corporal Payne in a way which ordinarily would not be appropriate for a conviction on a crime as serious as this. There is here advanced no defence of superior orders but as you indicated the principle which underpins that is something which Corporal Payne is entitled to rely on in mitigation and it will not surprise you that I advance that as the first and principal mitigation on his behalf. It does provide, I submit, a massive mitigation of his personal responsibility for this crime. That he finds himself -- him being Corporal

Payne -- in the sorry position in which he finds himself today must in large part be said to have flown from failings higher up the chain of command with the result being that a good soldier's career remains seriously tarnished and liable to be ended at a stroke if certain punishments are imposed. But the fact that this regime was permitted to obtain in 1 QLR in Basra in that month of 2003 explains why a man who, as his recent character references made clear and as is also clear from confidential reports which no doubt the court has seen, a man who had a good, a decent, a good military record with no serious concerns before this episode, it explains why in these wholly unusual and unique circumstances a good soldier has been led into doing that which was obviously wrong. Corporal Payne's lowly position as I've described it was of course made worse by the label which attaches to the offence to which he has pleaded guilty. Will you all, I am sure, have read am times over the months this

case ^ has been going on as well as since the end of the trial proper as Corporal Payne referred to as the first British soldier to be convicted of a war crime with all the horrible stigma that that term has because of its origins in the Nuremberg tribunal. ^ It is a truly horrible position for him to be in and it stands in stark contrast, you may think, to the very long list of other individuals whose conduct has escaped the court-martial process. I will not name names, but you know the individuals who I suggest share considerable blame, responsibility, for the situation which obtained in those two days in Basra.

JUDGE ADVOCATE: We are talking of about certain of members of the Rodgers' multiple.

MR OWEN: Yes. There is no point in beating about the bush, Sergeant Smulski and Colour Sergeant Livesey in terms of their responsibilities for the reimposition, if you

like, of the conditioning regime at a time where the actions of Sergeant Smith had been to relax the conditioning regime. Had I given evidence, Corporal Payne would have given evidence about the fact that he had himself raised with Major Peebles the question of whether it was necessary to continue the conditioning process and the understanding he had received -- and it had been confirmed by what he was faced with when he arrived there on the Monday morning -- of need to continue the shock of capture because it was believed that further valuable information may yet emerge from one or more of this group of detainees and therefore that unusually after the tactical questioning process had effectively ended at Battle Group level, a belief

that the conditioning should remain in place pending transfer to the J fit and then subsequent interrogation there. So there are those individuals and there are other unidentified individuals for whom Corporal Payne is not and cannot be held criminally responsible who, on the face of the evidence, participated in violence but whose role has never been identified or whose identities have never been known.

I am sure that you will be acutely sensitive to the fact therefore that though Corporal Payne is the only man to emerge convicted from this episode, he is far from being the only person with responsibility for it. You may recall that when the first Iraq witness gave evidence -- Mr Al Matairi -- he learned because I explained to him that Corporal Payne pleaded guilty to the inhuman treatment of him and the others and he said something which seemed rather remarkable. He thanked me for the fact that Corporal Payne had pleaded guilty and later said:

"I am asking this court to use mercy with him too respect him and even to acquit him."

Well I recognise that acquittal is not an option open to you, but mercy and respect for the fact that Corporal Payne has pleaded guilty are two things that I do ask you to extend to him in full measure. Mercy is obviously, for the reasons I've given about

the circumstances which led to this terrible position as far as he is concerned. But respect for and acknowledgment of his plea of guilty are, I submit, especially important in this case. Much has been made, justifiably, of how hard it was for the SIB to investigate this incident. The army -- perhaps like any institution that is to some extent closed from the world in at least one way it operates, rather like the Police Service or the Prison Service, present great difficulties in terms of investigation of incidents such as this and the reason is obvious and it was highlighted or indicated by

my Lord in his ruling at half time: a closing of ranks. That closing of ranks makes it hard for the Crown to call reliable testimony from those who either need to

cover up their own misdeeds -- and I submit that that was going on to an obvious extent in this case -- but also from those who, while they have not committed

crimes themselves, are simply unwilling to dump on colleagues. It is because of that problem that when a soldier admits his guilt and on a charge serious as this bound

to attract huge publicity adverse to him, it is in my submission ^ important that a court gives full acknowledgment of that by reducing the sentence considerably beyond that which it would have imposed had the case been contested and a finding of guilt returned at the conclusion of that. Mr Al Matairi clearly felt that in admitting his

guilt Corporal Payne had done a great deal personally to atone for his crime and that is the personal aspect of it, but discount and I say a substantial discount for a plea of guilty reflects I submit a powerful policy aim of a criminal justice system which is to encourage those in future who have done wrong to admit what they have done rather than simply take their chances before the Board and in the hope that they can rely precisely on the closing of ranks and the unwillingness of colleagues to dump on their mates to get an unjustified acquittal. So I submit that apart from the personal if you like atonement which any plea of guilty presents to the victims, apart from anything else, there is here a powerful policy aim which this court should reflect and particularly reflect because of in a sense the way this investigation proceeded and the consequences in terms of the failure to identify others who are responsible.

Now, of course I recognise that the Board and my Lord sat through all of the evidence and giving as you did a detailed and, with respect, very helpful provisional view of your findings, you have identified a number of

areas which go beyond that which Corporal Payne has admitted. I indicated before lunch that I was not minded to call Corporal Payne to give evidence to deal with those points. That does not mean -- and it is important I make that clear -- that I on his behalf am able to accept the points if you like which you say you do not accept beyond his basis of plea. It rather reflects the fact that he recognises that in circumstances where you have heard this evidence over many months and clearly listened with care to all the witnesses who gave evidence there is little in reality which he would be able to say beyond a reassertion of his basis of plea which would be really likely to persuade you to a contrary view. Therefore the course I intend to adopt -- and I will be doing it briefly in respect of the indications you have given ^ and I am not calling Corporal Payne -- my submission is therefore going to be confined to an analysis of the evidence on that particular point and in particular the evidence of senior aircraftman muse because it appears from what my Lord indicated just before lunch that you were influenced by his his evidence, you broadly accepted the thrust of his evidence which had led you to the view you formed about the degree of force involved in the choir and the kicking and punching of Kifah Matairi individually and so on and clearly that arises from the evidence of Senior Aircraftman Hughes ^. Could I say this about his evidence on the basis that your minds obviously are not closed and you have willing to review your provisional findings in the light of these points which I urge you to consider. The first

point is a simple one, Mr Hughes, Senior Aircraftman Hughes' evidence, cannot stand with the evidence of Messrs Riley and Betteridge who, although not present for the whole of the time of that visit to the TDF there nor most of it. I mean actually there inside or standing at the door looking inside that TDF ^ ^. What it bodily down to when one looks at the evidence of those three men altogether is that the visit lasted for an hour or thereabouts and that there came a point when the three of them were all there or thereabouts, the TDF, standing at the door looking in and all three of them describe the performance of the choir. What is significant is what rely and Betteridge say it amounted to in comparison with Senior Aircraftman Hughes. I indicated in opening -- and my cross-examination did not alter this view -- that in effect Corporal Payne had no issue with what rely and Betteridge had said. In other words, he accepted that their accounts were accurate. So the issue really is whether you, as a Board, are able in effect to choose, prefer, the evidence of Hughes as opposed to Riley and Betteridge. Mr May in his reply to our submissions on the basis of plea was in effect saying "well, Senior Aircraftman Hughes' evidence was particularly detailed."

It is true his statement ran to a number of pages. I think it was something like eight or nine pages. Betteridge's ran to five or six. Both of them gave detailed statements so I suggest that in terms of the actual content or detail that is there, all three of them gave careful witness statements. And their evidence in effect went over the same incident. It could not seriously have been suggested that what Riley and Betteridge saw was then succeeded by a completely different gross use of force by Corporal Payne, because all three of them were describing the choir and the nature of that as perform by Corporal Payne. If it is suggested that well Riley and Betteridge was army and Hughes was Air Force, that explains it, that does not really work either because Riley and Betteridge made quite clear in their statements that they had seen this act called the choir and they made it quite clear both in their statements and in their evidence that they did not like what they had seen, but they were therefore -- they neither of them found it funny or amusing, although they noted that others did, but the fact is they did not choose to report it until after they were asked to give an account and when asked they then gave the accounts which they did. Neither said that Corporal Payne delivered kicks with full force, although he says there were reactions of surprise and noises, various noise, being made by the Iraqis. There are some curious features I suggest of Senior Aircraftman Hughes' evidence. The first thing is that

if it was as bad as he said it was -- and his account was lurid and extreme -- why on earth -- and I put this question to him -- why on earth did he stay? His description was of wandering back and forth from one room to another over a lengthy period of time witnessing this gratuitous violence being inflicted quite openly, a description of Danish or Dutch doctors wandering around outside, why did he stay if it was as bad as he said it was. Because Riley and Betteridge did not stay. They made clear they had seen enough and they left and went back to a different area and they made clear that

Hughes stayed on for maybe ten minutes or so longer ^. There was also -- you may recall I dealt with this in some detail with Mr Hughes -- a conflict of evidence about circumstances in which Hughes reported what he had witnessed. The first thing is he did not report anything until after he had heard of the death of Baha Musa. He did not choose to bring it to the attention Niall Greenwood who was his immediate chain of command and who he said was a spot on because and a nice approachable officer ^^ he did not raise it with him at all. Perhaps understandably not on the early back to

the headquarters but after the journalists of GMTV had left he had an opportunity to raise it with the Major and he chose not to do it ^^ . What he said was that after he heard that Mr Musa had died -- and this was at least a day, possibly two days after the death -- he said he reported it to Lieutenant Walters, Lieutenant

Colonel Walters who in turn told Major Greenwood. So that was the sequence of reporting. You may recall Major Mayo was called because he had been in charge of the whole media unit ^^ he had not been asked to recall events until he made a statement on 21st March 2006 last year so his recollection -- without any notes -- was perhaps not the best.

According to Major Mayo, Hughes had told him, Mayo, that he, Hughes, had been invited to carry out the act of going around and kicking detainees in the groin.

Kicking them in the testicles as he said. Now that was something he never said in evidence and yet according to Major Mayo when he was just giving an account he is giving a detail which is, you would think, a vivid detail which was never even given in his witness statement. It is a completely different and more severe account.

You know that whereas Riley and Betteridge carried on in Iraq, Mr Hughes left theatre soon after and did not return. I suggested to him that in effect he used this incident -- and exaggerating its gravity and the certain that he felt having then reported on it -- as a reason to leave Iraq. It is a matter for you, clearly, to decide ^^ what you make of Mr Hughes. You have indicated a provisional view of broad acceptance of his account, but I do invite you to reflect on those considerable differences of detail between Hughes, Riley and Betteridge. The circumstances of him giving a detail to Major Mayo which he never put in his witness statement but which is a vivid and deeply unpleasant image of being invited himself to go round and kick all these men in the groin, whether that raises concerns about whether you can properly be sure, today, that you can prefer Hughes' account of the choir as opposed to that of Riley and Betteridge. The Crown called all three as witnesses of truth and there is a big difference between what Hughes says compared to Riley and Betteridge and I simply invite you -- and I accept you do not have Corporal Payne's evidence so to speak -- but this is a submission will how you can be sure based on the prosecution evidence whether you can really be sure because it is really only him which enables you to be sure, that it is right to sentence Corporal Payne on a basis which departs to some degree from his admitted basis of plea.

My Lord, members of the board, that is all I propose to say, if you like, about the basis for sentence and appeal to reflect merely on the quality of the prosecution evidence which you have heard. I do not propose in the light of what you have indicated about the concerns you have about the other evidence of the Rodgers multi, Cooper and MacKenzie in particular, to say anything more about, if you like, the facts of the case. Can I therefore conclude really with six points of mitigation before making a final plea, if you like, in relation to the sentence that you will in due course pass point one -- and it is a obvious point but I do not apologise for saying it not least because there are others listening.

Corporal Payne falls to be sentenced for what he did, for what he is individually responsible for and not the label which happens to attach to his offence. The label "war crime" I suggest, is not a helpful -- it is not helpful at all in assisting you at this stage to decide what the punishment is. The cliché of punishment fitting the crime applies just as much in circumstances where the offence attracts that rather and on motive label and that is an important point I submit bearing in mind all the attention that this case has received. It follows also and I know that you would not ^ do

this in any event, but he is not to be sentenced for the death of Baha Musa. He is to be sentenced because Mr Musa was one of a number of detainees who were treated in a way which was obviously unacceptable, but he is not criminally responsible for the death of Mr Musa and the punishment therefore must reflect what he has done and not the label which attaches to the crime. That is the first --

JUDGE ADVOCATE: Speaking for myself, that is obviously right.

MR OWEN: I am grateful. My Lord, the second point -- and it perhaps flows from the first principal point I made about responsibility for the conditioning process -- I do submit that the conditioning process as applied by 1 QLR in 2003 for that length of time would, inevitably, have caused extreme pain and suffering to these detainees simply and of itself. It is for that reason that applying it for that length of time must obviously have been a breach of humanitarian law. Of course to the extent that Corporal Payne then used excessive force even to a relatively moderate degree in addition to that inevitable process that will have made matters worse, I accept that, but it is important to recognise that, if you like, the extreme pain and suffering that was suffered -- and is a crucial element of the offence -- was a necessary consequence of applying this type of procedure to these unfortunate men in that ghastly heat of Basra. Thirdly, the fact that Corporal Payne did not receive proper training and supervision in terms of what it is that is acceptable in terms of how you treat a detainee is substantial mitigation. I perhaps have already made that point. It is an obvious point given the acknowledgment that the conditioning regime was one that was approved in circumstances where everyone accepts it should not have been.

JUDGE ADVOCATE: But as a Provost corporal he would have had some knowledge of how to treat persons detained.

MR OWEN: My Lord, he had had experience and training to equip him to deal as competently -- and the evidence is he was competent -- with looking after soldiers in the guard room in an ordinary sort of military prison environment with the greatest respect, beyond that he may have seen the law of armed conflict video but that would

not really have equipped him to the question of what is and is not acceptable.

The real problem is once you have sanctioned a regime which -- and obviously there was huge confusion within Brigade and we have had the debate about who was approving what or what was regarded as acceptable, but if you look at it from the point of view of a RP Provost corporal, what is he to assume about what is acceptable

or not? Whatever he may have been taught beforehand about what is acceptable, this will have really confused anyone because to put someone in hoods, double hoods

perhaps, handcuffed in stress positions without sleep and being told that that is something which is acceptable, I mean, what is he supposed to do about that very process? ^.

So, those are the first three points. The fourth point again is a point of mitigation arising from his conduct in that situation. In the middle of the awfulness with which the Board is now familiar with about the treatment which was meted out, Corporal Payne was described as the "kind man". He was someone who did extend understanding and sympathy to Mr Al Mansouri and his young son. He it was who ensured that they were not treated like the others and the heart condition was

acknowledged and medical assistance was provided and the son described Corporal Payne as the "kind man" and he is entitled for that fact to be fully taken into account.

You may think it sits ill with the image of this man that was described by others of a sort of raging sadist who was just perpetually kicking and punching indiscriminately. I submit that was a grotesque distortion of his conduct so it is a personal factor relating to his conduct in relation to the detainees. ^^ of course his plea of guilty -- and I made that clear at this time -- did not extend to the individuals who he kept separately in the left-hand side room, his admission on count two relates to his treatment of those who were kept for the majority of the time in the right-hand room ^^.

My Lord, point 5 -- again an obvious point but one I urge upon you -- is Corporal Payne's character, the type of man he is. You have heard the evidence from three witnesses, all of them I submit excellent tributes to this man's character, all of them making clear that you are dealing very sadly in these circumstances with a man who has had a very good record. He has done over eightene years now in the arm and he is virtually -- JUDGE ADVOCATE: He is of effective good character.

MR OWEN: Effectively of good character ^^ and you have perhaps helpfully from Colonel Beatson got a flavour of the kind of man he is. He is a man who wants to stay in the army to complete his term. He is committed to his career. It means a lot to him. You have heard about his performance on the rugby field and the kind of activities that he -- his helpfulness and so on and his general attitude to life perhaps you have gleaned from the tributes which you have heard and that is of enormous value I submit from when you have to decide the difficult task of what is an appropriate punishment. It is a tragedy for him being here before you in these circumstances. Lastly I ask you to take into account the factor of delay. The fact that this case has been hanging over his head for such a long time --

JUDGE ADVOCATE: 3.5 years.

MR OWEN: Yes. And for almost all of that, until my Lord ruled on 13th February of this year that he did not have a case to answer in relation to the manslaughter of Baha

Musa, the enormous anxiety of facing trial and fearful of conviction on that very serious charge and knowing that if he had been convicted of this crime then a lengthy prison sentence was inevitable. So he has suffered the huge anxiety, the misery, of

waiting all those years for his trial. He has been trading water in the army. He has been denied access to any vocational course or is training he has not been really able to progress his life at all, he has been marooned up in Catterick, not able to continue ^^ as he would like and kicked out of his Regiment which caused him enormous upset and when one is looking at delay and the inevitable punishments that will flow depending on what you impose, if you feel compelled to impose a prison sentence ^^ it is the destruction of his army career when he is a few years away from

completing his service and you know from what Colonel Eble has told you that the consequences of that for him are utterly devastating. It amounts in effect to a fine -- a financial penalty of some ,000. The question -- it is I recognise a difficult task that you face because of the nature of this case -- but the question is whether you feel compelled now at this stage having heard all that you have heard alone or you know whether the only sentence which you can pass is one of immediate imprisonment leading to consequences that I have outlined. I -- my submission to you is simply this: in the wholly exceptional circumstances of this

case which I hope I've sort to summarise, a prison extend sentence with the inevitable consequence of dismissal from the army and the attendant financial impact on this man after more than 18 years' service would simply be too severe. It would be disproportionate bearing in mind all you know about the causes of this terrible, unfortunate incident; that it would be disproportionate on this one man now appearing before you at the end of this process.

I do submit that although I accept there may be initial surprise that I make the submission, I do submit that a sentence of detention in Colchester would be a fairer option. It does not carry with it the inevitable consequence of dismissal from the army and it is a matter in terms of the quality of this man, the wholly unusual nature of the circumstances which led to him committing the offence which he did, it is a sentence which could be a fair conclusion bearing in mind all of the facts. Should you not feel that that is an appropriate sentence, it is not a penalty you can impose my alternative submission would be that any sentence of imprisonment should be suspended. It is not, in my submission, necessary either in terms of individual punishment of him or wider policy reasons in terms of the way or the message it sends out, because of the unusual circumstances of this case which it is hoped will never be repeated that a Provost corporal would be in a position that he is in or required to detain people subject to this conditioning regime, it is to be hoped it will never occur again and the question is really whether this man needs to be if you like a sacrificial lamb with not only his career destroyed but also removed from society for a length of time. I do submits it it would be appropriate, if you are unable to accede to my submission about the lesser sentence of detention at the Colchester regime --

JUDGE ADVOCATE: That would be in your submission preserving his army career?

MR OWEN: Yes.

JUDGE ADVOCATE: Which has what, three years to run?

MR OWEN: Something like that, yes. Just over three years. My Lords, Mr President, members of the Board, those are the matters I seek to put before you unless there is any other issue on which I can be of assistance. Those are our submissions. ^.

JUDGE ADVOCATE: Thank you very much. Mr Owen. We will consider. Thank you.

(3.12 pm) (The Members of the Board retire to consider the sentence)

(4.24 pm)

(In the presence of the President and Members of the Court)

JUDGE ADVOCATE: Please be seated.

#### SUMMING-UP

JUDGE ADVOCATE: Corporal Payne pleaded guilty just before the start of the trial to count two: that he, between 13th and 16th September 2003 in Basra Iraq, inhumanly treated Iraqi civilians arrested as a result of Operation Salerno. The arrest took place on Sunday 14th September; Mr Baha Musa dying on the Monday evening, the 15th, at about 9.30/10 pm. The alleged inhuman treatment took place on those days. For the offence to be committed it is necessary for the offender to inflict severe physical or mental pain or suffering upon one or more persons. The Crown do not allege that simply putting detainees into stress positions whilst handcuffed and hooded for substantial periods of time of itself constitutes the war crime of inhuman treatment. Clearly the prolonged use of stress positions would mean that the guarding soldiers would have to use some degree of force in order to impose and maintain the stress positions because stress positions are painful and cannot be maintained except by fear and/or the threat and/or use of violence. Corporal Payne's basis of plea may be summarised as follows: one, as ordered he put the detainees into stress positions and sought to maintain them in that state, hooded and handcuffed with no sleep, for up to 36 hours in the hot and increasingly squalid conditions of the temporary detention facility. He did so because the use of hoods combined with stress positions was a standard operating procedure, one, he had been told to use, two, he was aware had been used many times in the past and, three, was known of and approved by his superior officers. Corporal Payne maintains that the same applies to depriving the detainees of sleep. Two, by Monday 15th September, when he resumed his duties in the morning, the detainees had been at the temporary detention facility for over 24 hours. The physical conditions had deteriorated. The temperature in the temporary detention facility was very hot. Requiring the detainees to maintain stress positions at that stage must have involved severe physical or mental pain and suffering. To get the detainees to maintain the stress positions, Corporal Payne admits that he used force against the detainees in order to enforce what he regarded as his duty, that is the maintenance of stress positions as part and parcel of the conditioning process. Three, as to the choir, Corporal Payne broadly accepts the accounts given by Lance Bombardier Betteridge and Lance Corporal Riley. Corporal Payne understood that detainees had to be deprived of sleep. It was his practice when he returned to the temporary detention facility to kick, punch and slap each detainee as described by Betteridge and Riley in order to ensure he was awake. That is the violence used was very mild consisting of nudges rather than proper kicks or punches.



As he did this, he noticed that the detainees would make different noises. This became a joke among the soldiers and was known to some as "the choir". Corporal Payne does not accept that the choir itself caused severe or physical mental pain or suffering ^ ^. He accepts that he performed the choir exercise on many occasions on the Sunday 14th and Monday 15th September.

Four, Corporal Payne accepts that he used force, kicks, punches, slaps and forceful lifting of heads in to maintain both detainees in stress positions. applied this force on the Sunday and throughout the Monday. He does not accept that such force as he used would in itself constitute the infliction of severe pain or suffering but he accepts that the combination of length of time, the conditions of confinement, hooding and deprivation of sleep and the pain and suffering in the stress positions when added to the force used by Corporal Payne must inevitably have caused severe pain or suffering both physically and mentally. Five, Corporal Payne does not accept that he used gratuitous violence. He did not use extreme violence as alleged by some witnesses. He specifically denies that he knowingly tried to gouge the eyes of any detainee or that he kicked and punched detainees in a way that was intended to cause them severe pain or that he knew would cause them severe pain above and beyond the inevitable pain/suffering caused by the very conditioning process which he says he was required to enforce. It has to be noted that it was Colour Sergeant Livesey and Sergeant Smulski who ensured that the detainees were deprived of sleep throughout the night of Sunday 14th and that conditioning continued until the next day and that no order came from above that conditioning should cease. The Crown maintains that Corporal Payne was guilty of gratuitous cruelty to the detainees and a higher level of violence than he is prepared to admit. As to gratuitous cruelty, the Crown relies particularly on the evidence of its senior aircraftman Hughes who, it maintains, had no reason to exaggerate or minimise Corporal Payne's role. Senior Aircraftman Hughes' evidence was to the effect that Corporal Payne asked him if he wanted to hear the choir. Corporal Payne went round the right-hand room and kicked each in the back. Hughes said that if it had been done to him he would have cried out in pain. Each of the detainees let out a cry of pain. In cross-examination Hughes said that they were definitely kicked and not just nudged with the foot. Hughes' evidence conflicts with that of Betteridge and Riley who speak of nudges. Taking full account of the submissions of Mr Tim Owen QC on behalf of Corporal Payne, we prefer the evidence of Senior Aircraftman Hughes whom we found to be a wholly convincing witness.

We are sure that these were more than nudges and resulted in real pain being caused to the detainees. It is to us that this cannot have been the only occasion when real violence causing real pain was used by Corporal Payne when carrying out the choir.

The Crown relies on alleged eye gouging. We are clear that there was not deliberate gouging of the eyes but there was a careless lifting of the head of the detainee by gripping or holding the hair of the head near the eyes ^ ^. The Crown relies on the application of car rat to a kick by Corporal Payne to a detainee. We are not persuaded that this actually took place. Crown's reliance on the manner in which water was given to detainees does not, in our judgment, advance the case against Corporal Payne and the same may be said to apply to alleged insults and abuse. As we see it, Corporal Payne is able to some extent to rely on the excuse or mitigation that he was acting on superior's orders, but not in relation to his operation of the choir or the violence he used in it out. As we find, so that we are sure, Corporal Payne did from time to time treat the detainees with excessive violence in particular the detainee he "Grandad". That is Mr Kifah whom he punched and kicked. That was witnessed by Senior Aircraftman Hughes whom we are sure gave an accurate account. As to the level of violence, the Crown seeks to rely on witnesses from Lieutenant Rodgers' multiple. We do not agree that we can properly rely on the evidence of those witnesses, all of whom clearly did not give accurate accounts in one way or another.

As to Cooper and MacKenzie, they were both particularly unreliable. It would not be safe, in our view, to rely on any of those witnesses. Corporal Payne did treat Mr Baha Musa with some violence. It is impossible to say on the evidence what the true extent of it was. He did restrain Mr Baha Musa, pinning his arms behind his back in the course of doing so he fractured it would have his ribs near his spine. We cannot be sure whether that resulted from a deliberate knee drop or was the result of his using his knee simply to restrain Mr Baha Musa ^ ^. There is no reliable evidence in our judgment that Corporal Payne caused any other fractures or indeed any injuries to Baha Musa. We have already referred to Senior Aircraftman Hughes. He refers to Corporal Payne generally shouting and swearing at the prisoners to keep their positions for most of the 60 to 90 minutes he was there, kicking Grandad in the kidneys and appearing to kick another man, namely Baha Musa, in the groin. We accept that evidence. We are sure of it. We are also sure that Corporal Payne did give the lead by example to some of the junior ranks who were guarding the prisoners and conditioning them under his supervision. By treating some detainees with unnecessary violence as we have indicated. That is an aggravation of the offence.



We put our provisional views to Corporal Payne and his counsel. Corporal Payne has not indicated that he is prepared to accept that there was some gratuitous cruelty by him and that the level of violence on occasions was higher than that set out in his basis of plea, but it has not been necessary to have a Newton hearing, particularly as we have seen and heard all the Crown's witnesses. We are clear that Corporal Payne would not have committed this offence but for his being placed in the exceptional position of being required to condition the detainees, hooded and handcuffed, by imposing stress positions upon them. Corporal Payne was born on 9th August 1970 so he is now 36 years of age. He has been in the army since June 1988 and he is a married man with three children. We have read the pre-sentence report. In our judgment, taking into account all the matters to which we have referred, Corporal Payne cannot avoid immediate custodial sentence. Corporal Payne took part in conduct involved in unlawful violence on the citizens of a host country. That is particularly harmful to the reputation of the British Armed forces. It was bound to undermine such mutual trust as there was between service personnel and the local population. It could have put the lives of other service personnel at risk. It could also have hampered future operations. At all events as we say a custodial sentence cannot be avoided we would be taking a much more serious view of the case had it had been established that Corporal Payne had been guilty of more than the isolated example of unlawful violence to which we have referred.

We have taken full account of Corporal Payne's plea of guilty, a brave plea. The helpful way as we see it he has responded in avoiding the need for a Newton hearing is, his effectively previous good character. He was a good decent soldier, and the other mitigation ably addressed by Mr Tim Owen QC and in particular the fact that it is now more than three and a half years since the offence in September 2003. That is wholly unacceptable delay. We take full account of the three character witnesses who gave evidence over the video link. Corporal Payne obviously fell far short of what his duties required, but real mitigation is to be found in the fact that proper systems were not in place to supervise and check that this kind of crime did not take place. Clearly 1 QLR had a vast task confronting it in Basra and it is sad but not surprising that those who should have been supervising were engaged on other important duties. It is not for this court to say who is to blame for 1 QLR being in that position. That the use of stress positions on hooded and handcuffed detainees should have become a standard operating procedure within 1 QLR speaks volumes as we see it concerning a serious failing in the chain of all the way up to Brigade and beyond. The President will announce the sentence of the court.

THE PRESIDENT: The court sentences the accused, number 24841881, Corporal Donald Payne, 2nd Battalion Duke of Lancaster's Regiment, to be dismissed from the Service, to be sentenced to 12 months' imprisonment reduced to the ranks. This also represents a quantifiable financial loss to the defendant of just under ,000. Court Orderly, please march out.

(4.40 pm)  
Discussion

JUDGE ADVOCATE: Mr May, do you have a diary of events?

MR MAY: My Lord, I am just about to pass it up. (Handed).

JUDGE ADVOCATE: Thank you very much. I do not think I need to make any comment beyond the comment I have already made.

MR MAY: My Lord, it is not exhibited. It is simply placed with the court record.

JUDGE ADVOCATE: I am grateful. I do want publicly to thank WO2 Smith, the Court Orderly, for his invaluable contribution throughout the trial. I understand it is his last appointment in the Army so I can, I think on behalf of us all, wish him at least well.

This trial is concluded. This court-martial is accordingly dissolved. Thank you.

(4.42 pm)

(The court-martial concluded)