Neutral Citation Number: [2025] EWCA Crim 1150

Case No: 202304395 B2

IN THE COURT OF APPEAL, CRIMINAL DIVISION
ON APPEAL FROM THE CROWN COURT AT WORCESTER
PEPPERALL J
T2022 7032

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/09/2025

Before:

LORD JUSTICE HOLROYDE,
VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
MRS JUSTICE MAY
and
MR JUSTICE WALL

- -

Between:

GRAHAM ANDREW EVANS	**Appellant**
- and -	
THE KING	**Respondent**

- -
- -

Simon Csoka KC (assigned by **the Registrar of Criminal Appeals**) for the **appellant**
Duncan Atkinson KC & Lyndon Harris (instructed by **CPS Appeals and Review Unit**) for the **respondent**

Hearing dates: 12 June 2025

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Approved Judgment

This judgment was handed down remotely at 2:00pm on 5 September 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Holroyde:

1. The appellant was convicted of an offence of misconduct in a public office. With the leave of the single judge, he appealed against his conviction. At the conclusion of the hearing, we dismissed the appeal and stated that we would give our full reasons in writing at a later date. This we now do.

Summary of the relevant facts:

2. The appellant was employed as an "operational support grade" ("OSG") at HMP Hewell. It should be said in the appellant's favour that he had a long history of exemplary public service, having served as a police officer for many years before retiring, and had worked as an OSG for about ten years. Until the events which resulted in his conviction, his work had always been meticulous.

3. The appellant worked a night shift on 7-8 June 2018. During that shift, he was the only person working in a block which housed a large number of prisoners. A supervising officer was working in a different part of the prison. The appellant's duties included answering any cell calls sounded by any of the prisoners in his block, and supervising three prisoners who were subject to Assessment, Care in Custody and Teamwork plans ("ACCT plans").

4. One of those three prisoners was Mesut Olgun. He had been arrested and remanded into custody following an incident in which he had produced a knife in public, and had inflicted wounds upon himself. His conduct had given rise to concerns about his mental health. It was his first night in the prison. He had been assessed as a high-risk prisoner and had for that reason been allocated a single cell. The ACCT plan in his case required the appellant to make, and record, four irregularly-spaced checks per hour. The ACCT plans in relation to the other two prisoners required checks once per hour.

5. Prison officers who had inspected Mr Olgun's cell before he was moved into it had failed to notice, and to remove as they should have done, a projecting screw which was capable of being used as a ligature point. The judge was later to describe that serious error as the result of systemic failings at the prison for which the appellant had no responsibility.

6. At 6.33am on 8 June 2018 the appellant found Mr Olgun hanging by the neck from a ligature attached to the screw. The appellant called for the assistance of the supervising officer. Mr Olgun was cut down and resuscitated, but sadly died a week later.

7. It was accepted by the appellant that he had failed to perform his duties in relation to checking the prisoners who were subject to ACCT plans. He had last checked Mr Olgun at 5.35am, nearly an hour before he discovered Mr Olgun hanging in his cell. In all, the appellant had failed to perform 24 of the 38 checks he should have made of Mr Olgun, and had failed to perform 4 or 5 of the 9 checks he should have made of each of the other two prisoners. He had falsified the records he had made, which purported to show that he had carried out all the required checks.

The criminal proceedings:

8. The appellant was charged on an indictment containing two counts. Count 1 alleged an offence of manslaughter by gross negligence. Count 2 alleged an offence of misconduct in public office. The particulars of that offence alleged that the appellant, whilst acting as a public officer, had wilfully misconducted himself by wilfully neglecting to perform his duty by failing to undertake checks as required under the ACCT plans for the three prisoners, and by making entries in the log relating to Mr Olgun "purporting to have undertaken the required checks when he had not".

9. The appellant stood trial in the Crown Court at Worcester, before Pepperall J and a jury, in November 2023. The appellant was represented by Mr Csoka KC, the respondent by Messrs Atkinson KC and Harris.

10. At the conclusion of the prosecution evidence, Mr Csoka made a submission of no case to answer in relation to both counts. The submission was successful in respect of count 1: the judge ruled that the evidence was insufficient for a reasonable jury, properly directed, to be sure that any breach by the appellant of his duty of care to Mr Olgun had made a substantial contribution to Mr Olgun's death.

11. In relation to count 2, the judge considered case law including *R v Cosford* [2013] EWCA Crim 466 and *R v Mitchell* [2014] EWCA Crim 318. He observed that the Law Commission, in its 2020 report on the common law offence of misconduct in a public office (Law Commission No 397), had described the exact parameters of "a public officer" as being notoriously difficult to define.

12. The judge noted that in *Cosford*, at [38], this court had said that the question of whether the accused was a public officer was a matter of law for the trial judge. He doubted whether there was any real question of fact which should lead him to take a different course in this case. However, he accepted that a dispute of fact might emerge from defence evidence, and that "at this stage" he should therefore approach the matter as a jury question.

13. The judge was satisfied that a jury properly directed would be entitled to find that the appellant was a public officer and was acting as such in performing his duties at HMP Hewell at the material time. He accepted the submission of the prosecution that the jury, applying the three-stage test identified in *Cosford* and *Mitchell*, could properly find that the appellant was acting as a public officer in undertaking the ACCT observations on the three prisoners, and in maintaining a log of such observations. The judge therefore refused the submission of no case to answer on count 2.

14. The trial accordingly proceeded on count 2. The appellant gave evidence.

15. In his directions of law, the judge provided the jury with a flow chart which required them to consider the following five questions:

    i) Are you sure that the defendant was a public officer?

    ii) Are you sure that the defendant (a) failed to undertake checks as required under the ACCT plans for [the three prisoners]; and/or (b) made entries in Mr Olgun's log of required checks that had not been undertaken?

iii) Are you sure that the defendant, acting as a public officer, thereby wilfully neglected to perform his duty?

iv) Are you sure that the defendant wilfully neglected his duty to such a degree that his conduct is worthy of condemnation and punishment so as to amount to a breach of the public's trust in him?

v) Are you sure that the defendant did so without reasonable excuse or justification?

16. The jury were directed that if they answered each of those questions in the affirmative, they would find the appellant guilty.

17. In relation to the fourth question, the judge directed the jury:

> "While the prosecution has not in this case proved that any neglect by Mr Evans caused the death of Mr Olgun, and you must not go behind that ruling that I gave, there is no requirement for the prosecution to prove that the defendant's neglect led to harm, and you can properly take into account the consequences that would have been likely to have flowed from any proven neglect."

18. The appellant was convicted. At a later hearing, the judge imposed a suspended sentence of imprisonment with an unpaid work requirement, and ordered the appellant to pay £7,500 towards the prosecution costs.

The grounds of appeal:

19. In his appeal to this court, the appellant submitted that his conviction is unsafe for all or any of three reasons:

> "(i) The appellant was not acting as a public officer at the time of the breach of the duty as a matter of law or of fact. Accordingly, the case should have been stopped the close of the prosecution case.
>
> (ii) Because there was no adverse event caused or substantially caused by any breach, no reasonable jury could have concluded that the breach was so serious as to demand criminal condemnation and punishment.
>
> (iii) The direction to the jury about the relevance of the suicide of Mr Olgun was insufficient to prevent the jury from wrongly relying upon it to determine the gravity of the breach of duty."

20. Each of those grounds was opposed by the respondent.

The legal framework:

21. Misconduct in a public office is a common law offence. As the case law shows, it may be committed in a wide variety of circumstances. In *Attorney General's*

Reference, no. 3 of 2003 [2004] EWCA Crim 868 this court at [54] to [60] considered the nature of the offence, emphasising at [59] that it will normally be necessary to consider the likely consequences of an accused's breach of duty in considering whether his conduct fell so far below the standard of conduct to be expected of him as to constitute the offence. At [61] the court summarised the elements of the offence as follows (omitting internal references to earlier paragraphs):

> "(1) A public officer acting as such (2) wilfully neglects to perform his duty and/or wilfully misconducts himself (3) to such a degree as to amount to an abuse of the public's trust in the office holder (4) without reasonable excuse or justification. As with other criminal charges, it will be for the judge to decide whether there is evidence capable of establishing guilt of the offence and, if so, for the jury to decide whether the offence is proved."

22. We were referred to a number of sentence appeals in cases in which an appellant had pleaded guilty to an offence of misconduct in public office committed whilst acting as an OSG in a prison. However, it does not appear that this court has previously had to determine a contested issue as to whether an OSG in a prison, acting as such, was a public officer.

23. The decisions of this court in *Cosford* and *Mitchell* are relevant in this regard. In *Cosford* the court considered dicta in earlier cases to the effect that the offence should be strictly confined, and held at [34]:

> "Nothing in the authorities justifies the conclusion that the 'strict confinement' should be to the position held by whomsoever should be carrying out the duty: rather, it should be addressed to the nature of the duty undertaken and, in particular, whether it is a public duty in the sense that it represents the fulfilment of one of the responsibilities of government such that the public have a significant interest in its discharge extending beyond an interest in anyone who might be directly affected by a serious failure in the discharge of the duty."

24. In *Mitchell* at [16] the court stated:

> "In our judgment, the proper approach is to analyse the position of a particular employee or officer by asking three questions. First, what is the position held? Second, what is the nature of the duties undertaken by the employee or officer in that position? Third, does the fulfilment of those duties represent the fulfilment of one of the responsibilities of government such that the public have a significant interest in the discharge of that duty which is additional to or beyond an interest in anyone who might be directly affected by a serious failure in the performance of that duty? If the answer to this last question is 'yes', the relevant employee or officer is acting as a public officer; if 'no', he or she is not acting as a public officer."

25. The court went on to emphasise, at [17], that the focus must be on the duties and responsibilities of the individual who is accused, not on the overall responsibility of the organisation or body by which the individual is employed.

The submissions to this court:

26. In support of his first ground of appeal (see paragraph 19 above), Mr Csoka drew attention to the facts that, unlike a prison officer, an OSG has no power of arrest and (save in emergencies) has no right to search a prisoner, use force against a prisoner or enter a cell. He submitted that an OSG therefore has no greater powers than, for example, a civilian employed as a secretary in a prison. Acknowledging that a prison officer could rightly be held to be a public officer, Mr Csoka submitted that the same status could not be given to an OSG, and that the scope of the offence should not be extended simply because the prison authorities found it financially expedient to give more functions to those in an auxiliary role. Mr Csoka pointed to the distinction drawn by the case law between responsibilities owed to an individual and those owed to the public at large. He argued that when checking on a prisoner subject to an ACCT plan, an OSG owed a responsibility only to that prisoner. The appellant, he submitted, had no responsibility towards the many other prisoners in the block beyond carrying out a roll call. Mr Csoka accepted that security in a prison is always a matter of public interest, but argued that there was no public interest in the welfare or health care of an individual prisoner.

27. Mr Csoka made clear that he did not criticise the judge's directions of law, but did criticise the terms in which the law had come to define the elements of the offence. He submitted that the third question in the judge's flow chart (see paragraph 15 above) in effect invited the jury to consider a matter relating to the welfare of prisoners on which there could be a range of views. He argued that the jury were doing no more than reflecting their personal outlooks. On that basis, he submitted that the third question could never properly have been answered in the affirmative.

28. In support of his second ground of appeal, Mr Csoka pointed to the judge's finding that the jury could not be sure that any breach of duty by the appellant had caused Mr Olgun's death. He submitted that there was therefore no basis on which the jury could find that any breach of duty by the appellant was sufficiently serious to constitute the offence. He drew a comparison with the decision of the trial judge at first instance in *R v Travers* (Central Criminal Court, 26 January 2018), that on the facts of that case no reasonable jury, properly directed, could find the defendant guilty of misconduct in public office if they had found him not guilty of manslaughter by gross negligence.

29. As to the third ground of appeal, Mr Csoka submitted that there was no evidence as to what consequences were likely to have flowed from any neglect by the appellant, and the judge's direction (see paragraph 17 above) therefore opened the door to speculation by the jury. He argued that in the circumstances of this case, the potential consequences were not obvious: the introduction by the judge of an issue of likelihood therefore compounded what was in any event the absence of any rational basis on which the jury could have answered 'Yes' to the third question in the flow chart. Mr Csoka submitted that the judge should have directed the jury only to consider the issue of neglect and not to consider any possible consequences of neglect. On that basis, he argued that if ground 2 failed, ground 3 should succeed.

30. Mr Atkinson, in response to the submissions on ground 1, drew attention to the distinction drawn in *Cosford* at [36] between nurses in a general hospital (whose responsibilities were to individual patients for whom they were caring), and nurses in a prison setting (who were also "responsible to the public for, so far as it is within their power to do so, the proper, safe and secure running of the prison in which they work"). He submitted that the appellant as an OSG was the only member of staff responsible overnight for a large number of prisoners: the appellant was the only route by which any of those prisoners could raise any problem; he had to deal with any issue which might arise; and his duties included the proper, safe and secure running of the block and the taking of the steps which the ACCT plans identified as necessary for three vulnerable prisoners.

31. Mr Atkinson further submitted that the judge had applied the correct test in accordance with *Cosford* and *Mitchell*. He submitted that the fact that an OSG is paid significantly less than a prison officer was irrelevant: a person may hold a public office even though he or she receives no pay at all.

32. Mr Atkinson drew attention to *Cosford* at [38], where the court emphasised that the decisions as to whether particular persons were public officers were decisions of law:

> "If there had been an issue as to the facts (either of the relationship or the duties), the decision as to the facts would have been for the jury. The existence or otherwise of a public office as for the judge: the position is identical to that which obtains in relation to the existence or otherwise of a duty of care in gross negligence manslaughter … . The judge's decision to leave this question to the jury was overfavourable to the appellants."

33. As to ground 2, Mr Atkinson submitted that the judge's decision, and the directions which he gave to the jury, were correct: misconduct in public office is a conduct offence, and there is no requirement that the prosecution must prove that the accused's misconduct or breach of duty caused harm.

34. Similarly as to ground 3, Mr Atkinson submitted that the judge's decision, and the directions which he gave to the jury, were correct. He argued that the appellant's falsification of the records would inform future measures taken to secure the safety of the vulnerable prisoners, and the jury were correctly directed that they could consider the consequences that may have flowed from the appellant's conduct. Mr Atkinson submitted that juries often are called upon to make a qualitative judgement, and the fact that the jury had to do so in this case does not render the conviction unsafe.

35. We are grateful to all counsel for their very helpful written and oral submissions.

Analysis:

36. The first and second grounds of appeal challenged the judge's decision that there was a case for the appellant to answer on count 2. The question for this court, accordingly, was whether the judge was correct to find that a reasonable jury, properly directed, could on one view of the evidence find all the elements of the offence proved. The third ground of appeal challenged one aspect of the judge's

directions of law to the jury. The question for this court, accordingly, was whether the conviction was unsafe because the judge fell into error of law in that one respect.

37. The categories of activity which may be held to be a public office are not closed; but the elements of the offence of misconduct in a public office are in our view clearly established by the case law which we have summarised at paragraphs 21 to 25 above. In particular, we respectfully regard paragraph [16] of the judgment of the court given by Sir Brian Leveson P in *Mitchell* (quoted at paragraph 24 above) as a clear and helpful indication of the approach to be taken when considering the question which lay at the heart of this appeal.

38. Applying that approach to the circumstances of the present case, the answers to the first and second of the three questions were not in dispute. The appellant was employed as an OSG in prison. On the night in question, he was responsible for all of the large number of prisoners held in the block, was required to answer any calls for assistance which any of those prisoners might make, was required to carry out the checks which had been identified in the ACCT plans as necessary for the safety of each of the three vulnerable prisoners, and was required to keep an accurate record of his performance of those checks.

39. As to the third question, the proper performance by the appellant of those duties would represent the fulfilment of the responsibility of government for the safety and security of persons whom the state had deprived of their liberty. The appellant was responsible for the proper, safe and secure running of the block in which he was employed. On the night in question, he was the one person present in the block who held a position of responsibility towards all the prisoners in that block; the one person who was immediately able to assist if a prisoner's health and safety was for any reason compromised; and the one person who was immediately able to ensure compliance with the ACCT plans which had been designed to secure the safety and welfare of the three vulnerable prisoners. With respect to Mr Csoka's typically able submissions, we found it impossible to regard the appellant's duties and responsibilities as being no more than three discrete duties of care owed to three individual prisoners.

40. As was rightly accepted by Mr Csoka, there is a strong public interest in the safety and security of prisoners. The public therefore had a significant interest in the appellant's properly discharging his duties, which went well beyond the interest of an individual prisoner such as Mr Olgun who might be directly affected by a serious failure in the appellant's performance of his duties.

41. It followed, in our view, that the judge was plainly correct to rule that a reasonable jury properly directed could be sure that the appellant was a public officer acting as such at the material time.

42. Although it is not necessary to our decision, we would add that in the circumstances of this case, the admitted role and duties of the appellant were such that the judge could properly have directed the jury as a matter of law that the appellant was a public officer, and that the first of the five questions (see paragraph 15 above) must therefore be answered in the affirmative.

43. We should emphasise that in reaching our decision that the first ground of appeal should be rejected, our focus was necessarily on the admitted duties and responsibilities of the appellant on the night in question. It is possible that the application of the three-part test to other OSGs employed in prisons, with different roles at different times, would yield a different result.

44. As to the second ground of appeal, the admitted fact was that the appellant failed to make about two-thirds of the required number of checks in relation to Mr Olgun, a high-risk prisoner, and about half of the required number of checks in relation to each of the other two vulnerable prisoners. If the appellant had made four checks on Mr Olgun each hour, it would still have been possible for Mr Olgun to have taken his own life during one of the permissible intervals between those checks: the submission of no case to answer on count 1 was therefore successful, and the judge rightly gave the jury the direction (which we have quoted in paragraph 17 above) not to go behind that ruling. But it did not follow that the jury could not consider the potential consequences of the appellant's very substantial failure to carry out his duties towards the three prisoners, and his covering up of that failure by falsifying the records. The jury were entitled to take into account that compliance with the ACCT plan would have protected Mr Olgun against self-harm by limiting his opportunities and by increasing the likelihood that any attempted self-harm would be detected in time to prevent, or reduce, serious harm. Nor did it follow that the jury could not properly have found that the appellant was guilty of misconduct so serious that it merited condemnation and punishment as a crime.

45. The judge was therefore correct to rule that a reasonable jury, properly directed, could find that the appellant's misconduct was so serious as to constitute the offence. We accordingly rejected ground 2.

46. As to the third ground of appeal, the judge's direction, that the jury could properly take into account the likely consequences of any proven breach of duty, was correct in law: see paragraph 21 above.

47. We did not accept the submission that the judge failed to say enough to prevent the jury from wrongly relying upon Mr Olgun's suicide to determine the gravity of the breach of duty. The judge told the jury in terms that the prosecution had not proved that any neglect by the appellant had caused Mr Olgun's death, and he expressly directed them not to go behind his ruling in that regard. There was no reason to think the jury would disregard those clear instructions, and we did not think it was incumbent on the judge to say any more than he did. Ground 3 accordingly failed.

48. It was for those reasons that we rejected each of the grounds of appeal and dismissed the appeal.