

Australian court rejects appeal by jailed Afghan war crimes whistleblower David McBride

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The Australian Capital Territory's Court of Appeal yesterday rejected a bid by David McBride to have his sentence reduced, as well as a challenge by the whistleblower against the authoritarian legal conceptions behind his jailing.

The ruling by the three-judge panel continues and upholds the extraordinary situation where the only individual convicted and imprisoned over documented Australian war crimes in Afghanistan is McBride. He is not accused of having committed the atrocities. His sole "offence" was to expose the violations of international law.

As an army lawyer, McBride had access to information demonstrating that Australian Special Forces soldiers had committed clear war crimes during the neo-colonial occupation of Afghanistan, including extrajudicial murders of civilians.

After McBride's attempts to raise the issue within the chain of military command were blocked, he turned the information over to journalists. That led to the Australian Broadcasting Corporation's (ABC) 2017 publication of the "Afghan Files," detailing some of the crimes.

That publication triggered a massive state response, including an unprecedented 2019 raid of the ABC's Sydney headquarters by the Australian Federal Police and threats to prosecute the journalists involved. This was both a clear attempt to intimidate anyone contemplating further exposures and a continuation of a protracted cover-up of the war crimes, which had been committed between 2009 and 2013.

McBride was hounded for years before being charged with five offences, including unlawfully disclosing classified information under the Defence Act and divulging information in breach of the Crimes Act. In line with the "national security" prosecution, his trial was held under draconian secrecy provisions that barred extensive reporting.

McBride's attempt to defend the charges was obstructed by the Labor government, the prosecution and the presiding

Supreme Court Justice David Mossop.

The then Labor Attorney-General refused to exercise his powers to order a termination of the proceedings, greenlighting the prosecution.

Then, the Crown argued against McBride being permitted to employ a "public interest" defence. McBride's lawyers had argued that he was bound to reveal the war crimes, given that they contravened both national and international law.

The prosecutors countered that the sole duty of anyone within the military was to carry out the orders of command and to respect its authority. This line was strikingly reminiscent of that employed at the Nuremberg war trials by Nazi military officials, essentially asserting the unchallengeable authority of army command, even if its actions were facilitating the commission and cover-up of crimes.

When Justice Mossop accepted the prosecution argument, there was no basis on which McBride could contest the charges and he was compelled to plead guilty. Despite that, Mossop sentenced McBride to five years and eight months, with a non-parole period of two years and three months, noting its severity but declaring it was necessary to deter other potential whistleblowers.

In their appeal, McBride's lawyers had argued that the sentence was excessively long. They also sought a reversal on the bar on his public interest defence. After a three-month period, following the appeal hearings, one of the judges read out a single line in court yesterday, declaring, "The appellant's appeals against his conviction and his sentence are dismissed."

In a statement issued via his legal team, McBride was defiant, saying: "People who have stood up for what is right in history have suffered far more than I have... I am confident the outrage produced by this judgment will be felt by all Australians. I will not give up."

His lead lawyer, Eddie Lloyd, wrote: "David should never

have spent a single day behind bars. Yet as we speak, he is returning to a cold, dark prison cell—preparing for winter in a concrete jungle—while those who committed crimes walk free and those who covered up those crimes have been rewarded with medals and promotions.”

Pointing to the far-reaching implications of McBride’s punishment, Lloyd added: “It cannot be illegal to tell the truth. When a soldier acts on conscience to report wrongdoing, their actions must be protected—and their complaint properly investigated. Otherwise, we are not a democracy. We are something else.”

In a sharp warning of the erosion of democratic norms, to which Lloyd pointed, the rejection of McBride’s appeal has been given only the most cursory coverage by the official press. It continues a protracted blackout on the jailing of the whistleblower, including previous reports by his legal team that the conditions of his confinement were draconian and were severely impacting his mental health.

The timing of the appeal rejection provided for a striking juxtaposition. It came just weeks after another court case, involving Ben Roberts-Smith, one of Australia’s most decorated soldiers, who stands accused of committing war crimes, including murders in Afghanistan.

Roberts-Smith lost the case, proceedings that he initiated. He has been supported by some of the country’s wealthiest individuals, who have tied their backing of the accused soldier to their demand for an even greater military build-up.

Roberts-Smith was appealing a dismissal last year of a defamation case he had brought against Nine Media and several of its journalists, who had detailed his alleged atrocities.

As was the case in the initial hearings, the Federal Court, in rejecting the soldier’s appeal, effectively upheld the designation of Roberts-Smith as a war criminal. In one incident, Roberts-Smith had been accused of machine-gunning an unarmed Afghan man who used a prosthetic leg in 2009.

The Federal Court noted that the “dramatic fashion” of the killing suggested “a certain recklessness or perhaps even brazenness on the part of” Roberts-Smith. Despite his denials, “The problem for the appellant is that, unlike most homicides, there were three eyewitnesses to this murder,” who had testified against the leading Special Forces soldier.

But despite two civil courts having upheld the allegations against him, Roberts-Smith has never faced criminal prosecution. The only soldier charged with the murder of Afghan civilians was picked up years after footage of him shooting a prone and unarmed Afghan youth had been shown on national television. That prosecution has been dragged out interminably and has still not gone to a hearing.

That is despite the fact that it is now almost five years

since the official Brereton Inquiry found “credible evidence” that Australian Special Forces had murdered at least 39 Afghan civilians and prisoners between 2009 and 2013.

Brereton was a cover-up, however, aimed above all at exculpating governments and the military command, which it claimed had no knowledge of the atrocities.

In reality, the majority of the killings occurred under conditions where the Labor government of Prime Minister Julia Gillard had signed up to a massive US troop surge in Afghanistan, which included participation in “kill or capture” raids headed by US intelligence and special forces. The extrajudicial murders were either part of, or took place in the context of, this officially sanctioned assassination program.

The cover-up is aimed at shielding those responsible, including senior ministers in the Labor government, the opposition Liberal-National Coalition and the military command. It is also wholly bound up with a current war drive, at an even higher level than the neo-colonial occupations at the beginning of the century, and a related crackdown on democratic rights.

The atrocities committed by US-led forces foreshadowed the mass slaughter being perpetrated by Israel against the Palestinians in Gaza. That genocide is being supported by all of the imperialist powers, including Australia under the Labor government.

The Labor government has, in turn, presided over a massive assault on popular opposition, slandering the masses of people who oppose the murder of Palestinians as “antisemites,” while overseeing police attacks on them and attempts to ban demonstrations. The onslaught is not only an attempt to defend the war crimes in Gaza. It is a bid to outlaw anti-war sentiment more broadly, amid an eruption of global war, including Australia’s frontline role in US-led preparations for conflict with China.

A critical component of the fight against imperialist war is the defence of those being punished by the ruling elites for opposing and exposing militarist violence. That is why the working class, and all defenders of democratic rights, must come to the defence of McBride, and demand his immediate exoneration and freedom.



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