COURTS-MARTIAL APPEALS IN AUSTRALIA

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Some background material

In 1955 the Commonwealth Government passed the Courts-Martial Appeals Act 1955 setting up in Australia a Tribunal to be known as the Courts-Martial Appeal Tribunal. This gave the ultimate review of courts-martial (save that of 'pardon') to civilian lawyers, whereas previously it had been exercised by the Service concerned itself. The principles to be applied in determining appeals were set out in the Act[1] and are similar to those set out in the Criminal Appeal Act 1912 (N.S.W.).[2]

Since the creation of the Tribunal, the position of courts-martial in Australia has changed and the Tribunal's decisions are imposing on courts-martial the standards of justice required by a court of criminal appeal in a proper criminal trial. The Australian Act was part of a world-wide series of reforms. The United States had created its Court of Military Appeals and Uniform Code of Military Justice in 1950. Canada introduced reforms and created an Appeal Tribunal in 1950. That Tribunal is now a Court. The United Kingdom followed suit in 1951, and New Zealand in 1953. In England the problem of justice in the Armed Forces had been considered by the Darling Committee in 1919, an interdepartmental committee in 1925, the Oliver Committee in 1938, the Lewis Committee in 1948 and the Pilcher Committee in 1950, all of whom made recommendations and published detailed reports.

When the western world began to maintain large numbers of young ex-civilians in the services for long periods, the distinction between the hit-or-miss procedures in courts-martial and the procedure in an ordinary criminal trial became so marked that reform was inevitable, and the imposition over the military system of a civilian appellate tribunal is only one of many reforms that have been made and have yet to be made in military law. In New Zealand, Canada and the United Kingdom the appellate body is a court of judges drawn from the respective superior courts of those countries. In the United Kingdom the judges are members of the Court of Criminal Appeal. In Australia the Tribunal is not a

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References to 'the Act' are to the Courts-Martial Appeals Act 1955 (Cth), and references to 'regulation' to regulations made under that Act.

[1] S. 23.

[2] S. 6.

court and its members are selected when needed from a panel of eminent lawyers.[3] To date, the Tribunal has heard ten appeals. Compared with the large number of appeals heard elsewhere,[4] this number is small indeed ; however, already the influence of the Tribunal on the justice being administered in Army, Navy and Air Force courts-martial is very noticeable.

To understand fully the effect of the Tribunal decisions it is necessary to glance at how military law operated at the court-martial level in Australia before 1955. The illustrations that follow are typical of the problems that can arise. No attempt is made to evaluate the procedures in the large and increasing number of cases which are tried summarily by commanding officers and from whose decision there is no appeal to the Tribunal. The only protections in these cases are the Service procedures of confirmation, review and consideration of the accused's petition by superior officers and, perhaps, ultimately by the Judge Advocate General. The generalisations refer to Army and R.A.A.F. procedures. The R.A.N. procedures are often different.

Courts-martial are an anomaly from a judicial point of view. They developed under ' leveller ' influences in the Cromwellian army. They consist, usually, of five officers, one of whom acts as President. There is also a judge advocate and a prosecuting officer and the accused may be represented by a friend or qualified counsel of his own choice. The procedure followed is contained in the respective Manuals of Military Law and Air Force Law for the Army and Air Force, and in the B.R.11 in the Navy. These are the ' bibles ' of military and naval lawyers. The relevant Australian statutes are the Defence Act 1903-1956 (Cth), the Air Force Act 1923-1956 (Cth) and the Naval Defence Act 1910-1952 (Cth). Regulations made thereunder also apply. Laws, statute and otherwise, of the United Kingdom are often made applicable by these statutes to the Australian serviceman.[5] This has the result that repealed English laws are often applied to Australian servicemen but not applied to English servicemen on service in Australia. In the Manuals there are statements of the law to be applied but no authority is given and there is uncertainty whether they are the law or merely expressions of some unknown author's opinion on the law. Both the substantive and adjective laws are peculiar to the Service in which the accused serves. There is no uniform code for the three Services. Some Service offences are common to the ordinary criminal law to which a serviceman is also subject. In a court-martial, a plea of autrefois acquit or autrefois con-

[3] S. 8.

[4] By 1962 the United States Court of Military Appeals had considered some 15,000 petitions, the United Kingdom Courts-Martial Appeal Court 305 applications for leave to appeal, Canada 63 and New Zealand 9. Some of these figures, being based on judgments given, may not be accurate.

[5] Defence Act 1903-1956, s. 88 (Cth).

vict in an ordinary criminal court will be a defence, but an acquittal or conviction by a court-martial may not be pleaded as a defence in an ordinary criminal court.[6] Theoretically then, a serviceman can be tried twice for the same offence although visiting forces servicemen under visiting forces legislation can only be tried once, and if a serviceman successfully appeals against a court-martial conviction he can not be tried again by any other court.[7] The relevance of a non-compliance with the Judges' Rules, if it arose in a court-martial, is still uncertain. In an increasing number of matters, Australian law and particularly Australian criminal law, is moving away from English law,[8] yet, there seems little doubt, for example, that when an Australian serviceman is charged with an offence under 'the general [devil's] article', *i.e.* conduct to the prejudice of good order and 'military' discipline, he will be judged by English and not by Australian law. Many of these uncertain aspects of Australian military law will only be completely remedied by the enactment of a uniform code of military law. In the meantime the Tribunal deals with the problems that arise before it but is unable to introduce any major reforms. It does its best to determine the applicable law and insists that the minimum standards at courts-martial be no lower than those which courts of criminal appeal demand in trials at Quarter Sessions.

It is here that the judge advocate's position has been spotlighted. Historically, his was a strange role. As his title suggests, he was not a judge and for many years he was more advocate than judge. He merely advised the court on questions of law and his functions always included duties to assist the court, the prosecution and the accused. He is not in charge of the court as is a non-military judge. The President (usually his senior officer) controls the court and is also a member of the jury. Some of the judge advocate's difficulties result from the service view that courts-martial are not so much courts of law but courts of honour and true descendants of the old court of chivalry. The members are officers trained in Service traditions of discipline and efficiency, and there is nothing strange to them when one of their number, charged with an offence against those Service traditions, comes before them to be tried. It is not surprising when justice miscarries through an excess of zeal on the part of a judge advocate who forgets the impartial nature of his position and thinks of himself as a superior officer representing the Service against which some offence has been committed.[9] There are many professional disciplinary tribunals where similar problems exist and there are only rare suggestions of an infringement of the basic rules

[6] *R. v. Aughet* (1918) 34 T.L.R. 302, 13 Cr. App. R. 101; Army Act s. 162 (U.K.) (1881).
[7] S. 41.
[8] *Cf. Parker v. The Queen* (1963) 37 A.L.J.R. 3.
[9] See examples of cross-examination by the judge advocate in the appeal of *Schneider infra* p. 99 and the appeal of *Feiss infra* p. 102.

of natural justice. In those cases there is less of the zeal that one finds at courts-martial and the accused person has voluntarily entered the profession and subjected himself to its rules. Again, in such situations the parties involved are more likely to be equals in power and status. In the armed services where the young civilian serviceman is often a conscript, the argument that he takes the Service rules for better or for worse seems a little thin.

The court-martial is a jury, but a jury with a difference : it is judge of fact and of law, and it also decides on sentence. It can disregard the judge advocate's advice to it on the law it should apply. Strange situations can arise on interlocutory matters. A submission of no case to answer at the close of the prosecution case is not made to the judge advocate in the absence of the court—it is made to the court who are the jury, and they can disregard the judge advocate's advice. The judge advocate's advice on the law may be faultless—it may be that there was no case to answer and yet the court-jury may hold that there was, and convict. Suppose, again, evidence of a confession is tendered against the accused. He challenges its admission because it was not made voluntarily. In the Army and the R.A.A.F. the examination on the *voire dire* takes place in the presence of the court. If he is asked by the prosecuting officer ' Alright, but is the confession true ? ' and he answers ' Yes '[10] it is extremely unlikely that the court will be inclined to acquit even if it excludes the confession as not being voluntary. In the ordinary criminal trial such evidence would never get to the jury.

As the Tribunal's judgments expose the uncertainties and anomalies we can expect legislation to introduce reform. Service life is changing and old concepts which seemed basic are also changing. It is in keeping with these changes that the Tribunal should ' civilianize ' the procedures at courts-martial. It must not be forgotten that the 1955 Act did not itself change any Service law. It merely engrafted the system of appeals to the Tribunal on to the existing Service system of confirmation, review and petition. The presentation of an unsuccessful petition was made a pre-requisite to an application for leave to appeal.[11]

Since 1955, there have been ten appeals and the judgments are not to be found in any series of reports. One can read in the judgments the determination of the Tribunal to play an educative as well as an appellate role. Of the ten, the appeal of *Marwood* failed for a technicality and of the other nine, six succeeded. In *Marwood's* case, it became apparent on the application for leave to appeal that the petition to Air Board had not been properly endorsed as required by regulation 6. The defect was considered fatal, and, as it was held that there was no power to extend time for the presentation of another petition, the appeal went no further.

[10] *R. v. Hammond* (1941) 28 Cr. App. R. 84.
[11] S. 20 (2).

It was argued that time did not run until the conviction had been promulgated and that promulgation had been defective, but the Deputy President's view was that ' promulgation ' meant ' notifying the accused of the confirmation of finding and sentence '. It was not a ruling and the point is still open. The *Marwood* failure was unfortunate because the appeal would have raised the important question of whether a serviceman could be convicted of an offence alleged to have been committed before he became a serviceman.

The appeals to date that have proceeded to judgment are those of *Schneider* (R.A.A.F.), *Feiss* (R.A.A.F.), *Cox* (Army), *Goodwin* (R.A.A.F.), *Johnston* (R.A.A.F.), *McCann* (Army), *Manion* (Navy), *Adams* (R.A.A.F.) and *Muncey* (Army). The judgments have resulted in a new emphasis at courts-martial on the necessity for a fair trial. Certainly, the judgments have been noted with concern by the legal branches of the Services.[12] This writer has no knowledge of the percentage of convictions at courts-martial which are quashed or varied on review or by petition in the particular Service and which never get to the Tribunal, but suspects it is considerable. The Judges Advocate General are civilian lawyers, and well aware of the attitude of the Tribunal to inadequate standards at the hearing. The standards can be expected to improve still further.

The appeals to date

The Schneider appeal

The first appeal to come before the Tribunal was the appeal of *Schneider* and it failed. Schneider was charged with refusing to obey an order, using threatening language, escaping from arrest and conduct to the prejudice of good order and Air Force discipline.

When his appeal came on for hearing he had served his sentence and been discharged. This was the first point argued, the Tribunal deciding that notwithstanding his discharge, he still answered the description in section 20 of the Act of a person who had been convicted by a court-martial. The Tribunal has power under section 60 of the Act and regulation 11 (3) to grant legal aid. Regulation 11 (3) requires the Tribunal to be satisfied that the appellant has insufficient means to enable him to prosecute his appeal before it can grant legal aid. Schneider applied for legal aid and relied on a statutory declaration stating simply that he had insufficient funds for the reason that he had been imprisoned for five months without pay and that any money he had in reserve had been used up in commitments arising from this imprisonment. This was held to be not sufficient evidence, and he was permitted to supplement his statement by oral evidence on oath. The Tribunal granted legal aid, but declared that an appellant had no right to supplement his statutory declaration by oral evidence.

[12] See the agenda for the 1963 Australian Army Legal Corps Conference in Canberra.

An application was made to call fresh evidence pursuant to the provisions of section 31 of the Act. In a non-military court, such applications are usually made in support of an application for a new trial, but the Tribunal has no power to order a new trial. It can only allow or dismiss the appeal and, in certain cases, substitute findings and sentences.[13] Section 31 gives power to receive evidence at the appeal but gives no indication of how the new evidence is to be considered.

Counsel for the appellant informed the Tribunal that the proposed new evidence was no different in substance from the evidence which had been given at the court-martial and no written statements of the proposed new evidence were put before the Tribunal. This no doubt explained the failure of the application. The Tribunal, however, indicated its views on its duty to receive new evidence, but reserved the right to refuse to be bound by these views should exceptional cases occur in the future. It quoted with approval the statement dealing with the functions of the Courts-Martial Appeal Court in England by Lord Goddard C.J.:

> We cannot try anybody; we do not try anybody. We sit merely as a court of appeal, and as a court of appeal our duties are these. First of all, we have to see that the finding is one that is possible in law. Then we have to see that there was evidence before the court-martial which supported their finding. Then, if any question of law arose, we have to see whether or not the law has been correctly laid down by the judge-advocate, who nowadays is a qualified lawyer in every case before a general court-martial, I think, and in most cases before a district court-martial.[13A] We have to see that the summing up was adequate and, as we have repeatedly said in the Court of Criminal Appeal, the summing-up is adequate if it states fairly the facts for the prosecution and states fairly the nature and evidence of the defence. It is not necessary to go into every point the defence has raised. It is not necessary to go into the evidence of every witness. The court has to be reminded of the nature of the defence, and it is desirable that they should be reminded in substance, but not in detail, of the evidence given for the defence. It is not our function to re-try the case because we do not see the witnesses, and no court of appeal does re-try the case in the sense of substituting themselves either for a jury in a civil case or for a court-martial in the case of one of the services.[14]

The Tribunal's view was that new evidence should only be taken in an exceptional case and the Tribunal would have to be satisfied on three points : (1) that the evidence that the proposed witness can give is apparently credible (the witness should make a statutory declaration setting out the evidence he can give—a statement from the Bar table is not sufficient); (2) that the evidence, if believed, must be such that it would be likely to affect the finding of the court-martial; and (3) a

[13] Ss. 24-28.

[13A] Not so in Australia.

[14] *R. v. Linzee* [1956] 3 All E.R. 980, 981-982.

satisfactory explanation must be offered for the failure to call the evidence at the trial. These three points are the same as are required to satisfy a civilian court. It appears that, if these requirements are satisfied, the Tribunal will uphold the appeal without finding that it accepts the truth of the new evidence itself. The Rules of Procedure dealing with courts-martial were considered and declared to impose a particular burden upon commanding officers to ensure that all ranks who have duties in connection with the preparation of a trial by courts-martial should observe both in the letter and the spirit the provisions of the Rules of Procedure.

Schneider's counsel had submitted that the words used and alleged to constitute a command were no more than a suggestion or a piece of advice, and that to constitute a command the words used must be such as go beyond advice or suggestion. The argument failed as it later did in the *Manion* appeal,[15] it being held that although the most satisfactory course for a superior officer who intends to give a command is to use the language of direct command, it was impossible to say that all words which are capable of another interpretation could not also be the subject of a command. On the charge of resisting an escort whose duty it was to have him in charge, the defence at the trial had been that the escort had used unnecessary force in effecting the arrest, and that the accused in resisting this excessive force was merely defending himself. The judge advocate's summing up was critically examined. Although the Tribunal found that the Court might have been more clearly and distinctly told that if the arresting escort used more than necessary force and the resistance of the accused was directed to defending himself only against the use of that unnecessary force and not against his continuing arrest, he would be entitled to an acquittal, and also that the accused would be entitled to an acquittal if the Court were left in doubt whether more than necessary force was used in effecting the arrest and that the accused resisted only to the extent of defending himself against such unnecessary force and was not simply resisting his escort ; yet, as a whole, the summing up of the judge advocate was sufficient. A point argued as a matter of ' principle ' was that at the trial a single charge sheet had included charges relating to the different offences alleged to have been committed by the accused at different times and on different days. No objection had been taken to the procedure at the trial and no application had been made by the accused for a separate trial in respect of the different offences. There was no suggestion of prejudice. The Tribunal's view was that it was preferable for an accused to be arraigned on different charge sheets in respect of different groups of charges. Before dismissing the appeal, the Tribunal adopted its educative role and commented on the duties of the judge advocate at the trial and on the importance of his not descending

[15] *Infra* p. 113.

into the arena and assuming the mantle of a prosecuting officer.[16] One witness for the defence had been recalled merely for the purpose of being cross-examined by the judge advocate. The tone and language of the questions were such that had they been used by a non-military judge there is little doubt a new trial would have been ordered. There is no mention in the judgment of this aspect having been argued by the accused's counsel and it appears as an independent matter that troubled the Tribunal. Five years later this appeal might well have been upheld. A warning was given that cross-examination was not the function of the judge advocate. The judge advocate could ask questions particularly to assist the accused, but his paramount duty was to maintain an impartial position.

The Feiss appeal

Feiss was charged with neglect to the prejudice of good order and Air Force discipline in that he had received a certain hand package from the safe hand officer, and failed to ensure the safe custody of the package. An application was made under section 18 (2) of the Act for an order that in the interests of the defence of the Commonwealth all members of the public be excluded during the hearing. This was refused, but an order was made that no report of the contents of a document tendered in evidence be published. The Tribunal refused to embark on any exhaustive comment on the scope of section 18 (2) with the remark that such a statutory discretion was best left unfettered. An order was made under section 21 (1) (b) of the Act extending the time for making the application for leave to appeal to enable the accused to include certain additional grounds of appeal. Inadequate grounds had been filed before the accused was represented. No principles were declared as to how this discretion was to be exercised in the future but liberality can be assumed. Further affidavit evidence was admitted and the deponents cross-examined. Evidence of a handwriting expert was excluded because it would have been available at the time of the trial.[17] The Tribunal took as its guide on the proviso to section 23, the words of Fullagar J. in *Mraz v. The Queen* (*No.* 1):

> It is very well established that the proviso to s. 6 (1) does not mean that a convicted person, on an appeal under the Act, must show that he ought not to have been convicted of anything. It ought to be read, and it has in fact always been read, in the light of the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to

[16] *Cf. Jones v. National Coal Board* [1957] 2 Q.B. 55.

[17] See *Nash v. Rochford R.D.C.* [1917] 1 K.B. 384, 393 *per* Scrutton L.J., and the appeal of *Schneider supra p.* 99.

> him of being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says he shall have, and justice is justice according to law. It is for the Crown to make clear that there is no real possibility that justice has miscarried.[18]

The following grounds of appeal were then considered: (1) the bias or the appearance of bias on the part of the President of the Court-Martial; (2) a wrongful rejection of evidence; (3) unreasonable and improper interference by the Judge Advocate; (4) wrongful recall of a prosecution witness after the closure of the defence case; (5) misdirection by the Judge Advocate.

As to (1), Feiss tendered evidence of an opening address by the President of the Court-Martial which by order, had not been recorded. Its terms were to the effect that the loss or disclosure of classified information was very seriously viewed and if evidence of such information was to be given, the Court might be closed ; any evidence heard was not to be repeated outside the Court; divulging classified information was very serious and he had been instructed by higher authority to take every precaution regarding breaches of security during the trial; higher authority took a particularly serious view of this kind of offence and persons divulging what was said at the Court-Martial might well find themselves in a similar position to that of the accused. The appellant's submission was that the President's opening address left him and all others present with the strong feeling that the President had been briefed by someone in higher authority. This was the ' Court of Honour ' approach. The Tribunal was informed by counsel for respondent that the President had, on the day before the Court-Martial, attended a conference at Headquarters Home Command, and that he was there given a ' brief ' which disclosed that the contents of the safehand package contained confidential material. The purpose of the ' brief ' was to prevent improper disclosure of information at the Court-Martial and contained certain recommendations as to what action should be taken at the trial in certain eventualities. He was to safeguard Commonwealth security and not restrict the Court in its administration of justice. The well known principles expounded in *R. v. Sussex Justices. Ex parte McCarthy*,[19] *R. v. Essex Justices. Ex parte Perkins*[20] and *R. v. Bodmin Justices. Ex parte McEwen*[21] were relied on by the appellant who claimed that the President's remarks were such as to create a strong impression in the minds of reasonable persons that the Court-Martial had a bias against him: ' bias ' meaning ' a real likelihood of an operative prejudice whether conscious or unconscious '. The Tribunal referred to *Rex*

[18] (1955) 93 C.L.R. 493, 514.
[19] [1924] 1 K.B. 256, 259.
[20] [1927] 2 K.B. 475, 488-489.
[21] [1947] K.B. 321.

(*De Vesci*) *v. Justices of Queens County*[22] and *Reg. v. Nailsworth Licensing Justices. Ex parte Bird* where Lord Goddard C.J. said, '. . . the mere fact that a justice may be thought to have formed some opinion beforehand is not in my opinion enough to upset the decision',[23] and *Reg. v. Australian Stevedoring Industry Board, Ex parte Melbourne Stevedoring Company Pty. Ltd.*, where the High Court had said:

> But when bias of this kind is in question, as distinguished from a bias through interest, before it amounts to a disqualification it is necessary that there should be strong grounds for supposing that the judicial or quasi-judicial officer has so acted that he cannot be expected fairly to discharge his duties. Bias must be " real ". The officer must so have conducted himself that a high probability arises of a bias inconsistent with the fair performance of his duties, with the result that a substantial distrust of the result must exist in the minds of reasonable persons. It has been said that " preconceived opinions —though it is unfortunate that a judge should have any—do not constitute such a bias, nor even the expression of such opinions, for it does not follow that the evidence will be disregarded. . . ."[24]

Although the quoted principles were from judgments in cases of an entirely different kind and the *Feiss* case illustrates the difficulties to be found in imposing civil standards on military situations, the Tribunal came to the view that justice, being required to be not only done but manifestly seen to be done, had in fact, not manifestly been seen to be done. There was no justification for the President's opening address in the Act or the Rules of Procedure. Indeed, they provided that courts-martial were to be conducted in a manner befitting a court of justice and in accordance with the rules of evidence applied in courts exercising criminal jurisdiction in England. Such cases in the future should be met by giving full instructions to the prosecutor who would then be in a position to make such applications and submissions to the court-martial as occasion required. It was of great importance that members of a court-martial have their minds free of any knowledge concerning the charge other than what the law permits.

The Tribunal then considered the wrongful refusal by the judge advocate to allow certain questions in cross-examination of a prosecution witness and stated that if material and relevant evidence was rejected it necessarily followed that a miscarriage of justice had occurred. Dixon C.J. in *Balenzuela v. De Gail* had said:

> The basal fact is that material evidence was erroneously excluded from the consideration of the jury, evidence that touched the question upon which the case turned. It was something the party was entitled to lay before the jury for its consideration. It lies outside the province of the court to inquire into the effect which the evidence if admitted would produce upon the Court if the Court were the

[22] [1908] I.R. 285, 294.
[23] [1953] 1 W.L.R. 1046, 1048.
[24] (1953) 88 C.L.R. 100, 116.

> tribunal of fact, and it lies outside the province of the Court to speculate on the effect which it would have produced on the jury. It is enough that evidence definitely material to the determination of the case was excluded . . . That leaves the unsuccessful plaintiff entitled to a new trial,[25]

Menzies J. said:

> . . . the party aggrieved is *prima facie* entitled to a new trial but a new trial will not be ordered if the evidence rejected could have had no effect with the jury. . . .[26]

The Rules of Procedure 94, 95 (B) and 103 (c), (d) and (f) detailing the powers and duties of the judge advocate and, in particular, his obligation to record the transactions before the Court and record any objections concerning evidence and his advice to the Court on them and the facts that in this case counsel for the accused had not made any such objection or request for the matter to be recorded, and that as a result the Court-Martial had no written record before it of the complete proceedings when it deliberated in closed court on its findings, were considered as possibly restricting the extent of the dicta in *Balenzuela's* case,[27] but they did not overcome the real error which was that defending counsel had been prevented from following a line of enquiry which was plainly relevant.

As to (3), it was clear from a perusal of the proceedings that the judge advocate had in fact closely questioned one of the witnesses for the prosecution and later the appellant himself. Under Rule of Procedure 103 (q) he was entitled and indeed bound to question witnesses ' on any matters which appear to be necessary or desirable for the purpose of eliciting the truth '. But in this case his questioning of the appellant did partake of the character of cross-examination and did result in his deserting the entirely impartial position which is required of a judge advocate. The Tribunal repeated its remarks in the appeal of *Schneider*.[28] As though to emphasise its chosen educative role it excused the judge advocate because he would not have had an opportunity of reading the judgment in *Schneider's* case which had been handed down only two days before the trial. The inference was clear that the Tribunal's judgments were to be read as guides for the future conduct of courts-martial. To their reference in *Schneider's* case to *Jones v. National Coal Board*[29] they added *R. v. Delaney*[30] and also *Yuill v. Yuill*.[31] It was as though they were declaring the principles on which they would act and where the authorities could be found.

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[25] (1959) 32 A.L.J.R. 356, 360; (1959) 101 C.L.R. 226, 236-237.
[26] (1959) 32 A.L.J.R. 361; (1959) 101 C.L.R. 239.
[27] *Supra* n. 25.
[28] *Supra* p. 99.
[29] [1957] 2 Q.B. 55.
[30] [1955] V.L.R. 47.
[31] [1945] P. 15.

As to (4), that a witness for the prosecution had been recalled to give further evidence after the case for the defence had closed, it was clear that there was conflict between the common law reluctance to allow prosecution witnesses to be recalled[32] and Rule of Procedure 86 (D) which provided: 'A Court may call or recall any witness at any time before the finding if they consider it necessary in the interests of justice.' Which principle should prevail? The view that the Rule of Procedure was intended to confer greater powers on courts-martial than they would have had at common law was rejected. The power to recall prosecution witnesses was only to be exercised in the most exceptional circumstances, notwithstanding Rule of Procedure 86 (D).

As to (5), the judge advocate had told the Court that it must either accept or reject the evidence of one of the witnesses. No reference had been made to the possibility that the witness was honest but mistaken in his recollection or that he had honestly but mistakenly reconstructed the events. Again, where there was a direct conflict of evidence the Court had been told that it could not believe both the witness and the accused. There was no direction on the law to be applied should they fail to make up their minds as to who they should believe or if they were unable to determine whether either was a reliable witness. The direction as to the disputed evidence of handwriting was inadequate and misleading. There had been considerable conflict whether certain signatures were those of the accused, yet the judge advocate did not make this point clear and suggested wrongly that there was direct evidence of the accused's signature. This was misdirection on the facts, and although the dictum of Cussen J. in *Holford v. The Melbourne Tramway and Omnibus Co. Ltd.*, 'It is assumed in most cases that the jury, who have or ought to have heard the evidence, will probably correct any mistake of mere fact'[33] was noted, the Tribunal thought that, in this case, the misdirection was dangerous indeed. The trial had been marked by a number of grave departures from what was required in a criminal trial and there had been a substantial miscarriage of justice. Unfortunately, the Tribunal gave no assistance as to which of the grounds alone or together would have amounted to the required miscarriage of justice sufficient to quash the convictions. This was the first appeal in which the respondent was ordered to pay an agreed sum of costs to compensate the appellant for expenses incurred in the prosecution of the appeal.[34]

The Cox appeal

This was an appeal against a conviction for behaving in a scandalous manner unbecoming the character of an officer and gentleman. The

[32] *R. v. Harris* [1927] 2 K.B. 587, 594; *Shaw v. The Queen* (1952) 85 C.L.R. 365.
[33] [1909] V.L.R. 497, 527.
[34] See s. 37.

judge advocate's summing up was the basis of the appeal. The prosecution had relied heavily at the trial on the evidence of certain stains on bed sheets to establish that, in the circumstances, sodomy had taken place. There had been no evidence that the stains were seminal in character, and the prosecuting officer had stated at the close of his case that the Court could not be satisfied of this. However, the Tribunal held that the accused was entitled to a direction from the judge advocate that the stains should have been disregarded. Further, he had dealt incorrectly with the onus of proof, as his language could have suggested that the Court had to be satisfied beyond reasonable doubt of the explanation given by the accused. It was also a common ground that the accused had consumed a large amount of alcohol, and an important defence submission had been that he had no knowledge of any scandalous act and that he had been at all relevant times either drunk or asleep. This was a denial of *mens rea*, and he was entitled to have the judge advocate explain to the Court the effect of drunkenness on *mens rea* and that *mens rea* was essential and had to be proved beyond reasonable doubt. There was no direct evidence of any act of indecency and as the evidence was equally consistent with a number of inferences, some of which were innocent, they should all have been placed before the Court by the judge advocate. The appellant had raised his uncontested good character at the trial and the judge advocate had failed to direct the Court on its relevance. These omissions together amounted to a substantial miscarriage of justice but, as in the appeal of *Feiss*, the Tribunal gave no indication of the relative importance it attached to each omission. 'Justice' meant 'justice according to law', and there was no such justice if matters proper to be considered by the Court-Martial were not fully explained by the judge advocate. The conviction was quashed.

The Goodwin appeal

Goodwin had been convicted of four charges alleging that, being concerned in the care of public property, he had fraudulently misapplied the same. The facts alleged were that he was an accountant officer and had cashed his own cheques from R.A.A.F. moneys knowing that his bank account had insufficient funds to honour the cheques. The principal defences were that he believed that it was permissible for him to cash the cheques in the way he did because a written R.A.A.F. instruction suggested he had this right, that he had no intent to defraud, and that he had reason to believe that his cheques would be met on presentation because he had promises of financial assistance from another airman serving with him. The main grounds of the appeal were that these defences had not been properly explained by the judge advocate. Another submission was that the temporary deprivation of the Commonwealth of its moneys was not a sufficient detriment because the moneys were not interest bearing, but this was rejected.

Again it was held there were serious omissions in the summing up. The Court should have been told that the necessary intent had to be established at the time each cheque was cashed, and that the prosecution had to satisfy the Court that the accused's conduct was designed to induce the Commonwealth to a course of conduct involving some detriment or risk. The onus was on the prosecution to establish the accused's state of mind, and the accused carried no onus of proving that he had an expectation that the cheques would be met on presentation. It was to be expected that he would seek to adduce evidence of this, but it must not be assumed that he carried any burden of proving such an expectation. The summing up had been misleading and defective. It was as though the test was whether the accused had reasonably held his beliefs. It was true that if a prosecution could establish that an accused's belief that his cheques would be met on presentation had no reasonable foundation, it would go a long way to showing that he had no belief at all, but the absence of reasonable grounds for belief was not conclusive against the existence of that belief. It was merely evidence from which it would be open to the Court to infer that the belief did not exist and the finding on that point would only be a finding as to the ultimate issue, which in this case was whether the accused had misapplied public money with intent to defraud. The distinction had not been explained on either of the two occasions when the judge advocate addressed the Court. On the proviso in section 23 (2) of the Act, the Tribunal could not say that, had the Court been properly directed it must have, nevertheless, convicted on each count. Questions of fraud are usually questions of considerable difficulty and it was essential to have complete and accurate directions on the law.

This tendency to express views not strictly relevant to the issues being argued before it is a feature of all the Tribunal's judgments. In this regard it differs greatly from the judgments now being given by the Courts-Martial Appeal Court in England, which are shorter and relevant only to the issues before it. As the standard at courts-martial improves, the Australian judgments should follow more closely the form of the English ones.

The Johnston appeal

There were two convictions: (1) with obtaining money by false pretences contrary to section 32 (1) of the Larceny Act, 1916 (U.K.), and (2) in a document signed by him knowingly making a false statement. The facts alleged were that Johnston had made certain statements that he was maintaining his wife and home in order to obtain moneys and an allowance from the Air Force. The conviction on the first charge had not been confirmed and the appeal was in respect of the second conviction. The accused had previously appeared before a Court-Martial for similar offences, but, following an objection by his

counsel, that trial had been adjourned without prejudice to further proceedings if the convening authority so decided, and he had been released from arrest. Later the convening authority had dissolved the first court and convened the second court.

At the second trial 'a plea to the general jurisdiction' of the Court under Rule of Procedure 34 was entered. The submission was that the dissolution order was invalid and that the first court was still in existence and seized with the duty of trying the accused. He was in peril in two places. The submission was that section 53 of the Air Force Act, (U.K.), which applied, was exhaustive of the circumstances in which a court-martial could be dissolved, and that none of the circumstances set out had, in fact, occurred. The judge advocate had advised the second Court that it had jurisdiction to proceed. At the appeal the Tribunal considered this submission and cited *R. v. Durkin*,[35] where the English Courts-Martial Appeal Court had held that there was 'a common law of the Army' power to dissolve a court-martial if the convening authority considered that the proceedings were in some way irregular, or that matters had arisen which were prejudicial to the accused. The position was analogous to that prevailing in civilian courts where the court always had a power to discharge a jury and begin the case over again if the interests of justice so required. Section 5 of the Air Force Act 1923-1956 (Cth) was held to adopt not only the provisions of the United Kingdom Air Force Act, but also the common law applicable to members of the R.A.F. in England, and if the provisions under section 53 of the United Kingdom Act as to courts-martial were not exhaustive of the power to dissolve an R.A.F. court-martial they should not be so construed here. The same implied power to dissolve a court whenever the interests of justice so required existed also in the R.A.A.F. In any event, the settled rule of English criminal law was that 'the only pleas known to the law founded upon a former trial are pleas of autrefois convict or autrefois acquit for the same offence.'[36] If a former trial had been abortive with no verdict, there was neither a conviction nor an acquittal;[37] nor was a direction of a Judge who discharged a jury on a former trial examinable.[38] Some interest was expressed in section 95 of the Air Force Act, 1955 (U.K.),[39] which now confers on a convening authority an express power to dissolve a court-martial where it appears to be necessary or expedient to the administration of justice, but it was held that section 95 was not legislative recognition that *Durkin's*[40] case was bad law.

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[35] [1953] 2 All E.R. 685.

[36] *Archbold on Pleading, Evidence and Practice in Criminal Cases* (35th ed. 1962) ss. 422, 435.

[37] *Winsor v. The Queen* (1886) L.R. 1 Q.B. 390, 395.

[38] *R. v. Lewis* (1909) 2 Cr. App. R. 180; *Reg. v. Charlesworth* (1861) 1 B. & S. 460; 121 E.R. 786.

[39] Not applicable in Australia.

[40] [1953] 2 All E.R. 685.

The accused had also entered a plea in bar, and the judgment contains a lengthy and scholarly analysis of this peculiarly Service defence of condonation. The submission was that the dissolution of the first Court could only be justified legally under section 53 and if there was no such legal justification it had to be assumed that the dissolution had some other proper purpose and this could only be an intention to condone the offences. As the Tribunal had ruled otherwise on the effect of section 53, the submission failed, but condonation as a defence was fully considered. As a defence to criminal offences it was peculiar to the military code. Distinctions were drawn between pardon, condonation and *nolle prosequi*, and a reference in Clode's *The Administration of Justice under Military and Martial Law*[41] to *nolle prosequi* was criticised as showing misunderstanding.[42] Two aspects of condonation were left open in the lengthy *obiter dicta* in a manner that suggested the Tribunal will consider itself bound by its own decisions. The first was whether restoration to duty was essential, and the second, whether it was necessary to communicate the condonation to the accused. Final answers were not given, but it was thought to be essential that in some manner or other the offender should have been restored to the status which he had occupied prior to being charged with the offence alleged to have been condoned, and that although an express communication of the condoning intent to the accused was not necessary, it was essential for some overt act to have come to his knowledge from which the condoning intent could be reasonably inferred. In any event, no inference to condone could be drawn in this case, because only a few days later a second court had been convened to try the offender again in respect of the same offence.

The Tribunal then considered certain grounds of appeal based on a refusal by the second court-martial to grant an adjournment sought by the defence. The adjournment had been sought in order to procure the attendance of a certain witness to give evidence on the condonation issue, and to allow the defence time to prepare its case in relation to certain additional evidence. The Tribunal thought that the prosecution had acted quite wrongly in failing to take steps to procure the attendance of the witness. A court should entertain applications for adjournment in a liberal manner, and it was unfortunate that the prosecuting officer had stated that he opposed the adjournment as a matter of principle, and that he should have given the Court so little guidance as to the principles which should guide the exercise of their discretion. Adjournments almost always involved the defence no less than the prosecution in delay and additional costs. Spurious applications were less common than often thought and where an adjournment was sought for the purpose

[41] (1872) 124.

[42] On the effect of *nolle prosequi* see *Commonwealth Life Assurance Society Ltd. v. Smith* (1938) 59 C.L.R. 527, 534.

of calling a material witness or to enable the defence to prepare its case, one would normally expect that a court would grant the application.[43] The judge advocate appeared to have proceeded on the view that an application for an adjournment had always to be supported by sworn evidence and that a statement from the Bar table was not sufficient. This was plainly contrary to the provisions of Rule of Procedure 39A, which permitted the Court to act on any statement or evidence. The Tribunal was by no means satisfied that, had a proper direction been given on the application, the adjournment would have been refused. The submission that the witness to be called was the President at the previous court-martial and that it would have been a breach of his oath had he been permitted to give evidence in the second court-martial was considered[44] but rejected, because it did not appear that the evidence proposed to be given would necessarily involve a breach of that oath. The proper time for determining whether any breach of the oath would be involved was when the evidence was actually sought to be elicited and not before. Refusals to grant adjournments amount to a miscarriage of justice within the meaning of section 23 (1) (b) of the Act,[45] but in this case, the evidence of the witness would not have materially altered the defence of condonation already raised, and it followed that no substantial miscarriage of justice had occurred.

Other grounds of appeal were that no new summary of evidence was taken for the second trial and a notice of intention to call fresh evidence had been served late. These failed, because no application for an adjournment had been made. There could be occasions when it would be proper to take a fresh summary of evidence rather than serve a notice of intention to call additional evidence, but the taking of a new summary of evidence was not a condition precedent to the jurisdiction of the second court. The prosecution could serve a notice of an intention to call fresh evidence, and if this was served late an accused would be entitled to an adjournment or to have his cross-examination of the witnesses deferred. A prosecutor in a second trial is not bound to rest on the same evidence as was offered at the first trial.

The Tribunal thought that in his final summing up the judge advocate should have told the members of the Court that, notwithstanding that they had ruled that there was a case to answer, and that the accused had neither given nor adduced evidence, they were still entitled to acquit him.[46] There were other omissions. For example, if there was a possibility that words had been used with a special meaning then the Court should be

[43] *Cf. McManamy v. Fleming* (1889) 15 V.L.R. 337; *McKeering v. McIlroy, Ex parte McIlroy* [1915] St. R. Qd. 85.

[44] See Rule of Procedure 26.

[45] See *Stirland v. D.P.P.* [1944] A.C. 315, 321 *per* Viscount Simon L.C.; *R. v. Cohen and Bateman* (1909) 2 Cr. App. R. 197 ; *R. v. Haddy* [1944] K.B. 442.

[46] *May v. O'Sullivan* (1955) 92 C.L.R. 654, 658.

told to consider whether they were used with their ordinary or their special meaning. Again, the judge advocate had neither stated nor properly summarised the evidence in respect of the charges, but to this the Tribunal said that it was not always necessary to state or summarise evidence to the Court; after all, they are presumed to have heard it.[47] It was also essential in cases like this with a strong colour of fraud that the judge advocate should direct the Court to consider the evidence in relation to each of the charges separately. It was essential in considering the second charge, for example, to disregard such of the evidence as related solely to the first charge. The summing up was defective and had resulted in 'a miscarriage of justice' within the meaning of section 23 (1) (b). However, the proviso in section 23 (2) applied and the appeal was dismissed.

The McCann appeal

McCann was charged with being drunk and with using insubordinate language to his superior officer. The trial was one involving disputed questions of fact, it being alleged that there was personal animosity between the principal witness for the prosecution and the accused. The main basis of the defence was that this prosecution witness was not truthful and reliable. At the trial, a report by this witness, the accused's superior officer, setting out his version of the occurrence, had been tendered in evidence and the defence had made much of the discrepancies between the facts in the report and the evidence given.

The Tribunal held that the judge advocate had failed to advise the Court fully and fairly as to these discrepancies, and the complete addresses of both prosecutor and defence on this point did not excuse the inadequacies. One particular passage of the summing up was strongly criticised: 'After giving the matter very careful consideration I have come to the conclusion, I have a choice of two alternatives, either to review the whole of the evidence on this issue or to review none of it. You will be pleased I have chosen the latter.' The accused had not had a trial according to law, and there had been a miscarriage of justice within the meaning of the Act. This can be compared to *R. v. Tillman*,[48] where the judge's words to the jury: 'I do not think that I can help you much, you heard the evidence. It is for you to decide.', were the reason the conviction was reluctantly quashed by the Court of Criminal Appeal.

Opinions were expressed on two other matters. At the trial, the defence had applied unsuccessfully under Rule of Procedure 75 to have a witness called for cross-examination. The rule was considered to be only a restatement of the traditional practice followed in Australia and England

[47] *Holford v. The Melbourne Tramway and Omnibus Co. Ltd.* [1909] V.L.R. 497, 527.
[48] *The Times* 6 February 1962.

on the calling of witnesses for purposes of cross-examination.[49] If a prosecutor did not intend to examine a witness he should, unless there are exceptional reasons to the contrary, nevertheless place him in the witness box so that the defendant may have an opportunity of cross-examining him. It was undesirable for a prosecutor to join in a battle of tactics with counsel for the defence in respect of these matters, and the judge advocate should never have said ' This is essentially a matter of tactics. It is a considered manoeuvre by the defence . . .' The other point was that the judge advocate had marked certain passages of the evidence given before the Court and had referred the Court in his summing up to the passages which he had marked. This was done without the consent of and without revealing the content of such passages to the accused. It was a most undesirable practice.

The Manion appeal

This was the first appeal from a Naval court-martial. Manion was charged with wilfully disobeying a lawful command by a superior officer, and behaving with contempt to a superior officer. Many defences had been raised to the charges, the principal ones being that the words used did not constitute an order; the accused did not believe they were an order; if they were an order, it was to do something in the future, and that when the time arrived the accused was under close arrest and unable to comply with the order and had complied with the order. There were other submissions based on his uncontested good character. The main grounds of appeal concerned the failure of the judge advocate to explain these defences to the Court.

The first submission that no command had been properly given was rejected and the Tribunal repeated what it had said in the earlier appeal of *Schneider*.[50] On the submission that on a command to do something in the future, the offence could not be committed until that time in the future had arisen, and that in such circumstances an accused person may be guilty of contempt, but not wilful disobedience until the time came for the command to be obeyed, the Tribunal considered certain passages to this effect in the Navy B.R. 11 and the Manual of Military Law, and questioned whether they were binding or simply advisory. The judge advocate had accepted the passages as law and, without deciding the point, the Tribunal adopted this view. If it be assumed that to obey the order required the accused to give further orders himself, there were three possibilities : (a) the orders had to be given immediately, in which case the offence was immediately committed or (b) the orders had to be given at a certain later time or (c) they had to be given before the later time. In either (b) or (c) it was open to the Court to find that the accused

[49] See *Ziems v. The Prothonotary of the Supreme Court of New South Wales* (1957) 97 C.L.R. 279.

[50] *Supra* p. 99.

could not commit the offence because he was then under close arrest. Which of the possibilities was to be accepted was a matter to be determined by the Court and it should have been given proper directions by the judge advocate. There had been no reference in the summing up to the other interpretations of the words used which were open to the Court, and although it could not be said that it was not open to the Court to hold that the order required instant compliance, still the judge advocate should have left the question to be decided by the Court. He had given the Court no guidance on these matters where it was entitled to guidance. He had given no directions as to whether the legal submissions of counsel for the defence were correct or not, and the result was that there had been a miscarriage of justice.

With regard to the accused's good character which had been raised and confirmed by independent evidence, the Tribunal referred to *Attwood v. The Queen*[51] and *R. v. Aberg*,[52] and expressed its view that, although good character was a matter which the defence was entitled to have brought to the attention of the Court, to be weighed by them in coming to their decision, this particular failure did not amount to a substantial miscarriage of justice.

The direction on the burden of proof had been only casually criticised by the appellant but the Tribunal considered the judge advocate's direction on the no case submission that: 'You have to be satisfied that a prima facie case has been made out, that means that you have to be satisfied that the prosecutor's evidence which you have heard would lead to a conviction if uncontradicted or unexplained by the accused' went perilously close to suggesting that the onus of proof shifted to the defence. At the close of a case for the prosecution, the question to be decided on a 'no case' submission was not whether on the evidence as it stands the defendant ought to be convicted but whether on the evidence as it stands he can lawfully be convicted. This is a question of law and unless there is some special statutory provision on the matter, a ruling that there is a case to answer has no effect whatever on the onus of proof, which rests on the prosecution from beginning to end. Whether or not the accused calls evidence, the court must be satisfied beyond reasonable doubt that he is guilty.[53] This was a Naval court-martial and the Queen's Regulations and Admiralty Instructions 2126 (8) provided 'the Court shall be guided by the advice of the judge advocate on all points of law.' The judge advocate treated the matter as one of fact, not law, and had suggested that a case to answer indicated a probability of guilt. There had been no direction on the difference between the Court's function at the close of the prosecution case on a

[51] (1960) 102 C.L.R. 353, 359.

[52] [1948] 2 K.B. 173.

[53] *Woolmington v. D.P.P.* [1935] A.C. 462 ; *Thomas v. The Queen* (1960) 102 C.L.R. 584 ; *May v. O'Sullivan* (1955) 92 C.L.R. 654, 658.

' no case ' submission and its function at the end of the trial. These were all serious misdirections and the accused had not had a trial according to law. Although it was possible that a court properly directed would have brought in a verdict of guilty, it could not be said that it must undoubtedly have done so, and consequently section 23 (2) did not apply. In considering whether a conviction of contempt should be substituted under section 25 of the Act, the Tribunal considered what had happened at the trial, namely, that after convicting Manion of the offence of wilful disobedience, the Court had adopted the advice of the judge advocate and not proceeded further with the second charge. There had been no acquittal or finding of any sort. This was pursuant to Queen's Regulations and Admiralty Instructions Article 2184 (2). The Tribunal's view was that, although there was much to be said in favour of the view that the proper verdict would have been to substitute a conviction on the charge of contempt, section 25 of the Act only empowered it to substitute a conviction on the second charge if it appeared that the Court must have been satisfied of facts which proved the appellant guilty of that other offence. It could not be said that the Court must have been so satisfied.

The Tribunal emphasised its educative role by commenting on a direction of the judge advocate that the law presumes that every sane person intends the probable consequence of his acts. This referred to the defence that there was lack of intent. The Tribunal stated that the law did not provide such a presumption. The responsibility of deciding whether an inference of intention should be drawn lay upon the Court and no presumption of law existed to relieve the Court of that responsibility.[54]

The Adams appeal

This appeal was against two convictions of fraudulently misapplying property. The judgment is the shortest delivered by the Tribunal to date, and this is the only appeal in which the summing up by the judge advocate has not been questioned. The submissions were that the evidence did not support the convictions, and that it was a requirement of fraudulent misapplication that the property be initially in the possession of the offender. Both submissions failed. On the question whether the defendant had had possession of the property, the Tribunal held that, if not in his possession, it certainly was in his custody or control, and this was sufficient.

The Muncey appeal

This appeal is the last to be heard, judgment being delivered on 31 January 1964. It was an appeal against an Army conviction for stealing public property.

[54] *Thomas v. The Queen* (1960) 102 C.L.R. 584.

Matters considered but on which the Tribunal gave no decision were the questions of fresh evidence and the use of a view. The first ground upon which the appeal seems to have succeeded was the inadequacy in the judge advocate's direction on inconsistencies in the evidence of two prosecution witnesses. The Tribunal's view was that where a prosecution case turned so much on the evidence of one or two witnesses as it did here and in the appeal of *McCann*, and there were inconsistencies the judge advocate should evaluate the evidence for the assistance of the Court. The second successful ground of appeal concerned the prosecutor's handling of the case. One prosecution witness had made earlier statements in conflict with the evidence he gave. The prosecutor led this from the witness in chief in such a way as to put him forward as a witness of truth and, the defence having elected not to cross-examine, the Tribunal seemed to feel that this confirmed the prejudice the defence had suffered. The prosecutor had deprived the defence of an opportunity to show the witness to be unreliable.

The prosecutor's cross-examination of the accused was also criticised. In the Tribunal's opinion, it was wrong to put to a witness in cross-examination what others had said on a subject and then ask the witness whether he contradicts them or whether he says they are lying.

The Tribunal's final observation probably gives the underlying reason for the success of the appeal. ' Having regard to the way in which the trial was conducted by the prosecutor and the defence, the position of the Judge Advocate was plainly a difficult one.'

Some conclusions and problems

The annual courts-martial rate in Australia is approximately Army 200, Air Force 25 and Navy 12. These figures emphasise the importance of the Tribunal's judgments in the administration of military justice, yet the judgments are not reported in any series of law reports. Some Service lawyers probably get copies sent to them, but the difficulty in finding military case law quickly is a serious handicap to any advocate who is about to advise on or argue an appeal.

The principal lesson taught by the judgments is that the Tribunal expects a judge advocate to sum up at least as competently as a Quarter Sessions judge but the problem is that civil judges have many years of experience at the Bar to draw on, whereas judges advocate usually have little or none. Judges and barristers have continuity of work and judges advocate do not. Again, judges advocate do not control a court as a civilian judge does. They are often junior in rank to the President and sometimes to the prosecutor. With the exception of the appeal of *Adams* the judge advocate's summing up has always been attacked, with differing degrees of success, and this can be expected to continue. It would seem to be possible to so conduct a defence that the judge advocate will almost

certainly fall into error in his directions and a conviction will be quashed on appeal.

An English case, *Reg. v. Renn*,[55] illustrates the difference between the status and power of a judge in a civil trial and that of a judge advocate at a court-martial. A young serviceman on duty in Germany had been convicted of murder by a court-martial there despite overwhelming evidence of provocation. On appeal, Goddard L.J. expressed the view that had the trial been before a civil jury it would almost certainly have returned a verdict of manslaughter and not murder for the reasons that a judge would have summed up in such a way to show that he would have liked a verdict of manslaughter to have been returned and the jury would have mitigated the rigours of the common law. As there was no misdirection and there was some evidence to support the conviction of murder, the Appeal Court could not interfere, but the observations were forwarded to the appropriate authority and the Army Council reduced the sentence to two years imprisonment.

In England judges advocate were civilianised in 1955. They are now civilian barristers appointed by the Lord Chancellor. Their status is roughly equivalent to that of judges and they form no part of the Armed Services. In the United States, 'law officers' (judges advocate) are members of the large and very experienced Judge Advocate Corps and work with a Uniform Code. For these reasons their standard of direction and summing up is higher than ours.

One suggestion for cheaply overcoming the difficulties resulting from a shortage of competent judges advocate in Australia is to form a combined Judge Advocate Service common to the three Services. The combined service would have obvious advantages but there would be difficulties arising out of the differences between the codes of the three Services. The *Manion* appeal may have had a different result if counsel had been aware that the Navy rule on alternative charges was different from the Army and Air Force rule. The latter rule requires an acquittal on the alternative if there is a conviction of the original charge. Navy law does not require a finding on the alternative charge. The big differences exist between the Army and R.A.A.F. on the one hand and the Navy on the other. Perhaps as an intermediate step an interchange of Army and Air Force judges advocate could take place.

A development which it is felt will occur is the adoption of the 1955 British reform giving the judge advocate power to hear evidence and rule on interlocutory questions in the absence of the court. This will equate him more with a civil judge who deals with such questions in the absence of the jury. In the R.A.N. this is already done. Another need is the admissibility of statutory declarations and secondary evidence of bankers' books provided the accused does not require the attendance of

[55] [1957] *Criminal Law Review* 47.

the deponents for cross-examination. But these are piecemeal reforms which would make the practice of military law even more difficult for part-time advocates.

One of the most important problems in the hearing of the appeals is that of time. In Australia, an average of six months occurs after trial, before the decision on the appeal is given. The reasons are often given later. This means that if the accused has been imprisoned, his imprisonment will have to exceed six months, otherwise he will complete his punishment before knowing whether or not his appeal is successful.[56] The hearing of appeals could be hastened by abolishing the review processes within the Services, *viz* confirmation and consideration of the petition. Their purpose is no doubt to give an opportunity to the Services to put their house in order before the appeal is heard, but whether this purpose is achieved or not, they do cause delay which could make the appeal academic. The Tribunal's judgments are as capable of putting Service houses in order as is the system of confirmation and petition.

The procedure for granting legal aid and the willingness of the Tribunal to grant costs against the respondent Air Board, Army Board or Naval Board, is a feature of appeals before the Tribunal. It sets courts-martial appeals apart from ordinary criminal appeals where costs are almost never given, and the legal aid is less liberal.

The Tribunal cannot order a new trial, even though Australian appeal courts generally have power to order a new trial. The Canadian and New Zealand Courts-Martial Appeal Courts have such a power. It is only in England, whence came our model, that new trials cannot be ordered.

There have been suggestions that the Tribunal be changed from an *ad hoc* body to a court and be a regular part of the judicial system of the Commonwealth rather than an exercise of the defence power. Yet, full-time professional judges have weaknesses of a different kind from the weaknesses of part-time members of an *ad hoc* Tribunal. As at present constituted, it brings fresh civilian minds to bear on military problems, minds that are not fully conditioned by years of experience on the Bench or in the Services, and this is an advantage. Although it has been suggested that their status might indicate that they would be loath to challenge some established military procedure, their judgments do not bear this out and they have been most outspoken in their criticism of what sometimes happens at courts-martial.[57]

One outstanding problem that remains for the Tribunal to consider is the ' general article ', *i.e.* conduct to the prejudice of good order and

[56] See the appeal of *Cory* [1963] *Criminal Law Review* 517, where the appellant served his full term of imprisonment before succeeding in the English Courts-Martial Appeal Court.

[57] See the appeal of *Feiss supra* p. 102.

military or Air Force discipline. For centuries this offence has been a basic weapon in punishing conduct contrary to the prevailing Service ethic. It serves discipline well. It may be incompatible with the existence of the Tribunal that it should thus continue. The comments of Lord Reid in *Shaw v. D.P.P.*, an appeal against a conviction for the common law misdemeanour of conspiring to corrupt public morals, an equally general offence, suggest the problem :

> . . . I must advert to the consequences of holding that this very general offence exists. It has always been thought to be of primary importance that our law, and particularly our criminal law, should be certain: that a man should be able to know what conduct is and what is not criminal, particularly when heavy penalties are involved. Some suggestion was made that . . . you cannot tell what is criminal except by guessing what view a jury will take, and juries' views may vary and may change with the passing of time. Normally the meaning of words is a question of law for the court. For example, it is not left to a jury to determine the meaning of negligence . . . I know that in obscene libel the jury has great latitude but I think that it is an understatement to say that this has not been found wholly satisfactory. . . . if a jury is entitled to water down the strong words " deprave ", " corrupt " or " debauch " so as merely to mean lead astray morally, then it seems to me that the court has transferred to the jury the whole of its functions as censor morum, [and] the law will be whatever any jury may happen to think it ought to be, and this branch of the law will have lost all the certainty which we rightly prize in other branches of our law.[58]

The general article is, of course, a statutory and not a common law offence, and in limiting or widening its scope one question will be whether it is a question of law or fact. Has the judge advocate to direct the court whether or not the conduct is capable of being contrary to good order and military discipline, and how far can the court call on its own Service knowledge of what is by custom conduct to the prejudice of good order and military discipline? If it cannot, and evidence is required, then is the court to be expected to disregard its Service knowledge that the offence falls traditionally within the section and to treat it as a question of fact requiring evidence? In some Services the members of the court are entitled to have regard to their own Service knowledge. In America, the Court of Military Appeals in *United States v. Kirksey*[59] was faced with the problem of deciding whether to follow the United States Army and Air Force custom which recognised an unlawful homicide through simple negligence as falling within the general article, or the Navy custom which was to the contrary. The Court stated:

> we cannot hold in the absence of clear code authorisation or long established custom that a negligent omission in this respect rises

[58] [1962] A.C. 220, 281-282.

[59] (1955-1956) 20 *Courts-Martial Reports* 272.

> to the top of dishonourable conduct which is the gravamen of the offence in question.[60]

In *United States v. Hooper*,[61] the Court had to decide whether the public association with known sexual deviates fell within the general article. In deciding that it did, the Court relied on the fact that public association with notorious prostitutes had traditionally come within the article. But in *Reg. v. Owen*,[62] the Canadian Board had said

> ... the judicial notice of general service knowledge introduced a highly speculative element because of inadequate and meagre prosecution evidence ; [but] in the present case there is clearly established a set of facts to which the general military knowledge of the Court can be applied without introducing an element of difficult speculation, for the appellant.

In *Reg. v. Jarman*[63] the English court allowed the use of general Service knowledge in circumstances consistent with the Canadian test. An English opinion can be found in the remarks of Lord Tucker in *Shaw v. Director of Public Prosecutions*,[64] where his Lordship thought in such cases the jury must remain the final arbiters since they alone could adequately reflect the changing public opinion. In *United States v. Lefort* the United States Board of Review stated:

> The coverage of the " general article " is, of course, not limited to those offences heretofore recognized in reported cases. The law is not static. New and different conduct may become established as triable under [the general article].[65]

Another problem is whether *mens rea* is required in the general article. In *Reg. v. Howe*[66] a majority of the Canadian Courts-Martial Appeal Board read *mens rea* in for the reason given that if Parliament had intended to exclude *mens rea* it would have said so. It is clear that the Tribunal will be faced with similar problems in the future. The distaste associate with the devil's article ' is that it covers a wide range of behaviour. The questions will be whether the court *i.e.*, the jury is to be the *censor morum*, or whether it is to be the judge advocate and the Tribunal. What rules can safely be distilled and applied is uncretain. In *Reg. v. Phillips*,[67] the English Courts-Martial Appeal Court held that indecent behaviour by one soldier with another was conduct prejudicial to the good order and discipline notwithstanding that there was no evidence that anyone had observed the conduct, but in America the rule is that conduct to the

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[60] *Ibid.* 273.
[61] (1958-1959) 26 *Courts-Martial Reports* 417.
[62] (1961) No. 18, unreported.
[63] (1953) No. 21, unreported.
[64] [1962] A.C. 220, 289.
[65] (1954) 15 *Courts-Martial Reports* 596, 597.
[66] (1957) No. 4, unreported.
[67] (1961) No. 20, unreported.

prejudice must be direct and not remote conduct.[68] Also, the United States Court of Military Appeals has opined that it is wrong to allow the Services power to eliminate (by lack of use) vital elements from specific crimes and offences and to permit the remaining elements to be punished as offences under the general rule.[69] Put another way, this is a finding that when the legislature enacts specific crimes it intends to cover the whole field. This rule has not been followed in England,[70] but it may influence the Australian Tribunal if it seeks to limit the general article.

So far, the Tribunal seems to have preferred High Court decisions to English decisions to guide it, but the English law of evidence applies at courts-martial, so it is reasonable to assume that English authorities on evidence must be applied. Offences against the general article are subject to English law and English decisions again would seem to be applicable. In *Manion's* case it followed the High Court in *Thomas v. The Queen*[71] rather than the English decisions on intent. Decisions like *Parker v. The Queen*[72] emphasise the problems that will arise. In New South Wales, if an accused calls no evidence he still has no right to have the last address to the jury. In England, he has this right. What will be the attitude of the Tribunal if this question arises?

Military law is a strange thing, it flourishes and is recorded in times of national or international crisis. In prolonged periods of peace it appears to die down and disappear. The work of the Tribunal appears to be of lasting value at the moment. Its tasks and problems are illustrated by the Naval general article which it has yet to consider, *viz* ' scandalous conduct of God's Honour and corruption of good manners '. Lawyers may not know what it means but the Navy has no doubt.

[68] Winthrop, *Military Law and Precedents* (2nd ed. 1920) 723.
[69] *United States v. Norris* (1952-1953) 8 *Courts-Martial Reports* 36.
[70] *Reg. v. Phillips* (1961) No. 20, unreported.
[71] (1960) 102 C.L.R. 584.
[72] (1963) 37 A.L.J.R. 3, 11-12.