THE COMMONWEALTH OF AUSTRALIA

THE COURTS-MARTIAL APPEALS ACT, 1955

No. 1 of 1962

In the matter of an appeal against conviction by Court-Martial

by Surgeon-Lieutenant KEVIN ROBERT JOHN WARREN MANION, Royal Australian Navy.

BEFORE THE COURTS-MARTIAL APPEAL TRIBUNAL

M. V. McInerney, Esq., Q.C. - Deputy President

B. J. F. Wright, Esq. M.B.E. - Member

D. B. O'Sullivan, Esq. - Member

REASONS FOR DECISION

This is an appeal by the abovenamed officer pursuant to leave granted by this Tribunal on 26th April, 1962 against his conviction by a Naval Court-Martial held at Royal Australian Naval Headquarters, Sydney on 11th December, 1961, on the following charge:

N.D.A.
S.12 (a) On the second day of November, 1961 he, Surgeon-Lieutenant KEVIN ROBERT JOHN WARREN MANION, Royal Australian Navy, did wilfully disobey the lawful command of Captain DAVID CHARLES WELLS, A.D.C. Royal Australian Navy, of Her Majesty's Australian Ship VOYAGER, his superior Officer, when ordered to make the Sick Bay bunks available for the temporary accommodation of Trials Officers.

The Naval Discipline Act, s.12, provides as follows:

"Every person subject to this Act who

(a) Wilfully disobeys any lawful command of his superior officer (by whatever means communicated to him); or

(b) uses threatening or insulting language to, or behaves with contempt to his superior officer

shall be liable to dismissal with disgrace from Her Majesty's service or any less punishment authorised by this Act."

At the hearing of the appeal on 2nd and 3rd October 1962, Mr. K. Enderby of Counsel appeared for the appellant and Mr. W. H. Wilson of Counsel appeared for the respondent, the Naval Board.

At the outset, Mr. Enderby informed the Tribunal that the transcript was not an entirely accurate record of what had taken place at the trial, and that at times it might be necessary for him to speak from his own recollection of what had happened. We should mention in passing that it is of importance that the proceedings at a Court-Martial should be properly and accurately recorded. We note that B.R. 11 at p.84 adverts to this matter.

The grounds of the appeal are as follows:

1. THAT the Court-Martial was improperly constituted in that the Judge Advocate who assisted and advised the Court-Martial had previously considered the evidence against the appellant and formed certain opinions about the offences charged. This was contrary to natural justice.

2. THAT the charge on which the appellant was convicted was bad in law in that it did not disclose an offence. The particulars given of the disobedience to an order did not amount, in law, to a disobedience of an order but simply amounted to an order or request to approve or consent or agree with the Sick Bay bunks being used for a particular purpose.

3. THAT the charge on which the appellant was convicted was bad, in law, as being vague, uncertain and ambiguous.

4. THAT the evidence disclosed that no order, in law, had been given to the appellant to do or refrain from doing any act.

5. THAT the evidence disclosed that if the appellant was given an order then it was an order to do something at a future time and that there could be no disobedience of this order until that future time arrived and that the conviction was in respect of a disobedience to the order at the time when the order was given.

6. THAT the evidence disclosed that if the appellant was given an order then it was an order to do something at a future time and that there was no wilful disobedience of this order for the reason that when that future time arrived the appellant was under close arrest and not able to comply with the order.

7. THAT the evidence disclosed that if the appellant was given an order that he did comply with that order.

8. THAT the evidence disclosed that no order had been given to the appellant but that a request to consent to the use of the Sick Bay bunks for a particular purpose had been made to the appellant by Lieutenant-Commander Robertson.

9. THAT the evidence disclosed that there was no evidence of wilfulness on the appellant's part and in fact that there was an absence of wilfulness.

10. THAT there was no evidence of mens rea on the appellant's part and the evidence disclosed a lack of mens rea.

11. THAT as a matter of law the summing up and advice given to the Courts Martial by the Judge-Advocate was defective, misleading and inadequate in that it did not deal adequately or at all with the appellant's defences or the submissions

of the appellant's counsel on the matters set out above and other matters and in particular that the appellant had tendered his good character in his defence and called evidence of his good character YET the Judge-Advocate did not direct the Courts Martial adequately or at all on the effect of the appellant's tendering his good character and how it was to be considered.

12. THAT the Judge-Advocate did not deal adequately or at all with the problem of burden of proof in his advice to the Courts-Martial.

13. THAT the appellant's conviction was against the evidence and the weight of the evidence.

Ground 1 was abandoned at the hearing of the appeal.

At all relevant times, Captain Wells was the Captain of H.M.A.S. Voyager and was the superior officer of the appellant. The appellant, Surgeon-Lieutenant Manion, at all relevant times was the Medical Officer of H.M.A.S. Voyager and was in charge of the Sick Bay.

It becomes necessary to refer shortly to the evidence. It appears that at about 1730 on Thursday, 2nd November, 1961, a steward approached Surgeon-Lieutenant Manion and asked him for the keys to the Sick Bay as the First Lieutenant had instructed him to make up a bunk for a civilian who had come on board that evening. Surgeon-Lieutenant Manion refused to give the keys to the steward. About two and a half hours later, about 2000 hours, the First Lieutenant spoke to Surgeon-Lieutenant Manion and asked him to put up in the Sick ~~Berth~~ BAY one of two civilians who had come aboard. Surgeon-Lieutenant Manion said that he had no bunks available. Shortly after dinner, the First Lieutenant spoke to Surgeon-Lieutenant Manion again - this was somewhere about 2045 hours - when he told Surgeon-

Lieutenant Manion: "I would like the Sick ~~Berth~~ BAY to accommodate a civilian". Surgeon-Lieutenant Manion replied that the bunk was not available as it was for the care of the sick.

Between 2100 and 2130 hours Captain Wells sent for Surgeon-Lieutenant Manion. During the course of the interview Captain Wells said that the Sick Bay bunks were required. "I told him to make it available." According to Captain Wells Surgeon-Lieutenant Manion replied, "I refuse to do it". The version given by Surgeon-Lieutenant Manion was that he said: "I cannot agree to this." Captain Wells then drafted out a signal in the presence of Surgeon-Lieutenant Manion. The relevant part of the draft signal was as follows:

> "Officer (he had been named previously)
> wilfully disobeyed my order to make available
> sick bay bunks between hours of 2300 and 0600
> for temporary accommodation of trials officers
> even on the understanding that occupants vacate
> if bunks are required for the sick."

Captain Wells showed the draft signal to Surgeon-Lieutenant Manion and said: "Are you prepared to obey me." Surgeon-Lieutenant Manion replied: "I cannot agree with this. It doesn't seem right."

Surgeon-Lieutenant Manion then left the Captain's cabin, and shortly afterwards was placed under close arrest. He remained under close arrest until 0600 the following morning when Captain Wells saw him again in his cabin. Captain Wells asked Surgeon-Lieutenant Manion whether he had reconsidered the order of the previous night to make the Sick Bay bunks available, and whether he intended to obey it.

Surgeon-Lieutenant Manion said· "No". He was then landed, and ordered to report to H.M.A.S. "Penguin".

Surgeon-Lieutenant Manion maintained that he had not been given an order, and that he had no intention of disobeying a correctly formulated order.

At the close of the case for the prosecution, the defence made a submission that there was no case to answer and both counsel for the accused and the prosecutor addressed the Court.

At the conclusion of their addresses, the President of the Court stated:

> "I understand that I can clear my mind in the interests of Justice, that I can hear someone who has not been called, and I would like to hear Lieutenant-Commander Worrall who seemed to have something in his mind that the Accused felt he had not received an order."

After some discussion, and after the Judge-Advocate had given certain advice, Lieutenant-Commander Worrall was called by the prosecution, the defence not objecting.

At the close of Lieutenant-Commander Worrall's evidence the defence made further submissions.

After the Judge-Advocate had summed up, the Court adjourned. On returning to Court, the President announced that the Court considered that there was a case to answer.

Surgeon-Lieutenant Manion then gave evidence and called two supporting witnesses, one, Surgeon-Captain Armstrong R.A.N. giving evidence as to Surgeon-Lieutenant Manion's good character.

Evidence of two other incidents was introduced without objection at the trial. Neither incident was in our

view relevant. We mention them only lest otherwise we might be thought to have given sanction to the view that the Court-Martial could properly have taken either of them into account, either for or against the accused.

The first in point of time was that at 1730, Surgeon-Lieutenant Manion told the Sick Bay Attendant:

> "The First Lieutenant wants to put a civilian to sleep in the sick bay tonight. There may be some fuss about it. If you are given an order I want you to obey it."

Evidence of this incident was led as part of the defence case.

The second incident, (introduced as part of the prosecution case), was deposed to by Commander Peter George Elliott R.A.N., and was said to have occurred at about 1045 (a time which scarcely reconciles with the rest of the evidence). This evidence, concerning a wager said to have been made by the accused with Commander Elliott that no one would sleep in the sick bay over the weekend, was in our view plainly irrelevant to establish any ingredient of either of the offences charged against Surgeon-Lieutenant Manion and its effect was likely to have been to create prejudice against the accused. Although counsel for the accused did not object to its admissibility, we are of opinion that it should not have been tendered in evidence, and that the Judge-Advocate should have warned the Court-Martial to disregard the evidence. This he failed to do.

At the conclusion of the evidence, after addresses by counsel for the accused and by the prosecutor, the Judge-Advocate summed up.

We are satisfied from a consideration of the evidence that it was quite open to the Court to hold that a lawful command was given by Captain Wells and that it was understood as a command by Surgeon-Lieutenant Manion.

We are satisfied too that it was open to the Court to hold that there was no compliance by Surgeon-Lieutenant Manion with the command.

We would repeat what was said by this Tribunal in giving its reasons In the Appeal of Schneider No. 1 of 1957 at page 12:

> "We think that in any particular case words alleged to constitute a command must always be examined in the light of the circumstances in which they were used, and that this examination may show clearly enough that a set of words not otherwise supportable as a command was intended by the speaker to be a command, and was so understood by a person to whom they were spoken."

Discipline cannot depend on the mere nicety of words used.

A further defence raised was that the command given by Captain Wells at 2130 hours was one to be complied with at some future time, in that the command was to make the bunks available between 2300 hours and 0600 hours, and that Surgeon-Lieutenant Manion was unable to comply with the command at 2300 hours as he had been placed under close arrest shortly after 2130 hours. That defence would, of course, be equally open if the command was one requiring compliance at some point of time between 2130 hours and 2300 hours. The evidence establishes that the command was a command given shortly before 2130 hours, and it is clear that if there had been no disobedience to the command at 2130 hours, the charge could not be sustained, as after that hour it was not possible in the circumstances of the case for Surgeon-Lieutenant Manion to comply with the command, as after that hour he was under close arrest.

Our attention was drawn to the note in B.R. 11 at page 26 where it is stated:

"When an accused person is given an order which is to be complied with at some future time, and on receipt of the order he says that he will not obey it, he should not be charged with wilful disobedience unless, of course, the time arrives to carry out the order and he does not do so. A mere statement by the accused that he will not obey some order to be carried out in the future is not disobedience, because he may change his mind and obey when the time comes, but consideration should be given to framing a charge of behaving with contempt (vide Note 6 below), which would usually be appropriate; in exceptional cases, where that is not the case, it is probable that the words or actions would fall within Section 39."

Substantially the same view is expressed in Manual of Military Law 1951 Part I at p.206, and also in the 1956 Edn. p.246 note 2(a) as follows:

"2.(a) The disobedience must relate to the time when the command is to be obeyed. If the command demands a prompt and immediate compliance the accused will have disobeyed it if he does not comply at once. If the command is one which has to be complied with at some future time, however short, e.g., an order to parade 'in 10 minutes time,' the person to whom it is given cannot be charged under this section until he has had and fails to take a proper opportunity of carrying out the command notwithstanding that he may have said that he would not obey the command when given it."

We were informed by Mr. Wilson that this statement has always been applied in the Army in appropriate cases.

In Manual of Air Force Law (1939) p.21 s.11 the following passage occurs:

"If the command is of a prospective nature, a man, before he can be guilty of disobedience, must have had an opportunity to obey the command even if he has said, 'I will not do it.' For example, if the command is to take an aircraft into the air in half an hour, then, until the expiration of that time, no offence of disobedience to a lawful command can be committed. If the officer or airman on receiving the command makes a reply implying an intention to refuse, and is put under arrest or in the guard detention room before the end of the half hour, he may be charged under s.8 with using insubordinate language, or under s.40 with conduct of the prejudice of good order and air force discipline in respect of the improper language, but not with the offence of disobedience to a lawful command."

In the Manual of Air Force Law (Vol. 1) (1956) p.264, note 2, the matter is dealt with in these terms:

"2.(a) The disobedience must relate to the time when the command is to be obeyed. If the command demands a prompt and immediate compliance the accused will have disobeyed it if he does not comply at once. If the command is one which has to be complied with at some future time, however short, e.g. an order to 'parade in ten minutes time', the person to whom it is given cannot be charged under this section till he has had, and fails to take, a proper opportunity of carrying out the command, notwithstanding that he may have said that he would not obey the command when given it.
(b) Such a statement by itself is not disobedience because the accused may subsequently repent and carry out the order, but it may amount to insubordinate language under s.33(1)(b)."

The note quoted from B.R.11 at p.26 replaces a note which was to ~~be~~ THE contrary sense, namely:

> "It is not necessary that the time for carrying out the order should have arrived. A clear declaration by the recipient of a command that he will not carry it out when the time for doing it arrives amounts to defiance of the command and is therefore wilful disobedience under this section."

Neither note in B.R.11 was in any way binding as a matter of law on a Naval Court-Martial: as is pointed out in paragraph 1 of the memorandum dated 29th October 1962 submitted by Counsel for the Naval Board, each represents merely an advisory opinion on a point of law. Since the Judge-Advocate adopted the terms of the later note, which are more favourable to the appellant than those of the earlier note, the appellant did not contend that there was any misdirection in this respect. We propose to proceed on the view of the law adopted by the Judge-Advocate (the correctness of which it is not, in the circumstances, necessary for us to determine).

The question is therefore whether it was open for the Court-Martial to hold that the command in the present case was not a future command but was a present command given to the head of a department. The command has to be regarded in the light of the circumstances in which it was given. It was a command given to the head of a department to make the sick bay available between 2300 hours and 0600 hours. No doubt it was a simple command, but compliance with it required orders being issued by Surgeon-Lieutenant Manion, it did not require that he should be in personal attendance at 2300 hours to carry out the command. We may perhaps quote the example set out at page 206 of the Manual of Military Law that "if the command is to turn out for parade in half an

hour, then, until the expiration of that time, no offence of disobedience to a lawful command can be committed, even though he has stated that he does not intend to comply." Such a command is a personal command requiring personal compliance at the stated hour.

The issue for the Court-Martial was whether this command given to the head of a department was one requiring him to issue the necessary orders or instructions to his subordinates immediately or whether on the other hand it was one which required him to issue those orders and instructions only at 2300 hours or at such time (between the time of command and 2300 hours) as would ensure that the sick bay was available at 2300 hours for the temporary accommodation of trials officers.

If the command was of the first-mentioned character, it was not complied with, and at the time when Surgeon-Lieutenant Manion was taken into custody he had already committed the offence.

If it was of either of the last two-mentioned characters, the question would then arise whether the taking of Surgeon-Lieutenant Manion into custody at about 2130 hours prevented him from complying with the order.

The question whether the order was of the first, second or third character was one for the Court-Martial to decide, and it was for the Judge-Advocate to give the directions necessary to enable the Court to arrive at that decision.

We now turn to the summing up of the Judge-Advocate. A ground of complaint is that the summing up by the Judge-Advocate was defective as it did not deal adequately or at all with the defences raised.

It is clear that in his final summing up the only

reference made by the Judge-Advocate to the defence that the order was an order to do something at a future time was in the following passage (p.51, lines 20-23).

> "You have to decide whether you think this was in fact an order and also to decide whether it was to do something immediately or at some future time, and the accused refused there and then to do it."

He did not remind the Court that the words of the draft message shown to Surgeon-Lieutenant Manion by Captain Wells on the night of September 2nd at approximately 2130 hours were "Officer wilfully disobeyed my order to make available sick bay bunks between hours of 2300 and 0600 hours", nor did he remind them of the defence that after 2130 hours Surgeon-Lieutenant Manion could not comply with the order as he was then under close arrest.

It is true that in his advice following the submission of "No case", the Judge-Advocate said that the second point raised was that the accused could not comply with the order because at the time he was locked up. The Judge-Advocate then referred to the passage already quoted from B.R.11 at page 26. The Judge-Advocate then continued:

> "And he goes on, the learned Accused's Friend, and suggests that at 2300 which was the time he was supposed to have obeyed the order he couldn't do so. Now Captain Wells, in his evidence said that the order he gave was that the sick bay bunks were to be made available and that he would restrict the use of them to 2300 to 0600. Now it is for you to decide whether the Captain, when he gave this order, meant that the times 2300 - 0600 were incidental with the order itself. It is for you to decide whether you think that he meant 'You are to do this at 2300' or 'You are to do this now'."

There was however a third construction open, namely whether the order was one which meant "you are to do this between now and 2300". The Judge-Advocate in his final charge, made no reference to what he had said in dealing with the 'no case' submission nor did he incorporate what he had then said as part of his final charge. It is to be observed that the passage from the Judge-Advocate's final charge to the Court on this matter (page 51, lines 20-23, already quoted) contains no reference to the question whether, if the order was one to be obeyed at some future time, the accused was by that time disabled (by reason of being in close arrest) from complying with the order. That matter had clearly been raised by Counsel for the defence in his 'no case' submission (transcript p.24, lines 6 to 13) and in his closing address (transcript p.46, lines 17-19).

It was of course a question for the Court-Martial to decide whether the order was one requiring instant compliance or permitting of compliance at some future time. We are unable to say that it was not (as a matter of law) open to the Court to hold that it was an order requiring instant compliance. The Judge-Advocate was therefore bound to leave this question to be decided by the Court. He ought, however, to have given the members of the Court a direction that if they considered the order was one to be complied with at some future time, then the placing of the accused under close arrest disabled the accused from complying thereafter with the order and that they should therefore consider whether on the evidence they were satisfied beyond reasonable doubt that the accused had disobeyed the order.

The Judge-Advocate gave the Court no guidance on this matter; he did not tell them whether or not the submission of counsel for the defence to which he had referred in advising on the 'no case' submission was correct.

It might perhaps be said that he gave them this guidance inferentially by reading the passage in B.R. 11 to the Court after he had referred to the defence counsel's submission and by telling the Court that it was for them to decide whether Captain Wells meant "You are to do this at 2300" or "You are to do this now".

It might perhaps be said that this direction was unnecessary unless there was some point in determining whether the command was only "to do this at 2300", and that the Court must therefore have understood him to be telling them that B.R. 11 had to be applied by them if they thought the facts brought it into play.

But to such arguments there are, we think, two answers. First, such guidance as was contained in that passage was given in relation to a different issue (the 'no case' submission) than that which arose at the end of the trial on a different state of the evidence. Secondly, on a matter so vital to the determination of the guilt or otherwise of the accused the duty of the Judge-Advocate was to give advice to the Court which was clear and explicit, and not left to be spelt out by inference.

We are therefore ~~the~~ of the opinion that there was in this respect a miscarriage of justice.

A further ground of complaint was that the summing up did not deal with the fact that Surgeon-Lieutenant Manion had tendered his good character in his defence, and had called evidence as to his good character. At common law evidence of good character has always been admissible as evidence to be considered on the question of guilt or innocence. We would refer to the passage in the judgment of the High Court in Attwood v. Queen 102 C.L.R. 353 at 359:

> "The expression 'good character' has of course a known significance in relation to evidence upon

> criminal trials; for it denotes a description of evidence in disproof of guilt which an accused person may adduce. He may adduce evidence of the favourable character he bears as a fact or matter making it unlikely that he committed the crime charged."

Mr. Wilson referred us to The King v. Aberg 1948 2 K.B. 173, where the Court held that it was not necessary to mention character in the summing up as an element to be considered, as that case had been fought on the ground that the person concerned was a person of good character.

We feel however we should apply what was said by the High Court as set out above. Good character is always an element to be taken into consideration, particularly, we should have thought, where the good character was not disputed. The weight of the evidence would depend on the circumstances of the particular case. But it was a matter which the defence was entitled to have brought to the attention of the Court-Martial, and to be weighed by them in coming to their decision. We do not, however, consider that the failure to give a direction on the use to be made of evidence of good character amounts, in the circumstances of this case, to a substantial miscarriage of justice.

Ground 12 raised the question whether the Judge Advocate had dealt adequately or at all with the problem of the burden of proof.

It is necessary now to advert to the course which the trial took.

At the conclusion of the case for the prosecution the defence submitted that there was no case to answer.

The question whether there is or is not a case to answer is essentially a question of law. We would refer on this point to what was stated by the High Court in May v. O'Sullivan 92 C.L.R. 654 at 658:

"When, at the close of the case for the prosecution a submission is made that there is 'no case to answer', the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands he could lawfully be convicted. This is really a question of law. Unless there is some special statutory provision on the subject, 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."

The Queen's Regulations and Admiralty Instructions 2126(8) provides as follows:

"The Court shall be guided by the advice of the Judge-Advocate on all points of law."

In the present case the Judge-Advocate appears to have regarded the matter as one of fact, and seems to have advised on this basis rather than advising the Court on the law. The Judge-Advocate in advising the Court said at p.28:

"You have to be satisfied that a prima facie case has been made out. That means 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."

This statement does not accurately explain the duty of a Court-Martial in relation to a 'no case' submission (Cp. May v. O'Sullivan (supra)). Indeed it goes perilously close to suggesting that the onus of proof shifts to the defence.

FURTHER
~~Indeed~~ it suggests that the Court had, at that stage, to determine that there was a probability that the accused was guilty, whereas what the Court had to do was to determine whether (as the accused's counsel was, by his 'no case' submission, contending), the prosecution evidence was as a matter of law insufficient to establish the guilt

of the accused. Rejecting that submission would mean that at the conclusion of the trial the Court would have to determine whether the whole of the evidence (including, of course, the evidence for the defence) was or was not sufficient to discharge the burden of proof lying on the prosecution.

We have mentioned these matters because it is in the light of them that the final summing up of the Judge-Advocate on the onus of proof must be evaluated.

It should be remarked at the outset that at no stage during his summing up did the Judge-Advocate advert to the difference between the function the Court was called on to perform at the end of the trial, and that which it was called on to perform at the end of the prosecution's case, when the submission of 'no case' was made. In his final summing up the Judge-Advocate referred to the burden of proof as follows in terms which paraphrase a passage in B.R. 11, Chapter 6, paragraph 250 (page 152):

> "The burden of proof lies on the prosecution throughout to satisfy the Court of the accused's guilt beyond reasonable doubt. You must first be satisfied that the prosecutor has proved every fact which is material and necessary to constitute the offence charged. Put generally, you should apply this test to each charge: was the offence charged committed and was the accused the person who committed it? The prosecution must satisfy you on those two questions and if they do so either by means of the witnesses called for the prosecution or the aid of those called for the defence, it is open to you to convict the accused in default of sufficient answer or explanation by him or his witnesses. The accused is not obliged to furnish a satisfactory answer to every point proved by the prosecutor, or indeed admitted by him himself. It is sufficient if his story taken as a whole together with such facts as have been admitted by him or proved by the prosecutor may reasonably be true, and if

> the inference to be drawn from that entire picture is either one of innocence or shows a reasonable doubt whether his guilt has been established the accused must be found not guilty on that charge."

Any defect in the Judge-Advocate's summing up cannot, in this case, be discounted on the basis that this topic had been sufficiently dealt with in the final addresses of counsel: the topic was adverted to once only - in the address by counsel for the defence - and that in terms which understated the burden on the prosecution:

> "I would say you can't be satisfied on the probabilities that he did what was said."

It appears to us that the direction which we have quoted above in extenso was defective for the following reason.

Having regard to the terms in which the Judge-Advocate had directed the Court on the "no case submission" and to the fact that the Court had rejected that submission, there was, in this particular case, danger in that portion of the summing up which commenced with the words "it is open to you to convict the accused in default of sufficient answer or explanation by him or his witnesses...." and continuing to the end of the quotation above. The vice in that portion of the summing up is not cured by the first sentence quoted above. The whole effect of the summing up, when taken in conjunction with the direction on the no-case submission, was to qualify that opening sentence.

The golden thread that runs throughout the web of English Criminal Law must always clearly be seen, that the onus of proof of the accused's guilt beyond reasonable doubt lies throughout upon the prosecution. Except in the case of insanity, and any statutory exceptions, no burden of proof ever lies upon the accused.

If there is a case to answer, then whether or not the defence calls evidence, the question to be decided in the end is whether on the whole of the evidence, the tribunal of fact is satisfied beyond reasonable doubt that the accused is guilty. See Woolmington v. The Director of Public Prosecutions 1935 A.C. 462; May v. O'Sullivan 98 C.L.R. 654; Thomas v. The Queen 102 C.L.R. 584.

We are of opinion that the direction as to the burden of proof constitutes a serious misdirection, and that the accused did not have that to which he was entitled, namely a trial according to law. This failure amounts to a miscarriage of justice.

It therefore becomes necessary to consider two further matters, namely:

(1) Whether this Tribunal should, pursuant to section 23 (2), refuse to allow the appeal on the ground that no substantial miscarriage of justice has occurred

and (2) Whether this Tribunal should instead of allowing the appeal substitute, (pursuant to the power conferred by section 25) a finding of guilty on the charge of behaving with contempt.

There is "no substantial miscarriage of justice" if it can be said that had there been a proper direction a reasonable as distinct from a perverse Court-Martial would undoubtedly have convicted (Cp. R. v. Teitler 1959 V.R. 321 at 335). We think it possible that a Court, properly directed, would have brought in a verdict of guilty, but we are unable to say that it must undoubtedly have done so. Consequently we are unable to say that there has been in respect of the charge laid under s.12 (a) "no substantial miscarriage of justice."

The latter question as to section 25 was raised in a memorandum dated 29th October 1962 submitted by Counsel for the Naval Board after the conclusion of argument on the appeal.

Section 25 is in the following terms:

"25. Where -

(a) a person has been convicted of an offence by a court martial and the court-martial could lawfully have found him guilty of another offence; and

(b) it appears to the Tribunal upon the hearing of an appeal against the conviction that the court-martial must have been satisfied of facts which proved him guilty of that other offence,

the Tribunal may, instead of allowing or dismissing the appeal, substitute for the finding of the court-martial a finding of guilty of the other offence and pass on the appellant, in substitution for the sentence passed on him by the court-martial, such sentence as the Tribunal thinks proper, being a sentence which could lawfully have been passed on the appellant by the court-martial if it had found him guilty of that other offence, but not being a sentence of greater severity than the sentence passed by the court-martial."

To understand this submission it is necessary to state that at his Court-Martial Surgeon-Lieutenant Manion had, in addition to the charge on which he was convicted, been charged under section 12(b) of the Naval Discipline Act, with having, on the 2nd November 1961, behaved with contempt to Captain David Charles Wells, A.D.C., Royal Australian Navy,

of Her Majesty's Australian Ship Voyager, his superior officer.

The Court-Martial, having found Surgeon-Lieutenant Manion guilty on the first charge, did not proceed further on the second charge. In adopting this course with respect to the second charge, the Court-Martial acted in accordance with the advice given to it by the Judge-Advocate.

Queen's Regulations and Admiralty Instructions, Article 2184(2) provides as follows:

"(2) Findings on alternative charges:

Where an accused is charged with more than one offence in the alternative, the court shall consider the offence of greater gravity before it decides to convict of an offence of lesser gravity. Where the court decides to convict the accused of offences of greater gravity than and inconsistent with, any other charges (whether the accused has pleaded guilty to such other charges or not) the court should not proceed to a vote on such other charges and the findings shall contain a statement in the form "having found him guilty on charge ..... the court did not proceed further with charge .... " (viz. the lesser and inconsistent charge)."

In B.R. 11, Chapter 7, p.180, there is a note in the following terms on the provisions of article 2184(2).

"If there is more than one charge against the accused, the court should be careful to consider whether any of the charges relating to one incident or act are alternative and inconsistent ways of regarding the same matter."

After giving certain examples the note continues:

"Where alternative charges are consistent, and the accused is found guilty of the more serious offence, the court similarly should not proceed further with any less serious charge the ingredients of which are

all covered by the finding of guilt on the more serious charge (e.g., common assault, where there is a finding of guilt on a charge of indecent assault).

Findings in this form enable the Court-Martial Appeal Court or the Admiralty, if they think fit, to substitute a finding of guilty on the charge upon which the court did not proceed further. This would not be possible had the court formally acquitted the accused of these alternative charges.

However, where there are alternative and consistent charges, any of which contain some separate ingredients (e.g., assault occasioning grievous bodily harm and striking a superior officer), the court should convict on all such charges which it finds proved."

In his final charge to the Court, the Judge-Advocate said:

"Finally, charges one and two are alternate consistent charges, that is to say they are based on the same set of facts, and it is possible for the accused to be found guilty of each of them.

However, if you find the accused guilty of the first charge you should not proceed further with the second charge the ingredients of which are all covered by the finding of guilt on the second charge."

There seems at first sight some inconsistency between the two paragraphs just quoted, but it is unecessary to pursue this point.

Putting aside for the moment the misdirection as to the general onus of proof, we think there would have been much to be said in favour of the view that the proper verdict here ~~was~~ WOULD HAVE BEEN one of guilty of the second charge (i.e. that laid under section 12(b) of the Naval Discipline Act).

But section 25 of the Courts-Martial Appeals Act

only empowers the Tribunal to substitute a finding of guilty on the second charge if it appears to the Tribunal that the Court-Martial must have been satisfied of facts which proved the appellant guilty of that other offence (c/f. 58 L Q.R. 446 at 447, 448).

While we think it possible that the Court-Martial may have been satisfied of facts which would have warranted a finding of guilty of the offence charged under s.12(b) we are unable to say that the Court must have been satisfied of those facts. For those reasons we do not think that it is open to us to apply section 25 in the present appeal.

Before parting with the case we would refer to the direction of the Judge Advocate that the law presumes that every sane person intends the probable consequences of his acts. The law does not provide such 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. See Thomas v. The Queen 102 C.L.R. 584 at 594,596.

We must allow the appeal, and quash the conviction.

Dated this 21st day of November 1962

Murray V. McInerney
Deputy-President.

B. J. T. Wright
Member

D. B. Sullivan
Member.