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Synopsis of Military Appeals Cases

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SYNOPSIS OF MILITARY APPEALS CASES*

When we undertook the compilation of this *Synopsis* we expressed the hope that it would prove useful to military and civilian attorneys. We began this endeavor as an experiment — an experiment which appears, through a lack of response on the part of the bar, to have been unsuccessful. It is now our intention to discontinue this experiment with this issue unless we have response sufficient to justify its continuance.

GENERAL PROVISIONS. *Persons subject to the Code: Effect of discharge.* Where one is discharged upon the condition that he immediately reenlist he remains liable to prosecution for any offenses committed during his first enlistment.¹

PUNITIVE ARTICLES. *Bigamy.* Although it is *necessary* in a prosecution for bigamy, to show that the first wife was alive at the time of the second marriage, evidence supporting a conclusion that she was “probably” alive is *sufficient* to sustain a conviction.²

Desertion: Intent to avoid hazardous duty. For the purposes of the offense of desertion with intent to avoid hazardous duty, the term “hazardous duty” must include such duty as would be covered by the term “before or in the presence of the enemy.”³

Intent: Effect of intoxication. Where an offense requires intent, intoxication may make it impossible for one to entertain the necessary intent.⁴

Misbehavior before the enemy: Cowardice. An essential element of the offense of misbehavior before the enemy⁵ through cowardly conduct is that the act be the result of fear. Failure to instruct as to this element constitutes reversible error.⁶

REVIEW OF COURTS-MARTIAL. *Review by board of review.* The filing

* This issue of the *Military Synopsis* was prepared for publication by Lewis L. Cosor. Selected decisions of the Court of Military Appeals from January 13, 1953, through March 5, 1953, are summarized.

1. *United States v. Solinsky*, _____USCMA_____, February 2, 1953; cf. *United States ex rel. Hirshberg v. Cooke*, 336 U.S. 210 (1949).

2. *United States v. Patrick*, _____USCMA_____, February 13, 1953. (*Though the rule is apparently self contradictory, it is stated here as it was handed down.* Editor.)

3. *United States v. Cook*, _____USCMA_____, February 19, 1953. See *United States v. Sperland*, _____USCMA_____, September 3, 1952, 7 MIAMI L.Q. 218 (1953).

4. *United States v. Miller*, _____USCMA_____, February 13, 1953; *United States v. Mitchell*, _____USCMA_____, February 13, 1953.

5. Article 99(5), UCMJ.

6. *United States v. Soukup*, _____USCMA_____, January 23, 1953.

of a petition for review of a case by the Court of Military Appeals divests a board of review of jurisdiction over the case. Such petition is deemed to have been filed when it is placed in military channels for transmittal.⁷

TRIAL PROCEDURE. Absence of accused: Escape. If, after the beginning of a court-martial, an accused escapes from custody, the court is not deprived of jurisdiction and may continue the trial even if the offense charged is one for which capital punishment may be adjudged.⁸

Admissibility of evidence: Admissions. It is error to admit in evidence an admission made by an accused who has not been advised of his privilege against self-incrimination.⁹ Any departure from this principle is "generally and inherently prejudicial."¹⁰

Veneral disease in trial for rape. Evidence that the alleged victim of rape was suffering from advanced veneral disease while the accused is free from such disease is admissible. Failure to allow such evidence is reversible error.¹¹

Assistance of counsel: When an accused alleges on appeal that he was denied the effective assistance of counsel he must show that the assigned counsel was obviously incompetent. The Court of Military Appeals will not review counsel's professional judgment.¹²

Instructions: Lesser included offense. Where the accused pleads guilty to a lesser included offense and not guilty to the offense charged, failure by the law officer to instruct as to the elements of the lesser offense does not constitute error.¹³

Referral to prior decisions. It is error for the law officer to refer the court to prior board of review decisions as a substitute for instructions as to one of the elements of the crime.¹⁴ This is similar to referring the court to the Manual in similar situations, which practice has been condemned by the Court of Military Appeals.¹⁵

Joint trials. A joint trial may be had only where the offenses have been committed at the same time and place, are closely related, and are provable by the same evidence. In this matter courts-martial must follow the Federal Rules of Criminal Procedure.¹⁶ Such misjoinder is waived, however, by failure to request severance in the trial forum.¹⁷

Second Trial: Greater sentence. The Code¹⁸ does not preclude a

7. *United States v. Jackson*, _____ USCMA _____, February 11, 1953; Rule 22(b), Rules of Practice and Procedure, USCMA.

8. *United States v. Houghtaling et al.*, _____ USCMA _____, February 26, 1953.

9. Article 31(b), (d), UCMJ.

10. *United States v. Wilson and Harvey*, _____ USCMA _____, February 27, 1953.

11. *United States v. Allen*, _____ USCMA _____, March 5, 1953.

12. *United States v. Soukup*, _____ USCMA _____, January 23, 1953.

13. *United States v. Clover*, _____ USCMA _____, February 6, 1953.

14. *United States v. Chaput*, _____ USCMA _____, January 13, 1953.

15. *United States v. Gilbertson*, _____ USCMA _____, July 22, 1952; 7 *MIAMI L.Q.* 221 (1953).

16. *FED. R. CRIM. P.* 8(b).

17. *United States v. Bodenheimer*, _____ USCMA _____, January 19, 1953.

18. Article 63(b), UCMJ.

second court-martial, ordered by a reviewing agency, from imposing a greater sentence than that which could have been legally imposed by the first court-martial when the error which produced the rehearing does not go to the merits but only to the sentence.¹⁹

Voting and rulings: Conferences between law officer and court. Legal advice as to sentence matters given by the law officer to the court in the absence of the accused and his counsel constitutes prejudicial and reversible error.²⁰

Conferences as to matters of form between the court and the law officer outside the presence of the accused and his counsel constitute error but are not prejudicial and, therefore, will not be the basis of reversal.²¹

19. *United States v. Chapman*, _____USCMA_____, January 19, 1953.

20. *United States v. Woods and Duffer*, _____USCMA_____, February 19, 1953.

21. *United States v. Miskinis and Pontillo*, _____USCMA_____, March 5, 1953.