DORMIENTIBUS OR NON VIGILANTIBUS ?

R. v. *Edworthy*

Only last year the English court of Criminal Appeal found it necessary to reverse the convictions of three men who had been found guilty and sentenced in a trial, the record of which revealed an attempt by the judge to coerce the jury into reaching a verdict in time for him to catch an afternoon train. [1]

In the recent case of *Regina* v. *Edworthy*[2] the Courts Martial Appeal Court was confronted with another instance of alleged judicial impropriety; on this occasion by a judge advocate in a General Court Martial at which a serving Warrant Officer of the Royal Army Pay Corps was convicted on two counts involving the obtaining of sureties for money by forged documents, and sentenced to be discharged from the service.

The appellate body allowed his appeal against conviction and quashed the sentence on the ground that "there were so many points [both of fact and of law, which gave rise to anxiety] that the appellant might have felt that he had not had a fair trial."[3]

The main ground of appeal was that the judge advocate [4] appeared to fall asleep at what might have been a significant phase of the proceedings. During that

1. *R.* v. *McKenna and others* [1960] 2 W.L.R. 306; *The Times* newspaper, 16th January. 1960. See also this writer's comments in *University of Malaya Law Review,* Vol. 2 No. 1 at pp. 116-119.
2. *The Times* newspaper, February 18th, 1961. Before Lord Parker C.J., Winn and Widgery JJ.
3. *Ibid.*
4. Whose relationship to the President and Members of the Court Martial is akin to that of the judge to the jury, though he is sworn at each Court Martial at which he sits, and does not formulate or pronounce sentence.

period his inactivity necessitated the intervention of the President of the Court who saw fit to nudge him into a position of alertness more appropriate to the solemnity of a criminal trial.

In the opinion of counsel this lapse may have been the cause of the "considerable number" of mistakes of fact contained in the judge advocate's direction (some of which were serious enough to evoke corrections from both the defending and prosecuting officers during the summing up).

Mr. E. Garth Moore for the Crown suggested to the Appeal Court that it was possible that the judge advocate had merely given the appearance of sleep during the period in question.

" Those who know this particular judge advocate know that he could very easily give the impression of being asleep when in fact he is not at all." [5]

On this the Lord Chief Justice reflected,

"Judges have been known to do that." — to which learned (and presumably unambitious) counsel responded,

" Sometimes they actually have been asleep."

As well as *done* wherever possible, Justice should at all times be seen to be done, and it is unlikely that the second limb of this honourable (if cliched) exhortation will be fulfilled where the umpire holds court with his eyes firmly closed.

The civilian sees little of the military adjudicative machine in action and would probably be surprised to learn that it regulates a wider field of substantive crime than do his own criminal tribunals. [5a]

In view of this it is perhaps even more desirable that its unsalutory aspects[6] are exposed than those of the regular courts which sometimes received more unfavourable publicity than the inadequacies warrant.

It is therefore reassuring to be reminded from time to time that over the whole field of military justice there stands the Courts Martial Appeal Court. *R.* v. *Edworthy* serves to emphasise the need for the supervisory eye of that august body to remain unclosed and *semper vigilans.*

B. J. BROWN.

The judge advocate's presence is mandatory at General, though not at Field General, or District, Courts Martial. For the powers of these various types of Courts Martial see s.85 of the Army Act 1955 which is identical in substance to the corresponding Royal Air Force and Royal Navy provisions.

5. A remark which probably ranks as the *locus classicus* of all back-handed compliments!

5a. Mainly accounted for by offences which are peculiar to service discipline. For an example which would certainly not satisfy Sutherland's requirements of specificity in crime, see s.69 of the Army Act 1956, "Conduct to the prejudice of good order and military discipline."

6. Which, to the writer's knowledge, are surprisingly few considering the volume and complexity of criminal litigation which confronts the three services.