# 1957

# CANADA

# COURT MARTIAL APPEAL REPORTS

## VOLUME I

Published under the supervision

of

BRIGADIER W. J. LAWSON, Q.C.
*Judge Advocate General*

*of*

*The Canadian Forces*

(I)

EDMOND CLOUTIER, C.M.G., O.A., D.S.P.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1957

# MEMBERS
# OF THE
# COURT MARTIAL APPEAL
# BOARD

During the period of this report

CHAIRMAN:

The Honourable J. C. A. Cameron (Puisne judge of the Exchequer Court of Canada.)

OTHER MEMBERS:

His Honour A. G. McDougall (County Court Judge for the County of Carleton.)

G. A. Addy, Barrister

B. M. Alexandor, Q.C.

L. C. Audette, Q.C.

L. W. Brockington, C.M.G., Q.C.

M. B. K. Gordon, D.S.O., Q.C.

D. K. MacTavish, O.B.E., Q.C.

Leonce Plante, Q.C.

---

REGISTRAR:

George Audette

No. 2/52 OTTAWA, 7 March, 1952.

ALAN ROY MONTGOMERY DAVIS*
(Private, K-800045, 2 Bn PPCLI)

APPELLANT;

v.

HER MAJESTY THE QUEEN

RESPONDENT.

ON APPEAL FROM A GENERAL COURT MARTIAL HELD IN KOREA

*Drunkenness — affray — aiding and abetting.*

The appellant was convicted by G.C.M. in September, 1951 and appealed against the finding of guilty of conduct to the prejudice of good order and discipline, for having been concerned in an affray.

The appellant had gone with other men of his unit to what was supposed to be a bawdy house. There was no evidence that the appellant entered the house at any time, or that he was directly associated with certain other men who, in the house, assaulted Korean soldiers and women, fired shots, and threw a bomb.

HELD:

When a charge is laid under Section 40 of the Army Act, and is not one within the provisions of Section 56, the court can convict only if it finds that the facts alleged in the particulars contained in the charge have been proved in evidence and, that when so proven, they disclose the offence stated in the charge itself. It is not open to the court to find the accused guilty of other offences even though the evidence might disclose such to be the fact.

A person may be convicted of an offence without actually having committed the offence if it can be shown that there was a common intention formed between accused and others to prosecute an unlawful purpose and it can be shown that the offence was or ought to have been known to be the probable consequence of the prosecution of such purpose.

S. L. Chambers, Esq. for the appellant.

Lieut. F. A. Leger, for the respondent.

Before: Cameron, J., Alexandor, Audette.

The judgment of the Board was delivered by:

CAMERON, J.: At a General Court Martial held at Seoul, Korea, on September 2nd and 3rd, 1951, the appellant was charged with six offences; three of the charges

*See Blank vs. The Queen (post, p. 29) and Gibson vs. The Queen (post, p. 35).

involving assault were dismissed upon motion of defence counsel at the conclusion of the Crown's evidence. On September 3, 1951, the Court Martial found the appellant guilty on Charges One, Two and Six. Confirmation of the findings on charges One and Two was refused pursuant to the provisions of the Militia Act and under the procedure therein provided. An appeal is now taken from the conviction on Charge Six, both on the severity of the sentence and the legality of the findings, but this Board is concerned only with the latter.

The Sixth Charge was as follows:

> "Conduct to the Prejudice of Good Order and Military Discipline in that he at Chung Woon Myon, Kyong Ki Province, Republic of Korea, on the 17th day of March, 1951, was concerned in an affray involving military personnel of the Republic of Korea and Korean civilians in and about a house known as 272 Be-yong-ri, Chung Woon Myon, Yan Pyong Koon, Kyong Ki Province."

The charge was laid under Section 40 of the Army Act which is as follows:

> "Every person subject to military law who commits any of the following offences; that is to say, is guilty of any act, conduct, disorder, or neglect to the prejudice of good order and military discipline, shall, on conviction by Court Martial be liable, if an officer, to be cashiered or to suffer such less punishment as in this Act mentioned, and if a soldier, to suffer imprisonment, or such less punishment as is in the Act mentioned".

The proviso to that section is not here of importance and has been omitted.

It will be seen, therefore, that this charge was laid in accordance with the provisions of Rule 13 — sub-section B, C, D, of the Rules of Procedure, being divided into two parts, namely, the statement of the offence under Section 40 of the Army Act, and the statement of the particulars of the act, neglect or omission constituting the offence.

The duties and powers of the Court Martial in considering the evidence are laid down in Sections 69 and 70 under the heading "Courts-Martial" in Part V of Extracts from Manual on Military Law 1929, where at p. 58 it is stated:

> "69. The Court must decide whether the facts alleged in the particulars of each charge have been proved in evidence, and, if proved, whether they disclose the offence stated in the charge itself or some other offence of which they may, pursuant to their powers under s. 56 of the Army Act, find the accused guilty . . .
>
> 70. Where the court find that the facts proved in evidence differ materially from the facts alleged in the particulars of a charge, but are nevertheless sufficient to prove the offence charged, and that the difference is not so material as to have prejudiced the accused in his defence, they may record a special finding as to the particulars."

The offence here charged is not within the provisions of Section 56 of the Army Act and no special finding as to the particulars of the charge was made by the Court. I am of the opinion therefore, that the Court under these circumstances could convict the appellant only if it found that the facts alleged in the particulars contained in the charge had been proved in evidence and that when so proven they disclosed the offence stated in the charge itself. By that I mean that it was not here open to the Court to find the appellant guilty of such things as drunkenness, absence without leave, loss of equipment and the like even if the evidence disclosed such to be the facts. In this case the Court could convict only if it found to be established the facts alleged in the particulars, namely, "that he was concerned in an affray involving military personnel of the Republic of Korea and Korean civilians in and about a house known as 272 Be-yong-ri, Chung Woon Myon, Yan Pyong Koon, Kyong Ki Province".

Now as to the facts disclosed in evidence. On the date in question the appellant and others attended a party in the rest area after his regiment had come out of the line. Several of these, including the appellant, got drunk. Later they were in contact with certain other troops gathered around a bonfire and drinking and it was agreed that they would go to a bawdyhouse said to be known to one of the men. A jeep was secured and some seven or eight of the men, including the appellant, travelled in that jeep a few miles down the road. Upon observing a farmhouse which was thought to be the place they were looking for, they all got out of the jeep. Some of them proceeded at once towards the house but the appellant, being warned of an approaching car, took shelter in a ditch adjacent to the road and remained there for a short time. Those who preceded the appellant to the farmhouse found it occupied not only by the South Korean farmer who owned it but also by a number of South Korean soldiers and officers in uniform; and in an adjacent room separated only by an open door were two young Korean women who had taken shelter there, one of them being a sister of one of the Korean officers.

What then took place can be described only as most disgraceful and reprehensible. The soldiers who entered the house, upon being told that the house was not, in fact, a bawdy house, proceeded to terrorize all the occupants. All of the Korean soldiers were terrorized by threats and a display of rifles and several were viciously assaulted. The two Korean women sought to protect themselves but violent attempts were made to assault and rape them. Several rifle shots were fired and eventually a bomb was thrown into the room occupied by the Korean soldiers and two of the latter were killed. Thereafter the men returned to camp in the jeep after having been at or near the farmhouse for about fifteen or twenty minutes in all.

One of the grounds of appeal was that the Court Martial erred in finding that the appellant was concerned in an affray. His counsel submitted that the meaning to be attributed to "affray" was the same as in section 100 of the Canadian Criminal Code, in which one of the essential ingredients is that the fighting must be shown to have occurred in a public street or highway or in any other place to which the

public have access (*Rex vs. Hodulik and Hodulik*, (1950) O.W.N. 233.) He stressed the fact that here the disturbance took place in or adjacent to a private building — a farm house. While of the opinion that the term "affray" as used in the particulars of the charge is not so limited, it is not necessary to decide the point in view of the other conclusions which I have reached and which are sufficient to dispose of this appeal.

The occurrences which took place and which might be described as a "brawl", a "melee", or a "fray", are shown to be as follows: threats to the Korean soldiers and women accompanied by a display of arms; assaults on the Korean soldiers and women; the firing of shots and the throwing of a bomb. Three charges of assault on Korean soldiers and two charges of assault on Korean women were laid against the appellant and of these he has been acquitted. Further, there is no evidence whatever that he took any part in the firing of shots or the throwing of the bomb, or in making any threats to any person or persons. There is no evidence that he was in the house at any time or that he was directly associated with any of the men who committed these offences, or knew that they were planning to do so. The evidence fails to show that he participated directly or indirectly in any of the offences which actually took place and which could be said to be in the nature of a "brawl" or a "melee", or an "affray".

The evidence does show that after leaving the ditch, the appellant proceeded towards the farm house and that when he had reached the yard adjacent thereto, he saw a soldier struggling with a woman and heard the woman screaming. It is shown that for a short time he was in the yard chatting with another soldier and examining some articles of Chinese clothing; that he was for a time on the porch of the farm house where there was another soldier and one of the Korean women. His own statement of March 29, 1951, which was put in evidence by the Crown, states that on the porch he either fell asleep or "passed out" due to his drunken condition, and was awakened by the sound of an explosion. After some delay, he went to the jeep to which all the others had already returned and proceeded to the rest camp.

It is quite clear, therefore, that there was no evidence before the Court Martial that the appellant participated in any manner in any acts which would constitute an "affray" or a "brawl"; or that he aided, abetted or counseled any other person to commit such offences. The only facts that are established are that he set out from camp with a group of men, some of whom later actually committed the offences, and that while such offences were being committed, he was in the yard or on the porch and therefore within a short distance of the place where such offences were actually committed.

In my opinion, the principles to be applied in this case are those laid down in Section 69 (2) of the Canadian Criminal Code, as follows:

> "69 (2). If several persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is

> a party to every offence committed by any one of them in the prosecution of such common purpose, the commission of which offence was, or ought to have been known to be a probable consequence of the prosecution of such common purpose".

As stated in Tremeear's Criminal Code, 5th Ed., p. 94, the essential conditions which must be fulfilled before a person can be convicted under Section 69 (2) of an offence not actually committed by him, are:

(1) That a common intention should have been formed by accused and others;

(2) That the intention should be one to prosecute an unlawful purpose and to assist each other therein; and

(3) That the crime with which accused is charged should be one which was, or should have been, known to him to be a probable consequence of carrying out the unlawful purpose. (Rex vs. Silverstone, (1931) O.R. 50.)

In this case, the only common intention of the men when leaving camp was to go to a bawdy house; nothing was planned or envisaged beyond that. And if that purpose had been accomplished, there was no suggestion that any violence would be used or that any "melee" or "brawl" would occur. There is no evidence that any of the men should assist each other in the accomplishment of their purpose. It is the case that certain of the other men in concert later changed that intention and determined to accomplish their purpose by force and violence and participated in the "affray" or "brawl"; but the appellant was not a party thereto and took no part in the planning or execution of that altered purpose. It was for the Crown to prove that the appellant knew or ought to have known that a brawl was the probable consequence of the prosecution of the original common purpose, and that it has failed to do.

Reference may be made to the case of (Rex vs. Dick, 87 C.C.C. 101). In that case the headnote states:

> "Where the trial Judge on a murder charge finds it necessary to direct the jury as to aiding and abetting under s. 69 of the Cr. Code, he should clearly and precisely define for the jury what aiding, abetting, counselling and procuring mean as these terms are used in s. 69, and instruct the jury how the section might be applied to the evidence. The jury should be instructed that if they find mere passive acquiescence on the part of an accused, and that the accused had no reason to expect the commission of a crime, for example, murder by shooting, until the shooting actually occurred, s. 69 would not apply."

For these reasons, I would allow the appeal, set aside the finding of the Court Martial and direct that a finding of not guilty be recorded in respect of Charge 6.

On behalf of all members of the Board, I would like to express our thanks to counsel for the able assistance they have given us.

No. 5/52 OTTAWA, 24 June, 1952.

G. R. BLANK*
(Private H-800217 2nd Battalion, P.P.C.L.I.)

APPELLANT;

v.

HER MAJESTY THE QUEEN

RESPONDENT.

ON APPEAL FROM A GENERAL COURT MARTIAL HELD IN KOREA

*Murder — manslaughter — drunkenness — rape — intent to do grievous bodily harm — circumstantial evidence — weight of evidence — theory of defence not pointed out in summing up — nondirection amounting to misdirection — duties of Judge Advocate and rules governing his summing up.*

The appellant was charged with murder and convicted of manslaughter.

The prosecution evidence was to the effect that the appellant together with other soldiers entered a Korean farmhouse. There was evidence of violent assault upon some Korean soldiers and an attempt to rape two Korean women. Eventually a grenade was thrown from the courtyard of the house killing two Korean soldiers. The men then returned to their jeep and proceeded to the camp.

It was the contention of the prosecution that the appellant threw the grenade. The defence evidence consisted of an alibi and, in the alternative, that even if he had been at the house in question, there was no clear proof that he had in fact thrown the grenade.

In summing up the Judge Advocate made no reference whatever to the defence of an alibi and merely explained the law generally and then went over the evidence of each witness without correlating the various parts of the evidence.

The Judge Advocate did not outline the alternative defence raised by the appellant, or point out the weaknesses of the prosecution's case.

HELD:

There was non-direction by the Judge Advocate amounting to mis-direction. There being evidence which to some degree may have implicated the appellant, there should be a new trial rather than a substituted verdict of not guilty.

H. T. R. Gregg, Esq. for the appellant.

Lt. F. A. Leger for the respondent.

*See Davis vs. The Queen (ante, p. 13) and Gibson vs. The Queen (post, p. 35).

Before: Cameron, J., Plante, Alexandor.

The judgment of the Board was delivered by:

CAMERON, J.: At a General Court Martial held at Seoul, Korea, in August, 1951, the appellant was tried on a charge of murder. On August 28, he was found not guilty of murder but guilty of manslaughter and was sentenced to penal servitude for life. On April 19, 1952, he petitioned His Excellency, the Governor General in Council, praying that the conviction be set aside, and in the alternative that a new trial be granted; and in the further alternative that the penalty imposed be reduced. The members of the Board were requested to review the proceedings and to advise the Governor in Council through the Minister of National Defence. For the same reasons as stated in our decision in the case of the appeal of Private D. N. Gibson, we are of the opinion that this appeal should be considered as if it were taken under Part IX of The National Defence Act. For that reason, we have no power to consider the severity of the sentence.

The appellant was charged with:

> "Committing a civil offence, that is to say murder, in that he at Chung Woon Myon, Kyon Ki Province, Republic of Korea, on the 17th day of March, 1951, murdered Ee Chong Sung, an officer of the Army of the Republic of Korea.

It is not necessary to review all the evidence tendered at the Court Martial. The appellant's regiment had recently come out of the line and on the date in question was in a rest area in Korea. The appellant and his companions had been drinking heavily. Late in the evening, five or six Canadians and two men from the Middlesex Regiment, decided to go to a bawdy house said to be known to one of the men. A jeep was secured and these seven or eight men proceeded out of camp and down the road for several miles. Upon observing a farm house which was thought to be the place they were looking for, all got out of the jeep. Some of them proceeded at once to the house and found it occupied by a number of Korean officers and men who were occupying a room for the night; and also by two young Korean women who had taken shelter there and were occupying an adjoining room. One of these women was a sister of one of the Korean officers and it is clear that both women were of good character.

What followed can be described only as most disgraceful and reprehensible. The soldiers who entered the farm house ascertained at once that it was not, in fact a bawdy house. Nevertheless, most, if not all of them, determined to accomplish their purpose by threats and violence. The Korean soldiers were cowed into submission by a show of arms and by threats, and several of them, including the Korean officer who attempted to go to the rescue of his sister, were violently assaulted. The two Korean women — both of whom gave evidence — were threatened and physically assaulted and attempts were made to rape them. Eventually, a grenade was thrown from the courtyard into the room occupied by

the Korean soldiers and two of them were killed; thereafter, several rifle shots were fired. The men then all returned to the jeep and proceeded to the camp after having been at or near the farm house for perhaps half an hour.

It may be assumed that when the men first left camp it was not their intention to accomplish their purpose by resorting to violence, nor to commit the offence of rape. But, when inflamed by drink as most of them were, those who entered the house determined to gratify their passions by using whatever force was necessary. The evidence established that both women refused the advances of the men, that each was threatened and beaten, and that repeated attempts were made to rape them.

One of the Korean soldiers who was killed by the bomb was Ee Chong Sung, a Korean officer. It was the contention of the prosecuting officer that the appellant threw that bomb, and the conviction was obviously based on a finding that such was the fact.

The appellant gave evidence at the trial, stating that on the day in question he had been drinking heavily, that he continued to do so throughout the evening, that he had no recollection whatever of leaving the camp area that night, and that so far as he knew, he had not accompanied the other men in the jeep or been present at the farm house.

One defence raised by the appellant was therefore that of an alibi. The other defence was that even if it were established that the appellant had been at the farm house with the other men, there was no clear proof that he had, in fact, thrown the grenade, that on the evidence adduced there must have been a doubt in the minds of the tribunal below as to who actually threw the grenade, and that such doubt was not resolved to the benefit of the appellant. Counsel for the appellant took the objection that the Judge Advocate in his summing up had not clearly pointed out the nature of the defences raised, and in particular had not clearly indicated the weaknesses in the evidence of the Crown witnesses. The evidence which would tend to implicate the appellant with the commission of the crime — that is, by throwing the grenade — was entirely circumstantial. No witness said that he saw the appellant with a grenade or that he saw him throw a grenade at any time. The Crown's case rested almost entirely on the evidence of the witnesses Dietzer and Gibson. Dietzer stated that on the way back in the jeep some unidentified person asked Blank a question, the precise wording of which he could not recall. He stated: "That is pretty hard to remember, too, but one time somebody, I think, asked Blank if, or why, he threw the grenade". To that question he says Blank replied: "I don't know", and something about "They were all Communists". There was a second question to Blank — about the same — and Blank immediately answered, "I didn't," or "I didn't throw it".

Gibson states that at some time between going to and returning from the farm house — the place is not identified — Blank said something about going to throw a grenade, and that he — Gibson — told him not to be a fool and throw a grenade.

In his summing up the Judge Advocate made no reference whatever to the defence of an alibi. He merely explained the law generally and then went over the evidence of each witness in order without correlating the various parts of the evidence. That in our opinion is unsatisfactory (Supplement to Tremeear's Criminal Code, 5th Ed., p. 234). In our view, the Judge Advocate in summing up the case before the Court Martial is in many respects in the same position as that of the Judge delivering his charge to a jury. A judge should do more than merely repeat the evidence to a jury and should carefully review it for their guidance. As stated by O'Halloran, J. A. in *Rex vs. Hughes,* (1942) 3 D.L.R. 391:

> "They (the jury) have a right to expect that his trained legal mind will employ itself in stripping the testimony of non-essentials, and in presenting the evidence to them in its proper relation to the matters requiring factual decision, and directed also to the case put forward by the prosecution and the answer of the defence, or such answer as the evidence permits."

See also the case of *Rex vs. Hill and McDonald,* 4 D.L.R. 377, where it was held that the evidence should be reviewed for the jury in such a way that they clearly appreciate the issues involved, and the evidence bearing upon each issue. Reference may also be made to *Rex vs. Boak,* 44 C.C.C. 225. In the case of *Rex vs. Harrison,* 99 C.C.C. 96, O'Halloran, J. A. said:

> "If the learned Judge does not direct the jury's mind specifically to vital discrepancies and weaknesses in the prosecution case, the jury may easily be led to believe that their judicial mentor does not regard such things as destructive of the proof of guilt, and further that he does not consider them to be vital part of the defence case."

In view of our conclusion that there must be a new trial, it is not desirable to discuss the evidence in great detail, or to assess the weight that the tribunal below might have attached to any part of it. We are of the opinion, however, that the summing up of the Judge Advocate did not accurately outline the defences raised by the appellant or point out the weaknesses in the case made for the prosecution. As stated above, the defence of alibi was not mentioned. The evidence favourable to and that opposing that defence should have been carefully referred to. Then in regard to the other defence — namely, that if the appellant were proven to be at the farm house, he was not clearly identified as the one who threw the grenade — no effort was made to correlate the evidence which would indicate the weaknesses in the case for the Crown. It should have been emphasized that out of seven or eight men in the jeep, only Dietzer heard the question addressed to Blank and Blank's alleged reply thereto: that if the question put were, "*if* he threw the bomb," the reply alleged to have been made thereto did not necessary implicate Blank; and that Dietzer specifically said that he did not hear Blank admit that he had thrown the grenade. Then in regard to Gibson's evidence, the Court Martial should have been instructed that careful consideration should be given thereto, in view of the fact

that Gibson was facing charges arising out of the same occurrences, and possibly a charge of murder, and that his evidence therefore might be considered as possibly self-exculpatory; that Gibson was drunk, that in his evidence he stated that he had not seen that accused outside the camp area that night, that he could not remember any conversation with him, that he did not know if the appellant was with them that night, and that it was only under considerable pressure and by somewhat leading questions that he related the conversation with Blank, which I have set out above.

In view of the fact that much of the evidence was vague and uncertain, that some of the witnesses were evasive and reluctant and were then in a position where it was desirable to exculpate themselves and perhaps involve others, we are of the opinion that the Judge Advocate should have been more specific in emphasizing to the Court Martial those portions of the evidence which required their special consideration in the light of these circumstances.

Reference may be made to *Rex vs. MacDonald,* (1945) O.W.N. 430, where Laidlaw J. A., at p. 433, states:

> "It will be convenient and useful to set down certain established principles pertaining to the matter of directions to a jury. These appear in part in the judgment of Avory J. in *Rex vs. Finch* (1916), of Ferguson, J. A. in *Rex vs. Baugh* (1917), 38 O.L.R. 559 at 565, 28 C.C.C. 146, 33 D.L.R. 191:
>
> (1) The jury is entitled to have the assistance of the presiding judge in directing them.
>
> (2) The case should be 'put to the jury in a way to insure their due appreciation of the value of the evidence'; per Pickford J. in *Rex vs. Bundy* (1910), 5 Cr. App. R. 270 at 273.
>
> (3) 'Every summing-up must be regarded in the light of the conduct of the trial and the questions which have been raised by the counsel for the prosecution and for the defence respectively': per Lord Alverstone C. J. in *Rex vs. Stoddart* (1909), 2 Cr. App. R. 217 at 246.
>
> (4) In both the criminal and civil courts non-direction may in some cases amount to misdirection. Whether it does in any particular case depends upon the facts of that case.
>
> (5) Where the defence is an alibi the jury should be directed that they must be satisfied that this defence is unsound before they convict the accused.
>
> (6) Where the identity of the accused is an issue and the evidence as to identity cannot be regarded as wholly satisfactory it is incumbent upon the trial judge to place before the jury the matters upon which the defendant relies as rendering the identification unsatisfactory: *Rex vs. Hederson,* 81 C.C.C. 132, (1944) 2 D.L.R. 440.

(7) There is no absolute rule that a charge against an accomplice must be disposed of before he gives evidence for the Crown, but when that is not done the jury should be given warning about accepting his evidence: *Rex vs. Smith* (1924) 18 Cr. App. R. 19."

In our view, there was here non-direction which amounted to mis-direction and the conviction should therefore be set aside.

We are of the opinion, however, that there should be a new trial. There was evidence which to some degree may have implicated the appellant in the commission of the offence charged. Had the case been tried by a judge sitting with a jury, we are of the opinion that on the evidence adduced a judge ought not to have withdrawn the case from the jury or directed them to bring in a verdict of acquittal.

For these reasons, and pursuant to the provisions of s. 191 (1) (a) of The National Defence Act, the appeal will be allowed and we direct a new trial on the charge of manslaughter.

No. 6/52 OTTAWA, 24 June, 1952.

D. M. GIBSON*
(Private C-850178 2nd Battalion P.P.C.L.I.)

APPELLANT;

v.

HER MAJESTY THE QUEEN

RESPONDENT.

ON APPEAL FROM A GENERAL COURT MARTIAL HELD IN KOREA

*Attempted rape — weight of evidence — aiding and abetting.*

The appellant was convicted on two charges of attempted rape and on a further charge of being concerned in an affray.

The appellant, together with other soldiers, went to a Korean farmhouse under the misapprehension that it was a house of prostitution. Although the appellant and the others discovered their mistake at once, most, if not all of them, determined to accomplish their purpose by violence. Two Korean women were threatened and physically assaulted and attempts were made to rape them.

HELD:

On the first charge of attempted rape there was no evidence implicating the appellant. The Judge Advocate should have drawn the attention of the Court Martial to the facts relating to this charge, and, had he done so, the appellant would have been acquitted.

On the second charge of attempted rape there was evidence directly implicating the appellant which the court martial apparently believed, as it was entitled to do. This evidence showed the accused to have abetted others in an attempt to rape the complainant, and accordingly the accused was, by section 69 of the Criminal Code, party to and guilty of the offence.

On the charge of being concerned in an affray the evidence was such as to justify the finding of guilty.

H. R. T. Gregg, Esq. for the appellant.

Lt. F. A. Leger for the respondent.

Before: Cameron, J., Plante, Alexandor.

The judgment of the Board was delivered by:

CAMERON, J.: At a General Court Martial held at Seoul, Korea, on August 30 and 31, 1951, the appellant was charged with six offences all arising out of certain

*See Davis vs. The Queen (ante, p. 13) and Blank vs. The Queen (ante, p. 29).

occurrences which took place in Korea on March 17, 1951. Three of the charges involving common assault were dismissed upon motion of defence counsel at the conclusion of the Crown's evidence.

On August 31, 1951, the appellant was found guilty on two charges of attempted rape and on a further charge of being concerned in an affray. On May 9, 1952, the appellant petitioned His Excellency the Governor General in Council, praying that the convictions be set aside and, in the alternative, that the penalty imposed (imprisonment for two years less one day) be reduced. The members of this Board were requested to review the proceedings and to advise the Governor in Council through the Minister of National Defence, pursuant to an order of the Minister, effective February 1, 1951, clause 2 whereof was entitled: "Procedure for Dealing with Petitions Against Finding and Sentence of Courts Martial."

At the hearing we heard counsel on the question as to whether the appeal should be considered as a petition under the Order to which I have referred, or under the provisions of sec. 26 (1) and (4) of the Canadian Forces Act, 1951 (Statutes of Canada, 1951, c. 7). We are of the opinion that as the provisions of the National Defence Act relating to appeals came into effect on September 1, 1951, the appellant was entitled to proceed by way of appeal to this Board as such, notwithstanding that he was convicted prior to that date. We were given to understand that if the Board so decided, no objection would be taken by counsel representing the Crown to the fact that the appeal was taken by way of a petition rather than in the form of a Notice of Appeal. The appeal will therefore be considered in all respects as if it were an appeal taken under Part IX of the National Defence Act. The first charge on which the appellant was convicted was that:

> "He committed a civil offence, that is to say, attempted rape in that he at Chung Woon Myon, Kyong Ki Province, Republic of Korea, on the 17th day of March, 1951, did unlawfully assault Kim Ok Nan, a woman not his wife, with intent to have carnal knowledge of her, without her consent."

The second charge was in identical language except that the complainant in that charge was another Korean woman — Chun Ok Hwa.

It is not necessary to review all the evidence tendered at the Court Martial. The appellant's regiment had recently come out of the line and on the date in question was in a rest area in Korea. The appellant and his companions had been drinking heavily. Late in the evening, five or six Canadians (including the appellant) and two men from the Middlesex Regiment, decided to go to a bawdy house said to be known to one of the men. A jeep was secured and these seven or eight men proceeded out of camp and down the road for several miles. Upon observing a farm house which was thought to be the place they were looking for, all got out of the jeep. Some of them proceeded at once to the house and found it occupied by a number of Korean officers and men who were occupying a room for the night; and also by two young Korean women who had taken shelter there and were occupying an adjoining

room. One of these women was a sister of one of the Korean officers and it is clear that both women were of good character.

What followed can be described only as most disgraceful and reprehensible. The soldiers who entered the farm house ascertained at once that it was not, in fact, a bawdy house. Nevertheless, most, if not all of them, determined to accomplish their purpose by threats and violence. The Korean soldiers were cowed into submission by a show of arms and by threats, and several of them, including the Korean officer who attempted to go to the rescue of his sister, were violently assaulted. The two Korean women — both of whom gave evidence — were threatened and physically assaulted and attempts were made to rape them. Eventually, a grenade was thrown from the courtyard into the room occupied by the Korean soldiers and two of them were killed; thereafter, several rifle shots were fired. The men then all returned to the jeep and proceeded to the camp after having been at or near the farm house for perhaps half an hour.

It may be assumed that when the men first left camp it was not their intention to accomplish their purposes by resorting to violence, nor to commit the offence of rape. But, when inflamed by drink as most of them were, those who entered the house determined to gratify their passions by using whatever force was necessary. The evidence establishes that both women refused the advances of the men, that each one was threatened and beaten, and that repeated attempts were made to rape them.

The main ground of appeal was that there was no clear evidence that the appellant took any part in the assault on or the attempted rape of either of the women. To a considerable extent the evidence is confusing and uncertain. None of the Korean soldiers, and neither of the complainants, could positively identify the appellant in Court as one of the men who took part in the assault. All agreed that they were "foreign soldiers" from their dress and language. None of the Canadian and British soldiers who were at the farm house stated that Gibson took part in the attack; much of their evidence was given reluctantly and in an obvious attempt to exculpate themselves and the accused from complicity in the offence.

On the other hand, there was evidence which, if believed, would directly implicate the appellant. It was shown that he left camp with a pistol (an American .45), that he had it in his possession until about the time of the explosion of the grenade, that he was in the farm house, that he was present when the Korean soldiers were assaulted and when the women were attacked, and that he was the only one who was in possession of a pistol that night. The Court Martial obviously accepted that evidence as establishing that the appellant was "the man with the pistol" and on the evidence I do not see how they could have done otherwise.

It now becomes necessary to consider separately the evidence as to the two charges of attempted rape.

As to the first charge — that of the attack on Ok Nan — we are satisfied that there was no evidence implicating the appellant. Ok Nan saw one soldier with a

pistol but does not recall seeing him again and cannot identify the appellant, or "the man with the pistol", as one of those who struck her or later assaulted her. We are of the opinion that the Judge Advocate, in summing up, should have drawn attention of the members of the Court Martial to the facts relating to this charge and that, had he done so, the appellant would have been acquitted. The appeal on that charge will be allowed.

On the other charge of attempted rape, there is evidence that directly implicates the appellant. In that case, the complainant Chun Ok Hwa saw "the foreign soldier armed with the pistol" in her room, saw him and others beat her brother, and states that he beat her over the head with his pistol at or about the time others were attempting to tear off her clothing and rape her. In cross-examination, she admitted that "the soldier with the pistol" did not attempt himself to undress or to rape her. The Court Martial apparently believed that evidence, as they were entitled to.

By s. 69 of the Canadian Criminal Code, everyone is a party to and guilty of an offence who (c) abets any person in commission of the offence. I am of the opinion that under the circumstances disclosed, the sole purpose of "the man with the pistol" in beating the complainant over the head with the pistol, was to render her incapable of resisting the attempts of the other men to rape her. There could have been no other reason. It must follow that under s. 69 of the Code, the appellant is equally guilty of the offence, namely, that of attempting to commit rape. In Tremeear's Criminal Code, 5th Ed., p. 92, reference is made to *Rex vs. Hewston and Goddard*, 13 Can. Abr. 103 (C.A.) as authority for the statement that there can be no question about the guilt of a person who actively assists another in the commission of an offence, as by putting his hand over a woman's mouth to prevent her screaming, while the other attempts to rape her.

Gibson did not give evidence at his trial. However, there was admitted in evidence a statement given by him to the Military Police on or about April 1, 1951. It was not suggested before us that the statement was improperly admitted. In that statement, Gibson admits being in the house when the Korean soldiers were attacked and when the two complainants were assaulted and when others attempted to rape them. He states, however, that when he found on entering that the girls were not prostitutes, he told the others to let them go. That part of his statement the Court Martial obviously did not believe. In view of his own admission that he remained while the attacks were made, did nothing to prevent them, and the evidence of the witnesses as to the assaults made by "the man with the pistol", I think they were entitled to disregard this exculpatory statement of the appellant as of no value.

On the whole, I can find no serious error or omission in the summing up of the Judge Advocate as to the applicable law regarding corroboration, or the evidence of accomplices. We are all of the opinion that the appeal from a second conviction of attempted rape must be dismissed.

The remaining charge on which the appellant was found guilty was that of conduct to the prejudice of good order and military discipline in that he — at the

place and time mentioned above — was concerned in an affray involving military personnel of the Republic of Korea and Korean civilians. Counsel for the appellant, while not abandoning this appeal, did not advance any sound reason in support of it. On the evidence, we are quite satisfied that the finding of guilty on that charge was fully justified and should not be disturbed.

In the result, the appeal is allowed on the first charge, namely, that of attempted rape on Kim Ok Nan, and the finding of the Court Martial in regard thereto will be set aside and in lieu thereof, we direct that a finding of not guilty be recorded in respect of that charge. The appeals on the remaining two charges in which the appellant was found guilty will be dismissed.