U.S. Air Force Board of Review. United States v. Captain Theodore C. Rozema, AO 3112492, School of Aerospace Medicine.

ACM 18170 (f rev)

Petition for review by USCMA denied, 33 CMR 436.

February 8, 1963.

Sentence adjudged 31 July 1962 by General Court-Martial convened at Randolph Air Force Base, Texas. Approved sentence: Dismissal from the service.

Appearances: Colonel Joseph E. Krysakowski, Colonel Daniel E. Henderson, Jr., and Lieutenant Colonel Quincey W. Tucker, Jr., appellate counsel for the accused; Lieutenant Colonel Emanuel Lewis and Lieutenant Colonel John C. Wiley, appellate counsel for the United States.

DECISION UPON FURTHER REVIEW

Tried by general court-martial, the accused pleaded not guilty to three specifications of assault with intent to commit rape, in violation of Article 134, Uniform Code of Military Justice. He was found guilty of the lesser included offense of indecent assault under the first two specifications, and not guilty of the third specification. The adjudged and approved sentence provided for dismissal from the service. On 6 November 1962, the Board of Review found prejudicial error in the Staff Judge Advocate's post-trial review and returned the record of trial to The Judge Advocate General for referral to an appropriate general court-martial authority for a new review and action (ACM 18170, Rozema, (unpublished, decided 6 November 1962)). The record of trial is now before us for further review with a new review and action accomplished by a staff judge advocate and general court-martial authority other than the ones initially involved. As now approved, the sentence still provides for dismissal from the service.

Briefly, as to Specification 1, the evidence establishes the following:

Lieutenant Patricia M first met the accused at Brooks Air Force Base Officers' Club on the night or 20 January 1962. That evening, Lieutenant M and the accused, in company with two other couples, visited a private club for dinner and eventually arrived at the home of the accused. After drinks were fixed, Lieutenant M and the accused began to dance in the living room. One of the couples departed. Shortly thereafter, while still dancing with the accused, Lieutenant M suddenly realized that she was in the bedroom. At that point, the accused picked up Lieutenant M in his arms, placed her on the bed, and proceeded to kiss her. She struggled and momentarily got away, but the accused caught her, struck her on the forehead with his fist, threw her down on the bed, proceeded to pull up her dress, pinned her arms down over her head, and, while lying almost on top of her, tried to insert his finger vaginally. She did not consent to any of his advances. At the time, she observed that the accused's trousers were lowered and that his penis was exposed. She screamed twice, and the second time she cried for help. Captain C, who was with his "date" in another part of the house, entered the room, grabbed the accused by the shoulder and said, "That's enough." Although the bedroom was dimly lit, Captain C observed that the accused was in bed, fully clothed; however, he did not observe the front of his clothing. The accused offered no resistance, and Lieutenant M left the house with Captain C and his "date". Lieutenant M did not discuss the incident with Captain C that night. She did not report the incident to her chief nurse until almost two weeks later, after learning that two other nurses had had similar

experiences with the accused. A defense witness who was with the accused's party on the night of the incident, observed the accused, while at the club, "sort of running his hands up and down his date's side". Later, at the house, the witness observed that the accused put his arm around his "date's" abdomen while she was sitting on his lap. At no time did the accused's "date" object to the familiarities observed by this witness.

As to Specification 2, the evidence establishes the following:

Lieutenant H, who met the accused a few weeks previously and conversed with him several times, had occasion to see the accused in the Brooks Air Force Base Officers' Club during the early evening of 2 February 1962, at which time he joined her group. About two hours later, she and the accused left together and proceeded to a drive-in to get something to eat. At the drive-in, Lieutenant H permitted the accused to kiss her several times. On their return to the base, the accused did not stop at her quarters, but proceeded to drive on to an adjacent lot, where he parked. He then started kissing her and "making other advances". Although asked to stop, he continued and touched her "all over", unbuttoned her blouse, placed his hand on her leg, forcibly tried to hold her down, removed her panties so that he could get to her vaginal area, and told her he wanted to make love to her. She resisted, struggled, and managed to get out of the car but then fell to the ground. The accused got on top of her, and the struggle continued. The accused finally offered to let her get up, but, as she did so, he pushed her into the car where he continued his attempts until she ultimately managed to get away. The entire episode lasted anywhere from an hour to an hour and a half. Although Lieutenant H was in fear of losing her chastity and in fear of being struck by the accused, she at no time called out for help although several buildings were nearby. Upon reaching her quarters, she told an associate nurse merely that she had had a little struggle and had fallen down. She made no full report of the incident until approximately six days later, after learning that Lieutenant M had also had an experience with the accused.

Where necessary to a resolution of the issues before us, other evidence will be detailed in the course of our discussion.

Appellate defense counsel have assigned one error and have invited our attention to eleven errors asserted by the accused in his request for appellate representation. All of the errors assigned by the accused were discussed by the Staff Judge Advocate in the second post-trial review of this case and found to be without merit. After an independent evaluation, we, likewise, find no merit to these assertions of error, which will be discussed in further detail hereinafter.

The first and third assertions of error may be treated together, for, in essence, they deal with the same problem. In the first assertion, the accused urges that the instructions on indecent assault given the court by the law officer were deficient in that they failed to include as an element the intent to injure, and further failed to define the term "injury" as including the production of an unpleasant or disagreeable emotion. The third assertion urges error arising from this same deficiency but relates to the instruction on partial mental impairment in which the law officer, inter alia, advised the court that the only specific intent involved in the offense of indecent assault was the intent to gratify the lust or sexual desires of the accused.

[1] We have carefully examined the instructions given by the law officer advising the court-martial of the elements of the offense of indecent assault. We find that they are almost identical with the model form instructions contained in the Court-Martial Instructions Guide (Inst. 120, AFM 110-5, 12 June 1959) and contain all of the elements set forth therein. These elements cover the offense of indecent assault, which is defined as the taking by a man of indecent, lewd

or lascivious liberties with the person of a female, without her consent and against her will, with intent to gratify his lust or sexual desires (MCM, 1951, par. 213d(2); U. S. v Hobbs (No. 8682), 7 USCMA 693, 23 CMR 157). The instructions given were correct, furnished sufficient guideposts to the court as to the elements of the offense, and were not deficient in the respects adverted to by the accused in these two assertions of error.

In his second allegation of error, the accused contends that the law officer erred by refusing to include the alternative phrase "or did not in fact entertain" in his instruction that ". . . an accused may be mentally responsible in a general criminal sense, and yet because of some underlying mental impairment or deficiency, be mentally incapable of entertaining the specific intent involved . . . ."

[2] An instruction should not be considered in piecemeal fashion when it is tested for sufficiency (U. S. v Crawford (No. 6653) 6 USCMA 517, 20 CMR 233, citing U. S. v Nash (No. 5474), 5 USCMA 550, 18 CMR 174, and other cases). Again, here, the instructions given were patterned, verbatim, after the model form contained in the Court-Martial Instructions Guide (Chap. 4, AFM 110- 5, 5 Dec. 1960). We find that the instructions covering partial mental impairment with respect to the offense charged and the included offense of indecent assault each made two specific references to the requirement that the court find, beyond reasonable doubt, that the accused was capable of and did in fact entertain the respective specific intents involved. Therefore, the point now raised by the accused was fully covered, and we perceive no error in the law officer's omission to instruct in the precise form requested by trial defense counsel (ACM 10192, Holloway, 18 CMR 909, and cited cases).

[3][4][5] The fourth assertion of error concerns the instructions given which relate to the offense of assault and battery. The accused argues that this offense is not lesser included within the pleading and proof of assault with intent to commit rape. Nevertheless, the argument continues, the law officer prejudicially failed, in connection with the offense of assault and battery, to instruct on partial mental impairment and mistake of fact. A short answer here can be predicated on the fact that the court found the accused guilty of the lesser included offenses of indecent assault and not assault and battery, and the now alleged instructional errors relating to matters which may have precluded conviction of assault and battery could not possibly have resulted in prejudice to the accused. Additionally, we find that, under the pleadings of this case, assault and battery is a lesser included offense (U. S. v Hobbs, supra; CM 372725, Broomfield, 16 CMR 306); that the accused was not entitled to an instruction on mistake of fact in connection with the offense of assault and battery, as such issue was not reasonably raised by the evidence [FN1] (U. S. v Short (No. 3586), 4 USCMA 437, 16 CMR 11; U. S. v Bateman (No. 9392), 8 USCMA 88, 23 CMR 312); and, as the offense of assault and battery does not involve premeditation, specific intent or knowledge, a related instruction on partial mental impairment would have been inappropriate (cf. U. S. v Dunnahoe (No. 6740), 6 USCMA 745, 21 CMR 67; cf. U. S. v Storey (No. 9888), 9 USCMA 162, 25 CMR 424, and cited cases).

1. Why the issue of mistake of fact was not raised by the evidence is discussed in a subsequent portion of this opinion.

We next turn to assertions of error five, six and seven, all of which are concerned with the adequacy of the instructions given to the court on mistake of fact.

2. The law officer, in accordance with the request of trial defense counsel (Defense App. Ex. 1), instructed the court as follows:
"There has been some evidence introduced to the effect that the accused believed that each of the prosecution witnesses would be receptive to his advances.
"You are advised that you cannot find that the accused entertained a specific intent to commit rape or the specific intent to commit an indecent assault unless you find beyond reasonable doubt as to any one or more of the prosecuting witnesses involved that the accused did not believe them to be receptive to his advances."
The law officer, however, omitted from his instructions that portion of the requested instruction which referred to "specific intent to commit any other assault consummated by battery."

[6][7] It is axiomatic that before a failure to instruct on a defense may be alleged as ground for error, the evidence must show that the defense was reasonably raised (U. S. v Short, supra, citing U. S. v Sandoval (No. 3001), 4 USCMA 61, 15 CMR 61; U. S. v Bateman, supra, and cited cases). In our view, no issue of mistake of fact was reasonably raised in this case. We find no evidence whatever of the accused's personal evaluation of the circumstances with which he was confronted on each occasion. The uncontested evidence strongly establishes that, as to those offenses which resulted in conviction, both victims forcibly expressed by word and deed their vigorous objections to the improper advances made by the accused. In the face of such antagonism, it would be unreasonable to conclude that the accused believed the women involved were receptive to his amorous advances, and, in fact, to so conclude would require us to tread in the realm of speculation, which we will not do. The only evidence of record concerning previous intimacy between the parties is sparse and inconclusive. One victim testified that she had permitted the accused to kiss her earlier during the night in question. According to the testimony of a defense witness, the other victim was observed not to object to the accused running his hand over her person while at the Officers' Club. Later, at the accused's house, she was observed sitting on the accused's lap, held by him at the abdomen. Neither in a sophisticated sense nor otherwise, do any of these circumstances even remotely suggest that either female consented to engage in sexual intercourse with the accused.

Under the circumstances here presented, instructions on mistake of fact were not required. The instructions given in this area were superfluous; however, they were predicated upon those requested by the accused, and he cannot now be heard to complain. Therefore, we need not determine the sufficiency of the instructions on mistake of fact. Furthermore, in light of the foregoing conclusions, we need give no further consideration to the arguments of the accused that the law officer's concepts of honest and reasonable mistake and partial mental impairment, as expressed in the out-of-court hearing on instructions, were erroneous.

The accused's eighth assertion of error is a catch-all type and is a generalized contention that the entire instructions given by the law officer, judged by their four corners, were insufficient to apprise the members of the court of the law applicable to the case. With this we cannot agree. We have carefully reviewed the law officer's instructions to the court-martial and find that they not only met the mandatory requirements (UCMJ, Art. 51) but covered all such pertinent matters and material issues involved which were necessary to provide the court members with sufficient guideposts to enable them to discharge their duties in this case.

In assignment nine, the accused alleges that the law officer assumed the role of an advocate and, in fact, became a prosecutor when he questioned Doctor Giffin, a witness for the prosecution, concerning the accused's mental responsibility.

[8][9] Without question, a court member or law officer, when exercising his right to question a witness, may not become an advocate or a partisan for either side, and must act without bias or prejudice (U. S. v Blankenship (No. 8026), 7 USCMA 328, 22 CMR 118; U. S. v Marshall (No. 14,333), 12 USCMA 117, 30 CMR 117; U. S. v Smith (No. 6560), 6 USCMA 521, 20 CMR 237; U. S. v Bishop (No. 13,280), 11 USCMA 117, 28 CMR 341). Here, the complaint of partisan advocacy is based on a total of seven questions asked by the law officer which, on careful scrutiny, reflect that they called for and obtained, in substance, nothing more than a restatement of previous testimony elicited by trial and defense counsel. The examination conducted by the law officer did nothing more than clarify matters presented in evidence and most certainly is not indicative of partiality, bias, prejudice or predisposition toward the prosecution (U. S. v Marshall, supra; U. S. v Smith, supra; U. S. v Blankenship, supra; U. S. v Lindsay (No. 14,536), 12 USCMA 235, 30 CMR 235). Accordingly, we find that the law officer did not assume the role of a partisan advocate.

[10] For his tenth assertion of error, the accused contends that the facts presented in court are insufficient to support the convictions of indecent assault under Specifications 1 and 2 of the Charge. The main thrust of the argument in support of this position is apparently predicated, firstly, on evidence developed to the effect that rape is not in the accused's dynamic pattern, and, secondly, on the court's findings of not guilty of the offenses of assault with intent to commit rape. Thus, it is argued that the accused's only intention was to have permissive intercourse, that he intended to gratify his lust and sexual desires only by completion of such acts, that his acts were intended only to stimulate the lust and desires of his victims and not his own, and that his acts amounted to nothing more than attempts at seduction. The fault of the basic premise of this argument is immediately apparent. Although an accused may not intend to commit rape he may, nevertheless, commit an indecent assault. Further, we feel no constraint in disagreeing with the logic of the argument which urges us to accept the position that if the accused's objective, in each instance, was to satisfy his sexual desires by a completed act of intercourse, he could not have had the intent required for indecent assault. Moreover, whether the accused intended to commit rape, or even intended to have sexual intercourse with his victims, are conjectural matters and have no significance in the resolution of the issue before us here.

[11] With respect to that portion of the argument which concludes that, as the accused was acquitted of assault with intent to rape, it follows that he desired only to have permissive sexual intercourse, the following comment of the Court of Military Appeals is apropos:
". . . Furthermore, indecent assault is plainly lurking within such a factual situation, regardless of which principal offense is pleaded, [attempted rape or assault with intent to commit rape] if the court-martial is convinced beyond reasonable doubt that the accused intended to have sexual intercourse with a woman not his wife, but is not convinced by that degree of proof that he intended to overcome whatever degree of resistance he might encounter. . . ." (U. S. v Hobbs, supra, p. 163).

The evidence in this case, as we view it, establishes, beyond doubt, that the acts of the accused, over the objections of his victims, clearly amounted to indecent assaults, the intent being inferable from accused's words and unequivocal acts of exposing himself, touching and fondling the more intimate portions of the bodies of his victims, and attempting to disrobe them.

The accused, in his eleventh and final assertion of error, contends that a reasonable doubt exists as to his sanity at the time of the commission of the offenses. During trial, the issue of the accused's mental responsibility was raised by the defense through the testimony of Lieutenant Hill, a clinical psychologist, but not a medical doctor. Lieutenant Hill was of the opinion, based

on a battery of psychological tests administered, that there were ". . . factors within the tests which suggested to . . . [him] that there more than likely have been in the past transcient (sic) psychotic episodes, not of a well delineated nature . . . more in terms of a generalized confused state, a loss of contact with reality in a sense, but, . . . of a transcient (sic) nature." Lieutenant Hill was of the further opinion that from the accused's overt appearance, his condition could be characterized as a passive dependent character disorder, but his basic personality function "has more of a psychotic core to it than a character disorder." He concluded that an individual with the clinical background of the accused would be likely to become "assaultive" in a situation where his amorous advances were resisted, but such "assaultive" behaviour would be beyond his control.

The prosecution offered a rebuttal witness in the person of Colonel Giffen, a qualified psychiatrist and Chairman of the Psychiatric Department, USAF Hospital, Lackland Air Force Base, Texas. Colonel Giffen examined the psychological tests, and, while the accused was a hospital patient, interviewed him on three occasions for a total time of approximately one and one half hours. Colonel Giffen expressed the opinion that, at the time of the commission of the offenses alleged in the charges, the accused could distinguish right from wrong, adhere to the right, and had the mental capacity to form the specific intent to gratify his lust or sexual desires. According to Colonel Giffen, however, rape is not in the dynamic pattern of the accused, whose difficulty, basically, is of an emotional nature, fairly long termed, chronic, and defined as a schizophrenic process, latent type.

The accused, in support of this asserted error, points to the evidence adduced at trial. In addition, he points to a pretrial opinion expressed by Captain Lowry, an Air Force psychiatrist, who examined the accused when he was a patient in the psychiatric ward, USAF Hospital, Lackland Air Force Base, Texas, to the effect that the accused, at the time of the offenses, was not so far free from mental defect and derangement as to be able to distinguish right from wrong and adhere to the right. The accused has also forwarded, as attachments, a letter, dated 6 July 1962, from Captain Lowry to the accused's individual trial defense counsel, Mr. Joel W. Westbrook, and two letters to such counsel, dated 31 May 1962 and 9 July 1962, respectively, from Doctor Keedy, a board- qualified, civilian psychiatrist. All of these attached letters are concerned with the accused's mental status.

[12] In order to properly consider the matters now urged upon us, it is necessary that we place them in their correct background setting. After charges were preferred, the accused, at the specific request of his counsel, was given a psychiatric evaluation at the USAF Hospital, Lackland Air Force Base, Texas. Subsequently, on 20 June 1962, a board of medical officers submitted their psychiatric report which indicated that the accused, concerning the particular acts charged, could distinguish right from wrong, adhere to the right and could understand the nature of the proceedings against him and cooperate in his defense. This report was introduced by the defense during the pretrial investigation and was incorporated as an exhibit in the Article 32 investigation report. At that time, the accused was also represented by Mr. Joel W. Westbrook. The significance of the foregoing lies in the fact that the medical board took cognizance of the psychological testing referred to by Lieutenant Hill, of the opinion of Captain Lowry regarding the accused's inability to distinguish right from wrong and to adhere to the right, and of the statement of Doctor Keedy, based on his interview of the accused on 28 May 1962, as reflected in his letter of 31 May 1962. Long before 30 July 1962, the date of trial, the defense had in its possession all of the information it now seeks to utilize as a basis for claiming prejudicial error. Significantly, Captain Lowry, whose opinion is now heavily relied on to strengthen the asserted error, was physically present at the place of trial and was made available to the defense. He was

not called as a witness. Furthermore, there is no indication that Doctor Keedy, the accused's civilian psychiatrist, was unavailable to testify at the time of trial.

In connection with this assertion of error, the language of the Court of Military Appeals in the case of United States v Schick (No. 6388), 6 USCMA 493, 20 CMR 209, 210, is particularly pertinent:
"Once an accused has had a fair opportunity at the trial level to litigate the issue of his mental responsibility for an offense and his capacity to stand trial, those issues should, on appeal, be accorded the same treatment as all other contested matters. We mean that the question should not be tried de novo at every appellate level. A day in court means one fair and just trial of contested issues, and, when that has been granted to an accused, he does not have a right to a second trial in an appellate forum."

3. While the Court remanded the Schick case to the board of review for reconsideration of the sanity issue because of most unusual circumstances (not present in this case), it expressly stated: ". . . In taking this action we are not holding out to accused persons the hope that this Court will require boards of review to become trial forums. . . ." (at p. 211)

This same view has been expressed on other occasions by the Court of Military Appeals (U. S. v Henderson (No. 12,634), 11 USCMA 556, 29 CMR 372, U. S. v Bunting (No. 3387), 6 USCMA 170, 19 CMR 296). In the case at bar, the issue of sanity was litigated at the trial level, and there is a complete absence of any circumstances to indicate that the defense was in any way hampered in presenting evidence on this issue. Furthermore, no evidence has been uncovered that was not known and available to the defense at the time of trial (U. S. v Henderson, supra).

[13] The court, under appropriate instructions, by its findings, found beyond reasonable doubt, that at the relevant times, the accused was mentally responsible for his acts and was capable of forming the required specific intent. Having independently evaluated the evidence, we also find that at the time of commission of the offenses, the accused was so far free from mental defect, disease or derangement as to be able to distinguish right from wrong, adhere to the right, and form the specific intent to gratify his lust or sexual desires. In arriving at this conclusion, we have given consideration only to the evidence presented at trial [FN4] (U. S. v Russo (No. 13,565), 11 USCMA 352, 29 CMR 168, reported below ACM 15851, Russo, 28 CMR 812; cf. U. S. v Carey (No. 13,564), 11 USCMA 443, 29 CMR 259; cf U. S. v Roland (No. 10,448), 9 USCMA 401, 26 CMR 181; cf. U. S. v Burns (No. 847), 2 USCMA 400, 9 CMR 30).

4. In determining whether further inquiry into the accused's mental responsibility at the time of the alleged offenses, or accused's capacity to stand trial, is warranted, the psychiatric information now submitted to us by the accused has been considered, along with the medical report dated 20 June 1962 and all matters contained in the record of trial and allied papers. We conclude that, in connection with this case, the interests of justice do not require that any further inquiry be made into the accused's mental condition.

Appellate defense counsel have assigned the following as error:
"THE TRIAL COUNSEL WAS DISQUALIFIED FOR SUCH DUTY SINCE HE HAD BECOME AN INVESTIGATING OFFICER AS A RESULT OF HAVING CONDUCTED A PRETRIAL INVESTIGATION OF THE CASE."

It was developed during the course of the trial that, on 13 February 1962, trial counsel, Lieutenant Stansbury, acting in the capacity of "Legal Officer" had obtained, under oath, written

pretrial statements from each of the complaining witnesses. Charges were not preferred in this case until 2 May 1962, after which they were subsequently investigated pursuant to Article 32, Uniform Code of Military Justice, by a Captain Norris. The law officer, recognizing the possibility of disqualification under Article 27(a), Uniform Code of Military Justice, ascertained from Lieutenant Stansbury that these statements were obtained by him in anticipation of his acting as trial counsel if the case went to trial. Trial defense counsel then indicated he was satisfied with this explanation, made no motion to dismiss because of trial counsel's previous participation, and commented, equivocally, that, while not waiving objection, the characterization of Lieutenant Stansbury as investigating officer was "not for the purpose of making a record on this point. It was simply descriptive of what we interpreted his activities to be."

[14] After charges were preferred against the accused, an Article 32 investigating officer was duly appointed, and he conducted a thorough investigation as required. There is nothing to indicate that trial counsel, in any manner whatever, participated in connection with the preferral of charges, their formal investigation, or with any recommendations for disposition thereof (U. S. v Young (No. 15,581), 13 USCMA 134, 32 CMR 134; U. S. v Lee (No. 200), 1 USCMA 212, 2 CMR 118; ACM 10226, Sax, 19 CMR 826; cf. U. S. v Schreiber (No. 5468), 5 USCMA 602, 18 CMR 226, and cited cases). Under these circumstances, we find that the pretrial activities of Lieutenant Stansbury did not disqualify him from acting as trial counsel in this case.

For the reasons stated, the Board of Review finds the findings of guilty and the sentence correct in law and fact. Article 66(c) having been complied with, the findings of guilty and the sentence are

Affirmed.

MORGAN, HOGAN and REISS, Judge Advocates.

33 C.M.R. 694, 1963 WL 4944 (AFBR)