

EDUARDO L. MARTELINO, CIRILO OROPESA, TEODORO FACELO, RUPERTO AMISTOSO, ALBERTO SOTECO, SOLFERINO TITONG, ET AL., PETITIONER, VS. JOSE ALEJANDRO, RUBEN S. MONTOKA, SIXTO R. ALHA...*G.R. No. L-30894. March 25, 1970*

Ponente: CASTRO, J.

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This case presents another aspect of the court-martial proceedings against the petitioner, Major Eduardo Martelino, alias Abdul Latif Martelino, of the Armed Forces of the Philippines, and the officers and men under him, for violation of the 94th and 97th Articles of War, as a result of the alleged shooting on March 18, 1968 of some Muslim recruits then undergoing commando training on the island of Corregidor. Once before the question was raised before this Court whether the general court-martial, convened on April 6, 1968 to try the case against the petitioners, acquired jurisdiction over the case despite the fact that earlier, on March 23, a complaint for frustrated murder had been filed in the fiscal's office of Cavite City by Jibin Anula (who claimed to have been wounded in the incident) against some of the herein petitioners. The proceedings had to be suspended until the jurisdiction issue could be decided. On June 23, 1969 this Court ruled in favor of the jurisdiction of the military court.[1]

The jurisdiction question thus settled, attention once again shifted to the general court-martial, but no sooner had the proceedings resumed than another hitch developed. This came about as the petitioners, the accused in the court-martial proceedings, in turn came to this Court, seeking relief against certain orders of general court-martial.

It appears that at the hearing on August 12, 1969 the petitioner Martelino sought the disqualification of the president of the general court-martial, following the latter's admission that he read newspaper stories of the Corregidor incident. The petitioner contended that the case had received such an amount of publicity in the press and other news media and in fact was being exploited for political purposes in connection with the presidential election on November 11, 1969 as to imperil his right to a fair trial. After deliberating, the military court denied the challenge.

Thereafter the petitioners raised peremptory challenges against Col. Alejandro, as president of the court-martial, and Col. Olfindo, Lt. Col. Camagay, Lt. Col. Valones, Lt. Col. Planco and Col. Malig, as members. With regard to peremptory challenges it was the petitioners' position that for each specification each accused was entitled to one such challenge. They later changed their stand and adopted that of the trial judge advocate that "for each specification jointly tried, all of the accused are entitled to only 1 peremptory challenge; and that with respect to the specifications tried commonly, each one of the accused is entitled to one peremptory challenge." They there contended that they were entitled to a total of eleven peremptory challenges. On the other hand the court-martial ruled that the accused were entitled to only one peremptory challenge as the specifications were being jointly tried.

The petitioners therefore filed this petition for certiorari and prohibition, to nullify the orders of the court-martial denying their challenges, both peremptory and for cause. They allege that the adverse publicity given in the mass media to the Corregidor incident, coupled with the fact that it became an issue against the administration in the 1969 elections, was such as to unduly influence the members of the court-martial. With respect to peremptory challenges, they contend that they are entitled to eleven such challenges, one for each specification.

On August 29, 1969 this Court gave due course to the petition, required the respondents as members of the general court-martial to answer and, in the meantime, restrained them from proceeding with the case.

In their answer the respondents assert that despite the publicity which the case had received, no proof has been presented showing that the court-martial's president's fairness and impartiality have been impaired. On the contrary, they claim, the petitioner's own counsel expressed confidence in the "integrity, experience and background" of the members of the court. As a preliminary consideration, the respondents urge this Court to throw out the petition on the ground that it has no power to review the proceedings of the court-martial, "except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject matter, and whether, though having such jurisdiction, it had exceeded its powers in the sentence pronounced," and that at any rate the petitioners failed to exhaust remedies available to them within the military justice system.

I

It is true that civil courts as a rule exercise no supervision or correcting power over the proceedings of courts-martial, and that mere errors in their proceedings are not open to consideration. "The single inquiry, the test, is jurisdiction." [2] But it is equally true that in the exercise of their undoubted discretion, courts-martial may commit such an abuse of discretion - what in the language of Rule 65 is referred to as "grave abuse of discretion" - as to give rise to a defect in their jurisdiction. [3] This is precisely the point at issue in this action suggested by its nature as one for certiorari and prohibition, namely, whether in overruling the petitioners' challenges, the general court-martial committed such an abuse of discretion as to call for the exercise of the corrective powers of this Court. It is thus obvious that no other way is open to this Court by which it may avoid passing upon the constitutional issue thrust upon it. Nor will the fact that there may be available remedies within the system of military justice bar review considering that the questions raised are questions of law. [4]

And so the threshold question is whether the publicity given to the case against the petitioners was such as to prejudice their right to a fair trial. As already stated, the petitioner Martelino challenged the court-martial president on the ground that newspaper accounts of what had come to be referred to as the "Corregidor massacre" might unduly influence the trial of their case. The petitioner's counsel referred to a news item appearing in the July 29, 1969 issue of the Daily Mirror and cited other news reports to the effect that "coffins are being prepared for the President (of the Philippines) in Jolo," that according to Senator Aquino "massacre victims were given sea burial," and that Senator Magsaysay, opposition Vice Presidential candidate, had gone to Corregidor and "found bullet shells." In addition the petitioners cite in this Court a Manila Times editorial of August 26, 1969 which states that "The Jabidah [code name of the training operations] issue was bound to come up in the course of the election campaign. The opposition could not possibly ignore an issue that is heavily loaded against the administration." The petitioners argue that under the circumstances they could not expect a just and fair trial and that, in overruling their challenge for cause based on this ground, the general court-martial committed a grave abuse of discretion. In support of their contention they invoke the rulings of the United States Supreme Court in *Irvin v. Dowd*, [5] *Rideau v. Louisiana*, [6] *Estes v. Texas*, [7] and *Sheppard v. Maxwell*. [8]

An examination of the cases cited, however, will show that they, are widely disparate from this case in a fundamental sense. In *Irvin*, for instance, the Supreme Court found that shortly after the petitioner's arrest in

connection with six murders committed in Vanderburgh County, Indiana, the prosecutor and police officials issued press releases stating that the petitioner had confessed to the six murders and that "a barrage of newspaper headlines, articles, cartoons and pictures was unleashed against him during the six or seven months preceding his trial." In reversing his conviction, the Court said:

"Here the 'pattern of deep and bitter prejudice' shown to be present throughout the community, . . . was clearly reflected in the sum total of the voir dire examination of a majority of the jurors finally placed in the jury box. Eight out of the 12 thought petitioner was guilty. With such an opinion permeating their minds, it would be difficult to say that each could exclude this preconception of guilt from his deliberations. The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the processes of the average man. . . . Where one's life is at stake - and accounting for the frailties of human nature - we can only say that in the light of the circumstances here the finding of impartiality does not meet the constitutional standards." [9]

Irvin marks the first time a state conviction was struck down solely on the ground of prejudicial publicity.[10] In the earlier case of *Shepherd v. Florida*, [11] which involved elements of publicity, the reversal of the conviction was based solely on racial discrimination in the selection of the jury, although to concurring Justice Jackson, who was joined by Justice Frankfurter, "It is hard to imagine a more prejudicial influence than a press release by the officer of the court charged with defendants' custody stating that they had confessed, and here just such a statement unsworn to, unseen, unexamined and uncontradicted, was conveyed by the press to the jury." [12]

In *Rideau* the petitioner, suspect in the robbery of a bank in Lake Charles, Louisiana and in the kidnapping of three of its employees and in the killing of one of them, was similarly given "trial by publicity." Thus, the day after his arrest, a moving picture film was taken of him in an "interview" with the sheriff. The "interview," which lasted approximately 20 minutes, consisted of interrogation by the sheriff and admission by Rideau that he had perpetrated the bank robbery, kidnapping and murder. The interview was seen and heard on television by 24,000 people. Two weeks later he was arraigned. His lawyers promptly moved for a change of venue but their motion was denied and Rideau was convicted and sentenced to death. Rideau's counsel had requested that jurors be excused for cause, having exhausted all of their peremptory challenges, but these challenges for cause had been denied by the trial judge. In reversing his conviction, the Court said:

"[W]e hold that it was a denial of due process of law to refuse the request for a change of venue, after the people of Calcasieu Parish had been exposed repeatedly and in depth to the spectacle of Rideau personally confessing in detail to the crimes with which he was later to be charged. For anyone who has ever watched television the conclusion cannot be avoided that this spectacle, to the tens of thousands of people who saw and heard it, in a very real sense was Rideau's trial - at which he pleaded guilty to murder. Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality." [13]

In the third case, *Estes*, the Court voided a televised criminal trial for being inherently a denial of due process.

"The state . . . says that the use of television in the instant case was 'without injustice to the person immediately concerned,' basing its position on the fact that the petitioner has established no isolatable prejudice and that this must be shown in order to invalidate a conviction in these circumstances. The State paints too broadly in this contention, for this Court itself has found instances in which a showing of actual prejudice is not a prerequisite to reversal. This is such a case. It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is inherently lacking in due process." [14]

In *Sheppard*, the celebrated murder case of Sam Sheppard, who was accused of the murder of his wife Marilyn,

the Supreme Court observed a "carnival atmosphere" in which "bedlam reigned at the courthouse ... and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard." It observed that "despite the extent and nature of the publicity to which the jury was exposed during the trial, the judge refused defense counsel's other requests that the jury be asked whether they had read or heard specific prejudicial comment about the case. ... In these circumstances, we can assume that some of this material reached members of the jury." The Court held:

"From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances. Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates; or transfer it to another county not so permeated with publicity. In addition sequestration of the jury was something the judge should have raised sua sponte with counsel. If publicity during the proceeding threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interference. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measure." [15]

In contrast the spate of publicity in this case before us did not focus on the guilt of the petitioners but rather on the responsibility of the Government for what was claimed to be a "massacre" of Muslim trainees. If there was a "trial by newspaper" at all, it was not of the petitioners but of the Government. Absent here is a showing of failure of the court-martial to protect the accused from massive publicity encouraged by those connected with the conduct of the trial, [16] either by a failure to control the release of information or to remove the trial to another venue or to postpone it until the deluge of prejudicial publicity shall have subsided. Indeed we cannot say that the trial of the petitioners was being held under circumstances which did not permit the observance of those imperative deficiencies of procedure which have come to be identified with due process.

At all events, even granting the existence of "massive" and "prejudicial" publicity, since the petitioners here do not contend that the respondents have been unduly influenced but simply that they might be by the "barrage" of publicity, we think that the suspension of the court-martial proceedings has accomplished the purpose sought by the petitioners' challenge for cause, by postponing the trial of the petitioner until calmer times have returned. The atmosphere has since been cleared and the publicity surrounding the Corregidor incident has so far abated that we believe the trial may now be resumed in tranquility.

II

Article of War 18 provides that "Each side shall be entitled to one peremptory challenge, but the law member of the court shall not be challenged except for cause." The general court-martial originally interpreted this provision to mean that the entire defense was entitled to only one peremptory challenge. Subsequently, on August 27, 1969, it changed its ruling and held that the defense was entitled to eight peremptory challenges, but the petitioners declined to exercise their right to challenge on the ground that this Court had earlier restrained further proceedings in the court-martial.

It is the submission of the petitioners that "for every charge, each side may exercise one peremptory challenge," and therefore because there are eleven charges they are entitled to eleven separate peremptory challenges. The respondents, upon the other hand, argue that "for each specification jointly tried, all of the accused are entitled to only one peremptory challenge and that with respect to specifications tried commonly each of the accused is entitled to one peremptory challenge." Although there are actually a total of eleven specifications against the petitioners, three of these should be considered as merged with two other specifications, "since in fact they allege the same offenses committed in conspiracy, thus leaving a balance of eight specifications." The general court-martial therefore takes the position that all the 23 petitioners are entitled to a total of only eight peremptory challenges.

We thus inescapably confront, and therefore now address, the issue here posed.

We are of the view that both the petitioners and the general court-martial misapprehend the true meaning, intent and scope of Article of War 18. As will hereinafter be demonstrated, each of the petitioners is entitled as a matter of right to one peremptory challenge. The number of specifications and/or charges, and whether the accused are being jointly tried or undergoing a common trial, are of no moment.

In the early formative years of the infant Philippine Army, after the passage in 1935 of Commonwealth Act No. 1 (otherwise known as the National Defense Act), except for a handful of Philippine Scout officers and graduates of the United States military and naval academies who were on duty with the Philippine Army, there was a complete dearth of officers learned in military law, this aside from the fact that the officer corps of the developing army was numerically inadequate for the demands of the strictly military aspects of the national defense program. Because of these considerations it was then felt that peremptory challenges should not in the meanwhile be permitted and that only challenges for cause, in any number, would be allowed. Thus Article 18 of the Articles of War (Commonwealth Act No. 408), as worded on September 14, 1938, the date of the approval of the Act, made no mention or reference to any peremptory challenge by either the trial judge advocate of a court-martial or by the accused. After December 17, 1958, when the Manual for Courts-Martial^[17] of the Philippine Army became effective, the Judge Advocate General's Service of the Philippine Army conducted a continuing and intensive program of training and education in military law, encompassing the length and breadth of the Philippines. This program was pursued until the outbreak of World War II in the Pacific on December 7, 1941. After the formal surrender of Japan to the allies in 1945, the officer corps of the Armed Forces of the Philippines had expanded to a very large number, and a great many of the officers had been indoctrinated in military law. It was in these environmental circumstances that Article of War 18 was amended on June 12, 1948 to entitle "each side" to one peremptory challenge, with the sole proviso, that "the law member of the court shall not be challenged except for cause."

By its very inherent nature a peremptory, challenge does not require any reason or ground therefor to exist or to be stated. It may be used before, during, or after challenges for cause, or against a member of the court-martial unsuccessfully challenged for cause, or against a new member if not previously utilized in the trial. A member challenged peremptorily is forthwith excused from duty with the court-martial.

The right of challenge comes from the common law with the trial by jury itself, and has always been held essential to the fairness of trial by jury.^[18]

"As was said by Blackstone, and repeated by Mr. Justice Story: 'In criminal cases, or at least in capital ones, there is in favorem vitae, allowed to the Prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all, which is called a peremptory challenge; a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous. This is grounded on two

reasons: 1. As every one must be sensible, what sudden impression and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another; and how necessary it is that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him; the law has conceived a prejudice even without being able to assign a reason for his dislike. 2. Because, upon challenges for cause shown, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment, to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, peremptorily to set him aside.”[19]

The right to challenge is in quintessence the right to reject, not to select. If from the officers who remain an impartial military court is obtained, the constitutional right of the accused to a fair trial is maintained.[20]

As we have hereinbefore stated, each of the 23 petitioners (accused before the general court-martial) is entitled to one peremptory challenge,[21] irrespective of the number of specifications and/or charges and regardless of whether they are tried jointly or in common. Three overriding reasons compel us to this conclusion.

First, a peremptory challenge is afforded to an accused who, whether rightly or wrongly, honestly feels that the member of the court peremptorily challenged by him cannot try him, can not sit in judgment over him, impartially. Every accused person is entitled to a fair trial. It is not enough that objectively the members of the court may be fair and impartial. It is likewise necessary that subjectively the accused must feel that he is being tried by a fair and impartial body of officers. Because the petitioners may entertain grave doubts as to the fairness or impartiality of distinct, separate and different individual members of the court-martial, it follows necessarily that each of the accused is entitled to one peremptory challenge.

Second, Article of War 18 does not distinguish between common trials and joint trials, nor does it make the nature or number of specifications and/or charges a determinant. Reference is made by the respondents here to U. S. military law, in support of their argument that for each specification jointly tried all of the accused are entitled to only one peremptory challenge and with respect to all specifications tried in common each of the accused is entitled to one peremptory challenge. We have carefully scrutinized U. S. Military law, and it is unmistakable from our reading thereof that each accused person, whether in a joint or common trial unquestionably enjoys the right to one peremptory challenge.[22]

Third, a perceptive analysis of the companion articles[23] to Article 18 convinces us that the words, "each side," as used in the said article in reference to the defense, should be construed to mean each accused person. Thus, Articles of War 17 (Trial Judge Advocate to Prosecute; Counsel to Defend), 19 (Oath), 21 (Refusal or Failure to Plead), 28 (Court to Announce Action), 29 (Closed Sessions), 30 (Method of Voting), and 36 (Irregularities - Effect of), unequivocally speak of and refer to the "accused" in the singular.

ACCORDINGLY, subject to our pronouncement that each of the 23 petitioners is entitled to one separate peremptory challenge, the present petition is denied. The temporary restraining order issued by this Court on August 29, 1969 is hereby lifted. No pronouncement as to costs.

Concepcion, C.J., Reyes, J.B.L., Makalintal, Zaldivar, Fernando, Teehankee, Barredo, and Villamor, JJ., concur. Dizon, J., did not take part in view of his dissent in G.R. L-28949.

[1] *Arula v. Espino*, L-28949, June 23, 1959, 28 SCRA 540. This Court held that while a complaint had earlier been filed in the fiscal's office, no case had been filed in the Court of First Instance on or before April 6, 1968, when charge and specifications arising from the same incident were referred for trial to a general court-martial, and that the latter court had acquired jurisdiction of the persons of the accused by their arrest.

"[J]urisdiction to try a particular criminal case is vested in a court only when the appropriate charge is filed with it AND when jurisdiction of the person is acquired by it through the arrest of the party charged or by his voluntary submission to the court's jurisdiction." *Id.* at 565.

[2] *United States v. Grimley*, 137 U.S. 147, 150 (1890).

[3] *Hiatt v. Brown*, 339 U. S. 108 (1949); cf. *Grafton v. United States*, 206. U. S. 333 (1907).

[4] *Arula v. Espino*, *supra*, note 1.

[5] 366 U.S. 717 (1961).

[6] 373 U. S. 723 (1963).

[7] 381 U. S. 532 (1965).

[8] 384 U. S. 333 (1966).

[9] 366 U.S. at 727.

[10] W. LOCKHART, Y. KAMISAR & J. CHOPER, *CONSTITUTIONAL LAW, CASES, COMMENTS, QUESTIONS* 715 (2d ed. 1967).

[11] 341 U.S. 50 (1951), see also *Stroble v. California*, 343 U. S. 181 (1952).

[12] 341 U. S. at 52.

[13] 373 U. S. at 726.

[14] 381 U.S. at 542.

[15] 384 U.S. at 362.

Compare the American Bar Association Standards Relating to Fair Trial and Free Press, adopted in February, 1968 particularly Part sec. 3.1(c) which provides:

"A motion for change of venue or continuance shall be granted whenever it is determined that because of the dissemination of potentially prejudicial material, there is a reasonable likelihood that in the absence of such relief, a fair trial cannot be had. This determination may be based on such evidence as qualified public opinion surveys or opinion testimony offered by individuals, or on the court's own evaluation of the nature, frequency, and timing of the material involved. A showing of actual prejudice shall not be required." 54 A.E.A.J. 347, 349 (1968).

[16] Compare *Cruz v. Salva*, 106 Phil. 1151 (1959) in which this Court censured a fiscal for allowing wide publicity and sensationalism to be given to an investigation of a criminal case being conducted by him.

"However, according to the petitioner and not denied by the respondent, the investigation was conducted not in respondent's office but in the session hall of the Municipal Court of Pasay City evidently, to accommodate the big crowd that wanted to witness the proceeding, including members of the press. A number of microphones were installed. Reporters were everywhere and photographers were busy taking pictures. In other words, apparently with the permission of, if not the encouragement by the respondent, news photographers and newsmen had a field day. Not only this, but in the course of the investigation,' as shown by the transcript of the stenographic notes taken during said investigation, on two occasions, the first, after Oscar Caymo had concluded his testimony, respondent Salva, addressing the newspapermen said, 'Gentlemen of the press, if you want to ask questions I am

willing to let you do so and the questions asked will be reproduced as my own'; and the second, after Jose Maratella y de Guzman had finished testifying and respondent Salvia, addressing the newsmen, again said, 'Gentlemen of the press is free to ask questions to the witness if you want to. We are willing to adopt the questions as ours.' Why respondent was willing to abdicate and renounce his right and prerogative to make and address the questions to the witnesses under investigation, in favor of the members of the press, is difficult for us to understand, unless he, respondent, wanted to curry favor with the press and publicize his investigation as much as possible. Fortunately, the gentlemen of the press to whom he accorded such unusual privilege and favor appeared to have wisely and prudently declined the offer and did not ask questions, this according to the transcript now before us.

"But, the newspapers certainly played up and gave wide publicity to what took place during the investigation, and this involved headlines and extensive recitals, narrations of and comments on the testimonies given by the witnesses as well as vivid descriptions of the incidents that took place during the investigation. It seemed as though the criminal responsibility for the killing of Manuel Monroy which had already been tried and finally determined by the lower court and which was under appeal and advisement by this Tribunal, was being retried and redetermined in the press, and all with the apparent complaisance of respondent.

"Frankly, the members of this Court were greatly disturbed and annoyed by such publicity and sensationalism, all of which may properly be laid at the door of respondent Salva. In this, he committed what we regard a grievous error and poor judgment for which we fail to find any excuse or satisfactory explanation. His actions in this regard went well beyond the bounds of prudence, discretion and good taste. It is bad enough to have such undue publicity when a criminal case is being investigated by the authorities, even when it is being tried in court; but when said publicity and sensationalism is allowed, even encouraged, when the case is on appeal and is pending consideration by this Tribunal, the whole thing becomes inexcusable, even abhorrent, and this Court, in the interest of justice, is constrained and called upon to put an end to it and a deterrent against its repetition by meting an appropriate disciplinary measure, even a penalty to the one liable.

[17] The writer of this opinion was the Chairman of the Committee (of three Judge Advocates) which was entrusted with the responsibility of preparing the Manual for Courts-Martial. The Manual was published under cover of Executive Order 178, series of 1938, of President Manuel L. Quezon.

[18] "The court-martial, as its history and development demonstrate, is a blend of the jury system and the one-judge (non-jury) judicial system. In common law jurisdictions, an accused is tried by his peers. In one-judge (non-jury) jurisdictions, the accused is tried by a lone judicial arbiter. In a court-martial trial, the entire panel of officers who constitute the court-martial is judge and jury." (Concurring opinion of Justice Fred Ruiz Castro in *Santiago v. Alikpala*, L--25133, Sept. 28, 1968, 25 'SCRA, pp. 367-368)

[19] *Lewis v. U.S.*, 146 U. S. 370.

[20] *Hayes vs. Missouri*, 120 U.S. 68.

[21] Modern statutes allow peremptory challenges in all criminal prosecutions and fix the number for both the prosecutor and the defendant. Under some statutes the number of peremptory challenges allowed defendants jointly indicted is the same as though there were only one defendant, while under other statutes each defendant is allowed the same number of challenges as though he were prosecuted individually. Some of these statutes increase the number of challenges allowed the prosecution when the number of defendants is increased, while under others the prosecution is only given additional challenges when the defendants are entitled to additional challenges. (See Vol. 5, *Wharton's Criminal Law and Procedure*, 1991, pp. 122-124, citing authorities.)

It is pertinent to note that in U.S. federal courts, the basis for the number of peremptory challenges is the number of indictments. In *Krause vs. United States*; 147 F 442 (1906) it was held that each defendant is entitled to three peremptory challenges on each indictment, citing, in support thereof, section 819 of the Revised Statutes (U.S. Comp. St. 1901, p. 629). In *Gallaghan vs. United States*, 299 F. 472 (1924), it was likewise held that each defendant is entitled to three peremptory challenges on each information under the Judicial Code, 287 (Comp. St. 1264).

[22] See Articles 36 and 41 of the U. S. Uniform Code of Military Justice, and pars. 53(c) and 62(e) of the 1969 U. S. Manual for Courts-Martial.

[23] Articles of ??? 17 to 37 are lumped under the title "Procedure."

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